IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PHILIAN EUGENE LEE, Defendant and Appellant.	No. S080550 (Riverside County Superior Court No. CR-67398)

APPEAL FROM THE SUPERIOR COURT COUNTY OF RIVERSIDE
Honorable, Christian F. Thierbach, Judge

APPELLANT'S REPLY BRIEF

LAW OFFICE OF CONRAD PETERMANN
A Professional Corporation
Conrad Petermann, State Bar Number 51907

323 East Matilija Street
Suite 110, PMB 142
Ojai, California 93023
805-646-9022
fax: 805-646-8250
e-mail: firm@cpetermann.com

Attorney for Appellant

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

California

CONSTITUTION

California

Federal

JURY INSTRUCTIONS

TREATISE

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PHILIAN EUGENE LEE, Defendant and Appellant.	No. S080550 (Riverside County Superior Court No. CR-67398)

APPEAL FROM THE SUPERIOR COURT COUNTY OF RIVERSIDE
Honorable, Christian F. Thierbach, Judge

APPELLANT'S REPLY BRIEF

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3 [13 Cal.Rptr.2d 475]), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief ("AOB").

ARGUMENT

I. THE SPECIAL CIRCUMSTANCE FINDING WAS UNCONSTITUTIONALLY PREMISED ON INSUFFICIENT EVIDENCE THAT THE MURDER WAS COMMITTED AFTER AN ATTEMPTED RAPE

Respondent dedicates a half page of their six page response to this issue to an irrelevancy to this issue—the fact that this case was *not* prosecuted or charged on the theory of Penal Code section 261, subdivision (a)(3) that the victim was prevented from resisting by any intoxicating or anesthetic substance. (RB p. 31, fn. 5.) Respondent dedicates one half of the last page of their six page response to another irrelevancy to this issue—a factual recitation of the circumstances of the murder itself. (RB p. 34.) Respondent dedicates the first two pages of their six page response to the standard of review for insufficiency of the evidence claims, which at least is relevant to the issue raised. (RB pp. 29-30.) The irrelevancies should not camouflage the fact that respondent's remaining three pages grossly oversimplify this issue and otherwise are without substance.

The instant case provides about as attenuated a set of facts as one could imagine for attributing criminal liability for a sexual offense and insufficient as a matter of law. First, the special circumstance allegation is not for rape, but attempted rape. (Pen. Code,[1] § 190.2, subd. (a)(17)(iii).) Thus, there must be evidence that appellant intended to have sexual intercourse with Mele by overcoming her will by force, violence, or duress. These are the requirements here for rape.[2] (§ 261, subd. (a)(2); *People v. Griffin* (2004) 33 Cal.4th 1015, 1022 [17 Cal.Rptr.3d 225].)

---

1 All references are to this code unless otherwise noted.

2 The prosecutor conceded that other alternative routes to rape of menace, or fear of immediate and unlawful bodily injury on another were not present. (13RT 2264.)

The fact that an attempt has been charged, rather than the completed offense, brings with it its own additional requisites. An attempt to commit a crime has two elements. There must be: (a) the specific intent to commit the particular crime and (b) a direct ineffectual act done toward its commission. (*People v. Carpenter* (1997) 15 Cal.4th 312, 387 [63 Cal.Rptr.2d 1]; *People v. Miller* (1935) 2 Cal.2d 527, 530 [42 P.2d 308]; *People v. Stites* (1888) 75 Cal. 570, 575 [17 P. 693].) The failing here is in both of these elements. First, in regard to element (a), there is no evidence that appellant intended to overcome her will by force, violence, or duress. Respondent has not been able to cite a single fact to support a finding that appellant harbored that requisite intent; nor could it.

Moreover, all the facts present support the opposite inference. As detailed in *Argument I*, Part *B. 2. a* and *b*, in *Appellant's Opening Brief*, by all accounts appellant stopped as soon as Mele protested. Although, there was not complete uniformity of opinion about whether he immediately removed himself from her, there was no evidence that any sexual conduct continued. Respondent cites statements after the murder attributed to appellant by his companions, but cannot point to a single one that even suggests that he intended to overcome her will by force, violence, or duress. (RB p. 33.)

All the evidence substantiates that appellant stopped at the first point of any indication of her unwillingness to have sex with him. Under respondent's construct, every overly optimistic male who prepared for intercourse before an affirmative consent of the object of his attention would have met the factual, minimum prerequisites for attempted rape. Respondent has provided no authority for such a far-fetched construct.

The next failing addresses the insufficiency of factor (b) for an attempt—a direct ineffectual act done toward its commission. The difficulty here is in the evaluation of the "direct ineffectual act." This case does not involve any verbal

threat that might support the inference of a "direct ineffectual act." Thus, there is/are only appellant's physical act or acts to assess. There are no facts present here that appellant's acts were anything more than normal acts leading to sexual intercourse. And, although this Court has stated that a rape can occur when the force used is only that required to accomplish an act of sexual intercourse, that act must have been accomplished against a victim's will. (*People v. Griffin, supra*, 33 Cal.4th 1015, 1027.) There are no facts present here that appellant's acts exceeded that standard. As noted in *Appellant's Opening Brief* at pages 66 and 67, a defendant's intent to engage in sexual intercourse and efforts made to accomplish that end do not in themselves equate with an attempted or accomplished rape. (*People v. Griffin, supra,* 33 Cal.4th 1015, 1028; cf. *In re John Z* (2003) 29 Cal.4th 756, 762 [128 Cal.Rptr.2d 783] [essential factor for liability for forcible rape was that victim withdrew her consent after the minor had penetrated her]; *People v. Gonzalez* (1995) 33 Cal.App.4th 1440, 1443-1444 [39 Cal.Rptr.2d 778] [essential factor for liability for assault with intent to commit unlawful oral copulation , "the act must be accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the alleged victim"].)

Thus, in the face of the complete absence of any evidence to support factor (a), there is nothing about appellant's conduct to substantiate the prosecution's case, and respondent has certainly cited none. Therefore, the physical element of an attempt, factor (b), has also not been met.

One's intent is really unknowable. All that can be done is to draw inferences from the available evidence. The failing here is that no reasonable inferences support factor (a) of an attempt. And, factor (b) is equally deficient. All that is left is pure speculation and conjecture. This is not substantial evidence. (*People v. Morris* (1988) 46 Cal.3d 1, 21 [249 Cal.Rptr. 119], overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543 [37 Cal.Rptr.2d 446].)

Thus, the analysis need not proceed any further; whether Mele "consented" need not be resolved here. The parameters of "consent" in the context of the rape statute need not be explored. Respondent is unable to get this appeal over the threshold requirements for an attempt. The fact that the evidence of an absence of consent is also insufficient and a death knell to respondent's position doubles the merits of appellant's argument.

Addressing "consent", respondent states "Lee acknowledges that if he attempted to engage in sexual intercourse without Mele's consent, then he attempted to do so against her will." (RB p. 32.) This is apparently premised upon the observation in *Appellant's Opening Brief,* that since the 1982 amendment to section 261.6[3] the courts have resolved that "without the victim's consent" equates with "against the victim's will." (AOB p. 61, citing *People v. Cicero* (1984) 157 Cal.App.3d 465, 475 [204 Cal.Rptr. 582]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 460 [98 Cal.Rptr.2d 315].) This does not advance the resolution of this argument very far. The meaning of "consent" in this context must first be agreed upon before one can resolve whether rape has been committed. Notably, respondent does not contest that "consent" requires anything more than "passive acquiescence." (RB p. 33.)

Respondent is mistaken in the belief that the issue here requires resolution of whether there was sufficient evidence to support a conclusion that appellant did not harbor a good faith belief that the victim consented. (RB pp. 32-33, citing, *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr. 745].) There are

---

[3] Section 261.6 now provides in pertinent part:

> In prosecutions under Section 261... in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (§ 261.6.)

two defenses to rape. One involves the lack of consent as an element of the crime. The other involves the defendant's mistaken but reasonable and bona fide belief that the victim voluntarily consented; the defense recognized in *Mayberry*. (2 Witkin and Epstein, *California Criminal Law, Sex Offenses* (3d ed. 2000), § 1, p. 317, § 6, p. 320.) "The defense of consent and the *Mayberry* defense are distinct, and a defendant who claims consent does not automatically raise a *Mayberry* defense as well." (1 Witkin and Epstein, *California Criminal Law, Defenses, Sufficiency of Evidence To Raise Defense* (3d ed. 2000), § 44, p. 376-377, citing *People v. Romero* (1985) 171 Cal.App.3d 1149, 1155-1156 [215 Cal.Rptr. 634].) The *Mayberry* defense is premised on mistake of fact. (*Ibid.*)

The challenged element that is the centerpiece in several of appellant's arguments in the instant appeal involves the lack of consent as an element of the crime. The *Mayberry* defense is not in issue. Respondent's reference to it is irrelevant.[4] Here appellant's argument addresses the double negative—the lack of substantial evidence that the prosecution has proved the absence of consent, a requisite element of attempted rape. (2 Witkin and Epstein, *California Criminal Law, Sex Offenses* (3d ed. 2000), § 1, p. 317, § 6, p. 320.)

Since no rational trier of fact could have found true beyond a reasonable doubt that appellant attempted to rape the victim, the special circumstance finding accompanying the murder charge as well as appellant's death sentence must be reversed and appellant resentenced. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578 [162 Cal.Rptr. 431]; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) To do otherwise would deny appellant his constitutional right to due process and a fair trial in violation of the Fifth, Eighth,

---

[4] Repeatedly throughout Respondent's Brief, as will be noted in the following arguments, respondent does not acknowledge this distinction and muddles the two defenses.

and Fourteenth Amendments and Article I, sections 1, 7, and 17 of the California Constitution. (*Jackson v. Virginia, supra,* 443 U.S. 307, 313-324; *People v. Rowland* (1992) 4 Cal.4th 238, 269 [14 Cal.Rptr.2d 377].)

Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141]), the trial court should be directed to dismiss the allegation from the accusatory pleading with prejudice.

II. APPELLANT'S FIRST DEGREE MURDER VERDICT WAS UNCONSTITUTIONAL AS IT WAS LIKELY BASED ON A FELONY MURDER THEORY PREMISED ON INSUFFICIENT EVIDENCE OF THE FELONY OF ATTEMPTED RAPE

Respondent adopts and relies upon their response to *Argument I.* (RB pp. 35-38.) Respondent does not dispute the fact that it appears that the jury's verdict of first degree murder was based on the felony-murder theory alternative they had been provided, rather than on premeditation and deliberation.

One factual assertion of respondent must be corrected. Respondent recounts one of Devin's varying accounts of what he saw happen in the back seat of the car. (RB p. 37.) The full account from Devin is detailed in *Argument I,* Part *B, 2, a*, at pages 43 through 45 of *Appellant's Opening Brief*, and is incorporated here. Respondent continues,

> When Mele started to struggle, Lee did not immediately stop *what he was doing,* but instead remained on top of her as she raised her voice and *continued to try to push him off* of her. While he was still on top of her, Lee said, "'you know what we came up on the hill for.'" (XII RT 2162.) (RB p. 37 [emphasis added.)

Respondent does not explain what they are referring to in the clause "*what he was doing.*" No clarity, or even inference, can be found in the cited text. (12RT 2162.) However, no where in the record can be found any evidence that appellant

did not stop any sexual conduct he was engaged in when Mele voiced her complaint.

Respondent's statement, "[she] *continued to try to push him off of her*," implies that there was an ongoing effort. Yet, respondent's cited text does not include this point. (12RT 2162.) What the record does provide is the following: Devin said she pushed appellant off of her. (RT 2162.) Devin testified that while appellant was still on her, "With a mere push" she "forced him off of her." (RT 1503-1504, 1655-1656, 1663-1664.) She said something like, "'What do you guys take me for? Do you think I'm a toss-up whore or something?'" (RT 1504, 1631, 1655-1656, 1664-1665.) She seemed almost to be in "a fit of rage, as if she was disgusted by what was going on." (RT 1504.) Devin testified that appellant "got right off." (RT 1504-1505, 1537.) At another point, Devin testified somewhat inconsistently that appellant did not get off of her immediately. (RT 1655-1656.) Devin was then asked how appellant was positioned and what appellant was doing when Mele was saying "those things" and "she was not a whore." Devin replied, "He was looking down at her." (RT 1656.)

Nothing from Jarrod's account supports the inference respondent has proffered. Officer Thompson testified that Jarrod told him "'she wasn't, like, making no big attempt'" to get him off. (RT 1958, 1970.) She was not so drunk that she did not know what she was doing, and he told the police that. (RT 1807.) Jarrod testified that appellant was not on her long, it was rather quick. (RT 1805-1806.) She said in a loud voice to the effect that she wanted him off of her. (RT 1760, 1969-1971.) She said something like, get off. (RT 1806-1807, 1969-1971.) She pushed with her hands and he got off. (RT 1754, 1760-1761, 1806-1807.) Jarrod testified that after she pushed appellant, "he didn't get right off." (RT 1806.) Yet, a moment later, Jarrod testified that Mele did not make a big effort to

tell appellant to get off of her, "It wasn't like she was hitting him or something like that. She just pushed him" and he immediately got off. (RT 1807.)

Thus, respondent's position here is as poorly supported as its position in *Argument I.*

Since no rational trier of fact could properly have found true beyond a reasonable doubt that appellant intended to rape the victim, appellant's first degree murder conviction and death sentence must be reversed with directions to enter a verdict of second degree murder and resentence appellant. (*People v. Johnson, supra,* 26 Cal.3d 557, 576-578; *Jackson v. Virginia, supra,* 443 U.S. 307, 318-319.) To do otherwise would deny appellant his constitutional right to due process and a fair trial in violation of the Fifth and Fourteenth Amendments and Article I, section 15 of the California Constitution. (*Jackson v. Virginia, supra,* 443 U.S. 307, 313-324; *People v. Rowland, supra,* 4 Cal.4th 238, 269.)

Furthermore, since double jeopardy considerations bar a retrial for felony murder (*Burks v. United States, supra,* 437 U.S. 1), the trial court should be directed to dismiss the felony murder allegation from the accusatory pleading with prejudice.

III. THE TRIAL COURT'S FAILURE TO ADEQUATELY DEFINE CONSENT *SUA SPONTE* FOR THE DEFENSE TO ATTEMPTED RAPE WAS UNCONSTITUTIONAL

B. The Error

Respondent repeats the error it made in *Argument I.* (See pages 5 and 6 above and footnote 4, RB p. 41.) The inadequacy in the trial court's jury instructions here is in the definition of consent in the context of the element the prosecution must prove the absence of for the crime of attempted rape. The error has nothing to do with the adequacy of the jury instructions on the *Mayberry* defense, that addresses the defendant's mistaken but reasonable and bona fire

belief that the victim voluntarily consented, recognized more than 30 years ago in *People v. Mayberry, supra,* 15 Cal.3d 143, 157.

After this inauspicious beginning, respondent does attempt to paraphrase appellant's argument:

> Lee reasons that because the jury was told that "against the will" meant "without consent," and told that "consent" meant "a positive cooperation in act or attitude as an exercise of free will," the error was in not telling the jury that a person could theoretically consent to sexual intercourse without actually expressing that consent. (RB p. 41.)

It is respectfully submitted that this paraphrasing does not aid communication of the error committed here.

In brief, the jury was told that rape involved an act of sexual intercourse accomplished against the person's will. The jury was told that "against the person's will" meant without the consent of the alleged victim. (RT 2385-2387, CT3 79-80, Defendant's Special Instruction No. B.) The jury was told that "consent" meant positive cooperation in act or attitude as an exercise of free will. (RT 2387, CT3 81, CALJIC 1.23.1.) The error here is that the jury was not told that "positive cooperation" did not mean or require some verbal or nonverbal expression of cooperation. The jury was not told that a lack of "positive cooperation" meant that a reasonable person would have perceived some expression from the alleged victim, either verbal, nonverbal, or a combination thereof, that the act was against the alleged victim's will. The jury was not told that consent did not require something more than the victim's mere unexpressed assent. (AOB pp. 82-84; *People v. Griffin, supra,* 33 Cal.4th 1015, 1028; *In re John Z, supra,* 29 Cal.4th 756, 762; *State v. Guzman* (Wash. 2003) 79 P.3d 990, 994-995 [lack of consent must be clearly expressed by the victim's words or conduct]; *State v. Jackson* (N.H. 1996) 679 A.2d 572, 574 ["The issue of consent involves 'the victim's objective manifestations of her unwillingness to engage in

the charged conduct ... [and] thus concerns the victim's demonstrative and verbal conduct.' ... Although physical resistance is relevant to a determination of the absence of consent, the absence of physical resistance is not dispositive of the issue. ... The question, rather, is 'whether a reasonable person in the circumstances would have understood that the victim did not consent.'"]; *State v. Robinson* (Me. 1985) 496 A.2d 1067, 1070 ["a mere change of the woman's mind in the midst of sexual intercourse does not turn the man's subsequent participation into rape"]; *People v. Guthreau* (1980) 102 Cal.App.3d 436, 441 [162 Cal.Rptr. 376] ["the issue was not whether in some abstract sense the victim's resistance was reasonable. The critical inquiry is whether the resistance was sufficient to " *reasonably manifest*" her refusal"].)

Even after paraphrasing appellant's argument, respondent never gets around to addressing it. (RB pp. 41-45.) Instead, respondent recites over the next two and one-half pages the instructions that were provided the jury. (RB pp. 41-44.) This is followed by the completely unsupported, proffered conclusion, "The law does not support Lee's argument that the jury should have been instructed that they could have found Mele consented to sexual contact with Lee by "passively acquiescing" when he removed her shoes and pants and climbed on top of her." (RB 44.) Respondent never addresses, let alone takes issue with, the legislative history of section 261.6[5] as provided in *Appellant's Opening Brief, Argument I,* Part *D* at pages 59-68.

---

[5] Section 261.6 now provides in pertinent part:

> In prosecutions under Section 261... in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (§ 261.6.)

Respondent nears its conclusion by returning to the error it began the argument with: "Lee could not have had an objectively reasonable belief at that moment that Mele was consenting to have sex with him." (RB p. 44.) Once again, the error is in defining consent for the crime of attempted rape. It does not involve the adequacy of the instructions on a *Mayberry* defense of consent.

Finally, respondent contends that *People v. Gonzalez, supra,* 33 Cal.App.4th 1440, 1444 addressed and rejected the identical claim raised here by appellant. (RB 45.) There the defendant forced the victim on two separate occasions to orally copulate him by forcing her head down on to his penis, once over her protestations and attempt to get away and the other by threatening to kill her if she did not comply. (*Id.* at p. 1442.) Passive acquiescence was not even on the horizon there, let alone a contended omitted element of "positive cooperation in act or attitude pursuant to an exercise of free will."

Here there is nothing in the evidence, instructions, argument of counsel, or verdicts that manifests that the jury necessarily understood that the necessary element of an absence of consent for attempted rape would not be satisfied under the scenario presented here of a girl who was passively acquiescing in appellant's sexual advances, under circumstances where the initiator could not be expected to know that she was harboring but not communicating contrary wishes. Stated alternatively, the jury was not advised that "against a person's will" requires communication of some sort of that "will" and required certainly more than the person's mere passive acquiescence to the defendant's acts.[6]

---

[6] It will be recalled that this case was *not* prosecuted or charged on the theory of Penal Code section 261, subdivision (a)(3) that the victim was prevented from resisting by any intoxicating or anesthetic substance. (10RT 1698-1700, 12RT 2083.) Because there is that specific statute pertaining to rape of an intoxicated person, that fact/theory cannot be used in support of a charge of rape pursuant to (a)(2) to show the act was "accomplished against a person's will ...."

The special circumstance, the murder conviction, and appellant's death sentence must be reversed, and the matter retried to a properly instructed jury. Alternatively, as argued in *Argument II*, appellant's conviction must be reversed with directions to enter a verdict of second degree murder and resentence appellant.

IV. APPLICATION TO APPELLANT OF A NEWLY-LIMITED DEFINITION OF CONSENT FOR RAPE RESULTED IN THREE ADDITIONAL DUE PROCESS VIOLATIONS

A. Denial of Adequate Notice and Opportunity to Defend

Again, respondent attempts to re-characterize the argument as a challenge to a flaw in a defense to rape as recognized by this Court in *People v. Mayberry, supra,* 15 Cal.3d 143, 15. (RB pp. 45-46.) But, also once again, that is not the flaw here. The flaw here is that without adequate notice or the opportunity to defend, the jury was authorized to find that a rape was committed if appellant neither knew nor reasonably could have been expected to know—from his own conduct or Mele's—that she did not want to have sex. Should it be concluded that in prosecutions for rape the definition of consent in section 261.6[7] indeed meant that passive acquiescence was not consent, then such a definition applied to appellant violates the federal due process clause. Since no California statute or prior decision has found that a rape has been committed under such circumstances, appellant's conviction of first degree felony murder and special circumstance premised on such a definition for rape would violate the Fourteenth Amendment Due Process Clause's requirement of notice and an opportunity to defend. (*Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 721; *LaGrand v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1260 ["[T]he Due Process Clause ... protects criminal defendants against novel developments in judicial doctrine"]; *Cole v. Arkansas* (1948) 333

---

[7] The text of section 261.6 is set forth in footnote 5, above.

U.S. 196 [92 L.Ed. 644, 68 S. Ct. 514] [Due Process Clause prohibits state from upholding conviction under theory that defendant violated an uncharged statutory offense]; *In re Oliver* (1948) 333 U.S. 257, 273, 278 [92 L.Ed. 682, 68 S.Ct. 499] [no principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal].) "A judicial construction of a statute may violate due process if the defendant was 'unfairly surprised in a way that affected his legal defense.'" (*Clark v. Brown, supra,* at p. 721, quoting *Darnell v. Swinney* (9th Cir. 1987) 823 F.2d 299, 301.)

B. Improper First-Time Application of a New Definition for Consent

Respondent seeks to overcome this flaw by citing two prior appellate court decisions as illustrations of instances where passive acquiescence was held to constitute a lack of consent. (RB p. 46.) The first of these is *People v. Gonzalez, supra,* 33 Cal.App.4th 1440, 1442-1444, similarly relied upon by respondent in *Argument III.* Once again, there the defendant forced the victim on two separate occasions to orally copulate him by forcing her head down on to his penis, once over her protestations and attempt to get away and the other by threatening to kill her if she did not comply. (*Id.* at p. 1442.) And, once again, passive acquiescence was not even on the horizon there. Nor, was there the omitted element of "positive cooperation in act or attitude pursuant to an exercise of free will."

Respondent's remaining authority is *People v. Burmudez* (1984) 157 Cal.App.3d 619, 623-625 [203 Cal.Rptr. 728] which is equally unavailing. There the defendant, a Peeping Tom, gained entry into a woman's residence, who was a stranger who had been nursing her baby, and she said to him, "Do anything you want, just don't hurt the baby." (*Id.* at pp. 621-622.) On appeal the defendant urged that this was not rape. The court declined his invitation, observing:

> The law has had good reason to require proof of physical force or of clear threats of bodily injury in the sometimes ambiguous factual circumstances arising between acquaintances whose intentions can be misinterpreted. However, in cases such as this one in which a woman is sexually victimized by a stranger who seeks sexual satisfaction in an atmosphere of potential aggression, assertions of implied invitation and disclaimer of having used physical force fail to impress jurors and courts alike. (*Ibid.*)

As can be readily seen, the facts in *Burmudez* were on a par with those in *Gonzalez*, above. Yet, the very points that the *Burmudez* Court's decision turned on make appellant's point. "Ambiguous factual circumstances" whose intentions can be misinterpreted require greater clarity to impose criminal sanctions.

Respondent's inability to provide any applicable case law makes appellant's point. A holding in appellant's case that section 261.6 authorizes such an interpretation of the definition of consent would be new precedent applied for the first time against appellant. Such a change in the law will take away a defense. As a result, its first application to appellant is proscribed by the Due Process Clause of the Fifth Amendment. (See *Beazell v. Ohio* (1925) 269 U.S. 167 [70 L.Ed. 216, 46 S.Ct. 68]; *Marks v. United States* (1977) 430 U.S. 188, 191-192 [51 L.Ed.2d 260, 97 S.Ct. 990]; *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [19 Cal.Rptr.2d 520].)

Thus, the special circumstance, the murder conviction, and appellant's death sentence must be reversed; the murder conviction for the reasons stated in Argument *II*, Part *D*, above, and incorporated here, because the most likely theory upon which the jury rested the first degree murder conviction was that of felony murder. The matter must be remanded with directions to enter a verdict of second degree murder and resentence appellant.

C. Excluding a *Mens Rea* for Rape Offends Fundamental Principles of Justice

Respondent begins by again attempting to paraphrase appellant's argument with the apparent hope that their restatement will permit some nuance of change to

provide a premise for a response. (RB p. 47.) Yet, respondent does not build upon the change, so appellant will not dwell upon the differences in their restatement.

Instead, respondent proffers that appellant's argument is academic. This is another way of saying that the argument has merit but is not applicable here. From here respondent makes an effort to marshal facts to support this claim. But, their recitation culls all of the facts that do not support their conclusion. Much of their effort involves recounting Mele's alcohol consumption and evidence of its impact on her. (RB p. 48.)

However, when not just the facts respondent has selected are considered, the weakness of their claim is readily understood. Among the facts respondent has ignored are the following: Mele's blood alcohol level was .14 percent. (13RT 2219-2222.) A toxicologist explained that a person experienced with alcohol may be able to drive with a .14 level; others with less experience might fall asleep or be unsteady on their feet at that level. (13RT 2229-2230.) According to Devin, at the point when Mele was lying on the back seat, Mele kept saying that she was drunk. So, Jarrod said, "Squeeze my finger" and she did. (10RT 1630-1631, 1690A.) Jarrod said, "No, you're not drunk..., you can still squeeze my finger." (10RT 1630, 1690A.) Devin acknowledged that her eyes must have been open because she was able to see Jarrod's finger. (10RT 1630-1631, 1690A.) At some point, after her pants had been removed, she called Devin's name and he turned around and asked what she wanted. (10RT 1629, 1689A.) Officer Fernandez testified that the next day he asked Devin if she was fighting, and Devin said, "Nuh uh, she wasn't at all." (10RT 1688A, 12RT 2161.) When asked if she was passed out, Devin said, "'Nah, she was talkin' the whole time.'" (12RT 2162.) Officer Thompson testified that Jarrod told him, she was "'like, awake and stuff.'" (11RT

1958, 1968.) Jarrod told the police that she was not so drunk that she did not know what she was doing. (10RT 1807.)

After their selective factual recitation, respondent resorts to the irrelevancy it raised in *Argument I*—a factual recitation of the details of the murder. (RB p. 48.) Respondent does not explain how these facts are any more relevant here.

Finally, respondent makes no effort to explain how their repetition of the instructions given the jury addresses the specific claim made here that section 261.6's definition of consent violates federal due process by permitting a finding of lack of consent where the alleged victim passively acquiesced to a sexual act.

Under the facts in this case as well as in those of the hypothetical provided in *Appellant's Opening Brief* at pages 92 through 93, section 261.6 does not pass muster under the federal constitution. (*McMillan v. Pennsylvania* (1986) 477 US 79, 85 [91 L.Ed.2d 67, 106 S.Ct. 2411]; *People v. Vogel* (1956) 46 Cal.2d 798, 801, fn. 2 [299 P.2d 850]; *People v. Simon* (1995) 9 Cal.4th 493, 519-520 [37 Cal.Rptr.2d 278]; *Schad v. Arizona* (1991) 501 US 624, 640 [115 L.Ed.2d 555, 571, 111 S.Ct. 2491] (plurality opn. of Souter, J.) ["a freakish definition of the elements of a crime that finds no analogue in history or the criminal law of other jurisdictions will lighten the defendant's burden" of showing a due process violation].)

As a result, the special circumstance, the murder conviction, and appellant's death sentence must be reversed. The matter must be remanded with directions to enter a verdict of second degree murder and resentence appellant.

V. THE DEFINITION FOR CONSENT PROVIDED BY SECTION 261.6 VIOLATES DUE PROCESS BY CREATING A PRESUMPTION THAT A RAPE VICTIM HAS NOT CONSENTED UNLESS SHE EXPRESSES HER COOPERATION IN THE SEXUAL ACT IN SOME PERCEPTIBLE WAY

In *Argument IV, B*, above, it was noted that respondent had misapplied *People v. Gonzalez, supra,* 33 Cal.App.4th 1440 and *People v. Burmudez, supra,*

157 Cal.App.3d 619 as illustrations of instances where appellate courts had found that passive acquiescence constituted a lack of consent. (RB p. 46.) Here, respondent now attempts to misapply these cases as instances where appellate courts have rejected the due process violation raised here.

It will be recalled that in *People v. Gonzalez, supra,* 33 Cal.App.4th 1440, 1442-1444, the defendant forced the victim on two separate occasions to orally copulate him by forcing her head down on to his penis, once over her protestations and attempt to get away and the other by threatening to kill her if she did not comply. (*Id.* at p. 1442.) The *Gonzalez* Court decided the case on the facts before it. (*Id.* at pp. 1443-1444.) And, once again, passive acquiescence was not even on the horizon there. Thus, the Court did not have before it the claims or the context present here.

Again in *People v. Burmudez, supra,* 157 Cal.App.3d 619, 623-625 the defendant, a Peeping Tom, gained entry into a woman's residence, who was a stranger who had been nursing her baby, and she said to him, "Do anything you want, just don't hurt the baby." (*Id.* at pp. 621-622.) On appeal the defendant urged that this was not rape. The court found that the "[l]aw ... had good reason to require proof of physical force or of clear threats of bodily injury in the sometimes ambiguous factual circumstances arising between acquaintances whose intentions can be misinterpreted." However, the Court found no factual ambiguity there. (*Ibid.*) The *Bermudez* Court did not consider any due process claim, let alone the claim raised here. Moreover, the quoted section above from the decision implicitly points out the import for placing the burden of proof on the prosecution for proof of lack of consent and the injustice of creating a presumption for the defendant to overcome.

Respondent cites its efforts in *Argument III,* where, as here, no effort is made to explain how the instructions given specifically addressed the factual

scenario here, again, that of a girl who was passively acquiescing in appellant's sexual advances, under circumstances where the initiator could not be expected to know that she was harboring but not communicating contrary wishes, and made clear to the jury that this did not manifest a lack of consent. Where none of the instructions specifically address the defense and the prosecutor's argument capitalizes on the error, it is no saving grace that the jury has been told that the defendant must have the specific intent to rape, that he must have made a direct, but ineffectual, act towards that aim, that he is presumed to be innocent until the contrary is proved, and that the People have the burden of proving him guilty beyond a reasonable doubt, when "rape," the foundation upon which all of the instructions have been built, has not been adequately defined.

The brevity of respondent's six-line backup position that any error was harmless under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824] is commensurate with its lack of support. (RB 51.)

The entire defense pivoted on the jury's determination of the requisite level and form of Mele's response in resolving whether she consented and whether appellant actually and reasonably believed she consented. As defense counsel succinctly argued, there was a difference between a man who has not been told yes, but stops when he is told no, and a man who does not care about consent. (RT 2307-2309.) Because of the improper instructions and the prosecution's argument, the jury was given an improper presumption that there was no consent unless the "victim" expressed her willingness to proceed. The result meant for appellant guilt of first degree murder with special circumstances, when it should have meant innocence of that charge.

Here, nothing in the evidence, instructions, or verdicts manifests that the jury necessarily excluded the scenario of a girl who passively acquiesced to appellant's sexual advances.

Accordingly, the murder conviction, special circumstance, and appellant's death sentence must be reversed and retried to a properly instructed jury.

VI. APPELLANT'S FIRST DEGREE MURDER VERDICT WAS UNCONSTITUTIONAL BECAUSE IT WAS ALSO BASED ON INSUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION

As discussed in Argument *II*, the prosecution proffered two theories for first degree murder—felony murder premised on a killing during the felony of attempted rape or a killing premised on willful, deliberate and premeditated intent to kill. However, as demonstrated in Arguments *I* and *II*, there is insufficient evidence of attempted rape as a matter of law and therefore insufficient evidence of felony murder premised upon that attempted rape. Here, the discussion turns to the insufficient evidence that the killing was committed with a willful, deliberate and premeditated intent to kill.

Respondent cites *People v. Alcala* (1984) 36 Cal.3d 604, 626 [205 Cal.Rptr. 775] and *People v. Marks* (2003) 31 Cal.4th 197, 232 [2 Cal.Rptr.3d 252] for the proposition that appellant's "act of carrying around a loaded handgun makes it 'reasonable to infer that he considered the possibility of homicide from the outset,'" thus providing support for a finding of premeditation and deliberation. (RB p. 54.) Respondent neglects to mention that the act of carrying around the loaded handgun was only part of a litany of factors the *Alcala* Court considered including a scheme to abduct the victim and transport her to a rural area (*People v. Alcala, supra,* at p. 626) and the *Marks* Court considered including entering a place of business and shooting workers at close range without any provocation (*People v. Marks, supra,* at p. 232.) If carrying a loaded handgun was a

determinative factor, every killing with a handgun would necessarily show premeditation and deliberation. Equally unconvincing is the fact proffered by respondent that appellant had to reload the gun after Jarrod fired it into the air earlier in the evening. (RB p. 54.) Respondent offers, but does not explain, how carrying extra ammunition indicated that Mele's killing was premeditated. (RB p. 55.)

Respondent cites *People v. Bolin* (1998) 18 Cal.4th 297, 331-332 [75 Cal.Rptr.2d 412], as support for the proposition that multiple shots at close range support a finding of premeditation and deliberation. (RB p. 55.) Once again, that is a very different case than that here. In the instant case, all of the evidence establishes that the argument and shooting erupted simultaneously outside and at the back of the car, not from planning activity. (RT 1512-1513, 1515, 1558-1559.) (See, e.g., *People v. Mendes* (1950) 35 Cal.2d 537, 544-545 [219 P.2d 1] [the incident occurred within six to eight seconds, judgment modified to second degree]; *People v. Fields* (1950) 99 Cal.App.2d 10, 13 [221 P.2d 190] [the "killing occurred as a result of one of those sudden and unconsidered impulses upon which men in the condition of appellant [intoxicated] not uncommonly act, and which they regret after even slight reflection;" judgment modified to second degree]; compare *People v. Hernandez* (1988) 47 Cal.3d 315, 349, 351 [253 Cal.Rptr. 199] [manner of killing distinguished itself from an explosion of violence rather than calculated killing].)

In *People v. Bolin, supra*, by contrast, the defendant had a far more substantial period for reflection. Within minutes of the arrival of the three victims, defendant argued with them, went back toward his cabin, went inside, retrieved a revolver, shot one of the victims, proceeded across a creek and confronted the other two, apologized to them, and then opened fire. (*People v. Bolin, supra,* 18 Cal.4th at p. 332.)

Finally, respondent cites *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [119 Cal.Rptr.2d 859] and *People v. Welch* (1999) 20 Cal.4th 701, 759 [85 Cal.Rptr.2d 203] as support that the repeated shots to the head were in themselves sufficient to support a finding of premeditation and deliberation. (RB p. 55.) But neither case stands for such a simplified test. In both the cases for premeditation were vastly greater. In *Koontz* the firing of a shot at a vital area of the body at close range was amongst two paragraphs of details in the Court's opinion demonstrating premeditation and deliberation. (*People v. Koontz, supra,* at pp. 1081-1082.) In *Welch* the recitation of facts indicating premeditation and deliberation filled a paragraph and included the defendant's statements "made to the victims and others that he was planning to kill everybody in the ... house a few hours before doing so." (*People v. Welch, supra,* at pp. 758-759.)

Here, again, it is not possible to determine from the jury's verdict that they necessarily found appellant guilty of first degree murder on a proper theory. Moreover, neither theory of first degree murder was valid. Since neither theory for first degree murder is based on sufficient evidence, appellant has been denied his Fifth and Fourteenth Amendment rights to due process and a fair trial. Appellant's first degree murder conviction and death sentence must be reversed, with directions to enter a verdict of second degree murder and resentence appellant. (*People v. Johnson, supra,* 26 Cal.3d 557, 576-578; *Jackson v. Virginia, supra,* 443 U.S. 307, 318-319.) To do otherwise would deny appellant his constitutional right to due process and a fair trial, in violation of the Fifth, Eighth, and Fourteenth Amendments, and Article I, sections 1, 7 and 17 of the California Constitution. (*Jackson v. Virginia, supra,* 443 U.S. 307, 313-324; *People v. Rowland, supra,* 4 Cal.4th 238, 269.)

Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States, supra,* 437 U.S. 1), the trial court should be directed to dismiss the first degree murder allegation from the accusatory pleading with prejudice.

VII. INTRODUCTION OF APPELLANT'S NICKNAME OF "POINT BLANK" SUGGESTED GANG AFFILIATION AND ASPECTS OF HIS CHARACTER THAT WERE IRRELEVANT TO ANY ISSUE AND HIGHLY PREJUDICIAL TO APPELLANT'S DEFENSE

Respondent offers that appellant's nickname was relevant to identifying him. (RB p. 57.) Yet, respondent does not explain, nor could an explanation be made, how appellant's identity was in issue. Alternatively, respondent offers that the nickname was relevant "to establishing his intent, namely, that [he] committed the murder in a particular manner in order to live up to his nickname." (RB p. 57.) Respondent apparently is not really convinced of this since this theory was not even mentioned in their response to *Argument VI*, in its attempt to marshal evidence of premeditation and deliberation.

Respondent offers (and later repeats identical points [RB p. 59]) that the nickname was also necessary to explain Jarrod's comment to appellant after the shooting, "'So, is that why they call you Point Blank.'" (RB p. 57.) But, if the nickname was irrelevant, so too was Jarrod's comment. And, the same criticism can be levied against the comment attributed to appellant, "'[t]hey're never gonna really have to make a rap about my name being Point Blank'" (RB p. 57.) Respondent has not offered any rational, let alone compelling rational, why these comments were relevant, particularly to the point that their relevance outweighed the prejudice they brought to appellant's trial.

Respondent seeks support in *People v. Brown* (2003) 31 Cal.4th 518 [3 Cal.Rptr.3d 145] where the trial court had permitted the introduction into evidence of the defendant's nickname of "Bam" or "Bam Bam." (RB p. 57.) In *Brown*, unlike here, there were several witnesses to the defendant's role in the killing that

involved a factual account over several days with witnesses' accounts pieced together to tell the full account. (*Id.* at pp. 524-527.) There, the prosecutor assured the court:

> I can assure the Court that I won't emphasize or even unduly emphasize his nickname at all, and I will try to avoid it as much as possible. But the problem is some of these witnesses may have to be impeached with their prior statements, and in their prior statements they refer to the individual who committed the crime as Bam. And if we don't tell the jury the defendant is Bam, then the name Bam in the prior inconsistent statements means nothing. The jury might even think they're referring to somebody else. (*Id.* at p. 548.)

The trial court held the prosecutor to his bargain. (*Id.* at pp. 548-550.) The *Brown* Court held, "several witnesses in the instant case knew defendant primarily or exclusively by his nickname. Because defendant's identity was at issue, the trial court did not err in cautioning the prosecutor not to emphasize the nickname, but acquiescing in the inevitability that it would come out before the jury." (*Id.* at p. 551.)

By sharp contrast, in the instant case the prosecutor did precisely what the prosecutor in *Brown* agreed not to do, unduly emphasized appellant's nickname for purposes completely irrelevant to any proper rational for its use. (See AOB pp. 112-113, *United States v. Beedle* (3rd Cir. 1972) 463 F.2d 721, 725 [use of the defendant's alias "served no useful end and could only prejudice [the defendant]."]

Respondent argues that "[t]he application of ordinary rules of evidence generally do not impermissibly infringe upon a capital defendant's constitutional rights." (RB p. 60.) Yet, respondent has elected not to discuss the abundant authority provided in *Appellant's Opening Brief* at page 117 that effectively make the point that fundamental rights under our federal constitutional trump state evidentiary rules where the infringements have been as clearly breached as they have here.

Finally, respondent argues that whatever confusion would flow from the effort to instruct the jury on what use they could make and not make from appellant's nickname was an invited error since the language had been proposed by defense counsel.[8] (RB p. 61.) However, the underlying fault is in the uncorrectable circumstances that the prosecution and trial court had created that necessitated an instruction.

The prosecution's repeated and frequent references to appellant's nickname and linkage with the manner of killing so fatally infected the proceedings as to render them fundamentally unfair. (*See Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1465, *cert. denied,* 479 U.S. 1068 [93 L.Ed.2d 1006, 107 S.Ct. 958] (1987).)

Federal constitutional error committed by a state trial court requires reversal unless the reviewing court concludes that the error was harmless beyond a

---

[8] The instruction provided:

> Evidence has been introduced for the purpose of showing that the defendant had a nickname. This evidence, if believed, was introduced for a limited purpose and may only be considered by you for that purpose. The limited purpose for which this evidence was introduced was to prove that (1) defendant was the person introduced to Devin Bates on February 21, 1996, and (2) the defendant intended to kill Mele Kekuala.
>
> You are not to consider this evidence for any other purpose. You are not permitted to consider this evidence as proof that defendant killed, raped or attempted to rape Ms. Kekuala. Further, this evidence may not be considered by you to prove that the defendant is a person of bad character, has a disposition to commit crimes, or has ever acted in a manner consistent with this nickname. No evidence has been presented that on any prior occasion defendant acted in a manner referenced by this nickname.
>
> For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. (RT 2371-2372, CT3 40.)

reasonable doubt. (*Chapman* v. *California, supra,* 386 U.S. 18, 20-21, 24; *People* v. *Louis* (1986) 42 Cal.3d 969, 993 [232 Cal.Rptr. 110].)

This Court should consider this evidence to be as crucial to the conviction as did the prosecutor. (*People* v. *Powell* (1967) 67 Cal.2d 32, 56-57 [59 Cal.Rptr. 817].) The only conceivable purpose of offering this "evidence" was to inflame the minds of the jurors against appellant, to attribute a propensity to him, and to preclude their dispassionate and unbiased consideration of other relevant evidence. The state cannot prove beyond a reasonable doubt that appellant was not prejudiced by this evidence.

Denial of appellant's claim would constitute a deprivation of a state created-right (Evid. Code, §§ 352, 1101) and amount to an additional due process violation. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227].)

As a result, the special circumstance, the murder conviction, and appellant's death sentence must be reversed.

VIII. THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Respondent argues that these issues are waived by lack of objection below. (RB pp. 62-63.) Jury instructions are an exception to the general waiver rule. An appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant were affected. (§§ 1259, 1469.) Substantial rights are equated with reversible error, i.e., did the error result in a miscarriage of justice. (Cal. Const., Art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978 [125 Cal.Rptr. 419].) Lowering the prosecution's burden of proof for an element of an offense manifests a miscarriage of justice.

In any event, constitutional claims may be considered when presented for the first time on appeal when the error fundamentally affected the validity of the judgment, or important issues of public policy are at stake (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [149 Cal.Rptr. 375]; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173 [13 Cal.Rptr. 176]), all factors that are present here. Further, a reviewing court may consider a claim despite a lack of objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8 [72 Cal.Rptr.2d 656].) Again, lowering the prosecution's burden of proof manifestly provides an unfair trial.

Moreover, the fact that a state court may legitimately refuse to hear tardily based constitutional challenges does not mean that the state court is obliged as a matter of federal law to refrain from reaching the federal constitutional questions. (*Orr v. Orr* (1979) 440 U.S. 268, 275, fn. 4 [59 L.Ed.2d 306, 99 S.Ct. 1102].)

Otherwise, appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

IX. DURING CLOSING ARGUMENT, THE PROSECUTION'S EGREGIOUS EXAGGERATION OF ITS EVIDENCE OF LACK OF CONSENT, A PREREQUISITE FOR ATTEMPTED RAPE, AND THE COURT'S IMPRIMATUR PLACED ON THAT EXAGGERATION, DENIED APPELLANT OF HIS RIGHT TO A FAIR TRIAL

Respondent offers that a prosecutor is permitted "fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'" Respondent adds that "counsel ... may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.'" (RB p. 78, quoting *People v. Hill, supra,* 17 Cal.4th 800, 819.) Yet, even from respondent's selective mining of the available facts here, it is never able to bridge with these principles to justify the use of "scream" instead of loud or "struggle" instead of push. "Loud" does not carry

with it the inferences of desperation, fear, or even terror that readily comes in this context with "scream." "Push" does not carry with it the inferences of ineffective or inadequate efforts to overcome a superior, resisting force that would come in this context with "struggle." The prosecutor's construct of Mele starting to "scream and struggle" resulted in a combination greater than the sum of its parts. This was far from a fair comment on the evidence. It was an egregious exaggeration. It was without evidentiary support.

And, the court's resolution of the defense objection improperly gave credence to the prosecutor's false assertions. (*People* v. *Mahoney* (1927) 201 Cal. 618, 626-627 [258 P. 607] ["Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. ...."]; *Bollenbach* v. *United States* (1946) 326 U.S. 607, 612 [90 L.Ed. 350, 66 S.Ct. 402] ["jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word."]) "Words of instruction of the trial judge are more likely to effect prejudice than the words of argument of the prosecutor." (*People* v. *Morse* (1964) 60 Cal.2d 631, 650 [36 Cal.Rptr. 201].)

As this Court observed in *People v. Evans* (1952) 39 Cal.2d 242 [246 P.2d 636], "In a case such as this where the crime charged is of itself sufficient to inflame the mind of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and the conduct of the trial." (*Id.* at p. 251.)

The prosecutor's perception of the weakness of her case in this regard is best illustrated in her resort to such an egregious exaggeration of Mele's actions. In light of the significance of the cumulative effect of this and the errors detailed in *Arguments I* through *VIII*, the prosecution cannot establish beyond a reasonable doubt that the cumulative effect of these errors had no effect in bringing about the

guilty verdict and special circumstance finding. As a result, the special circumstance, the murder conviction, and appellant's death sentence must be reversed. (*Chapman* v. *California, supra,* 386 U.S. 18, 20-21, 24; *People* v. *Louis, supra,* 42 Cal.3d 969, 993; *see People* v. *Garceau* (1993) 6 Cal.4th 140, 186 [24 Cal.Rptr.2d 664]; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727 [112 Cal.Rptr. 565].)

X. APPELLANT'S PENALTY PHASE VERDICT WAS IMPROPERLY PREMISED ON FOUR INCIDENTS COMMITTED WHEN APPELLANT WAS A JUVENILE, THREE OF WHICH WERE COMMITTED WHEN HE WAS 15 YEARS OLD OR LESS, IN VIOLATION OF NUMEROUS CONSTITUTIONAL PROSCRIPTIONS

Appellant relies upon his argument from the opening brief and has nothing further to add on this issue.

XI. APPELLANT'S PENALTY PHASE VERDICT WAS PREDICATED ON IMPERMISSIBLE HEARSAY IN THE FORM OF A MISDEMEANOR JUDGMENT THAT WAS INADMISSIBLE AT THE TIME OF THIS OFFENSE

In *People v. Wheeler* (1992) 4 Cal.4th 284 [14 Cal.Rptr.2d 418], this Court held that a misdemeanor conviction itself is inadmissible hearsay when offered for the truth of the charge. (*Id.* at p. 288, 297-298.) "Generally, a statement offered for its truth, and made other than by a witness testifying at the hearing, is inadmissible hearsay." (*Id.* at p. 297.) Thus, while the documentary evidence of a conviction may be admissible to prove that the conviction occurred, the business or official records exceptions do not make the abstract of judgment admissible to show that the witness committed the underlying criminal conduct." (*Id.* at p. 300, fn. 13.)

The offenses appellant was charged with committing occurred on February 22, 1996. (CT 21-22.)

People v. Ray (1996) 13 Cal.4th 313 [52 Cal.Rptr.2d 296], decided May 6, 1996, two and one-half months after the commission of the homicide, Chief Justice George concluded in a concurring opinion joined by four associate justices, that *Wheeler* did not apply in a sentencing context such as section 190.3, factor (b).[9] (*Id.* at p. 369.) However, since *Ray* was decided after the instant offense, to apply it against appellant would be a denial of his constitutional right of due process.[10] The case before the court in *Ray* involved crimes committed in 1984. (*People v. Ray, supra,* at p. 326.)

---

9 Section 190.3 provides in pertinent part:

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

10 A criminal statute enacted with a retroactive application is invalid as an ex post facto law if it punishes an act innocent when done, or increases the punishment, or takes away a defense related to an element of the crime or an excuse or justification for the conduct, or alters the rules of evidence so that a conviction may be obtained on less or different testimony than was required when the crime was committed. (See *Beazell v. Ohio* (1925) 269 U.S. 167 [70 L.Ed. 216, 46 S.Ct. 68]; *Collins v. Youngblood* (1990) 497 U.S. 37 [111 L.Ed.2d 30, 110 S.Ct. 2715]; *People v. Frazer* (1999) 21 Cal.4th 737 [88 Cal.Rptr.2d 312].) Ex post facto laws are prohibited by the federal Constitution (Art. I, §§ 9, 10) and the California Constitution (Art. I, § 9). (Witkin, *California Criminal Law 1, Nature of Criminal Law*, (3rd ed. 2000) § 10, p. 21.) "The California ex post facto provision affords the same protection as the federal provision." (*Id.* at p. 23.)

However, where the courts make such a change in the law, the Due Process Clause of the Fifth Amendment has been violated.

> The Ex Post Facto Clause is a limitation upon the powers of the legislature... and does not of its own force apply to the Judicial Branch of government.... But the principle on which the clause is based the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty.... As such, that right is protected against judicial action by the Due Process Clause of the

In *Wheeler,* this Court observed that nothing precluded the Legislature "from creating a hearsay exception that would allow use of misdemeanor convictions for impeachment in criminal cases." (*Id.* at p. 300, fn. 14.) In the 1996 Legislative session, the Legislature did just that in enacting Evidence Code section 452.5.[11] (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460 [119 Cal.Rptr.2d 272].) The new Evidence Code section 452.5 went into effect on January 1, 1997, 10 months after the offense herein. (Gov. Code, § 9600 ["a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed"].)

Thus, until Evidence Code Section 452.5 became effective in 1997, misdemeanor conduct could not be proven by evidence of the misdemeanor conviction, whether by document or testimony. (*People v. Santos* (1994) 30 Cal.App.4th 169, 177, 179 [35 Cal.Rptr.2d 719]; *People v. Steele* (2000) 83 Cal.App.4th 212, 222-223 [99 Cal.Rptr.2d 458].) However, just as in the case of

---

Fifth Amendment. [Citations omitted.] (*Marks v. United States* (1977) 430 U.S. 188, 191-192 [51 L.Ed.2d 260, 97 S.Ct. 990]; accord *Clark v. Brown, supra,* 442 F.3d 708, 721-722.)

[11] Section 452.5 now provides:

(a) The official acts and records specified in subdivisions (c) and (d) of section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

the application of the decision in *People v. Ray*, section 452.5, adopted after the instant offense, cannot be applied against appellant. (See fn. 11, above.)

Consequently, the law in effect at the time of the commission of the homicide in the instant case was that a misdemeanor conviction was inadmissible hearsay because it did not bear with it the trustworthiness of a felony, the latter assured by the seriousness of a *felony* charge. (*People v. Wheeler, supra,* at p. 298.) Indeed as pointed out by defense counsel below, misdemeanor pleas in this county were frequently reflective of nothing more than an effort to get rid of the case, especially where the defendant was in custody, was offered credit for time served, and was released that afternoon. (RT 2551.) As here, no factual basis for the plea was required, no court reporter was present, and the defendant merely filled out a "Tahl Waiver." (RT 2549-2550, see Riverside Co. Municipal Court, case # 329002.) Moreover, appellant's guilty plea and resultant misdemeanor conviction served only as evidence that he had acquiesced to a resolution of his criminal liability rather than undertaking the risk of greater culpability or sanction if he went to trial.

Respondent presses that since the misdemeanor case was properly subject to judicial notice under Evidence Code section 452, that was somehow dispositive that appellant's plea was admissible. Notably, respondent has provided no substantiating support. Evidence judicially noticed must otherwise be admissible. (See, e.g., *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569 [55 Cal.Rtpr.3d 803]; *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 266 [15 Cal.Rptr.3d 244].)

Respondent offers that Article I, section 28, subdivision (d)[12] is dispositive, but again, respondent has provided no substantiating support. By its own terms, the section does not affect any existing statutory rule of evidence relating to privilege or hearsay. (See *People v. Wheeler, supra,* 4 Cal.4th 284, 288 ["the *fact of conviction of a misdemeanor* remains inadmissible under traditional *hearsay* rules when offered to prove that the witness committed misconduct bearing on his or her truthfulness"].)

Respondent's reliance on *Lake v. Reed* (1997) 16 Cal.4th 448 [65 Cal.Rptr.2d 860 (RB p. 89) is misplaced for at least two reasons: it was decided after the instant offense was committed (Feb. 22, 1996) and it did not involve a criminal proceeding, but rather an administrative suspension procedure conducted by the Department of Motor Vehicles. (*Ibid.*)

Equally unavailing is *People v. Kraft* (2000) 23 Cal.4th 978, 1057, cited by respondent to support the proposition that the driver's identity was not an element of the assault, but that identity was subject to being established by an admission. (RB p. 89) However, respondent does not and cannot make the next requisite link in this chain of logic because there is nothing in appellant's plea about the identity of the driver. Once again, all that can be inferred is that appellant had acquiesced

---

[12] The section provides:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

to a resolution of his criminal liability rather than undertaking the risk of greater culpability or sanction if he went to trial.

Alternatively, respondent offers that had the trial court not taken judicial notice of appellant's plea, the prosecutor could have established his identity as the person who committed the assault with the car in other ways. Respondent again selectively marshals facts in an effort to substantiate this claim. (RB pp. 90-91.) However, when the whole story is told, a conflicting conclusion emerges.

The prosecution was reliant upon the misdemeanor conviction because none of the three witnesses the prosecution called to testify about the assault (Ronald Gaither, Walter Fuller, and Joseph Scruggs) could identify appellant as a participant in the assault. (14RT 2488-2489, 2507-2508, 2517.) Respondent repeats the prosecutor's comments below that Deputy Melbrech had responded to the incident and had put in his report that Walter Fuller told him that appellant was the driver. Defense counsel objected because the prosecutor had not asked Mr. Fuller about this when he testified. Respondent now offers that Mr. Fuller could have been recalled and asked about the identification attributed to him and if he did not recall it, Officer Melbrech could have been called to impeach him. (RB pp. 90-91.)

The record provides a more complete story. Defense counsel informed the court that it appeared that Wanda Applewhite may have been the source of Mr. Fuller's information. (15RT 2544-2546.) Ms. Fuller was apparently in Florida, which was the likely reason that the prosecution had not made her available to testify. (14RT 2519-2522.) In any event, there is nothing in the record to demonstrate that any of these three witnesses could provide competent evidence on the issue.

The attempt to gauge prejudice at the penalty phase is always a hazardous task even in the presence of compelling aggravating factors. (*People v. Easley*

(1983) 34 Cal.3d 858, 885 [196 Cal.Rptr. 309].) In a close case, any substantial error is likely to require reversal, and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62 [123 P.2d 478]; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [15 Cal.Rptr.2d 112].)

In *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 620-622, the Ninth Circuit affirmed the grant of habeas relief to a defendant who had been sentenced to death for 13 murders. The prosecution argued that penalty phase error was harmless in the face of such a strong case in aggravation, even though the error prevented the jury from learning about significant facts in mitigation. The federal district court and the Ninth Circuit disagreed. They concluded that there was a reasonable probability that the mitigating evidence might have prevented a unanimous verdict for death. *Mak* demonstrates that even overwhelming evidence in aggravation is an inappropriate basis on which to conclude penalty phase error was harmless, even in cases with many victims.

In these circumstances *Chapman v. California, supra,* 386 U.S. 18 cannot be satisfied. (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [28 Cal.Rptr.2d 335].) As previously noted, the prosecution introduced five incidents involving acts of "force or violence." Four were committed when appellant was a juvenile, one when he was only 14, and two when he was 15. The only incident committed when he was adult, and just by a month, the jury should never have heard. The State cannot prove beyond a reasonable doubt that that error did not contribute to the jury's sentencing decision. Thus, appellant's sentence of death must be reversed.

XII. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT, FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY PERMITTING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY.

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. Appellant argues that the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment. (AOB pp. 156-160.)

Respondent argues that intercase proportionality is not required by the United States Constitution, relying on *Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [79 L.Ed.2d 29, 104 S.Ct. 871], as well as California cases which have declined to undertake it. (RB pp. 92-94.)

Appellant acknowledges these state cases, and further acknowledges that these cases are in turn based upon the United States Supreme Court's holding in *Pulley*. However, that was then and this is now. As appellant contends in his opening brief, the intervening 24 years between *Pulley* and the present time have seen the California sentencing scheme become one that demands proportionality review to ensure its constitutional application. This Court should revisit this issue and rule accordingly.

XIII. CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO REQUIRE THE APPROPRIATE BURDEN OF PROOF

Appellant proves his death verdict is unconstitutional because it was not premised on findings beyond a reasonable doubt by a unanimous jury. (AOB pp. 160-190.) Respondent relies on this Court's precedent in arguing that his claim should be rejected. (RB pp. 92-94.) Appellant writes here only to urge that his

claim must be considered in light of *Cunningham v. California* (2007) ___ U.S. ___, [166 L.Ed.2d 856, 127 S.Ct. 856]. This case, decided last year, supports appellant's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by the jury beyond a reasonable doubt. Because of *Cunningham,* this Court's effort to distinguish *Ring* v. *Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428] and *Blakely* v. *Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531] (*Blakely*) should be re-examined. (See *People* v. *Prieto* (2003) 30 Cal.4th 226, 275-276 [133 Cal.Rptr.2d 18] [rejecting the argument that *Blakely* requires findings beyond a reasonable doubt] and *People* v. *Morrison* (2004) 34 Cal.4th 698, 731 [21 Cal.Rptr.3d 682] [same].)

As appellant argues in his opening brief, the *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi* v. *New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. In *Blakely,* the United States Supreme Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely*v. *Washington, supra,* 542 U.S. at pp. 303-304.)

In *Cunningham* v. *Calfornia, supra,* 127 S.Ct. 856, the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law, i.e., whether the Sixth Amendment right to a jury trial requires that the aggravating facts used to sentence a non-capital defendant to the upper term (rather than to the presumptive middle-term) be proved beyond a reasonable

doubt. The High Court held that it did, reiterating its holding that the federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury *and proved beyond a reasonable doubt,* including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range" (*id.* at p. 868, citing *People* v. *Black* (2005) 35 Cal.4th 1238, 1254 [29 Cal.Rptr.3d 740]) so that the upper term (rather than the middle term) is the statutory maximum. The majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth Amendment: "We cautioned in *Blakely,* however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." (*Id.* at p. 869.) Justice Ginsburg's majority opinion held that there was a bright-line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Ibid.*, citing *Blakely, supra,* 542 U.S. at p. 305, and fn. 8.)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (See *People* v. *Farnam* (2002) 28 Cal.4th 107, 192 [121 Cal.Rptr.2d 106]; *People* v.

Duncan (1991) 53 Cal.3d 955, 977-978 [281 Cal.Rptr. 273]; see also CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely, Ring,* and *Apprendi.*

In *People* v. *Prieto, supra,* 30 Cal.4th 226, 275, citing *People* v. *Ochoa* (2001) 26 Cal.4th 398,462 [110 Cal.Rptr.2d 324], this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty sentencing is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the constitutional question whether the factfinding was something "traditionally" done by the sentencer. The only question relevant to the Sixth Amendment analysis is whether a fact is essential for increased punishment. (*Cunningham* v. *California, supra,* 127 S.Ct. at p. 869.)

This Court has also held that California's death penalty statute is not within the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People* ***v.*** *Prieto, supra,* 30 Cal.4th at p. 275), or because a death penalty decision involves the "moral assessment" of facts "and reflects whether a defendant should be sentenced to death." (*People* v. *Moon* (2005) 37 Cal.4th 1, 41 [32 Cal.Rptr.3d 894], citing *People* v. *Bvown* (1985) 40 Cal.3d 512, 540 [230 Cal.Rptr. 834].) This Court has also held that *Ring* does not apply 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." (*People* v. *Snow* (2003) 30 Cal.4th 43, 126, fn. 32 [132 Cal.Rptr.2d 271], citing *People* v. *Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14 [106 Cal.Rptr.2d 575].)

None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts—it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point.

Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly, a capital juror does not have to consider aggravation if in the juror's moral judgment the aggravation does not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact of aggravation has to be found beyond a reasonable doubt. [13] Because California does not require that aggravation be proved beyond a reasonable doubt, it violates the Sixth Amendment.

---

[13] The United States Supreme Court in *Blakely* as much as said that its ruling applied to "normative" decisions, without using that phrase. 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." *(Blakely* v. *Washington, supra,* 542 U.S. at p. 328 (dis. opn. of Breyer, J.) merely to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring* v. *Arizona, supra,* 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of *Ring* and *Apprendi:* "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by

A second recent United States Supreme Court case also supports appellant's argument that a sentence must be based on the findings beyond a reasonable doubt by a unanimous jury. In *Brown* v. *Sanders* (2006) 546 U.S. 212 [163 L.Ed.2d 723, 126 S.Ct. 884], the High Court clarified the role of aggravating circumstances in California's death penalty scheme: "Our cases have frequently employed the terms 'aggravating circumstance' or 'aggravating factor' to refer to those statutory factors which determine death eligibility in satisfaction of *Furman's*[14] narrowing requirement. (See, e.g., *Tuilaepa* v. *California* (1994) 512 U.S. 967, 972 [129 L.Ed.2d 750, 114 S.Ct. 2630].) This terminology becomes confusing when, as in this case, a State employs the term 'aggravating circumstance' to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty." (*Brown* v. *Sanders, supra,* 546 U.S. at p. 216, fn. 2, italics in original.) There can now be no question that one or more aggravating circumstances above and beyond any findings that make the defendant eligible for death must be found by a California jury before it can consider whether or not to impose a death sentence. (See CALJIC No. 8.88.) As Justice Scalia, the author of *Sanders*, concluded in *Ring*: "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 612.) In light of *Brown*, this Court should re-examine its decisions regarding the applicability of *Ring v. Arizona* to California's death penalty scheme.

Kansas v. Marsh (2006) ___ U.S. ___ [165 L.Ed.2d 429, 126 S.Ct. 2516] (*Marsh*) deserves mention, if only to show that it has no application to the present

---

the jury beyond a reasonable doubt."

[14] *Furman* v. *Georgia* (1972) 408 U.S. 238.

issue. The Kansas statute considered in Marsh provided: "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 ... exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced as provided by law." (Kan. Stat. Ann. § 21-4624(e) (1995), quoted at *Marsh, supra,* 126 S.Ct. at p. 2520.) The Kansas Supreme Court reversed Marsh's death sentence, holding that the statute's weighing equation violated the Eighth and Fourteenth Amendments of the United States Constitution because, in the event of equipoise, i.e., the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required. (*Id.* at p. 2521.)

The United States Supreme Court reversed the Kansas court's ruling. The High Court deemed the issue to be governed by its ruling in *Walton* **v.** *Arizona* (1990) 497 U.S. 639 [111 L.Ed.2d 511, 110 S.Ct. 3047], overruled on other grounds, *Ring v. Arizona, supra,* 536 U.S. 584. (*Marsh, supra,* 126 S.Ct. at p. 2522.) Appellant's present challenge to the absence of a beyond a reasonable doubt burden of proof from the California sentencing formula was not before the High Court in *Marsh* because, as that court noted, "the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate...." (*Marsh, supra,* 126 S.Ct. at p. 2524.) The only question before the High Court in *Marsh* was whether Kansas could require the sentencer to impose a death sentence when it had not found "that the ... aggravating circumstances [were] not outweighed by any mitigating circumstances." (*Marsh,*

supra, 126 S.Ct., at p. 2522.) As such, *Marsh* has no bearing on the issue of California's sentencing formula.

Because the sentencing formula that was used to determine that appellant should be put to death did not require that the jury make its sentencing determination beyond a reasonable doubt, the sentence of death must be reversed.

XIV. THE TRIAL COURT'S INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

Respondent argues that these issues are waived by lack of objection below. (RB pp. 96-97.) Jury instructions are an exception to the general waiver rule. An appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant were affected. (§§ 1259, 1469.) Substantial rights are equated with reversible error, i.e., did the error result in a miscarriage of justice. (Cal. Const., Art. VI, § 13; *People v. Watson, supra,* 46 Cal.2d 818, 836; *People v. Arredondo, supra,* 52 Cal.App.3d 973, 978.) Lowering the prosecution's burden of proof for an element of an offense manifests a miscarriage of justice.

In any event, constitutional claims may be considered when presented for the first time on appeal when the error fundamentally affected the validity of the judgment, or important issues of public policy are at stake (*Hale v. Morgan, supra,* 22 Cal.3d 388, 394; *People v. Blanco, supra,* 10 Cal.App.4th 1167, 1172-1173), all factors that are present here. Further, a reviewing court may consider a claim despite a lack of objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill, supra,* 17 Cal.4th 800, 843, fn. 8.) Again, this standard has readily been met.

Appellant argues that the penalty phase instructions were unconstitutional in that they failed to adequately define the scope of the jury's sentencing

discretion and the nature of its deliberative process. (AOB pp. 190-208.) Respondent relies on this Court's precedent in arguing that appellant's claims must be rejected. (RB pp. 95-101.)

Appellant argues that the inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Appellant is aware that the Court has rejected this very argument in *People v. Avila* (2006) 38 Cal.4th 491, 614 [43 Cal.Rptr. 3d]), but urges reconsideration in light of two recent high Court opinions.

The United States Supreme Court recently reaffirmed that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." (*Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___ [167 L.Ed.2d 585, 127 S.Ct. 1654, 1664].) Indeed, it has long been recognized:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605 [57 L.Ed.2d 973, 98 S.Ct. 2954]; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 323 [106 L.Ed.2d 256, 109 S.Ct. 2934] [jury must be able to give a reasoned moral response to defendant's mitigating evidence].)

This Court has assumed that Penal Code section 190.3 and CALJIC No. 8.85 allow meaningful consideration of all mental states because jurors will somehow understand that factor (k) permits consideration of a defendant's less-than-extreme mental or emotional disturbance as mitigating evidence. (See,. e.g.,

People v. Wright (1990) 52 Cal.3d 367, 443-444 [276 Cal.Rptr. 731].) However, to conclude that factor (k) overrides factors (d) and (g) would be tantamount to declaring the other factors 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 [268 Cal.Rptr. 753]), so too one would expect a juror to have rejected an interpretation of the court's instructions that would have rendered all of factors (d) and (g) surplusage. Finally, the language of factor (k) in no way compelled a juror to interpret it as overriding factors (d) and (g). 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 ...." (41CT: 10972.) There was no reason a juror would necessarily interpret appellant's mental or emotional impairment at the time of the killings or his domination by another—the subject of factors (d) and (g)—as an "aspect of his character." A juror more likely believed that factors (d) and (g) dealt with different subjects that factor (k).

Similarly, in *Brewer v. Quarterman* (2007)___ U.S. ___ [167 L.Ed.2d 622, 127 S.Ct. 1706], where the prosecutor's argument limited the jury's consideration of mitigating evidence (*id.* at p. 1711] [argument "deemphasized any mitigating effect that such evidence should have on the jury's determination"]), our High Court found that the jury was likely to have accepted the prosecutor's reasoning, which required reversal even if the mitigating evidence in *Brewer* was not as strong as in other cases. (*Id*, at p. 1712.) In so doing, the Court rejected the claim that there had to be evidence of a chronic or immutable mental illness before an error that foreclosed consideration of evidence was prejudicial:

> Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or

> immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime. (*Id.* at pp. 1712 -1713.)

Thus, it found that the Texas courts had "failed to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." (*Id.* at p. 1714.)

Here, the instructions foreclosed consideration of mitigation under factors (d) and (g). Neither the instructions nor the argument of counsel informed the jury that the consideration contained therein could be considered elsewhere. When jurors are unable to give meaningful effect or a reasoned moral response to a defendant's mitigating evidence, "the sentencing process is fatally flawed." (*Abdul-Kabir v. Quarterman, supra*, 127 S.Ct. at p. 1675.) Appellant therefore requests that the Court reconsider its previous opinions in light of *Brewer* and *Abdul-Kabir* and reverse the penalty judgment.

With regard to the remainder of appellant's Argument XIV, he relies on the state and federal authority cited in his opening brief, and has nothing further to add at this time.

XV. THE TRIAL COURT'S INSTRUCTIONS ABOUT MITIGATING AND AGGRAVATING FACTORS AND THEIR APPLICATION RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

Respondent argues that these issues are waived by lack of objection below. (RB pp. 96-97.) Jury instructions are an exception to the general waiver rule. An appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant were affected. (§§ 1259, 1469.) Substantial rights are equated with reversible error, i.e., did the

error result in a miscarriage of justice. (Cal. Const., Art. VI, § 13; *People v. Watson, supra,* 46 Cal.2d 818, 836; *People v. Arredondo, supra,* 52 Cal.App.3d 973, 978.) Lowering the prosecution's burden of proof for an element of an offense manifests a miscarriage of justice.

In any event, constitutional claims may be considered when presented for the first time on appeal when the error fundamentally affected the validity of the judgment, or important issues of public policy are at stake (*Hale v. Morgan, supra,* 22 Cal.3d 388, 394; *People v. Blanco, supra,* 10 Cal.App.4th 1167, 1172-1173), all factors that are present here. Further, a reviewing court may consider a claim despite a lack of objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill, supra,* 17 Cal.4th 800, 843, fn. 8.) Again, this standard has readily been met.

Appellant has delineated a number of reasons why California's death penalty statute and instructions fail to pass constitutional muster. (AOB pp. 190-208.) Respondent argues that each of appellant's attacks on the constitutionality of California's death penalty statute should be rejected since this Court has rejected them previously. (RB pp. 95-101.) Appellant requests this Court to reconsider its previous rulings. However, two issues deserve this Court's special attention because of recent rulings in the United States Supreme Court.

Appellant has argued that California's statute violated the Eighth and Fourteenth Amendments because the statute does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB pp. 190-208.) It was demonstrated that long-established United States Supreme Court precedent holds that to avoid the Eighth Amendment's proscription against cruel and unusual punishment the state must rationally and objectively narrow the class of murderers eligible for the death penalty. (*Ibid.*) This core constitutional principle was most recently reiterated in *Kansas v. Marsh, supra,* ___ U.S. ___ [126 S.Ct. 2516],

where in an opinion by Justice Thomas, the high court held that while states had wide discretion to determine the parameter's of their death penalty laws, a death penalty scheme must at an absolute minimum ensure that the procedure "rationally narrow[s] the class of death-eligible defendants." (*Id.* at pp. 2524-2525.)

Penal Code section 190.2's all embracing special circumstances, together with the Court's ever more expansive interpretation of those special circumstances, fails to rationally narrow the eligibility pool. In light of the increasing role the United States Supreme Court has given narrowing in its death penalty jurisprudence, it is time this Court did so.

In his opening brief, appellant argues that California's death penalty is unconstitutional because this Court has failed to apply a limiting construction to section 190.3, subdivision (a). (AOB pp. 208-213.) Most recently in *People v. Blair* (2005) 36 Cal.4th 686, 749 [31 Cal.Rptr.3d 485], this Court explicitly held that for evidence to be considered "circumstances of the crime," there is no requirement of spatial or temporal connection to the crime. It is apparent that this Court does not believe that there are any limitations necessary on its construction of section 190.3, subdivision (a). For the reasons articulated in his opening brief, appellant urges this Court to reconsider this holding.

XVI. THE TRIAL COURT'S DENIAL OF DEFENSE REQUESTED APPLICABLE AND ESSENTIAL JURY INSTRUCTIONS RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

B. The Trial Court Improperly Denied Essential Defense Requested Instructions

1. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT THEY MAY FIND MITIGATION IF THERE IS ANY EVIDENCE TO SUPPORT IT, NO MATTER HOW WEAK

Respondent offers the palliative that rejection of defense requested instruction H was proper "because *most of it* was duplicative of the instructions

provided in CALJIC Nos. 8.85 factor (k) and 8.88 [Emphasis added.]" (RB p. 113.) Yet, respondent does not challenge the propriety or viability of the points covered in instruction H, as detailed in *Appellant's Opening Brief* at pages 240-241, not fully addressed in the pattern instructions of CALJIC.

2. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION PINPOINT INSTRUCTIONS ADDRESSING SPECIFIC DEFENSE ISSUES

Respondent offers "many of the 19 items listed [in this argument] as mitigating factors ... were confusing or were simply not required." (RB p. 117.) Yet respondent does not identify which items it is referring to, why they were confusing, or challenge any of the supporting authority.

Respondent states "Trial courts are not expected to label factors as mitigating or aggravating," citing *People v. Frye* (1998) 18 Cal.4th 894, 1026 [77 Cal.Rptr.2d 25] and *People v. Carpenter, supra,* 15 Cal.4th 312, 420.) Appellant's contention here is not about labeling, but about relating relevant, potential mitigating circumstances surrounding appellant and the offense to the legal principles involved in the jury's task of selection of the appropriate penalty. Further, in neither *Frye* nor *Carpenter* was the Court addressing this point, but rather the claim "that the trial court should have advised the jury that certain statutory factors are relevant solely as potential mitigating circumstances." (*Ibid.*)

Respondent's assertion that much of appellant's proposed special instruction was duplicative of CALJIC No. 8.85, factor (k) is a gross oversimplification. (RB p. 117.)

3. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT THE JURORS WERE NOT REQUIRED TO AGREE ON ANY FACTOR IN MITIGATION

Appellant relies upon his argument from the opening brief and has nothing further to add on this issue.

4. THE REFUSAL OF THE DEFENSE REQUEST THAT THE JURY BE INSTRUCTED THAT A SINGLE MITIGATING FACTOR MAY OUTWEIGH MULTIPLE AGGRAVATING FACTORS IMPERMISSIBLY CONVEYED TO THE JURY THAT MULTIPLE FACTORS IN MITIGATION WERE REQUIRED TO AVOID A DEATH VERDICT

Respondent replies that the requested instruction that a single mitigating factor may possibly outweigh multiple aggravating factors "was argumentative and improperly implied that mitigating factors simply carried more weight than did aggravating ones." (RB p. 120.) Yet, respondent does not acknowledge that the requested instruction was a correct statement of the law and supported by the authority appellant proffered. (AOB p. 251, citing, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 557-558 [46 Cal.Rptr.2d 751].)

5. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT IF THEY WERE IN DOUBT AS TO WHICH PENALTY TO IMPOSE, THEY MUST IMPOSE LIFE WITHOUT THE POSSIBILITY OF PAROLE

Respondent asserts that *People v. Sanchez* (1995) 12 Cal.4th 1, 81 [47 Cal.Rptr.2d 843]; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [14 Cal.Rptr.2d 133]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667] are instances where this Court has repeatedly rejected the identical raised here. (RB p. 121.) However, these citations do not substantiate respondent's point.

6. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT THE LAW CONSIDERED DEATH THE WORST PUNISHMENT

Notably, respondent does not take issue with the point of the defense requested instruction, "that the law considers the more extreme punishment to be the death penalty, and not life imprisonment without the possibility of parole." (40CT 10925, RB pp. 122-123.)

C. These Multiple Errors Individually and Collectively Influenced the Outcome

Appellate referenced *Argument XI, C* in *Appellant's Opening Brief* and incorporated here the detailed and compelling mitigating evidence proffered by the defense through lay and expert witnesses. However, the page number cited was

incorrect. That evidence can be found at the second full paragraph of page 152, of *Appellant's Opening Brief.*

Otherwise, appellant relies in this Part C upon his argument from the opening brief and has nothing further to add on this issue.

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

Respondent argues that these issues are waived by lack of objection below. (RB pp. 123-124.) Constitutional claims may be considered when presented for the first time on appeal when the error fundamentally affected the validity of the judgment, or important issues of public policy are at stake (*Hale v. Morgan, supra,* 22 Cal.3d 388, 394; *People v. Blanco, supra,* 10 Cal.App.4th 1167, 1172-1173), all factors that are present here. Further, a reviewing court may consider a claim despite a lack of objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill, supra,* 17 Cal.4th 800, 843, fn. 8.) Again, this standard has readily been met.

Otherwise, appellant relies upon his argument from the opening brief and has nothing further to add on the issues raised here.

XVIII. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND APPELLANT'S CONVICTION AND SENTENCE OF DEATH MUST BE SET ASIDE

Appellant has argued that the punishment of death for ordinary crimes violates international law and the Eighth Amendment. (AOB pp. 274-285.) Respondent rejects appellant's argument in a single page, relying on this Court's rejection of the claim. (RB pp. 130-131.)

Recent developments in Eighth Amendment jurisprudence further support appellant's claim. In *Roper* v. *Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1, 125

S.Ct. 1183], the United States Supreme Court struck down death as a constitutional penalty for juvenile offenders. In holding that execution of juvenile criminals is cruel and unusual punishment, the Court looked to international law standards as informing the Eighth Amendment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103,78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime".) (*Id.* at p. 575.)

Respondent has not answered the merits of appellant' claim that the use of death as a regular punishment violates international law, as well as the Eighth and Fourteenth Amendments. Appellant asks this Court to reconsider its position on this issue and to reverse his death judgment

XIX. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS WHICH OCCURRED DURING THE GUILT AND PENALTY PHASES OF TRIAL COMPELS REVERSAL OF THE DEATH SENTENCE EVEN IF NO SINGLE ISSUE, STANDING ALONE, WOULD DO SO.

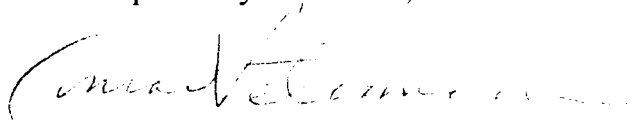
Appellant relies upon his argument from the opening brief and has nothing further to add on this issue.

CONCLUSION

For the foregoing reasons, appellant's convictions and death sentence must be reversed.

Dated: June 26, 2008

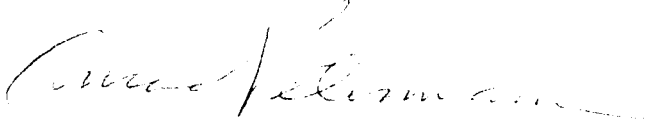
Respectfully submitted,



Conrad Petermann
Attorney for Appellant

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 15,589, not including tables, and thus is within the limits (47,600 words) of California Rules of Court, rule 8.630(b).



Conrad Petermann
Attorney for Appellant

CONRAD PETERMANN
323 East Matilija Street,
Suite 110, PMB 142
Ojai, CA 93023

CASE NUMBER: S080550

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served *APPELLANT'S REPLY BRIEF* by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed to the parties as follows:

Department of Justice
Attorney General's Office
Deputy Marilyn George
P.O. Box 85266
San Diego, CA 92186-5266

Clerk, Superior Court
County of Los Angeles
For delivery to the Hon. Christian F. Thierbach
4100 Main Street
Riverside, CA 92501-3626

California Appellate Project
101 Second Street
Suite 600
San Francisco, CA 94105

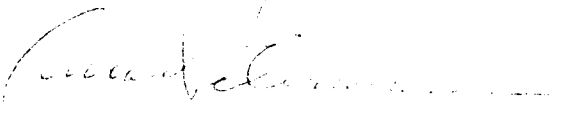
Mr. John Aquilina
Attorney at Law
3895 12th Street
Riverside, CA 92501

Mr. Douglas Myers
Attorney at Law
1953 East Chapman Avenue
Fullerton, CA 92831

Riverside District Attorney
Mr. William Mitchell
Supervising Deputy DA
4075 Main Street
Riverside, CA 92504

Mr. Philian Lee
5-EY-56
P.O. Box P-47000
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 26, 2008, at Ojai, California.



Conrad Petermann