SUPREME COURT COPY

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and respondent,

v.

ALEX DALE THOMAS,

Defendant and appellant.

No. S093456

SUPREME COURT
FILED
APR 04 2008
Frederick K. Ohlrich Clerk
DEPUTY

Appellant's Opening Brief

Automatic Appeal From A Judgment Of Death
Of The Superior Court Of The State Of California,
County Of Sonoma
Honorable Wilfred J. Harpham, Judge
No. SCR-29622

DEATH PENALTY

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Virgin Islands v. Parrott (3rd Cir. 1977) 551 F.2d 553 174

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Wainwright v. Witt (1985) 469 U.S. 412 42

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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and respondent, v. ALEX DALE THOMAS, Defendant and appellant.	)	No. S093456

Statement of the Case

On November 21, 1997, the Sacramento County District Attorney filed a two-count information charging appellant Alex Dale Thomas with the murder and forcible rape of Michelle Montoya (Pen. Code, § 187 & § 261), with the special circumstance that the murder occurred in the commission of rape (Pen. Code § 190.2, subd. (a)(17)). (CT 19:3771.)

The information alleged that appellant used a deadly weapon in the commission of the murder. (Pen. Code, § 12022, subd. (b).) The information also alleged eight prior convictions arising out of three separate

proceedings. (CT 19:3772-3773.)[1]

In December 1998, the trial court denied a defense motion for a change of venue due to extensive pre-trial publicity. (CT 21:4047.) A petition for writ of mandate was filed in the Court of Appeal and denied. (CT 21:4338.) However, in August 1999 the Supreme Court ordered the Court of Appeal to address the writ petition and stayed the trial pending the disposition of the writ proceedings. (CT 24:4963.)

In the meantime, appellant's counsel (the Sacramento County Public Defender) withdrew due to a conflict of interest after the prosecution announced its intent to call as a witness at trial a former client of the Public Defender. (CT 24:4875, 4988, 4998.) New counsel was appointed.

In March 2000, the parties stipulated to change the venue to Sonoma County with trial to begin in July 2000. (CT 24:5012, 5014.) The petition pending in the Court of Appeal on the venue issue was dismissed as moot. (CT 24:5014.)

Jury selection began on July 5, 2000. (CT 28:5633.) The parties

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[1] The initial complaint, filed on May 21, 1997, charged defendant with murder and 4 prior felony convictions under the Three Strikes law. (CT 19:3658.) An amended complaint was filed on June 9, 1997 (CT 19:3771) and deemed the information on November 21, 1997. (CT 19:3771.)

delivered opening statements on August 9, 2000. (CT 29:5760.) The case went to the jury on August 29 (RT 23:6741), and the next day the jury convicted appellant of first degree murder and found true the special circumstance allegation. (RT 23:6791; CT 29:5946.)

Appellant waived his right to a jury trial on the prior conviction allegations. (RT 23:6758-6759.) The court found the allegations to be true. (RT 28:8411.)

The parties delivered opening statements in the penalty trial on September 20, 2000. (CT 30:6109; RT 24:7143.) The jury began its deliberations on October 17. (CT 31:6193.) After deliberating for two full days, the jury returned a verdict of death by execution. (CT 31:6282, 31:6287; RT 29:8845.)

The defense filed posttrial motions for a new trial and to reduce the sentence to life without the possibility of parole. (CT 32:6342; 32:6501.) The court denied both motions. (CT 33:6610 & 33:6642; RT 30:8933 & RT 30:8970.)

On November 29, 2000, the court pronounced judgment as follows:

Count 1 (murder): Death by execution. (RT 30:8990; CT 33:6671.)

Count 2 (rape): 25 years to life under Penal Code section 667,

subdivision (e) (Three Strikes), with consecutive terms of one year for use of a weapon under section 12022, ten years for two prior convictions under section 667, subdivision (a), and one year for the prior prison term under section 667.5, subdivision (b). The punishment on Count 2 was stayed under section 654. (RT 30:8991.)

The court also ordered appellant to pay a restitution fine of $200 under sections 1202.4, subdivision (b) and 1202.45, as well as direct restitution of $15,860 to the State Board of Control, with an additional amount to be determined under section 1202.4. (RT 30:8992.) Finally, the court ordered appellant to pay jail fees of $166 and $36 under Government Code section 29550.2. (RT 30:8992.)

The direct appeal to the Supreme Court was automatic under section 1239, subdivision (b). (CT 33:6708.)

Statement of the Facts

The Guilt Trial

A. The Prosecution Case.

Seventeen-year-old Michelle Montoya was found dead in an empty classroom at Rio Linda High School in the late afternoon of May 16, 1997. She had suffered multiple traumatic injuries. (RT 19:5531.)[2] Appellant Alex Thomas, a temporary school custodian, was arrested at the scene.

Thomas's attorney conceded in his opening statement that Thomas killed Michelle Montoya. (RT 16:4720.) The attorney stated that Thomas had consensual sex with Montoya and then, fearing he had committed statutory rape that would send him to prison for life under the Three Strikes law, he panicked and killed Ms. Montoya. (RT 16:4719-4720.)

1. Circumstances Of The Crime

On May 16, 1997, English teacher Catherine Morel met with Michelle Montoya after school at about 2:50 p.m. to discuss a research

[2] The pathologist observed five areas of injury: (1) blunt force trauma, primarily to the head, (2) incised wounds to the front of the neck, (3) stab wounds to the back, (4) scratches and bruises, and (5) a skull fracture. (RT 18:5428-5435.) There were no defensive wounds. (RT 18:5434.) The pathologist believed Montoya lost consciousness immediately from the head injury and died within minutes. (RT 18:5457.) There was no trauma to the vagina or anus. (RT 18:5477.) A Maxi-pad and a fresh tampon were in place. (RT 18:5479.)

paper. (RT 16:4746-4749.) The meeting ended at 3:30 p.m. Michelle mentioned that she needed to call home for a ride; Morel offered Michelle her cell phone, but Michelle declined. (RT 16:4750.) Morel left right after the meeting. The school was deserted; all the students had left for the weekend. (RT 16:4752.)

Sometime between 3:30 and 3:45 p.m., Michelle called Joseph Schleeter, her stepfather, and asked him to pick her up at school. (RT 16:4778-4779.) It took Schleeter about 15 minutes to get to the school. He waited outside for another 15 minutes, but Michelle never came out. Schleeter decided she had gotten a ride with someone else. He began driving back home, but on the way he called to see if Michelle was there. His wife told him something had happened at the school and he should go back. (RT 16:4781.)

Robert Erickson, a shop teacher, left the school at 2:45 p.m. His classroom consists of two rooms, a workshop (Room L-1) and a classroom (Room L-2). (RT 16:4808-4810.) Inside Room L-2 is a telephone with an outside line. (RT 16:4812.)

Three custodians were working the night shift, which begins at 2:30 p.m. and ends at 11:00 p.m. Two of them, Robert Simpkins and Faruq

Shirley, were regular custodians. The third, appellant Alex Thomas, was a substitute. (RT 16:4862, 4876.) Thomas had worked at the school on three other days in the past few weeks, always on the night shift. (RT 16:4863-4864.) Simpkins, the lead custodian, assigned Thomas the same cleaning assignment he had the night before: Thomas was to start with the rooms in the H wing, then go to the L wing, then to the trailers and the small gym. (RT 16:4883-4885; Ex. 4 [diagram of cleaning route].) The custodians began their rounds shortly after 2:30. School was over for the day and the students were out of the classrooms. (RT 16:4887.)[3]

Near 4:00 p.m., Simpkins heard a loud bang, as if someone hit or slammed a door. He walked toward the sound to investigate; he saw Thomas coming out of a bathroom, bent over and walking backwards, with paper towels in his hands, as if he was wiping his hands or the floor. (RT 16:4889.) Simpkins, assuming that Thomas was cleaning his route, went on

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[3] Mary Mundy, a regular night custodian at Rio Linda High, was asked to come in a few days after May 16 to show the police detectives the route Thomas would have taken to complete his cleaning assignment. (RT 17:4944.) Mundy walked through the route and determined that only 10 to 15 minutes worth of cleaning had been accomplished. (RT 17:4945-4948.) The prosecutor also showed the jury a videotape tour of the classrooms to show the amount of cleaning done (or not done) in each of the classrooms assigned to Thomas. (RT 17:4964-4977; Ex. 1 [videotape].)

with his own business. (RT 16:4890.)

A short time later, Faruq Shirley and Thomas ran to him, saying they had found a body in the wood shop. (RT 16:4890.) Simpkins radioed the principal on his walkie-talkie and went to the shop room. The principal and vice-principal arrived at the same time. The room was dark. Someone turned on the lights. Simpkins saw Michelle Montoya lying on the floor, face down. She was fully clothed, with her backpack on, pulled tight to her body. There was a pool of blood about her. (RT 16:4895, 4903.)

Faruq Shirley's account was similar to that of Simpkins. Shirley began his rounds at about 2:30 or 2:40 p.m; Thomas began working at the same time. (RT 17:4988.) Sometime later, Faruq and Robert Simpkins were talking together, wondering where Thomas was because they had not seen him since he started working. (RT 17:4991.) Faruq heard a noise and they both walked toward it. Faruq saw Thomas coming out of the women's faculty bathroom near the F-wing. (RT 17:4992.) Simpkins left, and Faruq then saw Thomas gesturing to him, asking for a cigarette. Faruq said he did not smoke. Thomas asked Faruq to show him how to clean the ROTC room. This surprised Faruq because Thomas had cleaned the room the day before. (RT 17:4998.) Faruq explained the procedure and walked back to the

custodian's shop. (RT 17:4999.)

He had walked about 50 feet when he heard Thomas yell to him. Thomas led him to Room L-1, where Faruq saw Michelle's body. (RT 17:5002-5003.) He ran out immediately to tell Robert Simpkins. (RT 17:5003.) Faruq saw a faded red color on Thomas's arm; it could have been blood. (RT 17:5029.) Faruq heard no screams or yells from the classrooms that day. (RT 17:5033.)

Vice-principal Elmena Nelson was meeting with Principal Leo Burns when he received the call from Simpkins. (RT 17:5039.) Nelson and Burns ran to the shop room. All three custodians were standing near the body. Nelson asked if anyone had touched the body; Thomas said he did. (RT 17:5045.) Principal Burns immediately called the police. (RT 17:5054-5056.)[4]

2. Appellant's Statements to the Police.

Officer Ruben Del Hoyo was assigned to the school district and quickly responded to the call from Principal Burns. (RT 17:5063.) Burns told Officer Del Hoyo that Thomas had discovered the body. (RT 17:5068.)

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[4] The paramedic who responded to the scene received the call at 4:08 p.m and arrived at the school at 4:12 p.m. (RT 17:5096.) Montoya was already dead. (RT 17:5098.)

The officer asked Thomas what happened. He observed that Thomas "was very nervous, moving around. He was sweating excessively from his forehead. And he started telling me that he was working in L-1 and then he saw a white girl lying on the ground face down and then he turned her over and saw that she was dead, and then he said he ran to out to get help." (RT 17:5068.) Thomas asked for water; the officer escorted him to the custodian's office, and then he turned Thomas over to the sheriff's deputies who placed Thomas in a patrol car. (RT 17:5069-5071.)

Deputy Sheriff Chris Wilder spoke briefly to Thomas at the scene. Thomas said he had gotten blood on his hands and his pants; he used his shirt to wipe it off. (RT 18:5268.) The deputy saw small red spots on Thomas's shoes. He collected the shoes as evidence. (RT 18:5288.) He photographed the soles of the shoes worn by all emergency personnel who were at the scene in order to exclude them as the person who left bloody shoeprints near the body. (RT 18:5292.) Deputy Wilder also videotaped the crime scene. This videotape was shown to the jury. (RT 18:5278; Ex. 2.)

Sheriff's Detective Michael Abbott interviewed Thomas at the scene for 30 minutes. (RT 17:5161-5163.) Thomas said he was doing his rounds, cleaning classrooms, and discovered the body. (RT 17:5166.) Thomas said

he reached out and touched the body with his left hand. (RT 17:5168.) Thomas then showed the detective blood on his pants and said he got it on him as he was running out of the room. He said he slipped and his pants touched the blood. (RT 17:5169.) The detective asked what position Montoya was in when he touched her. Thomas replied, "Why was she lying on her back?" (RT 17:5171.) The detective did not understand Thomas's response. The detective asked Thomas if he saw any weapons in the room; Thomas replied that the room was "full of weapons." (RT 17:5172.) Thomas volunteered that he "wouldn't go to court over this incident because he was convicted." (RT 17:5172.)

When the interview ended, the detective ordered Thomas to remain in the back of the patrol car. Thomas became confrontational and defiant at this point. (RT 17:5174.) The deputies took Thomas back to the station house for further questioning. (RT 17:5175-5176.)

3. Blood Spatter and Other Physical Evidence.

A homicide investigator with expertise in blood stain interpretation examined Thomas's clothes. (RT 18:5369.) He concluded that the blood spatter on Thomas's pants was caused by "medium to high" blood spray from blunt force trauma. The small spots of blood on Thomas's pants were

not consistent with the blood spatter pattern that one would expect to see from a foot-stomp spray, that is, if the blood had gotten onto the pants after Thomas stepped in it. (RT 18:5378-5381.) There was also a "transfer" blood stain on Thomas's underwear. (RT 16:5380.)

Another forensic investigator, Faye Springer, investigated the scene in detail. (RT 19:5583-5586; Ex. 5 [Springer's diagram of crime scene].) She found a blood-soaked tampon in a paper cup in Room L-1. No semen was found on the tampon at the scene, but there was semen on the tampon and Maxi-pad removed from the body during the autopsy. (RT 19:5609-5613.) Sperm was detected in the victim's vagina and cervix. (RT 19:5614.) There was blood on a crowbar; someone had tried to wipe the blood off the crowbar before it dried. (RT 19:5600.)

There was blood spatter on Thomas's shoes, and on the lower part of both legs of Thomas's pants, from just below the knee to the hem line. (RT 19:5616-5621.) There also appeared to be body tissue material mixed in with the blood on the pants, as well as a small chip of green paint that resembled the paint on a crowbar found at the scene. (RT 19:5623-5629.) His left boot sole print was found in the blood pool. (RT 19:5644.) There were blood and tissue smears on Thomas's blue shirt, consistent with wiping

or touching another object. (RT 19:5625.) There was blood on his T-shirt. (RT 19:5627.)

At the jail, Thomas was asked to submit to a sexual assault examination and provide biological samples. (RT 18:5383.) Thomas refused to cooperate. He was forcibly handcuffed and taken to the hospital where blood and hair samples and penal and mouth swabs were taken. (RT 18:5385.) Earlier, when Thomas was left alone in the interview room, a video camera captured him inspecting his genitals. (RT 18:5389; Ex. 3 [videotape].) It was unclear whether Thomas had been informed that he was suspected of rape at the time this video was recorded. (RT 18:5392.)

The autopsy showed no trauma to the vagina or anus of the victim. (RT 18:5477.) A colposcopic examination conducted a few days after the homicide showed "a small amount of erythremia" (redness) "on the edges of the labia minora" but "no evidence of laceration or other injuries" to the labia majora or labia minor. (RT 19:5786.)

Dr. William Green, an emergency room physician with experience in sexual assault examinations, opined that the absence of genital trauma did not necessarily mean that no forcible rape occurred. (RT 19:5779, 5797.) In Dr. Green's experience, based on his own study, a significant number (29

percent) of women who claim to have been sexually assaulted suffer no vaginal trauma. (RT 19:5797.) According to Dr. Green, a number of factors must be considered in drawing conclusions from the absence of trauma, including, "the degree of force," "the state of relaxation of the structures," the "state of the erection in terms of how strong it was on the part of the male," the "degree of lubrication," the "degree of cooperation," and the "size of the genital structures." (RT 19:5798.)

4. DNA Evidence.

Keith Inman, a DNA expert from the California Department of Justice's Crime Lab, performed a DNA analysis of the semen and blood using the RFLP method, which was the most common method when he did the analysis in May 1998. (RT 19:5680, 5682.) He analyzed four evidence samples and three reference samples. (RT 19:5681.) The evidence samples consisted of a portion of a tampon with semen on it, a portion of a tampon with blood on it, blood flakes from a crowbar, and blood and tissue material from Thomas's pants. (RT 19:5681.) The reference samples consisted of blood from Michelle Montoya, Alex Thomas, and William Wilson (Michelle's boyfriend). (RT 19:5681.)

Inman concluded that the semen on the tampon could have come from Thomas but could not have come from the victim's boyfriend. (RT 19:5697.) He concluded that the blood on the crowbar, and on Thomas's pants, was not Thomas's or Wilson, but was probably Michelle Montoya's. (RT 19:5698-99.)

Brian Wraxxal, another DNA expert, performed DNA testing using a different process, the PCR-based method. (RT 19:5718.) He knew the Department of Justice had performed DNA testing on the evidence, but was unaware of the results. (RT 19:5719, 5731.) He received evidence samples consisting of (1) semen on a tampon and (2) blood and tissue from a portion of a pair of pants. (RT 19:5717.) He received reference samples consisting of blood from Michelle Montoya, Alex Thomas, and William Wilson. (RT 19:5717.) He issued a written report in May 2000. (RT 19:5719.)

In his report, Wraxxal concluded that the semen found in the victim came from Thomas; Wilson was excluded as a potential donor. (RT 19:572-30.) The blood on Thomas's pants was Michelle Montoya's. (RT 19:5726-30.)

B. The Defense Case.

1. No Evidence Of Forcible Rape.

William Thrailkill, a wood shop teacher at Rio Linda High, left school at about 3:45 p.m. on May 16. He was inside his classroom until that time, although he stepped outside briefly at about 3:30 p.m. He did not hear anyone yell or scream at any time. (RT 5980-5982.) On the Monday after the homicide, Thrailkill performed an experiment: he put a student in the room where Montoya was found (Room L-1) and told the student to scream. (RT 20:5986.) When he was outside his classroom, he could hear screaming from L-1, but when he went back into his classroom he could not hear any noise from L-1. (RT 20:5986.)

Sherry Arndt is a registered nurse who has examined more than 200 women who have alleged to have been sexually assaulted. (RT 21:6335-36.) She usually testifies for the prosecution in sexual assault cases. (RT 21:6338.) Based on her experience and expertise, the forcible rape of a 18-year-old girl by an adult male would result in visible injury to the posterior fourchette area of the vagina. (RT 21:6358.) She understood that in this case there were no observable injuries to the vagina or anus. She considered the absence of injury to be inconsistent with forcible rape. (RT 21:6349-6353.)

On cross-examination, Arndt agreed that the results reported by Dr.

William Green – that one-third of the rape cases produce no evidence of genital injury – is within the mainstream of studies done in this area. (RT 21:6375.) She conceded it is difficult to conclude from the absence of genital injury whether a forcible rape occurred. (RT 21:6395.)

2. Crime Scene Reconstruction.

Brent Turvey testified as an expert in crime-scene reconstruction. (RT 20:6073.) He consults regularly with law enforcement, and is a sworn police officer in Sitka, Alaska. (RT 20:6074.) Turvey made a detailed examination of the police reports, crime scene photographs and videotapes, and visited the crime scene. (RT 20:6083-84.) He also reviewed the autopsy report and photos. (RT 20:6086.)

Turvey concluded that the investigating detectives never determined the location of the act of sexual intercourse. (RT 21:6126.) He concluded that the sex act took place in the workshop, not in the classroom, because the used tampon was found in the shop and dust had collected on Michelle Montoya's clothes. (RT 21:6133.) A tampon wrapper was found in the workshop. This suggested to him that after engaging sexual activity, the victim took the time to reinsert an unused tampon while she got dressed. (RT 6144-45.)

Based on the different types of wounds to the body, Turvey concluded that Thomas used at least three different weapons. (RT 21:6167.) Given that no weapons were found on Thomas, it appeared he grabbed whatever was nearby, such as an awl, crowbar, and screwdriver. (RT 21:6168.) Turvey believed this showed the killing was not planned, but was a spontaneous act born of anger. (RT 21:6169.) Further, Thomas's attempt to conceal the killing was hasty and superficial, further evidence that the killing was completely unplanned. (RT 21:6174.)

There were no defensive wounds to the victim, indicating that the assault took her by surprise. (RT 21:6172.) Nor were there any injuries to the victim to show that she was raped. (RT 21:6188.) There were, for example, no bruises on the wrist or arms to indicate that Thomas used force to control the victim and compel her to submit to rape. (RT 21:6188.) All of the wounds suffered by the victim occurred while her clothing was still on. (RT 21:6170.) The witness conceded it was possible the victim submitted to rape under the threat of force. (RT 21:6271.)

3. Other Evidence.

Tony Mickeal, a school counselor, was working in his office after school on May 16. At some point he went to Anne Morel's classroom and

saw that she was talking to Michelle Montoya. (RT 20:6005.) He heard Morel offer a telephone to Michelle so she could call for a ride, but Michelle declined, saying that she had some things she wanted to do on campus and she would call for a ride later. (RT 20:6007.)

Greg Lee, Thomas's parole officer in 1997, regularly met with Thomas once or twice a month for eight to ten months. (RT 20:6014-6015.) He did not remember discussing the Three Strikes law with Thomas. (RT 20:6018.) It is possible they discussed the law but he does not specifically remember doing so. (RT 20:6018.)

C. Rebuttal.

A crime scene technician spent 14 hours on the Saturday and Sunday after the crime processing the scene for fingerprints. (RT 22:6427-28.) She checked for fingerprints in the workshop, the classroom, the office next to the classroom, and the men's bathroom. (RT 22:6428.) She lifted two latent fingerprints from the telephone in the office near the workshop. (RT 22:6430.) The prints did not match Michelle Montoya's fingerprints. (RT 22:6469.)[5]

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[5] Brent Turvey testified that the police erred by failing to process the telephone in the office for fingerprints. (RT 21:6132.)

The crime scene technician also processed various objects (an unopened soda bottle, a saw blade, a paper cup containing resin and a used tampon, a tampon string and wrapper, and a green crow bar) but was unable to develop a latent print impression from any of these objects. (RT 21:6434.)

Faye Springer, who also examined the crime scene, believed the physical assault occurred in the workshop near the table saw. (RT 22:6474-80.) Given the shape and position of the blood around the table saw, Springer concluded it was probable that Montoya was standing upright when she was struck. (RT 22:6482.) The tampon found in the cup had wood shavings on one side, which was consistent with someone laying the tampon down on the shavings; there were no shavings in the cup itself. (RT 22:6494.) There was also blood spatter on the back of Thomas's blue shirt, which was consistent with swinging a weapon over his shoulder and casting off blood from the weapon. (RT 22:6509.)

<u>The Penalty Trial</u>

A. Aggravating Evidence.

1. Prior Convictions.

The prosecutor introduced documentary evidence of Thomas's prior

convictions. (RT 29:8526.) On February 4, 1980, Thomas pleaded guilty to possession of a destructive device with the intent to injure (Pen. Code, § 1202.3). (Ex. 58.) On June 22, 1982, Thomas pleaded guilty to armed robbery (Pen. Code, §§ 211 & 12022.5). (Ex. 59.) Also on June 22, 1982, Thomas pleaded guilty to attempted robbery (Pen. Code, § 664/211) with the use of a weapon (Pen. Code, § 12022, subd. (a)). (Ex. 60.) On February 24, 1986, Thomas pleaded guilty to voluntary manslaughter (Pen. Code, § 192) and attempted robbery (Pen. Code, § 664/211) with the use of a firearm (Pen. Code, § 12022.5). (Ex. 61.)

2. Prior Acts of Violence.

Kelly Minix

Minix worked with Thomas at the 49'er truck stop in Sacramento in 1997. (RT 24:7167.) Minix had a clerical position; Thomas worked outside washing the trucks. (RT 24:7168.) In early 1997, Thomas walked with Minix to her car after work. Minix was in a hurry and did not want to talk to Thomas. When she got into her car, Thomas leaned in and either sucked or pinched her on the neck, leaving a small bruise. (RT 24:7174.) Minix pushed him away and Thomas apologized immediately. "I think he regretted it and apologized," Minix explained.

Minix showed the black and blue bruise on her neck to a friend. (RT 24:7215.) Later, Thomas called to say he was sorry. He asked if she was mad; Minix said she would "let it slide" this time. (RT 24:7177.) She did not report the incident to her employer or to the police. (RT 24:7177.)

However, the employer somehow found out about the incident because in March 1997, Minix was asked to make a written statement about what had occurred. Thomas stopped working at the truck stop shortly after that. (RT 24:7180.)

Delores Thomas

Delores Thomas married Thomas in May 1991; they met while he was in prison. (RT 24:7219.) Delores had two children before she met him and they had one child together, a daughter who was conceived while Thomas was in prison. (RT 24:7220, 7231.) When Thomas was paroled in June 1994, he moved in with Delores and her children, and within two weeks found a job at the 49'er truck stop. (RT 24: 7221.)

Delores helped Thomas get the job through friends who knew people at the truck stop. Delores filled out the employment application and other forms because Thomas could neither read nor write. (RT 24:7239-7240.) He could not tell time either, and read the prices on the gas pumps

backwards. (RT 24:7239.)

In August 1994, Thomas and Delores got into an argument. Thomas struck Delores on the side of her nose. Delores grabbed a knife and tried to stab him. (RT 24:7235.) Her son called the police and although Delores did not want Thomas to be prosecuted, he was returned to prison for violating his parole. (RT 24:7227.) Thomas was released from prison a year later, in August 1995, and again moved in with Delores. They lived together for six or seven months. Delores had no contact with him after Thomas was arrested on the murder charges. (RT 24:7227.)

Vincent McGowan

The prosecutor called several witnesses in an attempt to show that Thomas slashed Vincent McGowan when the two were inmates in Los Angeles County Jail in 1985. McGowan refused to testify. Lee Woods, a deputy sheriff in the Los Angeles County Jail, was on duty on July 4, 1985, at about 8:00 a.m. when he heard screaming on the cell row. He saw inmate Vincent McGowan holding the left side of his bleeding neck. (RT 25:7323.) Thomas was looking at McGowan through his cell bars, holding what appeared to be a toothbrush handle, and yelling, "Crippin' for real." (RT 25:7323.) McGowan later told Woods that Thomas had cut him. (RT

25:7324.) No weapon was found in Thomas's cell. (RT 25:7328.)

Richard Calzada, another deputy on duty that day, saw McGowan with his throat cut. (RT 25:7338.) Over objection, Calzada testified that McGowan said "cell 19" had cut him; Thomas was in cell 19. (RT 25:7342.) The cut took 14 stitches to close and appeared to be deep. (RT 25:7343.)

Gerald Franks, worked in the Reception Center for the Department of Corrections, which is where new inmates are assigned in order to determine where they should be housed permanently. (RT 25:7352.) Franks reviewed records concerning Vincent McGowan and learned that Thomas was a potential enemy of McGowan's. Franks noted that McGowan had scars on his throat that appeared to be fairly recent. Franks then interviewed Thomas. According to Franks's written report, Thomas "somewhat reluctantly verified the information" that Thomas had slashed McGowan's throat in jail. (RT 25:7360.) Franks did not recall exactly how Thomas "verified" the information; he recalled it was somewhere between an admission and a denial. (RT 25:7360, 7370.) Typically, if Franks became aware a crime had been committed he would make an incident report and forward the report to his supervisor. However, in this case he initiated no

action with regard to the alleged slashing incident. (RT 25:7372-7373.)

Clark Mason, a reporter with the Santa Rosa *Press Democrat*, interviewed Thomas for 20 minutes at the county jail on September 12, a few days before the penalty trial began. (RT 25:7425.) Thomas said he expected a man whose throat he had slashed to testify against him in the penalty trial. (RT 25:7425.) Thomas told Mason he tried to slash the man's throat because the man was a snitch. (RT 25:7426.) Mason published Thomas's statements in the newspaper the next day.

Renaud Vann

Renaud Vann, his wife, and mother-in-law Estella Black were robbed at gunpoint in Los Angeles in July 1984. (RT 25:7435.) Black was outside her apartment saying good night when Alex Thomas appeared and pointed a gun at them. He asked for money. (RT 25:7439.) They didn't have any money. (RT 25:7439.) Renaud Vann turned over his radio to the man who was with Thomas. (RT 25:7450.)

Daniel White

Later in July 1984, Thomas was arrested for the shooting death of Daniel White. The White shooting occurred in the course of a robbery, which occurred in one of the streets off of Montclair Avenue in South

Central Los Angeles. The robberies of Renaud Vann and Miss Brewster occurred in the same general area. (RT 25:7462-7471.)

Alan Yochelson, a Deputy District Attorney from Los Angeles, prosecuted Thomas for the Brewster, Vann, and White robbery cases. (RT 25:7552.) As part of his prosecution of those charges, Yochelson also investigated Thomas's criminal record. At age 17, Thomas was convicted of possession of an explosive device with intent to injure. (RT 25:7556.) He was prosecuted as an adult but sent to the California Youth Authority. (RT 25:7556.) He was discharged in September 1981. (RT 25:7560.)

Thomas then committed several felonies in December 1981 – the attempted robbery of James Moore, possession of a firearm, and the robbery of Seifeddin Khalatbary. (RT 25:7563.) Thomas pleaded guilty to these charges in June 1982 and was sentenced to state prison. He was paroled in April 1984. In July 1984, he committed new offenses – the robberies of Theresa Brewster and Renaud Vann, and the shooting of Daniel White. (RT 25:7565.) In a negotiated disposition, Thomas pleaded guilty to the armed robberies and to the charge of voluntary manslaughter of Daniel White. (RT 25:7571.) He received a prison term of 18 years and eight months. (RT 25:7571.)

Over objection, the preliminary hearing testimony of Ricardo (also known as James) Jones from the White case was read to the jury. (RT 25:7574.)[6] Jones testified that after midnight on July 26, 1984 he saw Thomas approach a man in a truck and say, "Give me the $25 or give me the rock." (RT 25:7583.) The driver argued with Thomas and began to drive away. (RT 25:7577.) Thomas pulled a gun and shot the driver. (RT 25:7578.) The truck motored down the street, swerved off the road, and ran onto a house lawn. (RT 25:7578.) The driver got out of the truck and fell onto the grass, apparently dead. (RT 25:7578.) Jones later identified Thomas as the shooter in a live line-up. (RT 25:7585.)

Yochelson decided to settle the White homicide for a voluntary manslaughter for a number of reasons. The judge who presided over the preliminary hearing expressed scepticism of Jones's testimony. A second suggested that a murder verdict may have been difficult to achieve given Jones's inconsistent testimony, his poor attitude, and the question of whether a robbery or attempted robbery had even occurred. (RT 26:7641.)

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[6] The court found that the prosecution had exercised due diligence in attempting to locate Jones for trial, but Jones could not be found and was unavailable as a witness. (RT 25:7489-7506.)

3. Victim Impact Evidence.

Michelle Montoya's mother testified. Michelle was the oldest of three children. She was a "happy-go-lucky" girl, very "caring" and "fun loving." (RT 26:7685.) Everyone in the family had difficulty returning to a normal life after Michelle's death. (RT 26:7694.)

A friend of Michelle's testified that Michelle was very close to her mother and her entire extended family. (RT 26:7698.) Her friend described Michelle as an outgoing girl who was "everyone's friend." (RT 26:7699.)

B. Mitigating Evidence.

1. Mental Retardation.

Thomas's IQ at age eight was 63. (RT 27:7937; Ex. UU.) He was tested again at age 15 and scored a 58. (RT 27:7943.) He read at a 1st grade level at age 15. (RT 27:7943.) He was diagnosed at that time as "educable mentally retarded." (RT 27:7962.) All his test scores put Thomas below the first percentile. (RT 27:7963.)

Clinical psychologist Nell Riley examined Thomas for this case. As part of her work-up she gave Thomas another IQ test in 1998. He scored a 68. (RT 27:7943.) Considering all the test scores, Thomas's IQ generally fell between the 1st and 2nd percentile of the population. (RT 27:7943.)

According to Dr. Riley, people who score in the 50th percentile on the IQ test are considered average. (RT 27:7942.) People who score in the 5th to 6th percentile appear very different from the average person and experience serious problems in cognitive tasks. (RT 27:7942.) Those who fall in the 1st to 3rd percentile are considered to be abnormal, and function so far below the average person that they are considered to be mentally impaired. (RT 27:7942.)

Dr. Riley gave Thomas a battery of neuropsychological tests to assess his cognitive abilities. (RT 27:7938.) She believed that Thomas gave his best effort and was not malingering. His overall performance was credible and consistent with the IQ scores he obtained when he was tested as a child and teenager. (RT 27:7938-41.)

Dr. Riley discovered she could not give certain tests because Thomas could not read the questions. (RT 27:7944.) Riley judged his reading vocabulary to be at the level of a 6 year old. He could read simple words such as "his," "as," or "when," but could not read a word such as "fixed." (RT 27:7944.) In literacy, Thomas's scores put him in the lowest tenth of the lowest percentile. (RT 27:7945.)

He did slightly better at math, scoring at the level of an 8 to 10 year

old. (RT 27:7945.) However, according to the guidelines established by the United States Department of Education, Thomas was overall in the lowest level of literacy. People in this level cannot read simple instructions, and cannot use reading to help them in the daily tasks of living. (RT 27:7947.) Riley believed that Thomas suffered from a severe form of dyslexia called "deep dyslexia" that would prevent him from ever reading above a 4th or 5th grade level, even with great effort on his part. (RT 27:7966, 7953.)

Thomas did poorly in memory tests. His ability to retain verbal information was very poor. (RT 27:7947.) Although his visual memory was average, his overall memory performance put him in the 6th percentile. (RT 27:7948.) He showed significant impairment in tests that required him to put geometric puzzles together. (RT 27:7950.) Most people improve the more times they do the test; Thomas did not. (RT 27:7950.)

In the clock test, in which Thomas was asked to draw a clock face, Thomas arranged the numbers in reverse order (counter-clockwise), and left a huge space between the last number and the top of the face. (RT 27:7952.) He could not accurately set the hands of the clock to 11:10. (RT 27:7952; EX. VV.)

In the Halstead-Reitan battery of neuropsychological tests, Thomas

scored in the 0.2 percentile, i.e., at the very bottom of the bottom percentile. (RT 27:7958.) After obtaining Thomas's tests scores, Dr. Riley recommended a PET scan because she believed he might have organic brain damage. (RT 27:7958.)

Based on the PET scan results, as well as Thomas's low IQ scores at age 8, showing mental retardation, Dr. Riley concluded that Thomas was either born with brain damage or developed it very early in life. Although the specific cause remains unknown, Thomas's brain did not develop normally. (RT 27:7960.)

2. Brain Damage.

A PET scan was performed of Thomas's brain in May 1999. (RT 26:7880.) "PET" stands for positron emission tomography. The scan is a diagnostic tool used to show conditions of internal organs. Patients are injected with a radioactive agent which is imaged onto a screen. In this case, Thomas was injected with a glucose tracer and his brain activity was then scanned. Active areas of the brain would show increased glucose activity and areas that were less active would show less activity. (RT 26:7878.) In this way the PET scan can show organic brain damage. (RT 26:7879.)

Dr. Riley was present during the PET scan in May 1999. (RT 27:7934.) While the scan was ongoing, Dr. Riley administered a neuropsychological and attention test to activate Thomas's brain. (RT 27:7934.)

Dr. Joseph Wu is an expert at interpreting brain scans. Dr. Wu graduated from Stanford University in 1978 and is now an Associate Professor at the College of Medicine at the University of California in Irvine, and the clinical director of the Brain Imaging Center at the University. (RT 27:8032.) According to Dr. Wu, a PET scan allows a doctor to peer into a living brain to see which part of the brain is working and which is not. (RT 278061.)

In Thomas's case, the PET scan showed his frontal lobe was abnormal. (RT 27:8066.) The frontal lobe, which is disproportionately larger in humans than in other animals, is the part of the brain involved in high order thinking, or "executive thinking." (RT 27:8070.) The frontal lobe handles abstract thinking, philosophy, and judgment. Individuals with frontal lobe impairment tend to have problems regulating aggression. (RT 27:8071.) A study of several hundred Vietnam veterans showed that those with frontal lobe injuries tended to be six times more aggressive or violent

than those who had head injuries affecting other parts of the brain. (RT 27:8071.)

Dr. Wu consulted with Dr. Riley and learned of the results she obtained in her testing of Thomas. (RT 27:8075.) Dr. Wu said those results were entirely consistent with frontal lobe damage. (RT 27:8075.)

3. Childhood Trauma.

Clinical psychologist Gretchen White investigated Thomas's background and prepared a psycho-social history that focused on Thomas's family history, childhood, and adolescence. (RT 27:8177.) She reviewed a number of social history records, and interviewed Thomas and a number of people who knew him. (RT 27:8177.) Dr. White has been recognized as an expert in compiling social histories for use in the penalty phase of capital trials. (RT 27:8174, 8184.)

Thomas's great-great grandmother was one of 14 children, 7 boys and 7 girls, born into slavery in Georgia. The father and 7 brothers were sold; she never saw them again. She and her sisters and mother were sold to an owner in Texas, where she was raised. (RT 27:8187.) Thomas's grandmother was one of 3 children who lived a hard-scrabble existence off the land in east Texas. (RT 27:8188.) She married a man who owned two

mules and a wagon, more than her family possessed. (RT 27:8188.)

Thomas's grandmother and her husband, Leonard, grew cotton, and Leonard farmed other people's land. (RT 27:8189.) Leonard went to work for Lone Star Steel when that company opened a steel mill in a nearby town and for a time the standard of living rose for everyone in the area. However, when the steel mill closed, many people pulled up stakes and moved to California. (RT 27:8191.) Thomas's mother and father, Ida Mae and Roy Lee Sr., were part of that movement.

Alex Thomas was the oldest of 5 children, all born by the time Thomas was 5 years old. (RT 27:8193.) The family first moved to Blythe, California, but after a year moved north to Richmond, California. Roy Lee worked for a railroad. He was gone for 2 weeks at a time. While he was gone, Ida Mae drank heavily and socialized with other men. (RT 27:8194.) Eventually, Ida Mae left Roy Lee and took the children to Los Angeles. They settled in Watts, an impoverished area of the city, where they lived on welfare. (RT 27:8196.) The children rarely saw their father after they moved to Los Angeles. (RT 27:8199.)

Ida Mae had a sixth child, fathered by Jewel Bolden. Although Bolden was married to another woman and lived with her, he brought a

measure of stability to the Thomas household. He was employed full-time and had money to spend. He believed in education and bettering onself. He was not an alcoholic. He wanted Ida Mae to move her family out of the bad neighborhood they were in but Ida Mae resisted so she could stay close to her friends from Texas, many of whom lived in the same neighborhood. (RT 27:8197-8198.)

Bolden eventually left Ida Mae and took his son away from her. (RT 27:8198.) When Bolden left, Ida Mae took up with Maurice Timmons who, like Ida Mae, was a heavy drinker. (RT 27:8201.) According to various sources, Ida Mae deteriorated sharply after Bolden left. She began drinking morning, noon, and night. She was intensely aggressive and abusive when she drank. She struck her children, including Alex Thomas, with various objects: a broomstick, a belt, an extension cord. (RT 27:8203.) She offered no support, guidance or supervision for her children, but essentially left them to fend for themselves. (RT 27:8203.) She screamed at the children, belittled them, swore at them, insulted them and struck them without warning, and often without reason. (RT 27:8203; RT 26: .) When especially displeased, she would put the children outside the house for an entire night. (RT 27:8213.)

Other evidence corroborated Dr. White's description of Thomas's childhood. A March 1979 probation report stated "the probation officer's contact with minor's mother have frequently found her in a highly intoxicated state and totally unable to control or supervise her son." (RT 27:8213.) The probation officer noted the family home was a shambles, dirty and unkept. (RT 27:8213.) The Thomas house was "located in a very high delinquency area in which there appears to be a great deal of commotion and chaos." (RT 27:8227.)

Several people who witnessed Thomas's difficult childhood testified at trial. A childhood friend, Patrick Ridgle, testified that Thomas's mother, Ida Mae, drank heavily, and used cocaine and crack. (RT 26:7767.) She was ill-tempered, loud and abusive when she was drinking, which was most of the time. (RT 26:7726.) She had a number of different men in her life and they frequently spent the night at her house. They were all heavy drinkers, too. (RT 26:7761.) Thomas's father was absent. (RT 26:7730.) Thomas had brothers but they were hardly ever at home. Thomas's brother Roy Lee got into a lot of trouble as a youth, but his brothers Dwight and Wayne managed to stay out of serious trouble. (RT 26:7769.)

When Thomas left his own house to escape his mother, he stayed with

his friend Ridgle. (RT 26:7723.) Ridgle's sister, Nita Sims, was Thomas's girlfriend when they were teenagers. She is the mother of Thomas's daughter Antoinette Thomas. (RT 26:7756.) Thomas was held back in school because he could not read; Nita tried to teach him to read but her effort was unsuccessful. (RT 26:7757.) Thomas could not tell time. He always complained that his head hurt, but he did not know why. (RT 26:7788, 7795.)

Nita believed Thomas's mother abused her child. She brought the 6-month-old baby to the mother's house to babysit. When Nita returned to pick up the child, she saw what appeared to be cigarette burn marks on the child's leg. (RT 26:7760.) Sims also saw Thomas's mother beat Thomas on the back with belts. (RT 26:7781.) The mother extorted money from Thomas by telling him that unless he gave her money she would call the police and say that he stole a car. (RT 26:7764.)

Thomas ran with a gang. The gang mostly stole cars and sold the parts; they were not selling drugs and Nita did not think Thomas used drugs, although he did drink beer. (RT 26:7787.)

Thomas's daughter, Antoinette Sims, who now has two children of her own, remembered playing with Thomas when she was younger. She

enjoyed her visits with him but as she got older she saw him less and less because he was in prison. (RT 26:7797-7798.) Their separation has made it difficult to have a normal relationship but she still cares about her father. (RT 26:7800.) She remembered the incident when Thomas's mother burned her with a cigarette. Ida Mae Thomas told her to move because she had bad breath and then burned her with a cigarette. Ida Mae also tried to beat her on another occasion. (RT 26:7801.)

Dr. White concluded that the Thomas family "was extremely dysfunctional and was basically not fulfilling the role that the family needs to do to move its children into mainstream productive society." (RT 27:8215.)[7]

Dr. White testified that Thomas became involved in a street gang at age 12. Small for his age, he was known on the street as "Half Pint." (RT 27:8226.) He began committing petty theft and other property crimes, but moved on to crimes against people. (RT 27:8228.) By age 14, Thomas was

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[7] Alice Spivey began visiting Thomas in jail after his arrest in this case. She and her husband thought Thomas might need support so they began visiting him from time to time. After three months of such visits, Thomas asked them if he could call them "Mom" and "Dad." (RT 27:8153-58.) He felt they had become parents to him and he said he never really had parents. However, he was very protective of his mother Ida Mae, and made many excuses for her neglect of him and his brothers. (RT 27:8158.)

a ward of the court. (RT 27:8228.) He went through several out-of-home placements, in the juvenile hall, at the boy's camp, and finally the California Youth Authority. (RT 27:8228.)

In his mid-teens, Thomas attended a special high school to address his profound mental impairment and learning disabilities. Although by all accounts he got along well with his teachers and made an effort to learn, his complete inability to read and write proved to be an unsurmountable hurdle to academic success. (RT 27:8229.)

Dr. White analyzed Thomas's social history from three perspectives: individual, family, and environment. She concluded that Thomas was vulnerable and at risk at every level. He was born mentally impaired, with IQ testing that puts him in the lowest 2 percent of the population. (RT 27:8231.) The people around him knew quite well that Thomas was mentally retarded, that he could not read, write, or even tell time. (RT 27:8231.) The mental impairments he suffered from were mostly likely caused before birth, due to his mother's drug or alcohol abuse during pregnancy, prenatal nutrition deficiencies, or exposure to toxic substances such as lead. (RT 27:8233.) Children with such problems tend to be very needy during infancy. They display poor self-control, are impulsive,

hyperactive, and have short attention spans. (RT 27:8233.) Such children can be difficult to raise, and require special attention from caring, well-organized, and motivated parents. (RT 27:8233-8234.)

Thomas, however, was born into a poor family, with an absent father and alcoholic mother who failed to provide even the minimum requirements for a healthy child. On top of that, he was raised in a dangerous, crime-ridden, violent neighborhood. Dr. White concluded, "Basically, you have an individual who is damaged and impaired; [] living in a family that is not able to provide even a modicum of structure and nurturance within an environment which itself is very depleted and destructive." (RT 27:8234.)

Jury Selection Issues

I. The Court Denied Appellant His Right To A Fair And Impartial Jury Drawn From A Representative Cross-Section Of The Community.

A. The Court's Exclusion For Cause Of Jurors Who Disfavored The Death Penalty But Who Could Have Applied The Law Violated Appellant's Rights To An Impartial Jury, To Due Process, And A Reliable Determination of Guilt And Penalty Under The Fifth, Sixth, Fourteenth And Eighth Amendments.

An accused's right to a fair and impartial jury drawn from a representative cross-section of the community is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, section 16, of the California Constitution. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *People v. Fauber* (1992) 2 Cal.4th 792, 816.) In a capital case, "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521-522, fn. 20.) Thus, "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that the are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162,

176.)

In effect, when those opposed to capital punishment are excluded from the venire, the State "crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois, supra,* at pp. 520-521.) "[A] sentence of death cannot be carried out if the jury imposing or recommending it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522, fn. omitted.)

In *Witherspoon, supra*, the United States Supreme Court held that a prospective juror cannot be excused for cause based on his or her views on capital punishment without violating a defendant's right to an impartial jury under the Sixth Amendment, unless the prospective juror has made it "unmistakably clear" that he or she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case . . . ." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 522, fn. 21.) Revisiting the issue later in *Wainwright v. Witt* (1985) 469 U.S. 412, the Court reaffirmed the fundamental principles

underlying the *Witherspoon* decision and clarified that a prospective juror may be excused for cause based upon his or her views on the death penalty only if the juror's answers convey a "definite impression" that his views "would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt,* 469 U.S. at p. 424, 426 [adopting the test applied in *Adams v. Texas* (1980) 448 U.S. 38, 45].)

In *People v. Ghent* (1987) 43 Cal.3d 739, 767, this court adopted the *Witt* standard as determinative of whether a defendant's right to an impartial jury under article I, section 16 of the state Constitution has been violated by an excusal for cause based upon a prospective juror's views on capital punishment. (See also, *People v. Stewart* (2004) 33 Cal.4th 425, 440-441; *People v. Heard* (2003) 31 Cal.4th 946, 963.) Under this standard, "[a] prospective juror is properly excluded [only] if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 974; accord *People v. Heard*, *supra*, 31 Cal.4th at p. 958.) "The real question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of

death in the case before the juror." (*People v. Heard*, *supra*, 31 Cal.4th at pp. 958-959 [internal quotation marks omitted, quoting from *People v. Ochoa* (2001) 26 Cal.4th 398, 431 & *People v. Hill* (1992) 3 Cal.4th 959, 1003].) "'Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 726-728), it is equally true that the 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.' (*People v. Cash* (2002) 28 Cal.4th 703, 719-720.)" (*People v. Heard*, *supra*, 31 Cal.4th at p. 959.)

The moving party bears "the burden of demonstrating to the trial court that the [*Witt*] standard [is] satisfied as to each of the challenged jurors." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) The court's ruling ordinarily is entitled to deference and will be upheld on appeal if supported by substantial evidence.

(*Wainwright v. Witt*, *supra*, 469 U. S. at pp. 426-430; *People v. Stewart*, *supra*, 33 Cal.4th at p. 451; *People v. Heard*, *supra*, 31 Cal.4th at p. 965.)

Of course, judicial discretion "implies absence of arbitrary determination, [and] capricious disposition," and must be "free from partiality." (*People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) Discretion is "neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*People v. Warner* (1978) 20 Cal.3d 678, 683.) Furthermore, "a trial court's broad discretion in the conduct of voir dire is nevertheless 'subject to essential demands of fairness.' [Citations.] 'At stake is [Petitioner's] right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors.' [Citations.]" (*Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 457.)

Hence, a trial court must apply the *Witt* standard in an even-handed and impartial manner. (Cf. *People v. Champion* (1995) 9 Cal.4th 879, 908-909 [holding that "trial courts should be evenhanded in their questions to prospective jurors during the 'death qualification' portion of the voir dire . .

. ."].) A court's application of the *Witt* standard in an arbitrary, capricious, or partial manner does not comport with the essence of fairness guaranteed by due process of law. (Cf. *Gray v. Klauser* (9th Cir. 2001) 282 F.3d 633, 645-648, 651 [and authorities cited therein, holding that a trial court's unjustified or uneven application of legal standard in a way that favors the prosecution over the defense violates due process].) At a minimum uneven rulings amount to an abuse of discretion, which are not entitled to deference.

As noted, the trial court's ruling regarding the prospective juror's views must be supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558.) On appeal, courts must examine the context in which the trial court ruled on the challenge in order to determine whether the trial court's decision that the juror's beliefs would or would not "'substantially impair the performance of [the juror's] duties' fairly is supported by the record." (*People v. Crittenden* (1994) 9 Cal.4th 83, 122.)

Here, the trial court erroneously excluded qualified jurors merely because they expressed reservations about the death penalty and otherwise applied the *Witt* standard in an arbitrary, capricious, and partial manner. Since the improper exclusion of even a single qualified juror for cause under

the standards set forth above is reversible per se (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *Davis v. Georgia* (1976) 429 U.S. 122; *People v. Heard, supra*, 31 Cal.4th at pp. 965-966), the penalty judgment must be reversed.

B. The Exclusion Of Prospective Jurors For Cause Was Unsupported By Substantial Evidence And Requires Reversal Of The Death Sentence.

1. Juror No. 6-353.

The court excused this juror on the prosecutor's motion. (RT 15:4511.) The court found she was "substantially impaired" due to her "total philosophy" and "body language." (RT 15:4511.) The court's ruling is not supported by the evidence.

In her questionnaire, the juror stated she was "moderately against" the death penalty and "strongly in favor" of life without the possibility of parole. (CT 12:2456.) In voir dire, she stated she did not "have the right" to ignore the law. (RT 15:4506.) She expressed difficulty in deciding whether she could impose the death penalty because she had never been in such a position before, but she concluded it was not "out of the realm of possibility" to impose death, although she qualified that it was "unlikely"

she would do so. (RT 15:4508.) She then explained: "I think probably for me to decide that the death penalty was appropriate, I would have to feel that the person was so wounded and had made such bad choices that there really — that a real sense of humanity almost didn't exist there anymore, and that he was even – he or she even within the prison system would be a real threat to other people. Their level of violence would be a threat to other people." (RT 15:4509.)

Nothing in what this juror said shows that her views on capital punishment "would prevent or impair [her] ability to return a verdict of death . . . ." (*People v. Heard, supra,* 31 Cal.4th at pp. 958-959.) The fact that the juror stated she would consider, in determining the appropriate penalty, whether the accused had made "bad choices," or if he had lost his "sense of humanity" or would be a threat to people in prison are the precise sort of facts that penalty phase jurors may consider in reaching a determination. (RT 15:4509) Thus, the juror was in fact focusing on factual issues that arise in death penalty cases and form the basis for determining the appropriate penalty. It clearly appeared that although she favored life without parole over the death penalty, she could nonetheless "conscientiously consider" both alternatives. (*People v. Cunningham,*

supra, 25 Cal.4th 926, 975.)

At no point did the juror state she would "invariably" vote for life over death. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Nor did the juror state that she would be reluctant to vote for first degree murder or the special circumstance in order to avoid the death penalty question. (See *People v. Heard, supra,* 31 Cal.4th at p. 964.) To the contrary, the juror stated she "could follow the rules that were given to me." (RT 15:4507.)

In sum, the record does not support excusal for cause under the governing standard. The bare reliance on "body language," without any explanation of how that "language" related to a particular question ro answer, is insufficient evidence of juror bias. The court abused its discretion in excusing juror No. 6-353. The death penalty judgment must be reversed. (*Gray v. Mississippi, supra,* 481 U.S. 648, 666-668; *People v. Heard, supra,* 31 Cal.4th at pp. 965-966.)

2. Juror No. 6-483.

The court excused this juror on the prosecutor's motion. (RT 15:4498.) The court stated the juror was "substantially impaired not merely by her words but when she would shake her head no and say 'I guess,' the

whole body language as well I guess [sic]. Clearly impaired." (RT 15:4498.) The record does not support the excusal for cause.

The juror stated in her questionnaire that she would "always" vote for life in prison regardless of the circumstances if an accused was convicted of first degree murder with special circumstances. (RT 15:4491.) In voir dire, however, her views evolved and she clarified that she could "consider" the death penalty once she heard "all the facts and everything." (RT 15:4493.) She said she could listen to both sides and she "could be very fair one way or the other." (RT 15:4493.) Further, she could impose the death penalty if she "really thought he was really, really guilty." (RT 15:4494.) There would have to be "no doubt" in her mind. ((RT 215:4494.) When asked by the prosecutor if she could impose the death penalty if she was convinced that aggravation outweighed the mitigation, she replied, "I probably could if it was really – if I really felt that was necessary, he was very bad." (RT 15:4496.) She denied she was a "conscientious objector" with regard to the death penalty. (RT 15:4497.) She "could" vote for the death penalty. (RT 15:4498.)

Nothing in the record shows that this juror's views on the death penalty "substantially impaired" her from weighing the circumstances and

imposing the death penalty if she felt it was appropriate. She simply stated that she would not impose the death penalty unless she was certain of the accused's guilt and convinced the death penalty was necessary because the accused was "very bad."

As with Juror No. 6-353, the juror's preconditions for considering the death penalty do not suggest that she would not be exercising the role that California law assigns to jurors in death penalty cases. (*People v. Heard, supra*, 31 Cal.4th at p. 965.) She essentially stated she could impose death if the accused was guilty and so "bad" that death was appropriate. That is precisely what the law requires of jurors in death penalty cases. Her responses to the prosecutor's questions did not demonstrate that she would refuse to consider relevant aggravating and mitigating circumstances but, quite the contrary, showed that she would and could consider such factors.

In sum, the record does not support excusal for cause under the governing standard. The court abused its discretion in excusing juror No. 6-483. The death penalty judgment must be reversed. (*Gray v. Mississippi, supra,* 481 U.S. 648, 666-668; *People v. Heard, supra,* 31 Cal.4th at pp. 965-966.)

3. Juror No. 74.

The prosecutor challenged this juror both for her views on the death penalty and prior unfavorable experiences with the criminal justice system. (RT 9:2629.) The court initially passed the juror for cause on both grounds, then reconsidered and excused the juror. (RT 9:2631; RT 9L2716.) The court gave no specific reason for excusing the juror, but stated that "I am convinced that she could not faithfully or impartially apply the law or follow the evidence, and she had very strong feelings." (RT 9:2716.)

The juror's views on the death penalty were explored in voir dire. She stated her opinion of the death penalty had evolved over the years to the point where she felt the death penalty was appropriate in certain cases. (RT 9:2624.) She stated she would not vote "automatically" either for life or death. (RT 9:2610.) She had no religious opposition to the death penalty. (RT 9:2625.) She could not vote for the death penalty unless she was convinced the defendant was guilty, but before the case started she was not leaning one way or the other before hearing any evidence. (RT 9:2626.) She did not know how she would feel "afterwards" if she did vote for death. (RT 9:2627.) She thought she could be fair to both the prosecution and the defense. (RT 9:2627.)

With respect to her experience with the criminal justice system, the juror said she was personally aware of a case where acquaintances of hers were falsely prosecuted and convicted of rape. (RT 9:2605.) She believed the prosecution was politically motivated. (RT 9:2605.) In another case, her future son-in-law was beaten by the police but lost his case because the police officers were "professional" witnesses and her son-in-law was naive. (RT 9:2603.) The juror, however, denied that she distrusted all policemen. (RT 9:2606.) She said she could "accept their testimony if [she] believed it was the truth." (RT 9:2606.) She would not disbelieve them simply because they were police officers. (RT 2606.)

When it initially denied the challenge for cause, the court stated, "I don't think I can grant the challenge for cause on the death penalty." (RT 9:2630.) The court was absolutely correct. Nothing the juror stated showed her ability to follow the law and impose the death penalty, if such was warranted, was "substantially impaired." She stated she could consider both life and death (see *People v. Cunningham, supra,* 25 Cal.4th at p. 975) and at no point did she say she would invariably vote for life over death (see *People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1005). In sum, the record does not support excusal for cause under the governing standard. The court

abused its discretion in excusing juror No. 74. The death penalty judgment must be reversed. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 666-668; *People v. Heard, supra,* 31 Cal.4th at pp. 965-966.)

It is true that the court excused the juror for other reasons, as well. Generally, the erroneous exclusion of a juror for cause "provides no basis for overturning the judgment" because a defendant is not entitled to a particular juror, but only to a fair and impartial jury. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 148; *People v. Holt* (1997) 15 Cal.4th 619, 656.) Here, however, the court did not state which reason it relied upon, or which reason predominated in its decision. In capital cases where there may be mixed reasons for excusing a juror, the trial court must specifically state which ground it relies upon. If the record does not show that the court relied upon a non-*Witherspoon* ground, then it must be presumed the challenge was based upon the death penalty issue.

4. Juror No. 833.

The prosecution challenged this juror for cause due to her views on the death penalty. (RT 10:3058.) The court granted the challenge, finding that she was "substantially impaired." (RT 10:3058.)

The juror, however, repeatedly stated that although she was "strongly against the death penalty" (RT 10:3047), she would *not* always vote for life over death. (RT 10:3048.) Her religious beliefs did not compel her to vote automatically for life. (RT 10:3050.) She stated unequivocally she was "sure" she "would consider" the death penalty if the defendant was found guilty. (RT 10:3052.) She would want to hear all the good and the bad about the defendant before she made a decision as to the death penalty or life in prison. (RT 10:3052.) After hearing the evidence, she could "genuinely consider" both life and death as punishment. (RT 10:3053.) The juror is a registered nurse, and the prosecutor asked if she could be the person who actually administered the lethal injection. To this the juror answered no, she could not. (RT 10:3054.) However, she maintained that she could still "consider" voting for the death penalty as a juror. (RT 10:3054.) Later, when asked if she could vote for death, she answered "I don't think so." (RT 10:3055.)

On balance, this juror's views of the death penalty did not substantially impair her ability to follow the law and impose the death penalty if she believed it was warranted. She repeatedly stated she could consider the death penalty and she had no religious belief that the death

penalty was invariably wrong. She did not want to be the actual executioner, which certainly does not bar her from jury service, and she was reluctant to impose the death penalty, but not automatically against it. The court abused its discretion in granting the challenge for cause. The death penalty judgment must be reversed. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 666-668; *People v. Heard, supra,* 31 Cal.4th at pp. 965-966.)

II. Appellant's Rights Under The Sixth And Fourteenth Amendments To A Fair And Unbiased Jury Drawn From A Cross-Section Of The Community Were Violated By The Prosecutor's Purposeful Elimination Of The Only African-American Juror From The Venire.

A. Summary Of Argument.

One African-American juror (number 550) remained in the jury panel after hardship and cause challenges. (RT 15:4587.) The prosecutor exercised a peremptory challenge against the juror. (RT 16:4614.) Defense counsel objected under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258. (RT 16:4615.) The prosecutor argued (incorrectly) that there could be no prima facie showing of purposeful discrimination because he had excused only one African-American juror. (RT 16:4620.) At the court's request, and in order to make a complete record for appeal, the prosecutor went on to state several reasons for excusing the juror. (RT 16:4620.)

The prosecutor claimed he struck the juror because the juror (1) had a prior record, (2) was irresponsible, with a history of under-employment, (3) lived out of van on his father's property, (3) was potentially anti-law enforcement despite his denial of any such bias, and (4) failed to admit that he had a conviction in 1990 for misdemeanor resisting arrest. (RT 16:4622.)

The court found "lots of reasons . . . besides being black that a challenge could be exercised." (RT 16:4630.) The court found "no pattern or systematic exclusion" because there was only one African-American juror that could have been excused. (RT 16:4630-31.) The court "therefore denied" the motion without further comment. (RT 16:4631.)

The court erred. The court's ruling shows it did not make a "sincere and reasoned" attempt to evaluate the good faith of this prosecutor's stated reasons, but instead based its decision by holding that a hypothetical, "reasonable" prosecutor could have found reasons to excuse the juror. The error violated appellant's right to trial by a jury drawn from a representative cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution and by Article I, section 16 of the California Constitution, to a reliable guilt determination under the Eighth Amendment, and to due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution. The error is reversible per se. (*Batson v. Kentucky, supra,* 476 U.S. at pp. 89, 100; *People v. Fuentes* (1991) 54 Cal.3d 707, 721.)

B. State and Federal Law Prohibits Racial Discrimination In The Exercise of Peremptory Challenges.

"The right of trial by jury is fundamental. It is a right which was transmitted to us by the common law and as such is expressly guaranteed by the Constitution, and the distinctive quality of that right – its very essence – is that every person put upon trial upon an issue involving his life or his liberty is entitled to have such issues tried by a jury consisting of unbiased and unprejudiced persons." (*Batson v. Kentucky, supra,* 476 U.S. 79; *People v. Wheeler, supra,* 22 Cal.3d 258.)

Implicit within the right to a fair and impartial jury is the right to a jury selected from a representative cross-section of the community:

> In a series of decisions beginning almost four decades ago the United States Supreme Court has held that an essential pre-requisite to an impartial jury is that it be drawn from a representative cross-section of the community. The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic conditions, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

(*People v. Wheeler, supra,* at p. 267.)

In *Wheeler*, the Court held that "the use of peremptory challenges to

remove prospective jurors on the sole ground of group bias violates the right to a representative cross-section of the community under article I, section 16 of the California Constitution." Any doubt as to the potential bias or impartiality in a jury must be resolved in favor of the appellant: "The right to a fair and impartial jury is one of the most sacred and important of the guarantees of the Constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (*Id.* at p. 284.) The Court has reiterated this rule in numerous subsequent decisions. (See *People v. Reynoso* (2003) 31 Cal.4th 903; *People v. Silva* (2001) 25 Cal.4th 345; *People v. Hall* (1983) 35 Cal.3d 161, 166-167.)

Furthermore, prosecutorial use of peremptory challenges to excuse jurors on the basis of group affiliation has been condemned by the United States Supreme Court as violative of the rights of an accused under the Sixth and Fourteenth Amendments to the United States Constitution. (*Batson v. Kentucky, supra,* 476 U.S. 79, 89, 96- 98; accord, *Hernandez v. New York* (1991) 500 U.S. 352.) Such use of peremptory challenges has also been found to violate the equal protection and due process rights of the excluded jurors. (*Powers v. Ohio* (1991) 499 U. S. 400; *Batson v. Kentucky, supra,*

476 U.S. at p. 87.)

C. Standard of Review.

Batson v. Kentucky, supra, 476 U.S. 79 requires a three-step process when a party claims an opponent has exercised a peremptory challenge against a prospective juror on the basis of race, religion, ethnicity, gender, or other cognizable group bias: "[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 767.)

Here, the court denied the motion but failed to state whether it found no prima facie case (step one) or whether it evaluated the prosecutor's reasons and found them sincere (step three).

Assuming the court found that appellant failed to establish a prima facie case, review of that finding is complicated by intervening legal developments. In *Johnson v. California* (2005) 545 U.S. 162, the United

States Supreme Court reversed *People v. Johnson* (2003) 30 Cal.4th 1302, wherein the California Supreme Court confirmed that the established California standard to show a prima facie case was that it "more likely than not" that the challenges were based on group discrimination. (*People v. Johnson, supra,* 30 Cal.4th at pp. 1312-1318.)

The United States Supreme Court held this standard to be too demanding for federal constitutional purposes. Under *Batson,* the court said, the prima facie burden is simply to "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California, supra,* 545 U.S. 162, 170.)

Appellant's trial occurred in 2000, years before *Johnson v. California* announced that California was applying the wrong legal standard. Although the trial court judge did not state which standard he applied, it is reasonable to assume he followed the then-existing California law. At best, there is no certainty that the court applied the correct standard. In such a case, this Court cannot defer to the trial court's prima facie ruling. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1105.) Rather, the Court should "assume, without deciding, that defendant did satisfy the first, or prima facie, step of *Batson* and *Wheeler*" and proceed directly to the second and

third steps of the *Wheeler/Batson* analysis. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1106 (Court assumes prima facie case and moves to second and third steps); *People v. Ward* (2005) 36 Cal.4th 186, 200-201 (same).)

D. A Prima Facie Case Of Purposeful Discrimination Was Made.

Contrary to the implication of the prosecutor's argument that the trial court seems to have accepted (RT 16:4630-31), the fact that the defense questioned only the removal of a single juror did not lessen the constitutional standard. "California law makes clear that a constitutional violation may arise even when only one of several members of a 'cognizable' group was improperly excluded." (*People v. Montiel* (1993) 5 Cal.4th 877, 909.) "[U]nder *Batson,* the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." (*United States v. Battle* (8th Cir.1987) 836 F.2d 1084, 1086.) "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva, supra,* 25 Cal.4th 345, 386; see also *People v. Gray, supra,* 87 Cal.App.4th at p. 789 ["facts showing there was no apparent reason to exclude at least one of the three potential jurors other

than his status as an African-American male" required reversal where trial court denied *Wheeler* motion without obtaining explanation]; *People v. Granillo* (1987) 197 Cal.App.3d 110 [conviction reversed for failure of prosecution to proffer sufficient nondiscriminatory reason for peremptorily challenging a single juror].)

Here, defense counsel made a prima facie case of discrimination on voir dire by showing there was no apparent, legitimate reason to excuse the challenged juror, which called for an adequate explanation from the prosecutor. (See *People v. McGee* (2003) 104 Cal.App .4th 559, 570-571.) Defense counsel argued that Juror 550 was not opposed to the death penalty, had himself been the victim of violent crime, was forthcoming about his criminal record and explained the circumstances surrounding the crimes. (RT 16:4617-4618.) Thus, the defense showed there was no adequate reason to excuse the juror. The prosecutor was therefore required to offer the reasons he relied upon to excuse the juror. The trial court was obligated to evaluate the credibility of the explanation. This the court did not do.

E. The Court Failed To Make A Sincere And Reasoned Attempt To Evaluate The Prosecutor's Reasons For Challenging The Minority Jurors.

In step three of the *Batson/Wheeler* procedure, the trial court must decide whether the defense "proved purposeful racial discrimination." (*Purkett v. Elem, supra,* 514 U.S. at p. 767.) On appeal, the trial court's step-three finding is afforded great deference because it turns largely on evaluations of credibility. (*People v. Reynoso, supra*, 31 Cal.4th at p. 918, 924.) "[I]t is imperative, if the constitutional guarantee is to have real meaning, that once a prima facie case of group bias appears the allegedly offending party be required to come forward with [an] explanation to the court that demonstrates other bases for the challenges, and that the court satisfy itself that the explanation is genuine." (*People v. Fuentes, supra,* 54 Cal.3d 707, 718.)

Thus, the trial court must make a "sincere and reasoned" attempt to evaluate the prosecutor's justifications. (*People v. Hall, supra,* 35 Cal.3d at pp. 167-68.) The "reasoned attempt" standard "requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes*, *supra*, 54 Cal.3d at p. 720.)

As the United States Supreme Court has said, "the critical question in determining whether a [party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 196 [stating that the issue is "whether the prosecutor acted with the prohibited intent," which in turn depends on "whether the prosecutor's customary denial of such intent is true"].) Thus, the proper focus of the court's inquiry is the subjective truthfulness of the prosecutor's explanations, not the objective reasonableness of those explanations. (*People v. Reynoso, supra,* 31 Cal.4th at p. 924; *Purkett v. Elem, supra,* 514 U.S. at p. 768.) Similarly, the court's focus must be on the real reason the juror was struck, not on nondiscriminatory reasons the responding party might have had. (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1089.)

In striking juror 550, the prosecutor offered several reasons. However, the trial court did not make a "sincere and reasoned" attempt to ascertain whether the reasons were pretextual. The court instead found in the abstract that there were "lots of reasons . . . besides being black that a challenge *could be* exercised." (RT 16:4630 (emphasis added).) The court

did not examine and rule that the reasons actually offered by the prosecutor were sincere. The question is not whether the court, or some reasonable person third person would have struck the juror, but whether this particular prosecutor struck the juror for the reasons given and not because of group discrimination. (*People v. Reynoso, supra,* 31 Cal.4th at p. 924.) The court below made no such finding. The court failed to make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons for striking the only African-American juror from the jury panel. Accordingly, the denial of the *Batson/Wheeler* motion was error.

F. The Error Is Reversible Per Se.

Batson/Wheeler error is prejudicial per se and reversible in light of the fundamental right involved. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.) "The error is prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.'" (*Ibid.*) Accordingly, the conviction must be reversed.

Guilt And Special Circumstance Issues

III. The Erroneous Denial Of The *Miranda* Motion Violated Appellant's Rights Under The Fifth, Eighth And Fourteenth Amendments And Requires Reversal.

A. Summary of Argument.

Shortly after arriving at the scene, Deputy Mark Bearor locked appellant in the backseat of a patrol car. (RT 5:1334.) Appellant could not get out of the car; the backseat had no interior door handles. (RT 5:1374.) Appellant was told he was being "detained" for questioning. (RT 5:1315.) The police claimed they had no suspicion at this time that appellant was involved in the crime, yet no other witness was detained in this manner. (RT 5:1336-37.) No *Miranda* warnings were given.

After 25 minutes, a different deputy took appellant out of the car and questioned him for 30 minutes. (RT 5:1359.) No *Miranda* warnings were given before questioning began. Appellant's responses to these questions were used against him at trial. After the questioning, appellant was returned to the locked patrol car and, hours later, was taken to the station for further questioning.

The defense moved to suppress appellant's statements under *Miranda*

v. Arizona (1966) 384 U.S. 436. (CT 25:5104; RT 5:1306.) The prosecutor conceded that no *Miranda* warnings were given but argued that *Miranda* did not apply because appellant was not "in custody" for *Miranda* purposes. (RT 5:1385.) The court agreed. (RT 5:1396-97.)

The court erred. The test for determining custody for *Miranda* purposes is "whether a reasonable person in [appellant's] position would have felt free to end the questioning and leave." (*Thompson v. Keohane* (1995) 516 U .S. 99, 112-113.) Appellant was certainly not free to leave while he was locked in the patrol car. Nor was he free to leave once he was let out for questioning. No reasonable person would have felt free to leave at that point, either. When he was put in the patrol car he was told he was being detained in order to be questioned. It is hardly reasonable that any person, who had been forcibly detained for 30 minutes for the purpose of being questioned, would believe he was free to go when the questioner finally arrived.

As the prosecutor noted in his opposition to the suppression motion, appellant' statements at the scene were "highly incriminating." (CT 26:5308.) The erroneous denial of the motion to suppress is therefore prejudicial and requires a new trial under the Fifth, Eighth and Fourteenth

Amendments.

B. The Relevant Facts.

The facts are taken from the suppression hearing.[8]

Deputy Sheriff Mark Bearor arrived at the high school at 4:16 p.m. Many police and emergency vehicles were already present. (RT 5:1309-10.) Bearor immediately knew a crime had been committed. He taped off the scene and moved people away from the area. (RT 5:1311.) Deputy Bearor learned from another officer that appellant had been seen coming out of a bathroom shortly after the victim was found. (RT 5:1313,1334.)[9]

Based on this, Deputy Bearor "felt that [appellant] was going to be a witness in this incident and decided to detain him in my patrol car." (RT 5:1334.) He asked appellant to accompany him to the patrol and then put appellant in the backseat. (RT 5:1315.) He told appellant that appellant was

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[8] In reviewing a trial court's ruling on a motion to suppress, the appellate court examines only the evidence presented at the suppression hearing and ignores additional or contrary evidence adduced at trial. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77-78, fn.18.)

[9] Bearor first testified that before he detained appellant he understood that appellant had been seen leaving a bathroom where blood was found. (RT 5:1313.) On cross-examination, he testified that he did not learn of the blood in the bathroom until *after* he detained appellant. (RT 5:1334; see also RT 5:1345 [same testimony on re-direct].)

a witness, that detectives were en route and "due to the severity of the crime the detectives would probably be handling the interviews of the primary witnesses and that he was going to be detained." (RT 5:1315.) Bearor did not see any blood on appellant. (RT 5:1336.) He did not know at this time that appellant was the person who first found the victim. (RT 5:1336.) Bearor claimed he had no suspicion that appellant was a suspect in the crime; he "detained him as a witness at that time." (RT 5:1337.) "[A]s far as I knew he was a witness." (RT 5:1338.) However, no other witnesses were locked in patrol cars. (RT 5:1336; 1346-47.)

Appellant was put into the car at 4:20 pm.. (RT 5:1317, 1326.) At 4:21 p.m., Bearor "advised communications that we had a subject detained." (RT 5:1326.) Bearor considered appellant a "major witness" and would have prevented appellant from leaving the scene: "[a]t that point he was detained." (RT 5:1328.) Approximately five patrol cars were parked nearby. (RT 5:1316.) Deputy Bearor then returned to the crime scene, which was about 40 feet from the patrol car. (RT 5:1317-18.)

Sheriff's Detective Michael Abbott arrived at the scene at about 4:15 p.m. (RT 5:1350.) About 5 minutes after he got there, another officer told him that blood had been found in a bathroom where appellant had been seen

washing his hands. (RT 5:1352-53.) Detective Abbott told Deputy Butler, who was standing next to him, to relay this information to Deputy Bearor who was standing near the appellant. (RT 5:1354.) Abbott then went to the bathroom, saw the blood, and secured the area with crime-scene tape. (RT 5:1354.)

After returning to the other officers on the scene, he learned that the initial information he got was wrong; the janitor (Faruq Shirley) had *not* seen appellant washing his hands in the bathroom. (RT 5:1356.)

Abbott then went to question appellant, who had by now been locked in the patrol car for 25 minutes. (RT 5:1359.) Abbott claimed he had no suspicion that appellant had committed the crime. He testified, "At the time of my interview he was a witness based on the information we had." (RT 5:1359.) No *Miranda* warnings were given. Appellant was let out of the car and led to the back of it, where Abbott questioned him. (RT 5:1360.) Abbott asked appellant, "what had happened." (RT 5:1361.) Appellant said, "I am a convict. I won't go to court about this." (RT 5:1361.) Abbott repeated that he wanted to find out "what happened" and he was not there to discuss whether appellant would go to court or testify. (RT 5:1361-62.)

Appellant told him he was a substitute janitor who had worked at the school for a few days. He had been assigned to clean a certain section of the school, and when he walked into one room he saw Ms. Montoya's body. (RT 5:1362.) He then ran to tell Faruq Shirley. (RT 5:1362.) Abbott questioned appellant about the position of Ms. Montoya's body when he first saw her, and whether he had touched her body. (RT 5:1363.) Appellant showed the detective that he had blood on him. (RT 5:1379.) The questioning lasted twenty to thirty minutes. (RT 5:1363.) Abbott did not accuse appellant of committing the crime. He did not raise his voice or threaten appellant. (RT 5:1364.) At some point, another deputy came and took appellant's shirt from him. (RT 5:1365.)

When the questioning stopped, Detective Abbott put appellant back into the patrol car. (RT 5:1365-66.) Appellant remained locked in the patrol for more than an hour. (RT 5:1366.) During this time, appellant banged on the window "a couple of times getting our attention, asking questions" but Abbott did not recall what he asked. (RT 5:1367.) Eventually appellant was transported downtown for an interview by the homicide detectives. (RT 5:1367.)

At trial, Detective Abbott testified that appellant told him he had

discovered the body, touched it, got blood on his pants. (RT 17:5166-69.) Appellant asked, "Why was she lying on her back?" (RT 17:5171.) When asked if he had any weapons, he said, "The whole room is full of weapons." (RT 17:5172.) He said he would not go to court over this incident because he was "convicted." (RT 17:5172.) Detective Abbot described appellant as cocky, uncaring, and unemotional. (RT 17:5173.) He became confrontational when Abbott ordered him back into the patrol car after the interrogation. (RT 17:5174.)

C. The Standard of Review.

Whether a defendant was in custody for purposes of *Miranda* warnings presents a mixed question of law and fact. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) To make that determination, a trial court must first establish the circumstances surrounding the interrogation. It must then measure those circumstances against an objective, legal standard: would a reasonable person in the suspect's position during the interrogation experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest. (*Ibid.; Thompson v. Keohane* (1995) 516 U .S. 99, 112-113.)

The facts here are not in dispute. Accordingly, the Court must decide on independent review "whether a reasonable person in [appellant's] position would have felt free to end the questioning and leave." (*Thompson v. Keohane, supra,* 516 U.S. at pp. 112-113.)

D. Appellant Was In Custody For *Miranda* Purposes.

"It long has been settled under the due process clause of the Fourteenth Amendment to the United States Constitution that an involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion is inadmissible in a criminal proceeding." (*People v. Neal* (2003) 31 Cal.4th 63, 67.) In *Miranda v. Arizona* (1966) 384 U.S. 436, the Supreme Court, recognizing that any statement obtained by an officer from a suspect during custodial interrogation may be potentially involuntary because such questioning may be coercive, held that such a statement may be admitted in evidence only if the officer advises the suspect of both his or her right to remain silent and right to have counsel present at questioning, and the suspect waives those rights and agrees to speak to the officer. (*Ibid.*)

The Court stated that the prosecution may not use statements,

"whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant" unless before questioning the person was "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Ibid.*)

Miranda applies only to custodial interrogations. (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) The court below found that defendant was not in custody for *Miranda* purposes and therefore no *Miranda* warnings were required. (RT 5:1396.) The court erred.

The test for determining whether a suspect is in custody for *Miranda* purposes is whether a reasonable person in the suspect's situation would have felt free to end the questioning and leave. (*Thompson v. Keohane, supra*, 516 U.S. at p. 112.) Here, appellant was unquestionably in custody when Deputy Bearor locked him in the back of the patrol car for 25 minutes. There is no question as to whether a "reasonable person" would have felt free to leave because it is undisputed that appellant **could not** leave -- he was locked in the car. Had appellant been questioned at that time, it would have been a custodial interrogation requiring *Miranda* warnings. (See, e.g., *United States v. Chamberlin* (9th Cir. 1980) 644 F.2d 1262, 1267-68 (20

minute detention in patrol car, during which time the suspect was questioned, constitutes custodial interrogation); accord *United States v. Parr* (9th Cir. 1989) 843 F.2d 1228, 1231, fn. 2.)

Nor was appellant free to leave once Detective Abbott let him out of the car. The reason for the half-hour detention was to keep appellant available for questioning; it is nonsense to think that a reasonable person feel free to walk away at the moment his questioner arrived. It was the prosecutor's burden to show that the force used to initially detain appellant was attenuated before he was questioned. (*People v. Taylor* (1986) 178 Cal.App.3d 217, 230.) The prosecutor failed to carry this burden.

Appellant was told by Deputy Bearor that he could not leave until he was questioned. Appellant was then isolated from all the other witnesses, locked in a car, and surrounded by the numerous deputies who had converged on the scene. (*United States v. Beraun-Panez* (9th Cir. 1987) 830 F.2d 127, 131 ("The Supreme Court in *Miranda* noted that separating a subject from others, . . . was a technique of psychological coercion.").) All of these circumstances show that there was a "restraint on freedom of movement of the degree associated with a formal arrest." (*Stansbury v. California* (1994) 511 U.S. 318, 32.)

Further, this was a full interrogation, not a brief inquiry. Appellant was in custody in a locked patrol car for 25 minutes and was then questioned outside the car for another 20-30 minutes. Detective Abbott's report shows that he questioned appellant extensively about his discovery of the body, what position it was in, whether he touched it, what he did before he found it, what he did after, and whether he had blood on him. (CT 25: 5115-5120.)[10] During the interview, another deputy came and took appellant's shirt away, apparently because it had blood on it. (RT 5:1365.)

Thus, this was not a brief *Terry* detention based on reasonable suspicion. (*Terry v. Ohio* (1968) 392 U.S. 1, 20-22.) The deputies expressly denied it was a *Terry* stop; they claimed they had no reason to believe appellant had committed a crime and they were simply interviewing him as a witness. (RT 5:1359.) Moreover, a one-hour detention is not "brief."

Accordingly, the undisputed evidence shows that appellant was in custody when questioned at the scene. The court erred in denying the motion to suppress.

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[10] The police reports of Deputy Bearor and Detective Abbott were attached to the appellant's motion to suppress. (CT 25:5104.)

E. The Erroneous Admission Of Appellant's Statements Was Prejudicial And Requires Reversal.

The erroneous denial of appellant's motion to suppress his statements to Detective Abbott is subject to harmless-error analysis of *Chapman v. California* (1967) 386 U.S. 18. *Chapman* "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. at p. 24.) "To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. The issue is "whether the ... verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

In *Chapman,* the court stated that "error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot ... be conceived of as harmless." (*Chapman v. California, supra,* 386 U.S. at p. 24.) And, as stated in *Miranda*, "no distinction may be drawn between

inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." (*Miranda v. Arizona, supra*, 384 U.S. at pp. 476-477.)

One objective means of assessing prejudice is to examine the prosecutor's reliance on the inadmissible evidence in closing argument. (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1487 (prosecutor's heavy reliance on defendant's statements in closing showed prejudicial error).) As noted above, before trial the prosecutor characterized the evidence to the trial court judge as "highly incriminating." (CT 26:5308.) He told the jury the same. He began his argument by stating that on the day of the crime, "Alex Thomas said he had nothing to do with it." (RT 22:6569.) "He spoke to a number of people that day and denied any responsibility for her death. He provided no explanation. No excuse. No mitigation. No extenuation.

He denied all responsibility all together [sic]." (RT 22:6569.)

The prosecutor argued that the "sincerity" of the defense case was at issue. (RT 22:6570.) In arguing that the defense was insincere, he stated that appellant "lied about his responsibility." (RT 22:6573.) According to the prosecutor, "[t]he significance of Mr. Thomas' statements to the police that day as to anybody he spoke to about this crime is not only that he was lying but the crimes did not happen the way Mr. Holmes is going to argue they happened." (RT 22:6601.) "He lied through and through." (RT 22:6602.)

Further, Detective Abbott's observations that appellant was cocky, defiant and unemotional (which should have been excluded as fruit of the poisonous tree under *Wong Sun v. United States* (1963) 371 U.S. 471, 487), was highly prejudicial to the appellant.

The prejudicial effect of the inadmissible evidence is all the more significant because the prosecution's case on the rape and special circumstance charges was not free of doubt. There was no physical evidence of forcible rape. Appellant's attorneys admitted murder, but not rape. The prosecution case consisted entirely of the speculation that

appellant raped the victim under the threat of force.

The erroneous admission of appellant's statements was exploited to undermine the entire defense case. Given that the rape charge was not corroborated by any physical evidence, the error was prejudicial and requires reversal of both the murder conviction, which was presented to the jury under alternative theories of felony-murder and premeditated murder, and the special circumstance finding. (*People v. Green* (1980) 27 Cal.3d 1, 69-70 (reversal required where murder charge is presented to the jury on alternative theories, one of which is incorrect, but record does not show which theory the jury relied upon).)

IV. The Court Erred In Giving CALJIC No. 2.28; The Error Violated Appellant's Rights Under The Fifth, Sixth, Eighth, And Fourteenth Amendments.

A. Summary of Argument.

The court ruled the defense was tardy in furnishing the prosecution with discovery regarding Brent Turvey, a defense criminologist. Over defense objection, and without any showing by the prosecution that it was prejudiced by the discovery violation, the court instructed the jury that "the Defendant has failed to timely disclose the following evidence: of Brent Turvey," that such delay may "deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence," and that the "significance of any delayed consideration" was a matter for the jury to consider. (CT 19:5888; CALJIC No. 2.28.)

This instruction has been roundly criticized. In *People v. Bell* (2004) 118 Cal.App.4th 249, the Court of Appeal reversed convictions for murder and robbery on the ground that the giving of CALJIC No. 2.28 was prejudicial error. The Court held the instruction "invite[d] the jurors to speculate; it told them to evaluate the weight and significance of a discovery

violation without any guidance on how to do so; and it falsely informed that [the defendant] was responsible for the violation. It did not warn them that the violation, standing alone, was insufficient to support a guilty verdict." (*Id.* at p. 257; see also *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249 (prejudicial error in giving CALJIC No. 2.28); *People v. Cabral* (2004) 121 Cal.App.4th 748 (error to give the instruction).)

In this case, the court erred in instructing the jury with CALJIC No. 2.28. The error deprived appellant of due process, a jury finding on all triable issues, and a reliable special circumstance finding under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Reversal is required.

B. The Relevant Facts.

The prosecution objected that the defense failed to furnish discovery material relating to the expert witness Brent Turvey. (RT 21:6324-6326.) Penal Code section 1054.3 requires the defense to disclose to the prosecuting attorney the names and addresses of persons he "intends to call as witnesses at trial, . . . including any reports or statements of experts made in connection with the case, and including the results of physical and mental

examinations, . . . which the defendant intends to offer in evidence at trial." These disclosures must be made "at least 30 days prior to trial." If the information becomes known to the party within 30 days of trial, the party must make immediate disclosure of the information. (Pen. Code, § 1054.7.)[11]

The defense responded that when Turvey was listed as a witness the defense had not decided whether to call him to testify. (RT 21:6323.) He had not completed his work on the case and the defense was unsure what his opinion would be. As soon as they knew of his opinion, and decided to call him to testify, they furnished the required discovery to the prosecutor. (RT 21:6323- 6325.)

The court found the defense unreasonably delayed in furnishing discovery to the prosecution and took steps to eliminate the prejudice (if any) this caused the prosecution. (RT 20:6051.) First, the court ordered Turvey to testify outside the presence of the jury to allow the prosecutor to

[11] The prosecutor also objected to Turvey's testimony on the ground that his opinions, and the inferences he drew from his crime scene reconstruction, were not beyond the knowledge of the jury such that his opinion would be helpful to understanding the evidence. (RT 20:6067.) The court overruled that objection. (RT 20:6068.)

learn of Turvey's qualifications and the scope of his testimony. (RT 20:6053.) Second, the court offered the prosecutor a continuance in order to investigate and prepare for Turvey's testimony. (RT 20:6051.) This offer was rejected. (RT 20:6069.) After Turvey testified, the prosecutor declined a continuance and cross-examined him extensively. (RT 21:6196-6313.)

The defense objected that the instruction was unnecessary, prejudicial, and violated due process. (RT 22:6533.) Overruling all defense objections, the court elected to give the instruction on the ground that it was unfair for Turvey to testify without furnishing a written report or speaking to the prosecutor before trial. (RT 22:6558.) The prosecutor made no offer of proof to show if or how he was prejudiced by the alleged discovery violation, nor did the court make any specific finding that the prosecution was prejudiced.

C. The Standard of Review.

The independent or de novo standard of review is applicable in assessing whether an instruction is correct and properly given. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on another point by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.

D. The Court Erred In Giving CALJIC No. 2.28.

The court instructed the jury as follows:

> The Prosecution and the Defendant are required to disclose to each other before trial the evidence which each intends to present at trial so as to promote the ascertainment of the truth, save court time, and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the noncomplying party's evidence.
>
> Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of the trial must be disclosed immediately. In this case, the Defendant has failed to timely disclose the following evidence: of Brent Turvey. [sic]
>
> Late disclosure of the evidence was without lawful justification; however, the Court has, under the law, permitted the production of this evidence during the trial.
>
> The weight and the significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters already established by other credible evidence.

(CT 29:5888.)

The court erred in giving this instruction. First, assuming that the defense was required to make Turvey available for the prosecution before

trial, there is no evidence that the prosecution was prejudiced by the late disclosure of Turvey's findings. The prosecutor was permitted to preview Turvey's testimony in a hearing outside the presence of the jury. The court offered the prosecutor a continuance to give him more time to investigate Turvey's background and prepare for cross-examination; the prosecutor refused. The prosecutor cross-examined Turvey extensively. In fact, in voir dire and cross-examination the prosecutor spent more time questioning Turvey than the defense attorneys did. (RT 20:6070-6087, RT 21:6124-6152, 21:6158-6188 [direct examination]; RT 20:6088-21:6124 [voir dire by prosecutor], RT 21:6196-6313 [cross-examination].) There is not a shred of evidence to suggest that the discovery violation had any impact on the prosecution's ability to confront Turvey's testimony.

"It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the inference." (*People v. Hannon* (1977) 19 Cal.3d 588, 597.) Here, the jury was invited to speculate, without any evidence before it, that the delayed discovery put the prosecution at a disadvantage.

Second, the wording of the instruction is problematic on a number of

grounds. It falsely informed the jury that appellant was personally responsible for the discovery violation, did not warn the jury that the violation alone was insufficient to support a guilty verdict, invited the jurors to speculate, and failed to provide guidance as to how the jury should evaluate the weight and significance of the delayed disclosure. (*People v. Bell, supra*, 118 Cal.App.4th at pp. 254-257; *People v. Cabral, supra*, 121 Cal.App.4th at pp. 751-753; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942-943; *People v. Lawson, supra,* 131 Cal.App.4th 1242, 1248- 1249.)

In *Bell*, the instruction was given after the defense made a belated disclosure of the statements of three alibi witnesses. The trial court found the defense had not attempted to gain a tactical advantage by the late disclosure, but still gave CALJIC No. 2.28. (*Id.* at p. 254.) The instruction was found to be "at least partially inaccurate" as given in that case, because it indicated the defendant himself had been responsible for the delayed disclosure. "It was misleading to suggest that 'the defendant' bore any responsibility for the failed compliance." (*People v. Bell, supra*, 118 Cal.App.4th at pp. 254-255.)

Second, the court concluded the wording of the instruction left the jury to speculate, with an "absence of any information, that the People were

put at an actual disadvantage because of the late discovery." (*Id.* at p. 255.)

Third, the court observed that the instruction failed to provide adequate guidelines as to how the jury was to apply the principles of the instruction to the testimony of the alibi witnesses, especially where the record lacked any indication as to whether the defendant or his witnesses were responsible for the delay. (*Id* at p. 255.)

Finally, the court explained that the instruction left the jury "free to find Bell guilty merely because he failed to comply with the discovery statute." (*Id.* at p. 256.) The *Bell* court reversed, because the instruction "unfairly" undermined alibi witnesses who were "critical" to Bell's case, and because the "prosecutor capitalized on the jury instruction at closing argument to discredit Bell's alibi defense . . . ." (*Id.* at p. 257; accord, *People v. Cabral, supra,* 121 Cal.App.4th 748.)

The same problems exist here. The instruction assigned blame for the late discovery to appellant himself, where there was no evidence that he was responsible. The instruction provided no guidance on how the late disclosure should be evaluated in the jury's consideration of the evidence. Moreover, there was no evidence that the late disclosure affected the

prosecution's ability to cross-examine or rebut the testimony of Brent Turvey. Thus, the jury was left to speculate how the prosecution was disadvantaged by the late disclosure.

As *Bell* noted: "The instruction implied that the jurors should "do something" but they were given no idea what that something should be. Their alternatives were severely limited. They could disbelieve, discount, or look askance at the defense witnesses. But it is not clear why, or to what extent, they should do so in the absence of evidence that the prosecution was unfairly prevented from showing that the witnesses were unreliable. Just as the failure of disclosure was not Bell's fault, there is absolutely no indication that the witnesses were responsible for the delayed discovery." (*People v. Bell, supra,* 118 Cal.App.4th at p. 255.)

The court erred in giving the instruction. As explained next, the error is cause for reversal.

E. The Error Is Prejudicial Under State Law And The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

It is reasonably probable that appellant would have received a more favorable result at trial had the instruction not been given. (*People v.*

Watson (1956) 46 Cal.2d 818, 836; *People v. Bell, supra,* 118 Cal.App.4th at p. 257.) Turvey's testimony that the police failed to thoroughly investigate the possibility that the sexual intercourse was consensual was a significant part of the defense case. (RT 22:6632-6643, 6681.) The instruction permitted the jury to disregard or deeply discount Turvey's testimony and the sole defense offered to the charges. (See *People v. Bell, supra,* 118 Cal.App.4th at p. 257 (in reversing for a new trial, the court noted that the witnesses subject to delayed discovery instruction were a "critical part" of the defense case).)

Further, the prosecution's case on the rape and special circumstance charges was not free of doubt. There was no physical evidence of forcible rape. Appellant did not confess to rape. The prosecution case consisted entirely of the inference that appellant raped the victim under the threat of force. Turvey's testimony went straight to that issue by explaining the crime scene in a manner that suggested the sexual intercourse was consensual.

The error is also reversible under federal law. In general, ambiguous or misleading instructions violate due process when there is a "reasonable likelihood" the jury applied the instruction in a way that violated a

constitutional right. (*Boyde v. California* (1990) 494 U.S. 370, 380; *Estelle v. McGuire* (1991) 502 U.S. 62, 67; *People v. Clair* (1992) 2 Cal.4th 629, 663.) The instruction here violated the federal Constitution in a number of ways.

An instruction that relieves the prosecution of proving each element of the crime beyond a reasonable doubt violates the Sixth Amendment right to a jury trial as well as the Due Process Clause of the Fourteenth Amendment. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 280; *People v. Flood* (1998) 18 Cal.4th 470.) The prohibition against directed verdicts includes situations in which the instructions fall short of directing a verdict but have the effect of doing so by eliminating other relevant factual considerations. (*People v. Figueroa* (1986) 41 Cal.3d 714, 724.)

An instruction that permits the jury to draw an inference violates due process if it undermines the jury's responsibility to find the ultimate facts beyond a reasonable doubt. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156.) A permissive inference "affects the application of the 'beyond a reasonable doubt' standard if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." (*Ulster County Court v. Allen, supra,* 442 U.S. at pp. 156-157.)

CALJIC No. 2.28 intruded upon these constitutional rights in a number of ways. First, the instruction lightened the prosecution's burden of proving the elements of rape by permitting the jury to attribute the defense attorneys' purported malfeasance to the appellant and thus infer consciousness of guilt from that act. The instruction permitted the jury to believe that appellant contrived a defense and delayed discovery in order to thwart the prosecution from discovering the fraud.

Second, the instruction did not inform the jury that the late disclosure of evidence was **not** evidence that appellant committed the crime of rape or the rape special circumstance, again lightening the burden of proof.

Third, the instruction permitted the jury (a) to speculate that the prosecution suffered prejudice as a result of the late disclosure and (b) to assign whatever "weight and significance" it wanted to this fact. There was, however, no evidence that the prosecution suffered any actual disadvantage due to the late disclosure.

Either singly or in combination, these grounds require reversal under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Chapman v. California, supra,* 386 U.S. 18, 24; *Beck v.*

Alabama (1980) 447 U.S. 625 (heightened reliability requirement of Eighth Amendment applies to guilt phase of death penalty case as well as penalty phase).) The erroneous instruction went to consent, the critical issue in the case. The evidence of forcible rape was not conclusive; a reasonable juror could have concluded that the evidence did not prove rape beyond a reasonable doubt. Given the impact of the erroneous instruction on a critical issue which was not free of doubt, the State will be unable to carry its burden to prove the error harmless beyond a reasonable doubt.

V. The Court Abused Its Discretion In Admitting A Videotape Of Appellant Examining Himself In The Jail Interrogation Room; The Error Violated Evidence Code Section 352 And Appellant's Right To Due Process And A Reliable And Fair Trial Under The Fifth, Eighth And Fourteenth Amendments To The United State Constitution.

A. The Relevant Facts.

Before trial, the defense moved to exclude a video tape of appellant unzipping his pants and exposing his penis in the interrogation room at the sheriff's station the day he was arrested. (CT 28:5584.) About 30 minutes after that incident, appellant is shown putting his hands on his genitals and then putting his hands to his nose. (CT 28:5585; Ex. 3 [videotape shown at trial].) The defense objected under Evidence Code section 352. (CT 28:5585.) Appellant had not been accused or charged with rape at the time he was captured on the videotape. The defense argued the tape offered no basis to infer a consciousness of guilt, that it was inflammatory and impermissible character evidence. (CT 28:5586-87; RT 6:1630-1633.)

The prosecutor argued that because appellant "continues to deny that he raped and murdered" the victim, and because he challenges the DNA evidence indicating his semen was found on a tampon found in the

victim at autopsy, the evidence was relevant to show that appellant had intercourse with the victim. (CT 28:5591; RT 6:1638.)

The court overruled the objection. The court found that the "issue of rape is certainly in issue" and therefore there was no undue prejudice to the appellant. (RT 6:1725.)

The prosecution played the videotape for the jury in its case in chief. (RT 18:5390.) But by that point, there was no dispute that sexual intercourse had occurred – the defense admitted as much in its opening statement. (RT 16:4715.) Thus, the tape was no longer relevant to the evidence it was being offered to prove.

B. Standard of Review.

A challenge to a trial court's choice to admit or exclude evidence under section 352 is reviewed for abuse of discretion. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737.) The trial court's determination "will not be overturned on appeal in the absence of a clear abuse of that discretion, upon a showing that the trial court's decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice." (*People v.*

Lamb (2006) 136 Cal.App.4th 575, 582, quoting *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385.)

C. The Admission of The Videotape Was More Prejudicial Than Probative.

"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.) "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

The tape was offered to prove that appellant had intercourse with the victim, but whether intercourse had occurred was no longer in issue when the tape was played. Defense counsel conceded in his opening statement that appellant had consensual intercourse with Ms. Montoya

and thereafter killed her in a panic, believing that for having sex with a minor he could be sentenced to prison for life under the Three Strikes law. (RT 16:4715-4719.) Thus, the prosecutor's primary reason for admitting the tape (CT 28:5591) was not at issue. The tape was no longer relevant.

Given the slight (if any) probative value of the evidence, the court should have excluded it under Evidence Code section 352. Appellant's actions in examining and handling his penis do not lend themselves to ready explanation, but may well have been viewed by some jurors as perverse or deviant behavior. The videotape certainly cast appellant in a bad light, and amounted to character evidence that should not have been admitted in a capital trial.

In sum, the court's admission of this evidence was arbitrary and capricious. The evidence added nothing to the prosecution case. It did, however, put before the jury an inflammatory and prejudicial incident that portrayed appellant in a bad, perhaps perverse, light. The incident may well have evoked in the jury an inchoate feeling that appellant was a sexual deviant and thus capable of committing rape. It is reasonable to conclude that one or more jurors improperly considered this videotape as

evidence of appellant's bad character tending to show guilt.

D. The Error Is Reversible.

It is reasonably probable that appellant would have received a more favorable result at trial had this evidence been excluded. (*People v. Watson, supra,* 46 Cal.2d 818, 836.) The prosecution's case on the rape and special circumstance charges was not free of doubt. There was no physical evidence of forcible rape. Appellant's counsel admitted homicide but not rape. The prosecution case consisted entirely of the inference that appellant raped the victim under the threat of force. No physical evidence corroborated this argument. The videotape evidence undermined the defense case by portraying appellant as a man of bad character, a sexual deviant. ,From there it is a short step to the conclusion that appellant had a tendency to commit sexual crimes.

The error also implicates the Due Process Clause of the Fourteenth Amendment. Although state-law evidentiary errors do not generally rise to the level of federal constitutional error, the erroneous admission of prejudicial or inflammatory character evidence is the sort of evidentiary error that has been recognized to be a due process violation. (See

generally, *Estelle v. McGuire* (1991) 502 U.S. 62, 75 (Due Process Clause is violated when evidentiary error "infuse[s] the trial with unfairness as to deny due process of law"); *Henry v. Estelle* (9th Cir. 1993) 993 F.2d 1423, 1427 (admission of inflammatory other-crimes evidence violated due process), rev. on other grounds *sub nom Duncan v. Henry* (1994) 513 U.S. 364; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380 (admission of evidence of weapon possession and other misconduct violated due process).)

Such is the case here. By admitting this evidence, the court denied appellant a fair trial under the Due Process Clause and undermined the reliability of the guilt phase determination under the Eighth Amendment. Under *Chapman v. California, supra,* 386 U.S. 18, the burden rests with the State "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) For the reasons stated above, the error is reversible.

Appellant's counsel did not object on federal constitutional grounds at trial. There was, however, no need for him to do so. First, counsel preserved all federal objections before trial. (CT 25:5072.) Second, the objection under Evidence Code section 352 was sufficient to

preserve a federal due process claim for appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 436 (a trial objection on Evidence Code section 352 grounds preserves the appellate argument that admitting the evidence violated a defendant's federal due process rights). When a defendant makes constitutional arguments on appeal "that do not invoke facts or legal standards different from those the court itself was asked to apply but merely assert that the court's action or omission had the additional legal consequence of violating the state or federal Constitution, his new constitutional arguments are not forfeited on appeal." (*People v. Thornton* (2007) 41 Cal.4th 391, 434, fn.7.)

VI. The Prosecutor Committed Misconduct In Closing Argument; The Error Is Prejudicial Under State Law And Federal Law.

A. Summary of Argument.

In his guilt-trial closing argument, the prosecutor told the jury that "[t]he defense strategy in this case is to beat the special circumstance. If you don't find Mr. Thomas guilty of rape, they win this case. [¶] First degree murder, second degree murder, voluntary manslaughter, you will hear instructions about all of those things. You can convict him of any of those crimes, but if you don't find him guilty of rape, and don't find the special circumstance to be true, that's a win for Mr. Thomas. **Life in prison with the possibility of parole**." (RT 22:6602.) Later, the prosecutor again emphasized that the jury had to find the special circumstance to be true because "[i]t is important that you hold Mr. Thomas responsible at the appropriate level. You have to put the right label on it." (RT 22:6607.)

The defense objected that the prosecutor was improperly raising the issue of punishment at the special circumstance phase of the trial. (RT 22:6615.) The trial court agreed. It sustained the objection and admonished the jury that "it's been asserted that Mr. Frawley referred to

punishment in a portion of his closing argument as to how – as a consideration as to how you should decide the issue of guilt or lack of guilt and you are instructed that in the consideration of guilt or lack of guilt the jury cannot be influenced by punishment." (RT 22:6620.) The court also included an instruction not to consider punishment in its final charge to the jury. (CT 29:5914.)[12]

The prosecutor committed misconduct in two ways. First, he intentionally told the jury that the death penalty depended entirely upon a true finding on the special circumstance allegation. However, "[a] defendant's possible punishment is not a proper matter for jury consideration." (*People v. Honeycutt* (1977) 20 Cal.3d 150, 157, fn. 4; *People v. Holt* (1984) 37 Cal.3d 436, 458 (same).) Although misconduct can be found absent proof of bad faith (*People v. Hill* (1998) 17 Cal.4th 800), it is inconceivable that this veteran prosecutor was unaware that punishment cannot be considered in the guilt phase.

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[12] The court gave the jury CALJIC No. 8.83.2, which states: "In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstance alleged in this case." (CT 29:5914.)

Second, the prosecutor's comments impliedly told the jury that he personally believed that the death penalty was the only appropriate punishment. (*People v. Bandhauer* (1967) 66 Cal.2d 524, 529 (improper for prosecutor to offer personal opinion as to the appropriateness of the death penalty); *People v. Ghent* (1987) 43 Cal.3d 739, 772 (same).)

The misconduct caused prejudice and violated appellant's rights to due process and a reliable guilt phase determination under the Fifth, Sixth, Fourteenth and Eighth Amendments. Reversal is required.

B. The Admonition Did Not Cure The Prejudice Caused By This Intentional Misconduct; Reversal Is Required.

That the prosecutor committed misconduct there is no doubt. In *People v. Holt, supra*, the prosecutor made essentially the same argument as was made here. There, the prosecutor noted that defendant had admitted committing burglary but not robbery. The prosecutor urged the jury to find defendant guilty of robbery because without a robbery finding, defendant would escape the death penalty. The prosecutor argued, "if you find that Steven Holt is guilty of first degree murder based on a burglary theory, then you cannot conclude that the murder

occurred during a robbery and if you cannot conclude that it occurred during a robbery, you've just guaranteed him a parole date." (*People v. Holt, supra,* 37 Cal. 3d at p. 458, n.14.) The Court found the argument to be misconduct, holding that "[a] defendant's possible punishment is not a proper matter for jury consideration." (*Ibid.*) "[T]he jury is not allowed to weigh the possibility of parole or pardon in determining the guilt of the defendant." (*Ibid.*, quoting *People v. Barclay* (1953) 40 Cal.2d 146, 158.)

Here, too, the prosecutor urged the jury to reject the admission that appellant killed the victim after engaging in consensual intercourse. The prosecutor argued that unless the jury found appellant guilty of rape, appellant would be sentenced to "life in prison with the possibility of parole." (RT 22:6602.) This argument is indistinguishable from the argument this Court found to be misconduct in *Holt*. It is misconduct under both state and federal law.[13]

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[13] "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent

Thus, the only question is whether the prejudice arising from such misconduct was eliminated by the court's admonition and instruction. In *Holt*, the Court found such misconduct to be a ground for reversal *even though* the court instructed the jury at the close of evidence that the jury must not consider punishment in deciding guilt. This Court held that the instruction, which was identical to the instruction given in this case, "did not negate the improper reference to punishment by the prosecutor." (*People v. Holt, supra*, 37 Cal. 3d at p. 458.)

However, in *People v. Stevens* (2007) 41 Cal.4th 182, this Court found that similar misconduct did not require reversal because the jury was immediately admonished and also later instructed that it should not consider punishment. (*Id.* at pp. 205-206.) The Court invoked the presumption that the jury follows the instructions given to it. (*Ibid.*)

Although it is sometimes held that an admonition is sufficient to cure any prejudice caused by the misconduct (see *People v. Cummings*

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here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44; see *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642.)

(1993) 4 Cal.4th 1233, 1302-03), courts have long acknowledged that an admonition may not always cure the harm.

"It is the essence of sophistry and lack of realism to think that an instruction or an admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130 (involving other-crimes evidence).) With regard to "an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208.) "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (*Bruton v. United States* (1968) 391 U.S. 123, 129, quoting *Krulewitch v. United States* (1949) 336 U.S. 440, 53 (Jackson, J., dissenting).) Justice Learned Hand wrote that an admonition to a jury to disregard prejudicial evidence requires the jury to perform a "mental gymnastic which is beyond, not only their powers, but anybody else's." (*Nash v. United States* (2nd. Cir. 1932) 54

F.2d 1006, 1007.)[14]

It is possible that the jury in this case might have convicted appellant of rape even in the absence of the misconduct. One cannot say, however, that there is *not* "a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales, supra,* 25 Cal.4th at p. 44.) It is unreasonable to assume that the jury disregarded the prosecutor's warning that appellant would be paroled unless the jury convicted appellant of rape. Given the common misconception that murderers are paroled within a short time (usually seven years), it is likely that one or more jurors was influenced to convict of rape solely to guarantee that appellant served a lengthy prison term.

Under California law, misconduct is prejudicial when "it is reasonably probable that a jury would have reached a more favorable

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[14] See also *People v. Aranda* (1965) 63 Cal.2d 518, 526 (erroneous admission of confession into evidence not cured by instruction to disregard the evidence); *Jackson v. Denno* (1964) 378 U.S. 368, 388-390 (same); *People v. Wagner* (1975) 13 Cal.3d 612, 621 (limiting admonition did not cure prejudice caused by prosecutor's misconduct); *People v. Guerrero* (1976) 16 Cal.3d 719, 729 (limiting instruction did not alleviate prejudice); *People v. Fabert* (1982) 127 Cal.App.3d 604, 610 (limiting instruction cannot cure *Doyle* error).)

result absent the objectionable comments." (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) Prosecutorial misconduct can rise to the level of federal constitutional error when it is "so egregious that it infects the trial with such unfairness as to make conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; see also *In re Ferguson* (1971) 5 Cal.3d 525, 531.)

Here, the prosecutor intentionally committed misconduct in order to have the jury consider the consequence of its verdict upon the sentence appellant would receive. This was a "deceptive or reprehensible method[] to attempt to persuade" the jury to convict of rape. (*People v. Morales, supra,* 25 Cal.4th at p. 44.) The reference to punishment was brief but its effect profound. Faced with an admission of homicide but very little evidence of rape, the jury could hardly ignore the prosecutor's reminder that appellant would be paroled, despite the severity and savagery of the homicide, unless the jury convicted of rape. Yet the case for rape was not conclusive. The absence of trauma to the victim was sufficient to raise reasonable doubt in the mind of at least one juror whether rape had occurred.

Further, it may well be that reversal is the only way to deter intentional misconduct. Otherwise, prosecutors will simply gamble that misconduct is a small risk, given that so few cases are reversed on appeal.

Accordingly, the misconduct requires reversal under both state and federal law.

VII. The Court Abused Its Discretion In Admitting Close-Up Photos Of Appellant's Tattoos; The Error Violated Evidence Code Section 352 And Appellant's Right To Due Process And A Reliable And Fair Trial Under The Fifth, Sixth, Eighth And Fourteenth Amendments To The United State Constitution.

A. The Relevant Facts.

The prosecutor sought to introduce close-up photographs of appellant, taken on the day of his arrest, in order to show the jury what appellant looked like on the day of the crime. (RT 16:4731.) The photos showed a number of gang tattoos, including the number "107" on appellant's forehead the initials "HCG," and small tear drops. (See RT 18:5325-5329; Exs. 18A, 18D, 18E, 18F, 18G, 18H, & 18I.) The defense objected on relevance and section 352 grounds. (RT 16:4732.) The court went back and forth on the admissibility of the photos, first admitting the evidence (RT 16:4733), then excluding it (RT 16:4740), and ultimately admitting it (RT 16:4859). The court ruled that appellant's appearance was relevant to the issue of whether Michelle Montoya consented to sex. (RT 16:4859.) The prosecutor stated it would not elicit any express testimony concerning the significance or meaning of the tattoos, although the significance is obvious. (RT 16:4860.) When the evidence was finally admitted, the defense renewed

its objections under state and federal law. (RT 18:5354.)

The court erred in admitting the evidence. The probative value of the tattoos with respect to consent is weak and speculative because there is no evidence that Michelle Montoya was either attracted to or repelled by tattoos. On the other hand, the evidence was inflammatory and prejudicial because the tattoos informed the jurors that appellant was a gang member. The admission of these photos violated state law, and denied appellant a fair and reliable jury trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Reversal is required.

B. Standard of Review.

A challenge to a trial court's choice to admit or exclude evidence under section 352 is reviewed for abuse of discretion. (*People v. Harris, supra,* 60 Cal.App.4th 727, 736-737.) The trial court's determination "will not be overturned on appeal in the absence of a clear abuse of that discretion, upon a showing that the trial court's decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice." (*People v. Lamb, supra,* 136 Cal.App.4th 575, 582, quoting *In re Ryan N.* (2001) 92

Cal.App.4th 1359, 1385.)

C. The Admission Of The Close-Up Photos Of The Gang Tattoos Was More Prejudicial Than Probative.

"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Branch, supra,* 91 Cal.App.4th 274, 286.) "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy, supra,* 53 Cal.App.4th 998, 1008-1009.)

Gang evidence is inherently prejudicial. As this Court has noted, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (holding that trial courts have the discretion to sever the gang enhancement from underlying felony due to

the inherent prejudice of gang evidence), citing *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) Evidence of gang membership casts a sinister light upon a defendant and erodes the presumption of innocence. This Court has emphasized that gang evidence is "highly inflammatory" and has cautioned against its admission unless the evidence bears substantial probative value. "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660.) "It is fair to say that when the word 'gang' is used..., one does not have visions of the characters from the 'Our Little Gang' series. The word gang ... connotes opprobrious implications .... [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) "Erroneous admission of gang related evidence, particularly regarding criminal activities, has frequently been found to be reversible error, because of its inflammatory nature and tendency to imply criminal disposition, or actual culpability." (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 342.)

The prejudicial effect is twofold. First, gang evidence suggests

that a defendant is the type of person predisposed to commit violent acts. (*People v. Luparello* (1986) 187 Cal.App.3d 410, 426.) Second, the evidence leads to the assumption of guilt based merely upon association with a gang. (*Bojorquez, supra*, 104 Cal. App. 4th 335, 342.)

The admission of gang evidence, as with the admission of other-crimes evidence, requires the trial court to "weigh the admission of [the challenged] evidence carefully in terms of whether the probative value of the evidence is greater than the potentially prejudicial effect its admission would have on the defense." (*People v. Perez, supra*, 114 Cal.App.3d at 478.) "[T]he fundamental rule [is] that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted." (*People v. Haston* (1968) 69 Cal.2d 233, 246.)

Thus, given the inherently prejudicial nature of the evidence, it was incumbent upon the prosecution to establish that the probative value of the close-up photos of the gang tattoos was substantial. It failed to do so.

The prosecution offered to photos to show how appellant looked and claimed it was relevant to the issue of consent. The prosecution

wanted the jury to draw the inference that Ms. Montoya would not have consented to a man with tattoos. The argument fails. It requires the jurors to assume that Ms. Montoya was repelled by tattoos when there is no evidence of that foundational fact. There is no reason to believe that the tattoos in and of themselves had any bearing on the consent issue.

Moreover, the jury was able to see what appellant looked like without the need for close-up, prejudicial photos that provided clearer information concerning appellant's gang involvement. As defense counsel noted, the jury was able to see appellant in the courtroom, and no attempt had been made to conceal the tattoos with make-up. (RT 16:4732.) Even if the jury could not see the details of each tattoo, it would have been apparent that appellant had tattoos on him, and the jury was able to see his general appearance. (RT 16:4733.) The prosecutor needed no more than appellant's general appearance to argue his point.

Thus, the close-up photos of the tattoos did not carry substantial probative value. The court erred in admitting them.

D. The Error Is Reversible.

It is reasonably probable that appellant would have received a

more favorable result at trial had this evidence been excluded. (*People v. Watson, supra,* 46 Cal.2d 818, 836.) The prosecution's case on the rape and special circumstance charges was not free of doubt. There was no physical evidence of forcible rape. Appellant's counsel admitted homicide but not rape. The prosecution case consisted entirely of the inference that appellant raped the victim under the threat of force. No physical evidence corroborated this argument. The gang-tattoo photos undermined the defense case by portraying appellant as a gangster.

The error also implicates the Due Process Clause of the Fourteenth Amendment. Although state-law evidentiary errors do not generally rise to the level of federal constitutional error, the erroneous admission of prejudicial or inflammatory character evidence is the sort of evidentiary error that has been recognized to be a due process violation. (See generally, *Estelle v. McGuire, supra,* 502 U.S. 62, 75 (Due Process Clause is violated when evidentiary error "infuse[s] the trial with unfairness as to deny due process of law"); *Henry v. Estelle, supra,* 993 F.2d 1423, 1427 (admission of inflammatory other-crimes evidence violated due process), rev. on other grounds *sub nom Duncan v. Henry* (1994) 513 U.S. 364; *McKinney v. Rees, supra,* 993 F.2d 1378, 1380

(admission of evidence of weapon possession and other misconduct violated due process).)

Such is the case here. By admitting this evidence, the court denied appellant a fair trial under the Due Process Clause and undermined the reliability of the guilt phase determination under the Eighth Amendment. Under *Chapman v. California, supra,* 386 U.S. 18, the burden rests with the State "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) For the reasons stated above, the error is reversible.

Appellant's counsel did not object on federal constitutional grounds at trial. There was, however, no need for him to do so. First, counsel preserved all federal objections before trial. (CT 25:5072.) Second, the objection under Evidence Code section 352 was sufficient to preserve a federal due process claim for appeal. (*People v. Partida, supra,* 37 Cal.4th 428, 436 (a trial objection on Evidence Code section 352 grounds preserves the appellate argument that admitting the evidence violated a defendant's federal due process rights); *People v. Thornton, supra,* 41 Cal.4th 391, 434, fn.7.) Reversal is required.

VIII. Cumulative Error Rendered The Trial Fundamentally Unfair And Violated Defendant's Right To Due Process Under the Fourteenth Amendment And To A Reliable Guilt And Special Circumstance Determination Under The Eighth Amendment To The United States Constitution.

A. The Cumulative Impact Of The Errors Deprived Appellant Of A Fair Trial Under The Due Process Clause.

Even if any one of the errors described above was not by itself cause for reversal, the cumulative effect of the errors created a trial that was fundamentally unfair and denied defendant the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 289-290, fn.3; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

B. The Cumulative Effect Of The Errors Made The Death Verdict Unreliable Under The Eighth Amendment.

Separate and apart from the Due Process grounds discussed above, the cumulative effect of the errors requires reversal of the conviction and/or the special circumstance finding under the Eighth Amendment. The United States Supreme Court has recognized the death penalty is a qualitatively different punishment than any other. (See, e.g., *Beck v.*

Alabama (1980) 447 U.S. 625, 638, n.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. (See, e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama, supra*, 447 U.S. at p. 638, n.13.) The heightened reliability requirement of the Eighth Amendment applies to the guilt phase of a death penalty case as well as to the penalty phase. (*Beck v. Alabama, supra,* 447 U.S. at p. 638.)

Procedures which interfere with the presentation and consideration of reliable information undercut this heightened need for reliability and therefore violate the Eighth Amendment. (See, e.g., *Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Gardner v. Florida* (1977) 430 U.S. 349, 362; *Lockett v. Ohio* (1978) 438 U.S. 586.) This is so even when those same procedures do not violate the Due Process clause. (See, e.g., *Beck v. Alabama, supra*, 447 U.S. at p. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]; *Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Court distinguishes between the protections of the due process clause and the "more particular guarantees of sentencing

reliability based on the Eighth Amendment."].)

Here, even if errors described above did not, alone or in combination, violate the Due Process Clause, they certainly violate the "heightened need for reliability" in capital cases. Reversal of the conviction and/or the special circumstance is therefore required.

Penalty Phase Issues

IX. The Court Erred In Excluding Evidence Offered To Explain Why Certain Defense Witnesses Did Not Testify; The Error Violated Appellant's Rights Under The Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. Summary of Argument.

In his cross-examination of Dr. Gretchen White, a psychologist who sought to give the jury a view of appellant's background and childhood, the prosecutor suggested that Dr. White's conclusions were unreliable because "all the people whose accounts you are telling us about, they haven't testified, have they?" (RT 28:8270.) Dr. White responded that many of the witnesses she spoke to in fact did testify at trial, but the prosecutor elicited from her that appellant's brother Kelvin did not testify, the father did not testify, and other brothers did not testify. (RT 28:8271.) The prosecutor later suggested that information obtained under oath was "different" and more reliable than information obtained in interviews of the sort Dr. White conducted. (RT 28:8284; RT 28:8287.)

To rebut the inference that the basis for Dr. White's conclusions was untrustworthy, or that the defense was concealing unfavorable

evidence, the defense moved to call its investigator to testify before the jury as to why certain witnesses did not testify in court. (RT 28:8417.) Counsel stated he wanted to "make a record of what we had done to secure the attendance of these people and some of them are very ill, of course some of them are dead, and there are just a whole variety of problems with getting witnesses to come and I'm a little bit leery of ---- I'll have to look at the instruction [regarding the calling of all available witnesses, mentioned by the prosecutor] but if it's going to be held against us —." (RT 28:8417.)

The court stated that such testimony would not be necessary. The court said it would give an instruction that neither side is required to call all witnesses, and assured defense counsel that it "wasn't suggesting that counsel is going to be able to argue that you should have had all those people here." (RT 28:8418.) The prosecutor agreed that the instruction to be given was that "neither side is required to call all witnesses." (RT 28:8418.)

However, in closing the prosecutor argued strenuously and at length that the mitigating evidence was "unreliable" because the jury had not heard "from the best witnesses on this point." (RT 29:8606.) The

prosecutor scoffed at the defense attorney's attempt to explain in argument, without evidentiary support, why certain witnesses did not testify. The prosecutor said the witnesses could have been ordered to appear in court and therefore their absence meant only that they had nothing favorable to say. The prosecutor claimed, "If there were witnesses out there who had good things to say about Alex Thomas, who could provide evidence that you could consider on his behalf, they would have been here. What you can infer from their absence is they didn't care enough about Alex Thomas to be here." (RT 29:8677.)

The court erred in excluding the defense investigator's testimony. The error violated appellant's rights to present a defense, to fair rebuttal of the prosecution's case, to due process and to a reliable penalty phase determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The prosecutor's closing argument provided the prejudice for this evidentiary error.

B. Evidence That Certain Witnesses Were Unavailable To Testify Was Relevant.

Relevant evidence "means evidence, including evidence relevant

to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Here, the defense sought to inform the jury of the effort that had been made to secure the testimony of various witnesses and to explain why these witnesses did not testify. This evidence was unquestionably relevant to rebut the insinuation made by the prosecution — first in its cross-examination of Dr. White, and later in its closing argument — that the defense had concealed unfavorable evidence and that Dr. White's conclusions were untrustworthy because she relied upon unsworn testimony. Paradoxically, and unfairly, although the court refused to allow the *defense* to offer such evidence, it explained to the jury that certain *prosecution* witnesses did not testify in person because they had been ruled unavailable (Ricardo Jones) or had refused to testify (Vincent McGowan). (RT 25:7573, RT 26:7681.)

The defense evidence was relevant because a party may comment upon the opposing party's failure to introduce relevant evidence or to call logical witnesses. There are, however, restrictions on such argument that the court failed to follow in this case. (*People v. Ford* (1988) 45 Cal.3d

431, 448.)

In *Ford,* the Court stated that "[t]he failure of a defendant to call an available witness whom he could be expected to call if that witness testimony would be favorable is itself relevant evidence." However, the Court cautioned that when the prosecutor intends to so comment, he or she should first advise the court and opposing counsel to allow the opposing party an opportunity to show that the uncalled witness was not available. (*Id.* at p. 448, fn.8.)

Just the opposite occurred here: the court excluded evidence as to why certain witnesses were not called, stated that the prosecutor would *not* be allowed to comment on the failure to present witnesses, and then allowed the prosecutor to do exactly that.

The testimony of the defense investigator was relevant and admissible under *People v. Ford, supra*. The court abused its discretion in excluding it. As discussed below, the court's ruling violated appellant's right to present a defense and to due process under the Fifth, Sixth and Fourteenth Amendments and, as a separate matter, violated appellant's right to a reliable penalty phase determination under the

Eighth Amendment.

C. The Court Abused Its Discretion By Excluding The Proffered Evidence.

Under state law, appellate review of a trial court's determination of relevance is conducted under the abuse-of-discretion standard. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) Here, the trial court abused its discretion in refusing to admit evidence explaining why certain witnesses who might be expected to testify did not testify. The ruling was capricious. First, it was plain error under *People v. Ford, supra.* The prosecutor's cross-examination of Dr. White made the absence of certain witnesses an issue in the case. The defense was entitled to rebut the insinuation that the absence of these witnesses could only mean they had nothing favorable to say.

Second, the ruling was based on the unjustified speculation that the prosecutor would not argue that the witnesses should have been called, when in fact the prosecutor had already made that point in his cross-examination of Dr. White and would go on to argue that the entire defense case for life was unreliable and should not be believed by the jury.

Third, the ruling appears arbitrary in that the court explained, at the prosecution's request, that prosecution witnesses Ricardo Jones and Vincent McGowan were unavailable.

Finally, as discussed in the next section, in a death penalty case the court must consider other factors in deciding whether to admit defense evidence. Its failure to consider these factors shows the exclusion of the evidence to be arbitrary and clearly unreasonable, and as a separate matter, furnishes independent grounds for admission of the evidence.

D. The Error Violated Appellant's Right To Fair Rebuttal Of The Prosecution's Case For The Death Penalty.

The United States Supreme Court has consistently maintained that a capital defendant must be given a fair opportunity to meet, rebut, or explain any reason the state offers for why the defendant should be sentenced to death. The "fair rebuttal" principle was explained in *Gardner v. Florida* (1977) 430 U.S. 349: "Our belief that debate between adversaries is often essential to the truth seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." (*Id.* at p. 360.) The Court concluded that the

Due Process Clause does not allow the execution of a person "on the basis of information which he had no opportunity to deny or explain." (*Id.* at p. 362.)

This principle arose again in *Simmons v. South Carolina* (1994) 512 U.S. 154. There, the Court reversed the defendant's death sentence on due process grounds, holding that the trial court's failure to tell the jury the truth regarding a capital defendant's parole ineligibility if sentenced to life imprisonment violated the defendant's right to fair rebuttal, especially because the prosecutor stressed the defendant's future dangerousness in his argument. (*Id.* at p. 171.) Here, appellant was not given a fair opportunity to meet the prosecutor's argument that the failure to call logical witnesses made the mitigation evidence untrustworthy.

Here, the exclusion of relevant defense evidence created a void that the prosecutor filled with false and misleading information. The prosecutor argued, "What you can infer from [the witnesses'] absence is they didn't care enough about Alex Thomas to be here." (RT 29:8677.) By excluding the testimony of the defense investigator, the court permitted the prosecutor to argue that the absence of defense witnesses

proved the state's case was "reliable" whereas the defense case was a sham. The court's erroneous ruling undermined the reliability of the jury's decision to impose the death penalty, and in itself this error violates the Supreme Court's long-standing rule that capital cases demand procedures that ensure a heightened reliability.

In *Woodson v. North Carolina* (1976) 428 U.S. 280, the Court explained that the need for heightened reliability "rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference there is a corresponding difference in the need for reliability in the determination death is the appropriate punishment in a specific case." (*Id.* at p. 305.)

E. The Exclusion Of The Evidence Denied Appellant The Right To Have A Jury Consider All Mitigation Evidence.

The exclusion of the defense evidence also violated the bedrock principle that the jury must be allowed to consider all relevant mitigating evidence. *Lockett v. Ohio* (1978) 438 U.S. 586 established the core

Eighth Amendment principle that "the fundamental respect for humanity underlying the Eighth Amendment [mandates] the consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Id.* at p. 304.) As a corollary to this rule, the Court has ruled that each juror must be free to consider and give effect to all evidence offered in mitigation. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 318.) It is not enough "simply to allow the defendant to present mitigating evidence to the sentencer." There must not be any impediment – through evidentiary rules, jury instructions, or prosecutorial argument – to the sentencer's full consideration and ability to give effect to mitigating evidence. (*Penry v. Lynaugh, supra*, 492 U.S. at pp. 327-328.)

Here, the court's exclusion of the investigator's testimony impeded the jury's consideration of the mitigation evidence. The court's ruling prevented the defense from rebutting the insinuations of unreliability raised in the prosecutor's cross-examination of Dr. White and opened the door to the closing argument that the mitigating evidence was unreliable and should not be considered by the jury.

F. The Exclusion Of The Evidence Violated Appellant's Constitutional Right To Present A Defense.

A defendant charged with criminal violations has a federally-guaranteed right to present evidence and witnesses in his behalf. As the United States Supreme Court has reasoned, "[t]he right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words: The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." (*Washington v. Texas* (1967) 388 U.S. 14, 19.) The right of the defendant to present

evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." (*Id.*, at p. 18 ; see also (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691.)

When evaluating the defendant's Sixth Amendment right against state rules of exclusion, the court has consistently struck the balance in favor of the accused's constitutional right to present evidence. (Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials* (1976) 9 Ind.L.Rev. 711, 756, 795, 858.) Thus, the right to compel the attendance of witnesses and to present their testimony can override evidentiary rules.

In *Washington v. Texas, supra*, 388 U.S. 14, the Court held that the defendant's right to present evidence trumped two state statutes that would have excluded the evidence. The statute at issue rendered the testimony of certain accomplices inadmissible, yet the Supreme Court held that the state may not "arbitrarily den[y the accused] the right to put on the stand a witness who is physically and mentally capable of testifying to events that he had personally observed, and whose

testimony is relevant and material to the defense." (*Id.* at 23.)

Similarly, in *Chambers v. Mississippi* (1973) 410 U.S. 284, the court held it was error to exclude evidence [i.e., testimony of witnesses that a third-party suspect called as a witness by defense had previously confessed to the crime, offered to impeach suspect's repudiation of a sworn and recorded confession already admitted into evidence], even if it constituted hearsay or improper impeachment of a party witness under the states' evidentiary rules. The fundamental right to present defense evidence preempts trial judges from applying evidentiary rules "mechanistically" so as to exclude reliable, vital defense evidence. (*Id.* at 302.)

G. The Error Is Not Harmless Beyond A Reasonable Doubt.

In excluding this evidence, the trial court erred under both state and federal law. State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 447.) This is a far different standard than the *Watson* harmless-error test. The Court has

acknowledged that it has "long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*People v. Brown, supra,* 46 Cal.3d at p, 447.) For penalty phase errors, reversal is required if "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*People v. Brown, supra*, 46 Cal.3d at p. 448.) The state reasonable-possibility standard is the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

The error is prejudicial for a number of reasons. First, the error tainted the entire defense case. The prosecutor argued extensively that Dr. White cherry-picked the evidence in order to "weave this tapestry of abuse and neglect for the defendant in order to gain your sympathy." (RT 29:8605, 8601.) The prosecutor suggested that the defense deliberately choose to not call certain family witnesses because those witnesses would not have supported Dr. White's conclusions:

> When you assess the weight that you are going to give their so-called mitigating evidence, you have to determine how reliable it is. [¶] Ladies and Gentlemen, it is not very reliable at all. You

> have not heard from the best witnesses on this point. You haven't heard from any of Mr. Thomas' brothers. You haven't heard from his Aunt Ruth and Uncle Leo who just live over here in Sacramento whom he lived with when he was 14 years old.

(RT 29:8606.)

Not only did this argument undermine Dr. White's testimony, it cast doubt upon the legitimacy of the other defense witnesses. The prosecutor described the State's case as honest, open and reliable, whereas the defense case was a sham, all smoke and mirrors. The prosecutor claimed Dr. White was the "key" to the defense case, but attacked her credibility relentlessly on the ground her conclusions rested entirely on "unreliable sources." (RT 29:8606.) In his examination of Dr. White (RT 28:8269-71) and in closing argument (RT 29:8601-8608), the prosecutor repeatedly noted that witnesses upon whom Dr. White relied in forming her opinions did not testify at trial. This argument was superficially compelling and reasonably likely to influence the jury. As Justice Kozinski has noted, "[e]vidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.)

Moreover, the case was close. The jury deliberated for three days

before returning its verdict. (RT 29:8768-RT 30:8845; CT 31:6282.) Such a lengthy deliberation reflects a close case. (See e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour deliberation was a "graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation].)

The aggravating evidence – including the appellant's prior record of violent crimes and the seriousness of the charged offense – was substantial. Yet the mitigating evidence was also substantial. There is no dispute that appellant was brain damaged from birth. (RT 27:7960.) His IQ scores from various ages, including two scores from ages 8 and 15, ranged from 58 to 68, placing him firmly in the range of the mentally retarded. (RT 27:7943.) Other tests of his cognitive abilities put appellant in the lowest ranks of the entire adult population. The evidence left no doubt that appellant was substantially impaired.

The effect of a deeply impoverished upbringing upon a boy who entered the world with serious cognitive and emotional deficiencies was an essential part of the mitigation case. The defense set out to show that

appellant was a boy who needed more nurturing and attention than a child with average abilities, but instead was neglected and abused. There was no safety net, no consistent support and supervision. Appellant was raised in a violent, chaotic house by an unpredictable, alcoholic mother. It was this home environment, as well as the poverty-stricken, violent neighborhood in which he was raised, that pushed appellant into the streets, and into the street gangs, where his life of crime began.

The critical connection between appellant's inherent deficiencies and his childhood was seriously undermined by the court's evidentiary error and the prosecutor's clever exploitation of it. In essence, the jury was told to disregard all of the evidence concerning appellant's childhood because Dr. White presented an unreliable picture of appellant's life.

Given the pervasive effect of the error, and the closeness of the penalty trial, there is a "realistic possibility" that the error contributed to the death verdict. This is especially true given that, in assessing prejudice, "[a] hung jury is a more favorable verdict" than a guilty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 471, n.1 (Broussard, J., conc. opn.).) In other words, if the exclusion of he defense evidence

affected the verdict of even one juror, then reversal of the death penalty is required.

X. Several Instances of Prosecutorial Misconduct Violated Appellant's Rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. Legal Principles.

The Due Process Clause guarantees criminal defendants a fair trial. (*Turner v. Louisiana* (1965) 379 U.S. 466.) It imposes on criminal prosecutors -- as agents of the state -- a duty not simply to convict, but to seek justice. (See American Bar Association Standards for Criminal Justice (2d. Ed. 1982) § 3-1.1(b)-(c); American Bar Association Code of Professional Responsibility, E. C. 7-3.) "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in representing the sovereign power, of the State." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) As the United States Supreme Court noted long ago, "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

The justification for this rule is simple. "[S]ociety wins not only

when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." (*Brady v. Maryland, supra*, 373 U.S. at p. 87.) Thus, the prosecutor may not be "the architect of a proceeding that does not comport with the standards of justice." (*Ibid.*) It is for this reason that the Due Process Clause has long been held to limit the ability of prosecutors to use unfair methods in obtaining a conviction. (See, e.g., *Giglio v. United States*, *supra*, 405 U.S. 150; *Miller v. Pate, supra*, 386 U.S. 1.)

In general, under state law the prosecutor commits misconduct when he or she uses "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820 [citations and quotations omitted].) Prosecutorial misconduct can rise to the level of federal constitutional error when it becomes "so egregious that it infects the trial with such unfairness as to make conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; see also *In re Ferguson* (1971) 5 Cal.3d 525, 531.) Although prosecutorial misconduct does *not* depend upon proof of intentional bad faith (*People v. Hill* (1998) 17 Cal.4th 800), it is difficult

to view the misconduct described below as anything other than a deliberate attempt to sway the jury by improper means.

Specifically, prosecutors may not work to prevent a defendant from introducing material evidence, argue that defendant had the same opportunity to call witnesses as the State, and then invite the jury to speculate that defendant did not present the evidence because it did not exist. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570; *Paxton v. Ward* (10th Cir. 1999)199 F.3d 1197, 1216-1218.)

B. The Prosecutor Committed Misconduct By Commenting On The Appellant's Failure To Call Witnesses The Prosecutor Knew Were Unavailable.

In *People v. Varona* (1983) 143 Cal.App.3d 566, the court found it was misconduct for the prosecutor to argue there was no evidence the victim was a prostitute when the prosecutor knew she was and had argued successfully for exclusion of evidence proving the fact. (*Id.* at p. 570.) In *People v. Daggett* (1990) 225 Cal.App.3d 751, the Court of Appeal found misconduct where the prosecutor "unfairly took advantage" of a ruling excluding evidence by arguing that the jury could draw an inference from certain evidence when the excluded evidence

would have shown such an inference was not reasonable. (*Id.* at p. 757-758.) Similarly, in *Davis v. Zant* (11th Cir.1994) 36 F.3d 1538 the court found prosecutorial misconduct where the prosecutor kept a third-party's confession out of evidence and then argued to the jury it did not exist. (*Id.* at pp. 1547-1548; see also *People v. Gaines* (1997) 54 Cal.App.821, 825 (prosecutor commits misconduct when he purports to tell a jury why a defense witness did not testify and what the testimony of that witness would have been).)

This case is similar. The prosecutor knew that the defense wanted to explain why certain witnesses were not called to testify. The prosecutor knew that the court had prevented the defense from doing so. The prosecutor knew that the court had assured the defense that the prosecutor would not argue that "you should have had all those people here." (RT 28:8418.) Surely at that point the prosecutor was obligated to correct the court's mistaken assumption and inform the court and opposing counsel that he intended to argue precisely what the court assumed he would not argue. Instead, the prosecutor said nothing.

As noted in *People v. Ford, supra,* 45 Cal.3d 431, when the prosecutor intends to argue that the defense should have called certain

witnesses, the proper procedure is to advise opposing counsel of that intention in order to give the defense an opportunity to call the witness or explain why the witness could not be called. (*Id.* at p. 448, fn.8.) Here, not only did the prosecutor fail to comply with *Ford*, but remained silent while the court excluded evidence because the court did not expect the prosecutor to comment upon the absence of witnesses. Instead of correcting the court's mistaken assumption, the prosecutor exploited the court's error.

Defense counsel did not object to this misconduct. Under state law, the failure to object to misconduct at trial and/or to request a curative instruction may operate to waive any error on appeal. (*People v. Green* (1980) 27 Cal.3d 1, 27; *People v. Wash* (1993) 6 Cal.4th 215, 259-260.) However, a defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would have been futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.) And failure to request the jury be admonished to disregard the misconduct will not constitute waive of the issue on appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333,

quoting *People v. Price* (1991) 1 Cal.4th 324, 447.)

Here, an objection would have been futile. The court was already on notice that the defense had tried to put on evidence to explain why certain witnesses did not testify. Having denied that motion, it seems unlikely would have prevented the prosecution form arguing the possible inferences to be drawn from the absence of the witnesses.

Further, no admonition would have cured the harm. The seed of distrust was planted in the minds of the jurors the moment the prosecutor suggested in his cross-examination of White that certain witnesses, who did not testify, would have rebutted Dr. White's conclusions. No admonition could have undone the damage caused by this misconduct. Once the bell was rung, the jury was not likely to forget its sound.

C. In A Separate Incident, The Prosecutor Committed Misconduct By Arguing Facts Not In Evidence And The Court Erred In Overruling Appellant's Objection And Allowing The Argument To Continue.

Vincent McGowan, the victim of a jail slashing allegedly perpetrated by appellant, refused to testify. The court instructed the jury that McGowan had refused to testify but did not tell the jury why

McGowan refused to testify. (RT 26:7681.) The court instructed the jury as follows: "In hearings outside your presence Mr. McGowan refused to answer questions even when told by me that he would be held in contempt of court. [¶] The evidence has already shown that Mr. McGowan is currently serving a life sentence in prison. As a practical matter, the Court can do nothing more to convince Mr. McGowan to testify. You cannot draw any inference from Mr. McGowan's refusal to testify." (RT 26:7681.)

Disregarding this admonition, the prosecutor provided the jury with an inference by arguing that McGowan "didn't testify probably because he doesn't want to be a snitch; doesn't want to go back to prison being known to have testified against Mr. Thomas. [¶] He is afraid. And Mr. Thomas is proud of it. He is proud of the fact that he can intimidate Vincent McGowan." (RT 29:8676.) Appellant objected that the prosecutor was arguing facts not in evidence. The court overruled the objection. (RT 29:8676.) The court erred.

It is misconduct for a prosecutor to argue facts not in evidence. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948.) Such statements "tend to make the prosecutor his own witness – offering unsworn testimony not

subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can by "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.'" (*People v. Bolton* (1979) 23 Cal.3d 208, 213 (citations omitted).) Such misconduct also violates the Sixth Amendment right to confrontation because defense counsel has no opportunity to cross-examine or rebut the evidence. (*Ibid.*)

There was no evidence before the jury as to why McGowan refused to testify. In telling the jury that McGowan refused to testify, the court gave the jury no reason for the refusal. The court stated simply that McGowan "refused to answer questions." (RT 26:7681.) There was no evidentiary support for the prosecutor's argument that McGowan refused to testify because he was afraid, nor was there evidentiary support for the related argument that appellant was "proud" that he intimidated McGowan.

Further, in statements outside the presence of the jury, McGowan, who was in custody and serving a life prison term at the time of this trial, made it clear that he refused to testify unless he was released from

custody. (RT 23:6946.) Whether McGowan was concerned about his safety or whether he sought to profit from the situation by trading his testimony for freedom is debatable. The jury, however, did not hear McGowan's statements. It was gross misconduct for the prosecutor to tell the jury that McGowan feared for his life when the facts permitted another inference to be drawn, an inference far less prejudicial to the appellant. It is, of course, misconduct for a prosecutor to mislead the jury or ask the jury to draw inferences from evidence that the prosecutor knows to be false. (*Miller v. Pate* (1967) 386 U.S. 1, 3-7; *Napue v.* Illinois (1959) 360 U.S. 264, 269; *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968.)

D. The Misconduct Was Prejudicial.

As noted above, state law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson, supra,* 13 Cal.4th 1164, 1232.) Because the state reasonable-possibility standard is the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt

standard of *Chapman v. California* (1967) 386 U.S. 18 (*People v. Ochoa, supra,* 19 Cal.4th at p. 479), the standard of review is the same whether the misconduct is cast as state-law error or federal-law error.

Much of the prejudice argument offered in earlier in this brief applies here. First and foremost, the misconduct tainted the entire defense case. The improper argument regarding the failure to call certain witnesses undermined Dr. White's testimony and cast doubt upon the legitimacy of the other defense witnesses. The prosecutor described the State's case as honest, open and reliable, but called the defense case a sham, all smoke and mirrors. The prosecutor claimed Dr. White was the "key" to the defense case, and attacked her credibility relentlessly on the ground her conclusions rested entirely on "unreliable sources." Both in his examination of Dr. White (RT 28:8269-71) and in closing argument (RT 29:8605), the prosecutor repeatedly noted that witnesses upon whom Dr. White relied in forming her opinions did not testify at trial. This argument, although baseless, was superficially compelling and reasonably likely to influence the jury.

The misconduct with respect to the McGowan testimony was especially inflammatory. The prosecutor argued that McGowan did not

testify for fear of reprisal, thereby suggesting that appellant could and would kill McGowan. This argument sought to persuade the jury that appellant would continue to be dangerous in the future unless the jury imposed the death penalty.

And, as noted above, the case was close. The jury deliberated for three days before returning its verdict. (RT 29:8768-RT 30:8845; CT 31:6282.) Although the aggravating evidence was substantial, the mitigating evidence -- even apart from the history of appellant's childhood -- was also substantial. The evidence showed appellant was brain-damaged from birth. His mental functioning was substantially impaired.

Given the pervasive effect of the error, and the closeness of the penalty trial, there is a "realistic possibility" that the misconduct contributed to the death verdict. This is especially true given that, in assessing prejudice, "[a] hung jury is a more favorable verdict" than a guilty verdict. (*People v. Brown, supra,* 46 Cal.3d at p. 471, n.1 (Broussard, J., conc. opn.).) If even one juror was persuaded by the prosecutor's argument, then reversal of the death penalty is required.

XI. The Court Erred In Overruling The Objection To The Prosecutor's Argument That McGowan Did Not Testify Because He Feared For His Life; The Error Violated Appellant's Rights To Due Process, Confrontation, And A Reliable Penalty Determination Under The Fifth, Sixth, Eighth, And Fourteenth Amendments.

As noted above, the court overruled appellant's objection that the prosecutor's argument that McGowan refused to testify out of fear was improper. (RT 29:8676.) The court erred. The prosecutor, in the guise of closing argument, told the jury what the testimony of a witness would have been. This denied appellant his Sixth Amendment rights to confront and cross-examine the witness. Therefore, reversal is required unless the State proves beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825; *Douglas v. Alabama* (1965) 380 U.S. 415, 420.)

There was no evidence before the jury as to why McGowan refused to testify. In telling the jury that McGowan refused to testify, the court stated simply that McGowan "refused to answer questions." (RT 26:7681.) There was no evidentiary support for the prosecutor's argument that McGowan refused to testify because he was afraid, nor

was there evidentiary support for the related argument that appellant was "proud" that he intimidated McGowan.

In fact, in his testimony outside the presence of the jury, McGowan, who was in custody and serving a life prison term at the time of this trial, made it clear that he refused to testify unless he was released from custody. (RT 23:6946.) Whether McGowan was concerned about his safety or whether he sought to profit from the situation by trading his testimony for freedom is unknown; he never explained his thinking. The jury, however, did not hear McGowan's statements. It was gross misconduct for the prosecutor to tell the jury that McGowan feared for his life when the facts permitted another inference to be drawn, an inference far less prejudicial to the appellant.

The prosecutor's argument was prejudicial. The argument that appellant had intimidated a witness was inflammatory. The claim that McGowan did not testify for fear of reprisal, suggested that appellant could and would kill McGowan in prison. This argument sought to persuade the jury that appellant would continue to be dangerous in the future unless the jury imposed the death penalty. Given that there was no basis for this argument, the court erred in overruling appellant's timely

objection to it.

Given the closeness of the case, the error is cause for reversal. As noted above, state law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson, supra,* 13 Cal.4th 1164, 1232.) Because the state reasonable-possibility standard is the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18 (*People v. Ochoa, supra,* 19 Cal.4th at p. 479), the standard of review is the same whether the misconduct is cast as state-law error or federal-law error.

XII. The Admission Of Ricardo Jones's Preliminary Hearing Testimony Violated Appellant's Rights To Due Process, Confrontation, And A Reliable Penalty Determination Under The Fifth, Sixth, Eighth, And Fourteenth Amendments.

A. Summary Of Argument.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This bedrock procedural guarantee applies to both federal and state prosecutions. (*Pointer v. Texas, supra,* 380 U.S. 400, 406.) Here, at the penalty trial in 2000, the prosecution introduced testimony of Ricardo Jones, given at a preliminary hearing in 1984, which implicated appellant in the shooting of Daniel White. Appellant pleaded guilty to voluntary manslaughter in the White case, and evidence of that conviction was admitted earlier in the trial. (RT 25:7571.) Jones's testimony was offered to prove the facts underlying that conviction.

The court erred in admitting Jones's former testimony. First, the prosecution did not demonstrate reasonable diligence in securing Jones's attendance at trial. (*People v. Louis* (1986) 42 Cal.3d 969, 991.) Because the prosecution failed to demonstrate that Jones was

unavailable, the admission of the former testimony violated the Confrontation Clause. (*Barber v. Page* (1968) 390 U.S. 719, 722.)

Second, even if Jones was unavailable, a preliminary hearing held 15 years earlier in a different criminal proceeding is not "a prior opportunity for cross-examination" under *Crawford v. Washington, supra,* 541 U.S. 36, 59.

Thus, the admission of Jones's testimony violated appellant's rights to confrontation, to due process, and to a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Reversal is required.

B. The Relevant Facts.

The prosecution introduced evidence that in 1985 appellant pleaded guilty to voluntary manslaughter in the shooting death of Daniel White. Ricardo Jones testified at the preliminary hearing in the White case that he saw appellant shoot White. (RT 25:7574.) Jones claimed he saw appellant arguing with White after midnight on July 26, 1984. White was sitting in a truck, behind the wheel. Jones heard appellant say, "Give me the $25 or give me the rock." (RT 25:7583.) White

started to drive away; appellant pulled a gun and fired at the truck. The truck swerved onto the sidewalk and stopped. White got out, ran a short distance, and fell down dead. (RT 25:7578.)

The prosecutor sought to introduce Jones's preliminary hearing testimony under Evidence Code section 1291 (former testimony). The prosecutor stated that Jones was unavailable despite efforts to locate him. The prosecutor called two witnesses to testify to the efforts that had been made to locate Jones. The first witness, Investigator Mark Rall of the District Attorney's Office, stated he had spoken to Jones three or four times by telephone and, through the cooperation of the Riverside District Attorney's Office, had served Jones with a subpoena on August 8, 2000. (RT 25:7490.) Jones did not appear on the scheduled date. (RT 25:7490.) Despite this, the prosecution took no steps to take Jones into custody as a material witness, but simply asked the Riverside District Attorney to serve another subpoena on Jones. The process server personally served Jones but once again Jones failed to appear on the scheduled date. (RT 25:7492.)

A bench warrant was issued for Jones's failure to appear the second time. (RT 25:7493.) Rall called the Riverside Sheriff's

Department and asked them to serve the warrant on Jones. (RT 25:7493.) The next day, Rall sent a packet of information about Jones, including his photograph and criminal history, to Lodric Clark, an investigator in the Riverside District Attorney's Office, with a request that Clark assist in locating Jones. (RT 257493.) Rall had no more direct involvement in the effort to find Jones. (RT 25:7494.)

Investigator Clark made several attempts to locate Jones between September 13 and September 23. (RT 25:7496.) He looked into jail and probation records. He spoke to Jones's sister, who told him Jones was an alcoholic and a drug abuser who "hung out" in various locations in rural areas of Riverside County. (RT 25:7497.) Clark checked out the places Jones usually frequented but did not find him. (RT 25:7497-98.) The sister tried to get Jones to come to her house to speak to Clark, but he refused and said he did not want to get involved. (RT 25:7499)

The defense argued that the prosecution had not shown reasonable diligence in securing Jones's attendance at trial and objected to the admission of Jones's testimony under the Confrontation Clause. (RT 25:7505-10.) The court found that the prosecution had exercised due diligence and allowed Jones's prior testimony to be read to the jury. (RT

25:7506.)

C. The Prosecution Failed To Show That Jones Was Unavailable.

In California, the exception to the Constitutional right to confrontation of witnesses for prior recorded testimony is codified in Evidence Code section 1291, subdivision (a), which provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

A witness is unavailable if "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) Although section 240 refers to "reasonable diligence," this Court has also used the term "due diligence." (E.g., *People v. Sanders* (1995) 11 Cal.4th 475, 523.) The reviewing court must make an independent review of the record to determine if a

party exercised good faith and reasonable diligence in attempting to locate a missing witness. (*People v. Cromer* (2001) 24 Cal.4th 889, 900.)

Here, the prosecution made a reasonable effort to find Jones, but did not exercise due diligence in *preventing* Jones from becoming absent in the first place. When seeking the bench warrant in September, the prosecutor stated, "I've always had my doubts as to whether or not he would appear," yet the prosecutor failed to act upon those doubts and take steps to secure Jones's appearance for trial. (RT 23:6832.) The prosecutor noted that at the preliminary hearing in the White case that Jones had testified under a body attachment order, that Jones had already told the prosecutor's investigators that he would not cooperate, that Jones had an alcohol problem, and "[h]e's not reliable." (RT 23:6832.) Despite all these warning signs, the prosecutor did not move to take Jones into custody to secure his attendance at trial.

Certainly, after Jones ignored the first subpoena it was plain he was an unreliable witness. At that point there was no reason to believe he would honor the second subpoena. The prosecution knew that Jones was a homeless, alcoholic transient who disobeyed a subpoena, and he

had received information that Jones might not appear, yet again, the prosecution made no effort to secure Jones's testimony at trial by taking him into custody as a material witness. (RT 23:6832.)

People v. Louis, supra, is instructive. In *Louis*, a key prosecution witness testified at defendant's preliminary hearing that defendant had identified himself in conversation as the triggerman in a gas station robbery. However, this witness had a long history of felony thefts, lies, inconsistencies, aliases, and missed court appearances. He also stood to reap a reward from the gas station owner if defendant was convicted, and his was the only testimony connecting defendant to the deed. Shortly after the preliminary examination, this witness was released on his own recognizance, disappeared, and was never heard from again. A transcript of the witness's preliminary hearing testimony was admitted against defendant in his trial, and he was convicted of murder and sentenced to death. (*People v. Louis, supra*, 42 Cal.3d at pp. 976-978.)

The Supreme Court held that the preliminary hearing transcript was inadmissible against defendant, in that the prosecutor failed to exercise due diligence to secure the presence of the witness, and reversed the conviction. The Court held that "[t]he obligation to use reasonable

means to procure the presence of the witness has two aspects. The more obvious is the duty to act with due diligence in attempting to make an absent witness present. Less obvious, perhaps, but no less important 'is the duty to use reasonable means to prevent a present witness from becoming absent.'" (*People v. Louis, supra*, 42 Cal.3d at p. 991 (citation omitted).) "The purpose of the due diligence requirement is to ensure that the prosecution has made all reasonable efforts *to procure the presence of the witness* before the defendant is denied the opportunity to confront him." (*Ibid.*)

As in *Louis*, the prosecutor here had actual knowledge that a critical witness was likely to flee if not taken into custody. Despite this, the prosecutor took no action to prevent the witness from becoming absent. The failure to act when the need to act was apparent cannot be considered due diligence. Accordingly, the court erred in ruling that Jones was unavailable to testify.

D. A Preliminary Hearing In A Different Proceeding By A Different Attorney Is Not A Prior Opportunity For Cross-Examination Under *Crawford*.

At the outset, appellant acknowledges that in *People v. Wharton*

(1991) 53 Cal.3d 522, this Court held the preliminary hearing testimony of an unavailable victim is admissible in the penalty phase to prove past violent conduct by the defendant. (*Id.* at p. 529; *People v. Carter* (2005) 36 Cal.4th 1114, 1172 (upholds the admissibility of preliminary hearing testimony when the witness is unavailable). Appellant also acknowledges that *California v. Green* (1970) 399 U.S. 149, holds that a preliminary hearing is a prior opportunity for cross-examination when the preliminary hearing was held in the same action in which the former testimony was admitted. (*Id.* at p. 165.)

However, as noted in *Barber v. Page, supra,* 390 U.S. 719, "[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." (*Id.* at p. 725.) Recently, a Colorado case, *People v. Fry* (Col. 2004) 92 P.3d 970 held that a preliminary hearing is not a prior opportunity for cross-examination, given the nature of the preliminary hearing.

Here, the examination of Jones at the preliminary hearing in 1985 was in a different case, where appellant was represented by a different lawyer, who had no reason to cross-examine Jones in detail about the circumstances of the crime. The preliminary hearing in California is not the same as a trial. Defense counsel's examination is limited to developing evidence to show an absence of probable cause to hold the accused over for trial. (Pen. Code, § 866, subd. (b).) The defense attorney may not use the preliminary hearing as a means to obtain discovery. (*Ibid.*) Thus, circumstances of the crime that might be relevant in the penalty-phase of a capital trial, such as explanations for the crime that do not constitute legal defenses, would not be relevant to the probable cause determination in a preliminary hearing, and defense counsel would not have an opportunity to cross-examine on such issues.

Thus, appellant had no prior opportunity to cross-examine Jones on the very matters that Jones's hearsay testimony was used in the capital trial. The admission of Jones's former testimony therefore violated appellant's rights to due process, to confrontation, and to a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments.

E. The Error Is Prejudicial.

Error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson, supra,* 13 Cal.4th 1164, 1232.) Because the state reasonable-possibility standard is the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18 (*People v. Ochoa, supra,* 19 Cal.4th at p. 479), the standard of review is the same whether the misconduct is cast as state-law error or federal-law error.

Here, Jones's former testimony was the only evidence presented on the circumstances of the White homicide. Without Jones's testimony, the White homicide would have been presented to the jury as simply a conviction for voluntary manslaughter. Jones's unconfronted testimony, however, introduced facts that suggested the murder was deliberate and intentional, i.e., not manslaughter. The admission of this hearsay was prejudicial, both because the evidence made appellant more culpable for the homicide than the manslaughter conviction suggested, and because the hearsay nature of the evidence afforded appellant no opportunity to cross-examine Jones on the circumstances of the crime.

As noted and argued elsewhere in this brief, the penalty phase trial was very close. The jury deliberated for three days before returning its verdict. (RT 29:8768-RT 30:8845; CT 31:6282.) Such a lengthy deliberation reflects a close case. (See e.g., *People v. Cardenas, supra,* 31 Cal.3d 897, 907 [twelve-hour deliberation was a "graphic demonstration of the closeness of this case"]; *People v. Rucker, supra,* 26 Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; *People v. Woodard, supra,* 23 Cal.3d 329, 341 [six-hour deliberation].)

The aggravating evidence – including the appellant's prior record of violent crimes and the seriousness of the charged offense – was substantial. Yet the mitigating evidence was also substantial. There is no dispute that appellant was brain damaged from birth. (RT 27:7960.) His IQ scores from various ages, including two scores from ages 8 and 15, ranged from 58 to 68, placing him firmly in the range of the mentally retarded. (RT 27:7943.) Other tests of his cognitive abilities put appellant in the lowest ranks of the entire adult population. The evidence left no doubt that appellant was substantially impaired.

In a close case, every piece of evidence is critical. The erroneous admission of Jones's former testimony allowed the jury to conclude that

appellant killed Daniel White deliberately and intentionally. An opportunity to cross-exam Jones might have put the homicide in a different light. Given the materiality of the Jones testimony, the erroneous admission of the evidence cannot be deemed harmless error.

XIII. The Admission And Use Of Evidence Of Unadjudicated Criminal Activity Violated Appellant's Rights Under The Fifth, Sixth, Eighth And Fourteenth Amendments Of The United States Constitution, Requiring Reversal Of The Death Judgment.

A. Summary of Argument.

At the penalty phase of appellant's trial, the prosecution introduced in aggravation evidence of unadjudicated acts, some of them quite old. It was alleged that appellant shot Samantha Mims in 1978 (RT 25:7537), that he slashed Vincent McGowan in 1985 (RT 25:7324), that he struck his wife in 1994 (RT 24:7235), and that he gave Kelly Minix a hickey in 1997 (RT 24:7174).

The use of unadjudicated criminal activity during the penalty phase deprived appellant of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, and a reliable penalty determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellant's death judgment must therefore be reversed.

B. The Use Of Unadjudicated Criminal Activity Violated Appellant's Constitutional Rights, Including His Fifth, Sixth, Eighth and Fourteenth Amendment Rights to Due Process, To Confrontation, And a Reliable Penalty Determination.

The court instructed the jury it could consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (CT 31:6243.) The prosecution presented evidence of four different instances of alleged violent criminal activity committed by appellant: the shooting of Samantha Mims, the knifing of Vincent McGowan, an assault on Delores Thomas, and a hickey on the neck of Kelly Minix. The admission of this evidence violated appellant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276.) Admission of the unadjudicated prior criminal activity also denied appellant the right to a trial by an impartial and unanimous jury, and to effective confrontation of witnesses, under the

Sixth and Fourteenth Amendments, and to equal protection of the law under the Fourteenth Amendment. An instruction expressly permitting the jury to consider such evidence in aggravation violates these same constitutional rights.

Penal Code section 190.3, subdivision (b), as written and as it has been interpreted by this Court, is an open-ended and vague aggravating factor that fosters arbitrary and capricious application of the death penalty in violation of the Eighth Amendment requirement that a rational distinction be made "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

This Court has interpreted the section in such an overly-broad fashion that it cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be *more* rigorous than those provided noncapital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.);

Lockett v. Ohio (1978) 438 U.S. 586, 605-606), this Court has ignored this mandate and in fact singled out capital defendants for *less* procedural protection than that afforded other criminal defendants.

For example, this Court has ruled that, in order to consider evidence under factor (b), it is not necessary for the 12 jurors to unanimously agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt (see *People v. Caro* (1988) 46 Cal.3d 1035, 1057). It has also held:

▪ The jury may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192).

▪ The trial court is not required to enumerate the other crimes that the jury should consider or to instruct on the elements of those crimes (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207).

▪ Unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under subdivision (b), but felony convictions, even for violent crimes, rendered after the capital homicide are not admissible (*People v. Morales* (1989) 48 Cal.3d 527, 567).

■ A threat of violence is admissible if, by happenstance, the words are uttered in a state that has made such threat a criminal offense (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1258-1261).

■ Juvenile conduct is admissible under this factor (*People v. Burton* (1989) 48 Cal.3d 843, 862), as is an offense dismissed pursuant to a plea bargain (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659).

In sum, this Court has indeed treated death differently by *lowering* rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

In addition, the use of the same jury for the penalty-phase adjudication of other-crimes evidence deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of guilt, in violation of the Sixth, Eighth and Fourteenth Amendments. Under the California capital-sentencing statute, a juror may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to such offense, the defendant is entitled to the

presumption of innocence (see *Johnson v. Mississippi, supra*, 486 U.S. at p. 585) and the jurors must give the exact same level of deliberation and impartiality as would have been required of them in a separate criminal trial, for when a state provides for capital sentencing by a jury, the Due Process Clause of the Fourteenth Amendment requires that such jury be impartial. (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509 (1971) [where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand]; *Irvin v. Dowd* (1961) 366 U.S. 717, 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d 201, 202.)

In appellant's case, the jurors charged with making an impartial, and therefore reliable, assessment of his guilt of the previously-unadjudicated offenses were the same jurors who had just convicted him of capital murder. A jury that already found a defendant guilty of capital murder cannot be impartial in considering whether unrelated but similar violent crimes have been proved beyond a reasonable doubt. (See *People v. Frierson* (1985) 39 Cal.3d 803, 821-822 (conc. opn. of Bird, C.J.).)

Even in the unlikely event that only a single juror was impermissibly prejudiced against him, appellant's rights would still be

violated. (See *People v. Pierce* (1979) 24 Cal.3d 199, 208 ("[A] conviction cannot stand if even a single juror has been improperly influenced."]; *United States v. Aguon* (9th Cir. 1987) 813 F.2d 1413, 1421, mod. (en banc 1988) 851 F.2d 1158 ["The presence of even a single partial juror violates a defendant's rights under the Sixth Amendment to trial by an impartial jury."].)

A finding of guilt by such a biased fact-finder clearly could not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554, citing *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

Independent of its effect on the impartiality of the jury, the use of the same jury at both the guilt and penalty phases of trial forced appellant to make impossible and unconstitutional choices during jury selection. Voir dire constitutes a significant part of a criminal trial. (*Pointer v.*

United States (1894) 151 U.S. 396, 408-409; *Lewis v. United States* (1892) 146 U.S. 370, 376.) The ability to probe potential jurors regarding their prejudices is an essential aspect of a trial by an impartial jury. (*Dyer v. Calderon* (9th Cir. en banc 1998) 151 F.3d 970, 973.) In this case, counsel for appellant understandably did not question potential jurors during jury selection about the unadjudicated crimes introduced at the penalty phase. Such evidence was not admissible during the guilt phase of the trial, and questioning the potential jurors about other violent crimes unquestionably would have tainted the impartiality of the jury that was impaneled. Counsel could not adequately examine potential jurors during voir dire as to their biases and potential prejudices with respect to the prior unadjudicated crimes without forfeiting appellant's constitutional right not to have such subjects brought before the jurors. Requiring appellant to choose between these two constitutional rights violated his rights to assistance of counsel, a fair trial before an impartial jury, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

Further, because California does not allow the use of unadjudicated offenses in noncapital sentencing, the use of this evidence

in a capital proceeding violated appellant's equal protection rights under the Fourteenth Amendment. It also violated appellant's Fourteenth Amendment right to due process because the state applies its law in an irrational and unfair manner. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

Finally, the failure to require jury unanimity with respect to such unadjudicated conduct not only exacerbated this defect, but itself violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

C. The Alleged Criminal Activity Was Improperly Considered in Aggravation Because It Was Not Required To Be Found True Beyond a Reasonable Doubt by a Unanimous Jury.

The application of the *Apprendi* line of cases to California's capital-sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See *Blakely v. Washington* (2004) 542 U.S. 296, 313; *Ring v. Arizona* (2002) 536 U.S. 584, 609; *Apprendi v. New Jersey, supra.*) Thus, even if it were constitutionally permissible to rely

upon alleged unadjudicated criminal activity in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. Although the jury in appellant's case was instructed that the prosecutor had the burden of proving the other-crimes evidence beyond a reasonable doubt (CT 31:6255), the jury was *not* instructed on the need for a unanimous finding. Indeed, the jury was expressly told they need not be unanimous. The jurors' consideration of this evidence thus violated appellant's rights to due process of law, to trial by jury, and to a reliable capital-sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

D. The Unadjudicated Prior Criminal Activity Alleged Against Appellant Was Outside Applicable Statutes of Limitations and Therefore Was Improperly Introduced As Evidence in Aggravation.

The capital charges were filed against appellant in November 1997. By then, the statute of limitations had passed for the criminal charges involving Samantha Mims and Vincent McGowan. (See Pen. Code, § 800 (six-year limitation for crimes carrying punishment of eight years or more).) The admission of such stale evidence of criminal conduct at the penalty phase violated appellant's due process rights to effectively

confront and rebut aggravating evidence presented against him and the constitutional requirement of heightened reliability in a capital trial. (U.S. Const., 6th, 8th & 14th Amends.; see *Gardner v. Florida, supra,* 430 U.S. 349, 362.)

A statute of limitations is not a mere technicality. Time bars exist to ensure a level of reliability required in any criminal case and heightened in capital proceedings. Such statutes recognize the "difficulty faced by both the government and a criminal defendant in obtaining *reliable* evidence (or any evidence at all) as time passes following the commission of a crime." (*People v. Zamora* (1976) 18 Cal.3d 538, 546 (emphasis added).) Limitation periods "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (*United States v. Marion* (1971) 404 U.S. 307, 322; see *Stogner v. California* (2003) 539 U.S. 607, 615-616.)

This Court has held that because there is no statute of limitations for murder, the expiration of the statute of limitations for any other substantive crime does not constrain the prosecution from introducing evidence of such a crime at the penalty phase of a capital trial. (*People v. Heishman, supra*, 45 Cal.3d at p. 192; accord, e.g., *People v. Medina*

(1995) 11 Cal.4th 694, 772.) *Heishman*, however, relied on *People v. Terry* (1969) 70 Cal.2d 410, a capital case decided prior to *Furman v. Georgia* (1972) 408 U.S. 238, the case that inaugurated modern capital-punishment jurisprudence. Since that time, the United States Supreme Court has explicitly held that the Eighth Amendment's guarantee of a reliable penalty determination requires that the procedures governing a capital sentencer's consideration of "other crimes" evidence must conform to the constitutional standards governing proof of the substantive offense. (See *Johnson v. Mississippi, supra*, 486 U.S. at pp. 585-586 [invalidating a death judgment because one of the aggravating circumstances was based on a prior conviction that had been found constitutionally defective by a state appellate court].)

In light of *Johnson*, this Court's focus on capital murder as the predicate offense which renders the statute of limitations inapplicable to any other crimes alleged at the penalty phase is misdirected. The jury's consideration of evidence of other violent crimes committed by the defendant is likely to have "an ascertainable and 'dramatic' impact'" (*Zant v Stephens* (1983) 462 U.S. 862, 903 (conc. opn. of Rehnquist, J.), and even to prove "decisive" in the choice of penalty (*Gardner v. Florida,*

supra, 430 U.S. at p. 359). Therefore, allowing the prosecution to litigate time-barred offenses necessarily creates an unacceptable risk of unfairness and introduces unreliable evidence into the penalty determination.

Where the passage of time prejudices a defendant's right to a fair trial on a substantive offense (see *Stogner v. California, supra*, 539 U.S. at pp. 615-616; *United States v. Marion, supra*, 404 U.S. at p. 322), the state can no longer overcome the defendant's presumption of innocence in a manner that satisfies the minimum federal constitutional guarantees. Allowing the jury to consider such a charge denies the defendant a fair penalty trial, and thus a death sentence based even in part on such evidence is fatally defective. (See *Johnson v. Mississippi, supra*, 486 U.S. at pp. 586, 590; *Gardner v. Florida, supra*, 430 U.S. at pp. 359, 362.)

E. The Error Is Prejudicial.

The unadjudicated offenses were particularly prejudicial to appellant's case. The McGowan incident, in particular, was used by the prosecution as a reason to execute appellant because fellow prisoners and prison guards would be in peril if appellant was not executed. The other instances were used to portray appellant not only as an incorrigible

offender, but a person of bad character and low morals. For this reason, and the reasons already articulated that show this case to be very close, the use of the evidence of unadjudicated criminal activity against appellant requires reversal of the judgment of death. (See *Johnson v. Mississippi, supra*, 486 U.S. at p. 590; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

XIV. The Court Erred In Admitting Non-Statutory Aggravating Evidence; The Admission Of Such Unreliable Evidence Violated Appellant's Rights To Due Process And A Reliable Penalty Determination Under The Fifth, Sixth, Eighth and Fourteenth Amendments.

A. Summary Of Argument.

The United States Supreme Court has repeatedly emphasized that because of the exceptional and irrevocable nature of the death penalty, "extraordinary measures" are required by the Eighth Amendment to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. (See, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (O'Connor, J., concurring); *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Here, the court erred in admitting non-statutory aggravation and bad character evidence that did not provide valid reasons for imposing the death penalty. There is a reasonable possibility that the erroneous admission of such evidence affected the verdict. Reversal is required.

B. Standard of Review.

State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 447.) The state reasonable-

possibility standard is the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

C. The Kelly Minix Incident Was Improperly Admitted; Leaving A Hickey Is Not A Reason To Impose The Death Penalty.

In determining whether to impose the death penalty, the jury may consider as an aggravating factor "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 of violence." (Pen. Code, § 190.3, factor (b).) Over objection (RT 23:6882), the court admitted evidence that defendant either kissed or pinched Kelly Minix, leaving a bruise or "hickey." Although this was a battery and thus involved the use of "force" in a strict legal sense, it is not the sort of violent criminal activity that authorizes or warrants the death penalty.

Factor (b) limits the admission of unadjudicated criminal activity to instances of violent acts. "The purpose of the statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision." (*People v. Boyd* (1985) 38 Cal.3d 762, 774 (evidence of nonviolent escape

from custody, threats and damage to property inadmissible under factor (b).)

Here, a pinch or kiss that leaves a small bruise is rude, unwanted behavior, and technically a crime, but it is not the sort of conduct that "should influence a life or death decision." (*Ibid.*) Accordingly, the court erred in admitting this evidence.

D. The Court Erred In Admitting, Over Objection, Evidence That Appellant Might Have Been "Fooling Around" With His Wife's Sister, And That He Called His Wife's Son Names.

The prosecution called Delores Thomas, appellant's former wife, to testify that he struck her during an argument while they were married. (RT 24:7223.) Over objection, Delores Thomas testified that she accused appellant of "fooling around" with a neighbor's daughter and with her sister. (RT 24:7223.) Delores Thomas later testified that the relationship between appellant and Delores's son was poor. Over objection, Delores testified that appellant called her son names, such as "punk" and "sissy," and said he was "weak." (RT 24:7241.) The evidence of domestic violence was admissible under factor (b). However, the other evidence the prosecutor elicited was irrelevant and inadmissible. The court erred in

overruling the objections to this evidence.

Relevant evidence "means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, 210; see *People v. Ortiz* (1979) 95 Cal.App.3d 926, 933.) "Since the jury must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those factors. Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation." (*People v. Boyd, supra*, 38 Cal.3d at pp. 773-774.)

Here, the allegations that appellant was engaged in extra-marital affairs, and that he called his wife's son names, were not relevant to the statutory aggravating factors. The court erred in admitting this evidence over objection.

E. The Error Is Prejudicial.

As noted above, this case was especially close. Substantial

mitigating evidence was presented and the jury deliberated over three days before reaching its verdict. Given this, there is a "realistic possibility" that the erroneously-admitted bad-character evidence contributed to the verdict. Reversal is required.

XV. The Court Erred In Admitting The Hearsay Statement That McGowan Identified Appellant As The Man Who Assaulted Him In County Jail; The Error Violated The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

A. The Relevant Facts.

The prosecution sought to prove that appellant assaulted Vincent McGowan when both were inmates in Los Angeles County Jail in 1985. McGowan did not testify. (RT 23:6946-48.) Instead, the prosecution presented the hearsay testimony of two jail officers, Lee Woods and Richard Calzada, who said that McGowan identified appellant as the man who cut him in the neck with a sharp object. (RT 25:7324; RT 25:7342.) Appellant's attorneys objected to the hearsay testimony under state and federal grounds. (RT 25:7339; CT 25:5072.) The court admitted the testimony as a spontaneous declaration under Evidence Code section 1240. (RT 25:7340.)

The court erred. The admission of the hearsay testimony violated the California rules of evidence. Moreover, even if the hearsay was properly admitted under California law, its admission violates the Confrontation Clause, due process, and the heightened reliability requirement for capital cases under Sixth, Fourteenth, and Eighth

Amendments to the United States Constitution.

B. The Court Abused Its Discretion In Admitting The Hearsay Testimony.

The identification of appellant was admitted under the spontaneous statement exception to the hearsay rule. (Evid. Code, § 1240.) The theory of the spontaneous statement exception to the hearsay rule is that since the statement is made spontaneously, while under the stress of excitement and with no opportunity to contrive or reflect, it is *particularly* likely to be truthful. As explained by Wigmore, this type of out-of-court statement, because of its "superior" trustworthiness, is "better than is likely to be obtained from the same person upon the stand." (6 Wigmore, Evidence (Chadbourn ed.1976) § 1748, p. 199; see also *People v. Brust* (1957) 47 Cal.2d 776, 785; *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1392-1393.)

To qualify for admission under the spontaneous statement exception to the hearsay rule, an utterance must first purport to describe or explain an act or condition perceived by the declarant. (Evid. Code, § 1240, subd. (a).) Secondly, the statement must be made spontaneously, while the declarant is under the stress of excitement caused by the perception. (*Id.*,

subd. (b); *People v. Farmer* (1989) 47 Cal.3d 888, 901, disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) For purposes of the exception, a statement may qualify as spontaneous if it is undertaken *without* deliberation or reflection. (*People v. Farmer, supra,* 47 Cal.3d at p. 903.) Responses to questioning are likely to lack spontaneity, although an answer to a simple inquiry may be spontaneous. (*Id.* at p. 904.) The trial court must consider each fact pattern on its own merits and is vested with reasonable discretion in the matter. (*Id.* at p. 904; see *People v. Morrison* (2004) 34 Cal.4th 698, 718-719.)

"The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance-how long it was made after the startling incident and whether the speaker blurted it out, for example-may be important, but solely as an indicator of the mental state of the declarant. The fact that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation, but it does not ipso facto deprive the statement of spontaneity." (*People v. Farmer, supra,* 47 Cal.3d at pp. 903-904.)

McGowan's identification of appellant to Deputies Woods and Calzada was not spontaneous. McGowan's identification of appellant was made in response to questioning, after the incident occurred. (RT 25:7338.) Deputy Woods was the first to become aware of the incident; he called Deputy Calzada for assistance. Woods was stationed over 100 feet from McGowan when he first heard the yelling. (RT 25:7347.) McGowan walked towards Woods's station as Woods called Calzada for assistance. When Calzada arrived, he asked McGowan what had happened. (RT 25:7339.) McGowan said his throat had been cut. (RT 25:7339.) Calzada asked who did it; McGowan said "cell nineteen, Thomas." (RT 25:7340-41.) McGowan did not "spontaneously" identify appellant. He identified appellant in response to questioning that occurred not in the heat of the moment, but well after the event. He had ample time to decide it would be unwise to identify the person who just attacked him, and instead to cast blame elsewhere.

Thus, the court erred in admitting the hearsay.

C. The Admission Of Hearsay Testimony Violated Due Process And The Confrontation Clause.

In all criminal prosecution, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments, "to be confronted with the witnesses against him . . .." (U.S. Const., Amend. 6; *Pointer v. Texas* (1965) 380 U.S. 400.) The Confrontation Clause ensures "the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845.) In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court held that all out-of-court statements that are "testimonial" in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. In *Crawford*, the Court held that a wife's out-of-court statement to an officer during interrogation about a knife fight, in which the wife and her husband were suspects, could not be used against the husband at his trial for attempted murder. (*Crawford v. Washington, supra*, 541 U.S. at p. 68.) The Court declined to give a comprehensive definition of "testimonial," but noted that "it applie[d], at a minimum, to prior testimony at a preliminary hearing,

before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*)

More recently, the Court held that statements made to a 9-1-1 operator concerning an ongoing emergency were not testimonial, because the purpose of the questioning was to assist with the emergency situation. (*Davis v. Washington* (2006) 547 U.S. ----, 126 S.Ct. 2266, 2277.) On the other hand, statements made during police questioning at the scene of a domestic violence incident that had just concluded were testimonial because the questioning was for investigative purposes, not to determine " 'what is happening,' but rather 'what happened.' " (*Id.* at p. 2278.) *Davis* held: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at pp. 2273-2274.)

McGowan's identification was a testimonial statement under these standards. The statement was made in response to police questioning.

The jail guard were not seeking to obtain information to address an on-going emergency (as in the case of a call to a 911 operator) but were gathering evidence to determine who assaulted McGowan. Whoever attacked McGowan was locked in a cell and not a threat to leave or attack others. The court erred in admitting this evidence.

D. The Erroneous Admission Of The Hearsay, And The Denial of Appellant's Right To Confront The Evidence, Is Prejudicial And Requires Reversal.

Federal constitutional error is reviewed under the *Chapman* test, which requires the People to prove beyond a reasonable doubt that any error was harmless. (*Chapman v. California* (1965) 386 U.S. 18, 24.) Under *Chapman*, " '[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" (*Chapman v. California, supra,* 386 U.S. at p. 23, quoting *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Hearsay evidence is weak and unreliable when it forecloses effective cross-examination. McGowan's hearsay identification of appellant as his attacker was offered to prove the truth of that statement, yet there is no evidence that McGowan actually saw appellant strike him. The jailers who questioned McGowan did not ask him if he saw appellant strike him. Neither of the jail officers saw the attack; they only heard the yelling after the attack occurred. McGowan's belief that appellant struck him may have been based on hunch that appellant struck him because appellant was near him at the time, or it may have been based on appellant's yelling out after the assault, or it may have been based on the prior relationship between appellant and McGowan. There is no way of knowing for certain because defense counsel was unable to cross-examine McGowan.

To be sure, other evidence was admitted to persuade the jury that appellant attacked McGowan. One of the guards claimed he saw appellant holding a toothbrush handle after the attack, and those are sometimes used to fashion weapons. (RT 24:7323.) However, no weapon was found in appellant's cell. (RT 24:7328.) A correctional counselor interviewed appellant months later about the alleged assault. (RT 25:7357.) He wrote

in his report (also hearsay) that appellant "reluctantly verified" the assault. (RT 25:7360.) However, he could not say that appellant actually admitted attacking McGowan. (RT 25:7370.) Finally, appellant supposedly told a newspaper reporter in an interview during the penalty phase that he assaulted McGowan. (RT 25:7425.) However, appellant also told the reporter that he wanted the death penalty. (RT 24:7135.) He told the prosecutor's investigator the same. (RT 24:7060.) Given appellant's desire to be executed, his confession to a crime that will make that more likely is less than reliable.

To avoid repeating what has been presented earlier with respect to other claims, it suffices to say that this was a close case. The defense presented a compelling and credible mitigation case. The McGowan hearsay went to a significant issue. The prosecutor argued in closing that the death penalty was necessary because appellant was a threat to others if he was sent to prison for life. (RT 29:8572.) The prosecutor's reliance on this evidence in closing demonstrates the prejudice flowing form its erroneous admission. (*People v. Woodard* (1979) 23 Cal.3d 329, 341.)

Under these circumstances, it cannot be said that the death penalty verdict was "surely unattributable" to the erroneous admission of the

McGowan hearsay. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279.)

XVI. The Court Erred In Admitting The Testimony Of Correctional Officer Franks; The Error Violated Appellant's Rights Under The Fifth, Sixth, Eighth, And Fourteenth Amendments.

A. The Relevant Facts.

The prosecution called Sergeant Gerald Franks, of the California Department of Corrections, to testify to conversations he had with Vincent McGowan and appellant in May 1986. (RT 22:7352.) Beforehand, a hearing was held outside the presence of the jury to determine the admissibility of Franks's testimony. (RT 24:7283.)

At that hearing, Franks testified he was working as a correctional counselor in May 1986. He wrote a report of his interviews with McGowan and appellant but he had no memory of speaking to either man. (RT 24:7284.) Generally, he wrote his reports within 30 minutes of the interview, when the events were still fresh in his mind. (RT 24:7284.)

The report (Ex. 66), indicates that his interview of McGowan was part of the initial processing of the inmate soon after the inmate was received at the Department of Correction from county jail. (RT 24:7285.) One of the areas covered in the initial processing of inmates was whether they had enemies in the prison system. (RT 24:7285.) McGowan told

him that appellant was an enemy; he said appellant had cut him on the throat while both were in Los Angeles County Jail. (RT 24:7286.)

According to his report, Parks then summoned appellant to his office for questioning. (RT 24:7288.) Appellant may have walked unescorted to the office. Once there, he was not restrained or shackled. (RT 24:7289.) Franks did not give appellant the *Miranda* warnings before questioning him. (RT 24:7289.) The report states that appellant "somewhat reluctantly verified" McGowan's claim that appellant had assaulted him in jail. (RT 24:7290.) Franks had no recollection of exactly what appellant said or why he wrote that appellant "somewhat reluctantly verified" the allegation. (RT 24:7291.)

Defense counsel objected to Franks's testimony. First, counsel objected that the McGowan statement (that appellant assaulted him) was double hearsay. The defense acknowledged that the statements in the written report were offered as a writing previously made by the witness under Evidence Code section 1237, but objected that McGowan's statement to Franks was hearsay for which there was no exception. (RT 24:7300-RT 25:7301.)

Second, the defense objected that appellant's statement to Franks was ambiguous in that it was uncertain what appellant was supposedly verifying. Moreover, neither appellant's silence nor his words could be used against him because Officer Franks did not advise appellant under *Miranda* of his right to remain silent and to the assistance of counsel. (RT 25:7306.)

The prosecution argued that even if appellant said nothing, his failure to deny the assault on McGowan was an adoptive admission. (RT 25:7302.) The court ruled that McGowan's statements could not be admitted for the truth of the matter asserted. (RT 25:7359.) As to appellant's alleged admission, the court found that *Miranda* did not apply because appellant was not interrogated for "prosecutorial reasons." (RT 25:7306.) The court allowed Franks to testify. (RT 25:7351.)

Franks testified that he received information that appellant was possibly an enemy of McGowan's. (RT 25:7356.) Again admitting that he had no memory of his interviews with appellant and McGowan, Franks simply repeated what was in his written report. (RT 25:7356.) According to the report, Franks told appellant that McGowan claimed that appellant had "slashed his throat." (RT 25:7358.) Franks's statement from the

report that appellant "somewhat reluctantly verified" this allegation was then read to the jury. (RT 25:7360.) Franks testified that if appellant had denied the allegation, he would have put that in the report. (RT 25:7361.)

Franks suggested that appellant's response was somewhere between silence and an outright admission. (RT 25:7370.) Had appellant admitted the crime, Franks would have quoted the admission, so he was confident that appellant neither expressly admitted nor expressly denied the assault. (RT 25:7370.)

B. Appellant Was In Custody And *Miranda* Warnings Were Required.

In *Miranda v. Arizona, supra,* 384 U.S. 436, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Id.*, at p. 444.) Consistent with the need for a bright-line rule, the Court adopted a straightforward definition of "custodial interrogation": "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Ibid.*) In this case,

appellant challenged the admission of statements he made in response to direct questioning by a prison official about an assault upon another inmate. Notwithstanding *Miranda* 's clear language, the court below held that no compliance with *Miranda* was necessary.

In *Mathis v. United States* (1968) 391 U.S. 1 the Court held that a defendant serving a prison sentence for one crime was in custody when he was interrogated about another, unrelated crime. (*Id.* at pp. 4-5.) *Illinois v. Perkins* (1990) 496 U.S. 292 seemingly left open the question whether "the bare fact of custody [would] in every instance require a warning even when the suspect is aware that he is speaking to an official." (*id.* at p. 299.) In *People v. Roldan* (2005) 35 Cal.4th 646, this Court declined to address the issue but noted in passing that "[s]ome additional restraint, over and above mere incarceration, is required before an interrogation is custodial for *Miranda* purposes." (*Id.* at p. 736, fn.41.)

In *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, the Ninth Circuit held that *Miranda* warnings were not necessarily required for an accused who was already in custody before the interrogation began. There, the inmate was involved in a recent fight in the facility and was taken to the library for questioning. He left his property outside the library

as directed, and when the property was searched, the officers found contraband. The inmate stated, "That's grass, man." (*Id* at p. 427.) He objected to the admission of his statement on *Miranda* grounds, but the court rejected his argument, holding that he was not in custody for *Miranda* purposes. The Court held that to determine if *Miranda* warnings were required, the trial court must consider the circumstances, including "the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him" to determine whether a reasonable person "would believe there had been a restriction of his freedom over and above that in his normal prisoner setting." (*Id.* at p. 428; but see *United States v. Cadmus* (S.D.N.Y. 1985) 614 F.Supp. 367, 370 (disagreeing with *Cervantes* and holding that custody requires *Miranda* warnings).)

The California Court of Appeal has followed the *Cervantes* analysis in two cases, *People v. Fradiue* (2000) 80 Cal.App.4th 15 and *People v. Macklem* (2007) 149 Cal.App.4th 674. In *Fradiue*, the inmate was questioned by a prison officer who was investigating contraband in the prison. The officer spoke to the inmate at the inmate's cell, through a slot

in his cell door. The inmates later efforts to suppress his statements under *Miranda* were rejected. The Court of Appeal held the inmate was not in custody for *Miranda* purposes because "no restraints were placed upon defendant to coerce him into participating in the interrogation over and above those normally associated with his inmate status." (*Id.* at p. 21.)

In *Macklem*, an investigator looking into a recent jailhouse incident summoned the inmate to an office for an interview. The inmate was told that he was not required to cooperate. The inmate was lead to the office in handcuffs but the handcuffs were removed during the interview. There was no clear evidence that the inmate was confronted with evidence of guilt and he was aware that he was free to leave at any time. (*Id.* at pp. 695-696.)

A fair reading of *Miranda* and *Mathis* leads to the conclusion that an individual who is incarcerated or confined to any jail-like setting is in custody and must be advised of his *Miranda* rights before any interrogation can take place.

Moreover, even under the *Cervantes* framework, appellant here was restrained over and above the mere fact of incarceration such that his

interrogation by Sergeant Franks was custodial for *Miranda* purposes. First, appellant was not informed that his cooperation was voluntary. Second, appellant was not interviewed in his cell, but was summoned to a separate office. Third, appellant was confronted with evidence (McGowan's statement) that appellant had committed a crime. Fourth, appellant was not offered an opportunity to end the interrogation. Under the totality of the circumstances, the atmosphere in which the interrogation took place was coercive, and *Miranda* warnings were required.

C. The Public Safety Exception To *Miranda* Does Not Apply.

The trial court ruled that no *Miranda* warnings were required because appellant was not interrogated for "prosecutorial reasons." (RT 25:7306.) However, the subjective views of the police officers are not relevant to the determination of whether a custodial interrogation has taken place. (*Stansbury v. California* (1994) 511 U.S. 318, 323.) An interrogation is either express questioning or other police actions that are reasonably likely to elicit an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.) Under this test, the questioning of appellant was an "interrogation." He was confronted with evidence of guilt and asked to confirm or deny it.

It might be argued that the questioning falls under the rescue or public safety exception to the *Miranda* requirement. "Under some narrow circumstances, sometimes called the 'public safety' or 'rescue' exceptions, compliance with *Miranda* is excused where the purpose of police questioning is to protect life or avoid serious injury and the statement is otherwise voluntary." (*People v. Panah* (2005) 35 Cal.4th 395, 471.) In *New York v. Quarles* (1984) 467 U.S. 649, the United States Supreme Court ruled that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." (*Id.* at p. 657.) Thus, compliance with *Miranda* may be excused where exigent circumstances exist "in that the need for action was urgent, the possibility of saving human life was present, and the primary motive for police questioning was rescue." (*People v. Riddle* (1978) 83 Cal.App.3d 563, 579.)

Here, no "exigent" circumstances outweighed appellant's Fifth Amendment rights. This was not a case where the police needed information immediately in order to address an immediate emergency. The possibility that appellant would attack McGowan was not only

speculative, but it could have been addressed simply by keeping the two apart. There was no urgent need to verify McGowan's allegations by interrogating appellant outside of *Miranda*.

Thus, the court erred in failing to suppress appellant's statements.

D. Admission Of The Statement Was Prejudicial Error.

Federal constitutional error is reviewed under the *Chapman* test, which requires the People to prove beyond a reasonable doubt that any error was harmless. (*Chapman v. California, supra,* 386 U.S. 18, 24.) Under *Chapman*, " '[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" (*Chapman v. California, supra,* 386 U.S. at p. 23 [citation omitted].) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279.)

Appellant's improperly admitted confession was offered to corroborate the hearsay evidence that appellant assaulted McGowan in jail.

As noted above, McGowan's hearsay identification of appellant was also inadmissible, and was speculative evidence as well.

To avoid repeating what has been presented earlier with respect to other claims, it suffices to say that this was a close case. The defense presented a compelling and credible mitigation case. The McGowan assault was a significant issue regarding the potential for future dangerousness. The prosecutor argued in closing that the death penalty was necessary because appellant was a threat to others if he was sent to prison for life. (RT 29:8572.) The prosecutor's reliance on this evidence in closing demonstrates the prejudice flowing form its erroneous admission. (*People v. Woodard, supra,* 23 Cal.3d 329, 341.)

Under these circumstances, it cannot be said that the death penalty verdict was "surely unattributable" to the erroneous admission of the McGowan hearsay. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279.)

XVII. The Court Erred In Instructing the Jury On Mitigating Factors Not Supported By The Evidence.

A. The Court Violated Appellant's Rights To Due Process And To A Reliable Penalty Determination By Instructing The Jury On Mitigating Factors Unsupported By Evidence.

The trial court instructed the jury under CALJIC No. 8.85 (2000 Revision) as to all aggravating and mitigating factors listed in Penal Code section 190.3, subdivisions (a) through (k). Four of these mitigating factors were not supported by the evidence in appellant's case:

Factor (e): Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

Factor (f): Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

Factor (g): Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

Factor (j): Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

A jury should not be instructed on principles of law that are not supported by the evidence presented at trial. (See, e.g., *People v. Williams* (1992) 4 Cal.4th 354, 361 (defendant not entitled to consent instruction absent evidence); *People v. Hannon* (1977) 19 Cal.3d 588, 597.) An exception to this general rule has arisen in capital cases, where the jury is routinely instructed on mitigating factors that have nothing to do with the case. This Court has upheld this practice. (*People v. Ghent* (1987) 43 Cal.3d 739, 776-777.) The Court held there was no danger the jury would draw a negative inference from the fact that many of the listed mitigating factors did not apply because the jury is instructed that the absence of a mitigating factor cannot be considered to be an aggravating factor. (*Ibid.*; see CT 31:6245.)

Although it is presumed that jurors understand and follow jury instructions, there are practical limits to this maxim. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453.)[15] In this case, the

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[15] See *Bruton v. United States* (1968) 398 U.S. 123, 129 (instruction telling jury not to consider a co-defendant's confession that inculpates defendant

court gave the jury a list of mitigating factors. The prosecutor then went through the list and methodically checked off each of the four factors that did not apply. (RT 29:8577-79.) One plain inference that the prosecutor asked the jury to draw from his argument was that the law provides many reasons for not imposing the death penalty but very few of those reasons apply in this case and thus a sentence of life without parole was not appropriate.

The problem is not cured by the admonition that the absence of mitigation is not aggravation. First, the admonition (which reads like a proverb) is too vague to be widely understood. Second, even if each juror understood it in the proper sense, the jury still hears the list of mitigating factors that do not apply and is left with the inescapable sense that the appellant has failed to satisfy many (or most) of the legal requirements for a sentence of life without parole.

The inclusion of these inapplicable factors in the list of aggravating and mitigating factors violates the defendant's federal constitutional right to due process and to a reliable and fair sentencing process under the

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is insufficient to eliminate prejudice to defendant). See also *People v. Aranda* (1965) 63 Cal.2d 518, 528 (same).

Eighth and Fourteenth Amendments. Instructing the jury on inapplicable mitigating factors is error because those extraneous instructions inject irrelevant information into the jury's deliberations. Only relevant factors may be considered in making the capital sentencing decision; and the state is only permitted to use in aggravation those statutory factors that have been designated aggravating. (*People v. Boyd, supra,* 38 Cal.3d 762.) This danger is heightened because the instructions do not explicitly designate which factors are mitigating and which are aggravating, permitting jurors improperly to assign aggravating weight to a factor that can only be considered as mitigation, or to conclude that the crime is particularly aggravated because proof of some factor in mitigation has not been proved. (See *People v. Davenport* (1985) 41 Cal.3d 247, 289-290.)

Finally, the failure to delete unsupported factors leaves the jury to decide which factors were relevant and applicable to appellant's case, thus creating the possibility that the jury rejected relevant mitigating evidence because it thought that it was somehow inapplicable to appellant's case. Such a risk violates his rights under the Eighth Amendment. (*Boyde v. California* (1986) 494 U.S. 370, 380 [instructions which create the reasonable likelihood that the jury was prevented from giving mitigating

effect to relevant evidence violate the Eighth Amendment].)

Empirical research undercuts the argument that deleting inapplicable factors is unnecessary because jurors fully understand the penalty phase instructions and follow them expertly. This research demonstrates a critical misunderstanding by large numbers of jurors as to basic constitutional concepts underlying capital sentencing. (See Haney & Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 423-424, 428-429.)

Another study of California jurors who had actually served in capital cases found that many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it fit in with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating. (Haney, et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 (no. 2) J. of Social Issues 149, 167-168.)

In summary, the failure to delete inapplicable factors deprived appellant of his rights to an individualized sentencing determination based on permissible factors relating to him and the crime. In addition, this error, by artificially inflating the factors on death's side of the scale, violated the Fifth, Sixth, Eighth and Fourteenth Amendments' requirement of heightened reliability in the death determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama* (1980) 447 U.S. 625, 637.)

B. There Is A Reasonable Possibility The Error Affected The Verdict.

As noted above, state law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson, supra,* 13 Cal.4th 1164, 1232; *People v. Brown, supra,* 46 Cal.3d 432, 447.) The state reasonable-possibility standard is the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California, supra,* 386 U.S. 18, 24. (*People v. Ochoa, supra,* 19 Cal.4th 353, 479.)

Thus, the standard of prejudice is the same whether the error is one of state law only, or one of federal scope dimension. (See *Boyde v.*

California, supra, 494 U.S. 370, 380 [instructions which create the reasonable likelihood that the jury was prevented from giving mitigating effect to relevant evidence violate the Eighth Amendment].)

It is reasonably likely that the instruction confused and misled the jury. The listing of a number of mitigating requirements that the appellant has not "met" unavoidably leads a juror to conclude that appellant's case for mitigation does not measure up to the standards for life in prison set by law. Again, given the closeness of the case, as evidenced by the strong mitigating presented and the length of the deliberations, it is reasonably likely that this error affected the death verdict. Reversal is required.

XVIII. California's Death Penalty Statute, As Interpreted By This Court And Applied At Appellant's Trial, Violates The United States Constitution.

A. Summary Of Argument.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

The Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) ___ U.S. ___, 126 S.Ct. 2516, 2527, fn. 6; see also, *Pulley v. Harris* (1984) 465

U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).)

Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, the absence of a particular procedural safeguard, while perhaps not constitutionally fatal in the context of other sentencing schemes, may render California's scheme unconstitutional because it is a safeguard that might otherwise have made California's scheme reliable.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first

degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section essentially makes almost every murderer eligible for the death penalty.

No safeguards in the penalty phase enhance the reliability of the outcome. Jurors make critical factual findings without applying a burden of proof and without agreeing unanimously. Paradoxically, the principle that "death is different" has been stood on its head: protections taken for granted for lesser criminal offenses are suspended when the question is a finding that supports the death penalty. The result is a "wanton and freakish" system that randomly chooses imposes the death penalty upon a few defendants from among the thousands of murderers in California

B. Penal Code § 190.2 Is Impermissibly Broad.

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and

objective criteria, the class of murderers eligible for the death penalty. The requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

However, in California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) The reach of section 190.2 has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now makes almost every murderer eligible for death.

This Court should review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing

international law.

C. Penal Code § 190.3(a) As Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10), or having had a "hatred of religion" (*People v.*

Nicolaus (1991) 54 Cal.3d 551, 581-582), or threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204), or disposed of the victim's body in a manner that precluded its recovery (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35). It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

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

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every

homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

D. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

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

fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000)

530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *Cunningham v. California* (2007) 549 U.S. ___ [2007 WL 135687]. The question is whether the jury must make a factual finding in order to impose the greater punishment of death. If so, then the *Apprendi* principle applies. Because the jury must find at least aggravating factor to be true before it can impose the death penalty, the right to a jury trial and to proof beyond a reasonable doubt applies.

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice

between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant

'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v.*

Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are

essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of fact-finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.* In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id., pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.)

In the wake of *Cunningham*, it is clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole

relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

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

This holding is simply wrong. As section 190, subd. (a) indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places

on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it: "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151." (*Ring*, 530 U.S. at p. 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be

applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither life without parole nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id*., 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and

Cunningham, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite fact-finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to

dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden

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of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than

human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself.

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in

a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' " (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be

impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.) The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421) the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's

finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative

proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*"

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

The greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal

penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

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

The inclusion in the list of potential mitigating factors of such

adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

6. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the

basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887.) The Court has stated that " 'no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.' " (*People v. Morrison* (2004) 34 Cal.4th 698, 730, quoting *People v. Arias, supra,* 13 Cal.4th at p. 188.)

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

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*,

supra, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant

treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

This Court has analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws. (*Bush v. Gore* (2000) 531 U.S. 98.) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United*

Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The non-use of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S.

[11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country

inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes.") Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments.

XIX. The Admission Of Victim-Impact Testimony Violated Appellant's Rights To Due Process And To A Reliable Penalty Determination Under The Fifth, Eighth And Fourteenth Amendments.

Before trial, the defense filed a written objection to the admission of the testimony of friends of the victim as victim-impact testimony. (CT 29:3834; RT 23:6748.) The court overruled the objection. (RT 23:6879.) At trial, the prosecutor presented two victim-impact witnesses, Michelle Montoya's mother, and a friend, Darcie Purcell, who attended high school with Ms. Montoya. (RT 26:7697.) Purcell and Montoya became close beginning in November of their senior year in high school. (RT 26:7697.) They shopped together, played powder puff football, went for coffee, talked on the phone, and generally kept each other's company. (RT 26:7698.) She spent nights at Michelle's house. She felt she was part of their family. (RT 26:7698.) Michelle and her mother were very close. (RT 26:7698.)

Purcell said Michelle was"very, very beautiful, outgoing . . . Everybody's friend [sic]." (RT 26:7699.) "Teachers loved her, friends loved her." (RT 26:7699.) She worked two jobs to help her family. (RT 26:7699.) She was involved with the peer counseling program at her high school, where she helped resolve conflicts between students. (RT 26:7701.) Purcell and Michelle had planned to go to a party the night she was killed.

Purcell went to the high school to look for her and found out that she had been killed. (RT 26:7705.)

Purcell described a memorial the high school had erected for Michelle on the school grounds. (RT 26:7706.) She said the entire school was affected by the homicide, and that as of the time of trial, three years later, reporters were still asking students how the homicide affected them. (RT 26:7706.)

The admission of this victim-impact testimony violated appellant's right to due process and a reliable penalty phase decision under the Fifth, Fourteenth and Eighth Amendments and requires reversal. This Court has ratified the admission of a similar sort of victim-impact testimony in prior cases. (See. e.g., *People v. Edwards* (1991) 54 Cal.3d 787, 835 (allowing victim-impact evidence as circumstance of the crime under factor (a) of Pen. Code, § 190.3); *People v. Brown* (2003) 31 Cal.4th 518, 573 (victim-impact testimony not limited to blood relatives); *People v. Marks* (2003) 31 Cal.4th 197, 235 (same).) Appellant raises the issue here to exhaust it for purposes of federal review.

The testimony was improperly admitted for several reasons. First, the

testimony of a non-family member who was not present at the time of the crime goes beyond the sort of victim-impact testimony permitted by the United States Supreme Court in *Payne v. Tennessee* (1991) 501 U.S. 808, 827.) In *Payne,* a mother and her three-year-old daughter were killed with a knife in the presence of the mother's two-year-old son, who survived injuries suffered in the attack. The prosecution presented the testimony of the boy's grandmother that he missed his mother and sister, and argued, among other things, that he will never have his "mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing a lullaby." (501 U.S. at p. 816.) The Court held there was no Eighth Amendment bar to such testimony and argument. (501 U.S. at p. 827.)

However, the Court warned there are limits to victim impact evidence. The court held it would violate due process to introduce victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (501 U.S. at p. 825.) *Payne* is further limited by its facts. There, the evidence described the impact of a crime on a family member who was personally present during, and immediately affected by, the homicides. The testimony of Darcie Purcell went beyond this.

Second, in California the admission of victim-impact testimony is permitted only to the extent it is related to the "circumstances of the crime" under factor (a) of Penal Code section 190.3. (*People v. Edwards, supra,* 54 Cal.3d 787, 835-836.) However, the "circumstances of the crime" should be understood "to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." (*People v. Fierro* (1991) 1 Cal.4th 173, 264 (conc. and dis. opn. Kennard, J.).) Although *Payne* held that the Eighth Amendment does not render victim-impact evidence inadmissible *per se*, the Court did not retreat from its holding in *South Carolina v. Gathers* (1989) 490 U.S. 805 that the term "circumstances of the crime" does not include personal characteristics of the victim that were unknown to the defendant at the time of the crime. (*Id.* at pp. 811-812.) Here, the testimony regarding Ms. Montoya's personal characteristics, including her relationship to her mother, friends, and teachers, her employment outside the home to help her family, and her outgoing personality, were all facts that were unknown to appellant at the time of the crime.

Third, the lack of any express statutory authorization for the

admission of victim-impact evidence, or a description of the types and limits of admissible evidence, raises federal constitutional concerns about the vagueness and the arbitrary application of Penal Code section 190.3. The "circumstances of the crime" aggravating factor has been held to be not unconstitutionally vague or over broad, but judicial interpretations that permit this broad language to include victim-impact evidence raise serious questions about the continued constitutionality of factor (a) of Penal Code section 190.3. (See *People v. Boyette* (2002) 29 Cal.4th 381, 443 (allowing victim-impact evidence under § 190.3 does not make factor (a) unconstitutionally vague).)

The error is reversible. The erroneous admission of prejudicial or inflammatory victim-impact evidence is the sort of evidentiary error that rises to the level of an Eighth Amendment and due process violation. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825; *Estelle v. McGuire, supra,* 502 U.S. 62, 75 (Due Process Clause is violated when evidentiary error "infuse[s] the trial with unfairness as to deny due process of law").) As previously noted and argued in this brief, the penalty phase case was extremely close. The jury deliberations were lengthy and there was substantial mitigation evidence presented. Victim-impact evidence is

especially emotional and evocative, and the erroneous admission of such testimony in a close case cannot be deemed harmless.

XX. The Death Penalty Is Cruel and Unusual Punishment Proscribed by the Eighth Amendment.

Appellant urges the Court to re-evaluate the constitutionality of the death penalty under the Eighth Amendment to the United States Constitution and its counterpart under the California Constitution and hold that the infliction of the death penalty is cruel and unusual punishment in all cases. (See *Gregg v. Georgia* (1975) 428 U.S. 153, 227-231 (dissenting opinion of Brennan, J.), & 231-241 (dissenting opinion of Marshall, J.).)

XXI. Cumulative Error Rendered the Trial Fundamentally Unfair and Violated Defendant's Right to Due Process under the Fourteenth Amendment and to a Reliable Penalty Trial under the Eighth Amendment to the United States Constitution.

A. The Cumulative Impact Of The Errors Deprived Appellant Of A Fair Trial Under The Due Process Clause.

The cumulative effect of several errors described above created a trial that was fundamentally unfair and denied defendant the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

B. The Cumulative Effect Of The Errors Made The Death Verdict Unreliable Under The Eighth Amendment.

Separate and apart from the Due Process grounds discussed above, a new penalty phase is compelled by the Eighth Amendment. The United States Supreme Court has recognized the death penalty is a qualitatively different punishment than any other. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 638, n.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. (See, e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama, supra*, 447 U.S. at p. 638,

n.13.)

Procedures which interfere with the presentation and consideration of reliable information undercut this heightened need for reliability and therefore violate the Eighth Amendment. (See, e.g., *Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Gardner v. Florida* (1977) 430 U.S. 349, 362; *Lockett v. Ohio* (1978) 438 U.S. 586.) This is so even when those same procedures do not violate the Due Process clause. (See, e.g., *Beck v. Alabama, supra*, 447 U.S. at p. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]; *Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Court distinguishes between the protections of the due process clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."].)

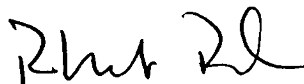
Here, even if errors described above did not, alone or in combination, violate the Due Process Clause, they certainly violate the "heightened need for reliability" in capital cases. Reversal of the death penalty is required.

Conclusion

For the reasons stated above, the judgment must be reversed.

Date: March 31, 2008

Respectfully submitted,



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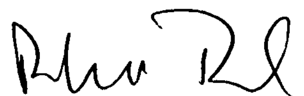
Word Count Certificate

I certify there are 54,779 words in this appellant's opening brief, and the brief complies with the word-number limit set forth in rule 8.630.



Robert Derham

CERTIFICATE OF SERVICE

I, Robert Derham, am over 18 years of age. My business address is 1010 B Street, Suite 217, San Rafael, CA 94901. I am over 18 years of age; I am not a party to this action. On April 4, 2008, I served the **Appellant's Opening Brief** upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Rafael, CA, in a sealed envelope, postage prepaid, and addressed as follows:

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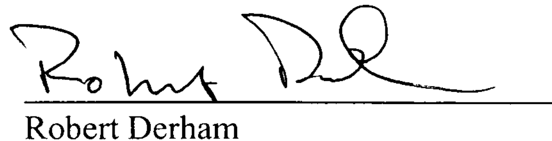
I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2008, in San Rafael, California.



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