IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. KENNETH RAY BIVERT Defendant and Appellant	S099414

Monterey County Superior Court No. SS991410
The Honorable Wendy C. Duffy, Judge

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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STATEMENT OF APPEALABILITY

This appeal is an automatic appeal following a judgment of death pursuant to Penal Code section 1249, subdivision (a).

INTRODUCTION

When appellant Kenneth Ray Bivert was 17 years old, he participated in three murders in two separate incidents in Yolo County. Because appellant was a juvenile at the time of the offenses, the prosecution could not legally seek the death penalty. (Pen. Code, § 190.5, subd. (a).) Appellant entered pleas of guilty to three counts of first degree murder and was sentenced to state prison for a term of 52 years 8 months to life.

While an inmate in Salinas Valley State Prison in Monterey County, appellant was accused of killing inmate Leonard Swartz – a murder allegedly committed because Swartz was a child molester. The Monterey County District Attorney sought the death penalty against appellant.

In any penalty phase, the most important factor in aggravation would be appellant's three prior convictions for murder while the most important factor in mitigation would be the fact that appellant killed Swartz because Swartz was a child molester. During the voir dire proceedings, the prosecution was able to ask each prospective juror how he or she felt about the prospect of imposing the death penalty for a person who committed the murder of a child molester. However, because the trial court denied a defense motion for a separate jury for any penalty phase, appellant's trial counsel could not ask prospective jurors how they might view the appropriateness of the death penalty for a prison inmate who had been previously convicted of three counts of murder when he was a juvenile, as such questions would obviously have prejudiced appellant in the guilt phase of the trial.

Both sides exercised all their peremptory challenges of prospective jurors. The trial court erroneously granted the prosecution's challenge for cause of a prospective juror who believed the death penalty was "probably" not appropriate for a person who killed a child molester.

The trial court also erroneously denied a defense motion to excuse a prospective juror for cause because of his beliefs concerning the death penalty.

In the guilt phase of the trial, the prosecution presented, over defense objection, evidence that appellant was a White supremacist. Appellant is White, as was Swartz. The evidence of racist beliefs on appellant's part was irrelevant and the court's allowing the prosecution to introduce such inflammatory evidence resulted in a prejudicial violation of appellant's constitutional right to a fair trial.

In the penalty phase of the trial, the prosecution introduced evidence of the three prior murders. In light of the evidence concerning the three prior murders and the evidence that appellant was a racist, the jury returned a verdict of death in less than an hour and a half. The introduction of the evidence of the prior murders in the penalty phase violated appellant's constitutional rights because the evidence resulted in appellant being sentenced to death principally for crimes he committed when he was a juvenile, which is contrary to the United States Supreme Court decision in *Roper v. Simmons* (2005) 543 U.S. 551, 572-578 [161 L.Ed.2d 1].

Because of the above errors, this court should reverse both the judgment of death and the underlying conviction for murder.

STATEMENT OF FACTS

GUILT PHASE OF THE TRIAL

Prosecution's Case

The Assault On Rick Dixon

In November of 1996, Rick Dixon was an inmate at Salinas Valley State Prison in Monterey County. (47 RT 9221-9222.) Dixon had served seven and a half years of a fourteen-year prison term. (47 RT 9223.) Dixon had also served time in prison on other prior occasions. (47 RT 9222-9223.) Dixon's felony convictions included seven counts of receiving stolen property, forgery, grand theft person, burglary, two counts of robbery, assault with a deadly weapon on a peace officer with a vehicle, and two counts of escape. (47 RT 9222-9224.) At the time of his testimony, Dixon was on parole. (47 RT 9223, 9241, 9246.)

Appellant, who was also a prison inmate at Salinas Valley State Prison, was housed with Dixon in building B2. (47 RT 9224-9225.) In November of 1996, appellant, while in the building day room, told Dixon there was a "piece of shit" housed in cell 217 that he wanted Dixon to "deal with," or stab. (47 RT 9925, 9227, 9254.) Appellant said it was Dixon's time to "earn [his] bones" and show that he was part of the group of the "woods," or White inmates. (47 RT 9226, 9254.) Dixon considered appellant to be in charge of the White inmates in building B2. (47 RT

9229.) In prison, there is a code that results in each race being responsible for dealing with its own "rats" and pedophiles. (47 RT 9232.) The inmate in cell 217, who was named "Dennis," was a child molester. (47 RT 9227.) No one else heard appellant make this proposal to Dixon. (47 RT 9254.)

Dixon did not want to get involved in appellant's proposal because his release date from prison was pending. (47 RT 9227.) According to Dixon, a few days after the proposal, appellant told Dixon that "something" (which was never defined) would happen to him if he did not stab the child molester. (47 RT 9254-9455.) Dixon, being aware that, in the past, similar requests to attack another inmate had been made by other inmates and that nothing had happened when those requests were refused, did not take appellant's proposal seriously and thought he was bluffing. (47 RT 9230, 9255.)

On November 23, 1996, Dixon, who had been out in the prison yard, returned to building B2 around 4:30 p.m. (47 RT 9235.) At that time, the two correctional "floor officers" for that building, Rolando Gonzales and Nicholas Griewank, went outside to check inmates who were returning to the building for contraband. (47 RT 9030, 9052.) Upon entering the building, Dixon used a urinal attached to a wall in the day room. (47 RT 9235-9236.)

As Dixon started to walk away from the urinal, inmate Steve

area of Dixon's chest and scratches on both sides of his neck. (47 RT 9211, 9214-9215.) After being taken for a short period of time to a hospital outside of the prison, Dixon was transported to a hospital within the prison, where he remained until November 27, 1996. (47 RT 9215, 9240.) Dixon was placed under observation, but he did not receive any other medical treatment for his scratches or puncture wounds. (47 RT 9216-9217.)

On the night of the stabbing, Dixon picked out appellant and Steve Petty from a photographic lineup. (47 RT 9245-9246, 9288-9289; 54 RT 10,618-10,619.) At that time, Dixon told prison officials that the motive for the stabbing was that his former cell mate had not paid a drug debt owed to inmates of other races – not because he had refused appellant's request to attack an inmate who was a child molester. (47 RT 9247-9250.) Before Dixon was stabbed, appellant had asked Dixon why his cell mate, who had bought drugs from inmates of other races and was then transferred out of the yard for the B building complex while still owing money for the drugs, had not been "dealt with" prior to leaving the yard. (47 RT 9230.)

More than two years after he had been stabbed, Dixon provided a new motive for the stabbing. (47 RT 9251-9252, 9271-9272.) In December of 1998, Dixon told Correctional Officer Andy Cariaga that he was stabbed due to his refusal to comply with appellant's request to stab an inmate who was a child molester, as opposed to a motive relating to a drug

debt owed by a White inmate to an inmate of another race. (47 RT 9251-9252, 9271-9272.) Dixon testified that he received no promises from the prosecution in exchange for his testimony and his prison sentence was not reduced. (47 RT 9224.)

Like Dixon and appellant, Inmate D[1] was housed in building B2 at Salinas Valley State Prison on the date Dixon was stabbed. (47 RT 9277.) He was serving a 32-year sentence for convictions of four counts of child molestation and one count of embezzlement. (47 RT 9276-9277.)

From his cell on the upper of the two tiers of cells, Inmate D could see the day room. (47 RT 9280-9281.) Inmate D testified that, on November 23, 1996, while he was in his cell, he saw appellant come up behind Rick Dixon and hold him while Steve Petty approached from the front and started stabbing him in the chest. (47 RT 9281-9282.) In contrast to Dixon's version of the events, Inmate D was certain Petty, not appellant, was the stabber. (47 RT 9282, 9285; 50 RT 9854-9855.) After the stabbing, Inmate D observed Petty run to the lower C section and throw something into the shower. (47 RT 9282-9283.)

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[1] At trial, inmate witnesses other than Dixon were identified only by an initial. However, during deliberations, the jury was given exhibits that contained the full names of all the inmate witnesses. (52 RT 10,225, 10,293-10,294; 56 RT 11,057-11,058; 64 RT 12,646; 65 RT 12,823.)

The Killing Of Leonard Swartz

A. Appellant's Pre-Offense Statements To Two Inmates About The Killing Of Swartz

1. The Statements To Inmate D

After Rick Dixon was stabbed, appellant was transferred out of the buildings in the B complex of the prison. (50 RT 9839-9840.) But a few months later, in February of 1997, Inmate D saw appellant back in the B complex yard. (50 RT 9840.) Inmate D asked appellant why he was back on the B yard so soon after the Dixon incident and whether he was going to be getting his job back. (50 RT 9841.) Appellant responded he was not going to be around too long because he was going to "hit" a child molester in building B1. (50 RT 9841.) Inmate D asked appellant if he was sure he wanted to do that in light of his just being allowed to return to the B yard. (50 RT 9841.) Appellant replied it was something he had to do as the other inmate needed to be "gutted." (50 RT 9841, 9854.)

Almost a year after Dixon was stabbed, Inmate D contacted the Santa Barbara County District Attorney's Office to tell them of the information he had regarding the stabbing of Dixon. (50 RT 9851-9852.) In turn, the Santa Barbara County District Attorney's Office passed on the information to the Monterey County District Attorney's Office. (50 RT 9852.) Denying there was any causal connection to any charges in Santa

Barbara against him and his coming forward with information about the stabbing, Inmate D testified he felt compelled to come forward with his information because he had seen too many attacks in prison. (50 RT 9847-9848, 9852.)

Because he was testifying against another inmate, Inmate D risked being stabbed himself and, as a result, he was assigned to a "soft" or "sensitive needs" yard. (47 RT 9286-9287; 50 RT 9847, 9849.) Inmate D had written the district attorney several times to complain about problems he was experiencing in prison. (47 RT 9286-9287; 50 RT 9852)

2. The Statements To Inmate C

In 1996, Inmate C was housed in building B1 at Salinas Valley State Prison. (50 RT 9862.) He was serving a 40-year sentence for six counts of robbery with firearm enhancements, assault with a firearm on a peace officer, assault with a deadly weapon, and stealing a car. (50 RT 9862.) He had also been convicted of three or four felonies in Florida. (50 RT 9885.)

Two or three times, including the morning of February 5, 1997, on which Swartz was stabbed, appellant told Inmate C that Swartz was a child molester who did not belong on the face of the earth. (50 RT 9863-9868.) Appellant said one of his missions in prison was to take care of

"scum" like Swartz. (50 RT 9866.) Appellant further stated it was the responsibility of the White race to "take care of" such people. (50 RT 9866.)

Appellant would tell young White inmates new to prison "what the white race is all about and what they should do." (50 RT 9876.) Appellant said that the White race had "gotten soft" over the years and, years ago, people like Swartz would have been "dealt with." (50 RT 9867.) Appellant said that one of his missions was to clean up all the "trash" and "scum" that White people "let slide." (51 RT 10,019.)

During the conversation on February 5, 1997, appellant told Inmate C that he was going to deal with the Swartz matter himself that day. (50 RT 9869.) Although Inmate C saw Swartz, who was his friend, after he had spoken to appellant and before Swartz was stabbed later that day, Inmate C did not warn Swartz about appellant's statements because he did not believe appellant would really attack Swartz. (50 RT 9865, 9874.)

During the time the B building complex was open, inmates can choose to go to the yard or to remain in the building. (50 RT 9872.) On the day Swartz was stabbed, Swartz remained in the building while Inmate C chose to go out to the yard. (50 RT 9872, 9874.) As he left, Inmate C observed appellant sweeping, even though appellant was not assigned to do sweeping duties in the building. (50 RT 9872-9873.) While Inmate C was

in the yard, Swartz was attacked. (50 RT 9868.) Inmate C did not see the attack on Swartz, but he did see him being carried out of the building on a stretcher. (50 RT 9868, 9883.)

Inmate C believed that appellant told only him and three others – inmate Steven Lesley and two other inmates named "Steve" and "Kenny" – about his plan to stab Swartz and, therefore, if someone informed on appellant, appellant would be able to find out the identity of the informant. (50 RT 9871-9872.) Inmate C believed it would have been dangerous to inform on appellant. (50 RT 9875-9876, 9881.) Inmate C testified he later came forward because his conscience was bothering him for not doing anything to stop Swartz's killing. (50 RT 9882.)

At the time of his first interview regarding this matter, Inmate C was under a doctor's care and took medication for anxiety and depression. (50 RT 9885-9886.) He was on this same medication at the time of his trial testimony. (50 RT 9886.) Inmate C denied receiving any benefit in exchange for his testimony other than receiving secure housing while in prison. (50 RT 9882.)

B. The Stabbing Of Swartz

On November 23, 1996, the date Dixon was stabbed, appellant was moved to an administrative segregation unit at Salinas Valley State Prison, where he remained until January 24, 1997. (53 RT 10,446-10,447.) Appellant was then transferred to building B1. (53 RT 10,447-10,448.) In building B1, as well as in all buildings at the prison, Black inmates stayed on the C section side of the day room along with Northern Hispanics, while White inmates congregated in section A with Southern Hispanics. (47 RT 9295; 48 RT 9464.)

On February 5, 1997, Correctional Officers Erica Carbajal (who then went by the surname of "Schweitzer") and Jason Morgan were working in building B1 as floor officers while Correctional Officer Mary Brockett was working in the upstairs control room. (47 RT 9291-9293, 9312; 48 RT 9460.) Around 11:25 a.m., a couple of Black inmates approached the officers' podium where Carbajal was sitting and asked for some paperwork. (47 RT 9293-9294.) Carbajal went into an office by the day room to get the requested paperwork. (47 RT 9296.)

About the same time, in the upstairs control room, Officer Brockett's attention was drawn to a Black inmate in the upper tier of section C, who was persistently shouting at her to open his cell door. (47 RT 9315-9317; 48 RT 9423.) Also at the same time, Officer Morgan stepped outside

the building to talk with Sergeant Wayne Mitchell. (48 RT 9460.)

When Carbajal left the office with the paperwork that the inmates had requested, she saw, on the A side of the day room, inmate Leonard Swartz, who was bleeding, holding his hands around his throat and stumbling towards her. (47 RT 9297, 9299.) Carbajal pressed the alarm she carried on her and ordered all the inmates down to the floor. (47 RT 9298.) Carbajal then helped Swartz down to floor and called for medical help. (47 RT 9298.)

After hearing the alarm set off by Carbajal, Officer Morgan and Sergeant Mitchell entered the building. (48 RT 9438, 9461-9462.) They too saw that Swartz was bleeding and ordered all the inmates to get down on the floor in a prone position. (48 RT 9438-9439, 9462.) When correctional officers with the Investigative Services Unit (ISU) arrived, Sergeant Mitchell turned over the area to them for an investigation to be conducted. (48 RT 9440-9441.)

Officer Carbajal retrieved a Stokes litter (a gurney without wheels) so Swartz could be carried away from the building. (47 RT 9299-9300.) As Swartz was being carried off on the gurney, one of the officers tripped and the litter fell to the ground, but Swartz remained on the litter when it was dropped. (47 RT 9302; 48 RT 9453, 9463, 9485.) The officers took Swartz first to the prison infirmary of the B building complex and then

to the emergency room at the prison's Correctional Treatment Center. (48 RT 9486-9487.) From there, an ambulance took Swartz to the emergency room at Natividad Medical Center. (49 RT 9705-9708.)

As a result of the stabbing, Swartz's carotid artery had been partially severed and muscles in his neck had been cut. (50 RT 9821.) Over two weeks later, on February 22, 1997, Swartz died. (50 RT 9820, 9828-9830.) Forensic pathologist Dr. John Randolph Hain testified that the stab wounds caused blood loss, which in turn caused strokes, which resulted in a brain seizure and death. (50 RT 9828-9830, 9838.)

C. The Investigation Following The Killing Of Swartz

Officer Joseph Moss of the ISU prepared a diagram of the scene, documenting the location of the inmates in the section A side of the day room. (48 RT 9496, 9499.) Appellant was among those inmates. (48 RT 9499.) Moss also made a videotape showing the location of the inmates. (48 RT 9501.)

Officer Warren Holland was working in the B complex yard at the time the alarm sounded in relation to the stabbing of Swartz. (48 RT 9528.) While on the yard earlier that day, Officer Holland had confiscated as contraband some blue Los Angeles County shorts from an inmate on the yard. (48 RT 9529.) When responding to the alarm in building B1, Officer

Holland still had the contraband blue shorts in his possession. (48 RT 9529.)

After entering building B1, Officer Holland observed a shank on the floor on the A side of the day room. (48 RT 9529-9530.) He secured the shank by placing a bucket over it and then placing the contraband blue shorts on top of the bucket. (48 RT 9530.) At trial, Holland did not recall seeing blood on the contraband shorts, but he acknowledged that a photograph of the shorts he was shown appeared to depict stains on the shorts. (49 RT 9604.)

Officer Holland relinquished control of the bucket covering the shank to another officer, who had arrived on the scene to take photographs. (49 RT 9611.) Officer Holland also participated in strip searching inmates from the A and B sections who were in the immediate area of the stabbing. (49 RT 9610-9611.)

Correctional Officer Andy Cariaga, who was an investigator with the ISU, arrived at building B1 and assumed control of the investigation from Lieutenant Davis and Sergeant Mitchell. (49 RT 9632.) One of Cariaga's first directives to Sergeant Mitchell was to "freeze" the entire day room floor, or stop the inmate movement that had been taking place in that area. (49 RT 9633.)

Upon the arrival of Sergeant Jose Rocha on the scene, Cariaga

relinquished control of the investigation to him. (49 RT 9634.) Rocha instructed Cariaga to conduct a Hemastix presumptive test for blood on 10 randomly selected inmates in the day room. (49 RT 9634.) The inmates selected included appellant. (49 RT 9636, 9638.) Appellant's Hemastix test reaction was positive. (53 RT 10,431.)

Cariaga saw that appellant's hands were shaking, his chest was quivering, and he was sweating. (49 RT 9636.) When Cariaga asked appellant why he was shaking, appellant answered that he was cold. (49 RT 9636, 9700.) When Cariaga asked appellant why he was sweating, appellant had no response. (49 RT 9636, 9700-9701.) The temperature in the room was normal and Cariaga noticed no other inmates who were shaking. (49 RT 9637.)

Cariaga logged the shank that was found into evidence. (49 RT 9642-9643.) The weapon had a white cotton linen handle and flat metal which had been bent in an L-shape. (49 RT 9643.) Cariaga disassembled the weapon to do a fingerprint exam, but he found no prints. (49 RT 9643-9644.)

Officers took appellant's blue jeans, belt, and shoes from him and later forwarded them to the Department of Justice (DOJ) laboratory in Watsonville for examination. (49 RT 9645-9646, 9664-9665.) Also taken into evidence and forwarded to the DOJ laboratory was a blue state-issued

shirt found by Correctional Officer Fernando Beltran on a stairwell handrail near the crime scene. (49 RT 9646, 9647, 9670-9671.)

It was determined that appellant's shoes did not match the footprints found on the floor at the crime scene area. (49 RT 9647.) Greg Alivez, a senior criminalist with the DOJ laboratory in Watsonville, detected blood on the shank, blood on Swartz's clothing, blood on the blue shirt which was found on the railing by Officer Beltran, and blood on appellant's jeans. (53 RT 10,408-10,409, 10,413-10,416, 10,418-10,419.) He sent that evidence, as well as blood drawn from appellant, to the DOJ DNA laboratory in Berkeley. (53 RT 10,408-10,409, 10,413-10,416.)

The laboratory extracted DNA from the blood evidence received in appellant's case. (54 RT 10,677.) Margaret Aceves, a criminalist at the laboratory, used the PCR method to type and compare the DNA found on the evidence. (54 RT 10,685, 10,691-10,692.) She found that blood on the shank blade, the shank handle, and the rear of appellant's pants matched Swartz's blood. (54 RT 10,703-10,704.) She estimated the probability among Caucasians that a random person, other than Swartz, would possess this DNA profile ranged from 1 in 15 billion to 1 in 26 billion. (54 RT 10,702-10,704.)

DNA found on the front of appellant's pants contained a mixture of Swartz's DNA and appellant's DNA and it appeared that blood,

which was consistent with Swartz's blood, was the major contributor of the DNA with appellant contributing "background" DNA as the wearer of the pants. (54 RT 10,705-10,710; 55 RT 10,803-10,804.) Background DNA could come from saliva or semen. (54 RT 10,712.) Some DNA that was found on appellant's shirt sleeve was from neither appellant nor Swartz. (55 RT 10,806-10,807.)

After the stabbing of Swartz, Sergeant Jose Rocha began reviewing appellant's outgoing and incoming mail. (53 RT 10,470.) He noticed an envelope addressed by appellant to Mary Ellen Mercer in Citrus Heights, California. (53 RT 10,471-10,472.) Inside the envelope was a letter dated February 19, 1997, written to "Christian." (53 RT 10,471-10,472.) In February of 1997, Christian Banscombe was an inmate in building B1. (53 RT 10,482-10,483.) Inmates are not allowed to send letters to one another and, in order to circumvent that rule, inmates will write to intermediaries outside of prison. (53 RT 10,481-10,482.) Mercer was Branscombe's grandmother. (54 RT 10,639.) Rocha copied the envelope and letter and put them in the mail. (53 RT 10,472.)

In May of 1998, District Attorney Investigator Gary Craft searched Mary Ellen Mercer's home in Citrus Heights and seized the envelope previously viewed by Sergeant Rocha. (54 RT 10,639, 10,643.) At trial, Ms. Mercer acknowledged she served as an intermediary for mail

between appellant and her grandson, Christian Banscombe. (54 RT 10,658-10,659.)

In the letter, appellant wrote Branscombe that he wished he could have "hung around with him" longer in building B1, but he "was honor bound, gave my word and that is law." (53 RT 10,474.) Appellant wrote that the authorities had the wrong man as the victim "realized what a worthless piece of human waste he was and tried to take himself out." (53 RT 10,476.) Appellant asked, "How can a man call himself a peckerwood and still live on the yard with scrap?" (53 RT 10,478.) Sergeant Rocha explained that a "peckerwood" is a White supremacist in the prison system and also testified that the term refers to a White inmate who is a "bleed off" of the Aryan Brotherhood. (53 RT 10,478, 10,481.) In the letter, appellant wrote he had not smoked for a while and would gladly beat a Muslim to death with a sack of pork chops for a cigarette. (53 RT 10,479.)

At one point in his letter, appellant told Branscombe that prison authorities had taken blood samples from him and identified him as the assailant in a stabbing incident, but they were wrong because he did not stab anyone. (53 RT 10,476.) Appellant hoped that "[e]ventually maybe . . . they will figure out they have got the wrong guy." (53 RT 10,474.)

District Attorney Investigator Gary Craft testified that on September 7, 1999, a book was found in appellant's property that bore a

label with appellant's name, his address at Pelican Bay State Prison, and his Department of Corrections number. (54 RT 10,635-10,638.) The book contained handwritten passages that read, "Non-existence of the unfit has and will be the law of nature," and "The one who knows the secret does not speak; the one who speaks does not know the secret." (54 RT 10,639.)

D. The Testimony of Three Inmates Who Saw The Stabbing Of Swartz

1. Inmate F

On the date Swartz was stabbed, Inmate F, who is a Northern Mexican for purposes of the unofficial system of segregation, was housed in building B1 of Salinas Valley State Prison. (50 RT 9899-9000, 9902, 9910.) He was serving a sentence of 28 years to life and had previously been convicted of two counts of second degree burglary, petty theft with a prior theft conviction as a felony, the sales of narcotics, a prison battery on a non-inmate, and first degree murder. (50 RT 9898-9899.) Inmate F was a "shot caller" for his gang, the Nuestra Familia. (50 RT 9910, 9913.) A shot caller could order members of his gang to "hit" (stab or kill) other inmates in the prison. (51 RT 10,010.)

Around the time of the stabbing, Inmate F wanted to get into his cell on the second tier to retrieve some items so he could shower and, in

order to do so, he was using the call button to try to get the attention of the control booth officer. (50 RT 9901-9902.) Inmate F, while talking to an inmate in another cell, heard punching and slapping that sounded like a fight. (50 RT 9902.) He turned and saw appellant slapping another White inmate with both hands while the other inmate was attempting to push appellant away. (50 RT 9902-9904.) Before the grand jury, Inmate F testified he saw appellant hitting the inmate with one hand and slapping him with the other. (51 RT 10,005.) Inmate F testified that his memory had faded and, at the time he shared information with the grand jury, the facts were fresher in his mind. (50 RT 9923; 51 RT 10,006.)

The inmate with whom appellant had been fighting started walking to the floor officers' podium bleeding and holding his neck. (50 RT 9904.) However, Inmate F never saw a weapon being used in the fight. (50 RT 9923.) After the fight ended, Inmate F was not focusing on appellant. (50 RT 9905.) But, in his peripheral vison, Inmate F saw appellant walk off and throw "something," although he was unsure what was thrown. (50 RT 9905-9906.) Inmate F was not familiar with either participant in the fight and had never spoken to either appellant or the other individual involved. (50 RT 9909-9910.)

On March 7, 1997, about a month after Swartz was stabbed, Inmate F, during an interview with Correctional Officers Beltran and

Barron, stated that all that he saw was Swartz bleeding. (51 RT 10,008-10,009.) He came forward with additional information only after he was the victim of an attack by other Northern Mexican inmates. (50 RT 9913, 9915.) In March of 1998, which was about a year after he first provided information to Officers Beltran and Barron, Inmate F identified appellant in a photographic lineup. (50 RT 9918.) Two years after his first interview, Inmate F identified appellant in the videotape of the crime scene that was filmed just after the attack. (50 RT 9918-9919; 54 RT 10,624-10,625.) Inmate F's testimony at appellant's trial exposed him to further attacks by his own ethnic group. (50 RT 9913.)

Besides remaining in safer prison housing, Inmate F had not received any benefits from the prosecution. (50 RT 9915, 9917-9918.) Inmate F believed that, in any event, information he had provided in other cases would have ensured him a "soft yard." (51 RT 10,011.)

2. Inmate G

Inmate G, who was housed in building B1, is a Southern Mexican inmate for purposes of the prison's informal segregation system and therefore would spend time in section A of the day room – the same section where the White inmates congregated. (51 RT 10,021.) He was serving two life sentences plus seven years and had previously been

convicted of assault with a deadly weapon, grand theft person, two counts of kidnapping for robbery, robbery with a firearm, and grand theft auto. (51 RT 10,020-10,021, 10,047.)

At the time of the stabbing of Swartz, Inmate G was on his way to the showers in section A when he saw a fight between two inmates. (51 RT 10,022-10,023.) One of the inmates, who had blood coming from his neck, ran towards the floor officers' podium. (51 RT 10,023.) Inmate G identified appellant as one of the inmates involved in the incident. (51 RT 10,024.)

In his testimony before the grand jury, Inmate G stated he saw appellant make two quick motions. (51 RT 10,034.) However, he told Investigator Gary Craft of the District Attorney's Office that he saw that the victim had been stabbed three or four times. (51 RT 10,036.) At trial, Inmate G explained that he heard thumps before seeing the stabbing motions, but he saw only two stabbing motions. (51 RT 10,036-10,037.)

After noticing the other inmate bleeding from his neck, Inmate G saw appellant had something in his hand, but he could not tell whether or not it was a weapon. (51 RT 10,034, 10,041-10,042.) Later, as he was walking to the day room wall, as he was ordered to do by the correctional officers, Inmate G saw a weapon on the floor. (51 RT 10,024.)

When he was lying prone on the floor of the day room with all

the other inmates, Inmate G saw, lying next to him, a blue shirt with blood on it. (51 RT 10,038-10,039.) After the inmates were later moved, Inmate G saw appellant wearing a blue shirt that was too small for him. (51 RT 10,025-10,026.) Inmate G did not remember if appellant was wearing the shirt at the time of the fight with the other inmate. (51 RT 10,027.)

When Inmate G was ordered to stand by the wall, he walked over the blood on the floor and he could not remember whether other inmates also walked through the blood as they made their way to the wall. (51 RT 10,044, 10,047.) The yellow crime scene tape was not put up around the blood trail until after the inmates had been moved across the room to the wall and had been strip searched in the crime scene area. (51 RT 10,044.)

Inmate G was first questioned about the incident by Lieutenant Moss and Sergeant Rocha in a prison office. (51 RT 10,045.) Because he was being interviewed in an office with a lot of windows and he thought the other inmates were watching him, he did not tell the officers what he saw. (48 RT 9520-9521; 51 RT 10,031; 53 RT 10,467-10,468.) However, Lieutenant Moss testified that the windows of the office had been covered completely so that other inmates could not see inside. (48 RT 9509.)

In a second interview conducted in June of 1998, Inmate G decided to tell the officers he had information about the stabbing. (51 RT

10,031-10,032.) At that time, Inmate G had already testified in another unrelated murder case and was a target of other inmates so he decided he "needed to get off of the yard" by providing information about appellant. (51 RT 10,031-10,032.) Inmate G had played handball with appellant and was sure of his identification of appellant. (51 RT 10,028, 10,030.)

In addition to providing information because he wanted to get transferred, Inmate G testified he also came forward with information because he felt the attacked inmate did not deserve to be stabbed. (51 RT 10,030.) By his testimony, Inmate G had placed himself at risk of attack by other Southern Mexicans. (51 RT 10,030.) Inmate G had been moved to a protective housing unit, but had received no other benefits as a result of his testimony. (51 RT 10,032.)

3. Inmate A

Inmate A, another inmate housed in building B1, was convicted of child molestation and failing to register as sex offender, for which he was sentenced to prison for 26 years to life under the Three Strikes law. (51 RT 10,054.) Inmate A was a friend of Leonard Swartz and, around 11:20 a.m. on February 5, 1997, he was playing dominos with him in the day room. (51 RT 10,055-10,056.) There was a yard recall for a custody count at that time. (51 RT 10,056.) Swartz walked away from the table

before the grand jury, Inmate A testified he was not positive of his photographic identification of appellant. (51 RT 10,068-10,069.) On May 5, 1999, he was shown the crime scene videotape taken after the stabbing, but he could not identify appellant in the video. (51 RT 10,666-10,667.) Also on that date, he told District Attorney Investigator Craft that he did not want to testify because he could not remember details of the incident. (51 RT 10,667.) In March of 1999, Inmate A told Investigator Craft that the person he picked out in March of 1997 was definitely the person who committed the crime. (51 RT 10,071.) At trial, Inmate A testified he was sure of his identification of appellant. (51 RT 10,071.)

According to Inmate A, he was not promised anything by the prosecution in exchange for his testimony other than a transfer to Mule Creek State Prison. (51 RT 10,064.)

. Appellant's Statements Regarding Both Offenses To Inmates J, R, and P

A. Inmate J

From May 12 through May 20, 1997, Inmate J was appellant's cell mate at Corcoran State Prison. (52 RT 10,207, 10,220.) Inmate J had been convicted of two counts of residential burglaries and petty theft with a prior conviction for theft. (52 RT 10,205-10,206.) In September of 1997, Inmate J received an additional six-year term for possessing a shank while in custody at Salinas Valley State Prison. (52 RT 10,206.) Inmate J was carrying shanks for the prison gang Nazi Low Riders so that members of that gang could use them to assault other inmates. (52 RT 10,236-10,237.) The district attorney who prosecuted Inmate J in the weapon-possession case was the same district attorney prosecuting appellant's case. (52 RT 10,206.)

During the eight days he was celled with appellant, Inmate J reviewed appellant's paperwork relating to the incidents charged against him. (52 RT 10,239.) Appellant told Inmate J that, in November of 1996 in Salinas Valley State Prison, inmate Steve Petty and he threw a garotte around another inmate and appellant then stabbed that inmate six to eight times in the torso area. (52 RT 10,208-10,209.) Appellant said he wanted to kill the inmate because he heard rumors that the stabbed inmate had earlier shared a cell with a Black inmate. (52 RT 10,210.) Appellant said

that, as a result of the incident, he was placed in "the hole," but he was later released into building B1 when the prison investigation "didn't pan out." (52 RT 10,211.)

Appellant told Inmate J that, while he was in "the hole," he thought up a mental list of inmates to target. (52 RT 10,211.) Appellant was glad he was released to building B1 because the target on the top of his list was also housed there. (52 RT 10,211-10,212.) Appellant wanted to kill that target, who was a child molester, because he wanted to get clout and bragging rights. (52 RT 10,212-10,213.) Appellant said he made a knife to kill the inmate child molester by sharpening a flat piece of metal on one side. (52 RT 10,213-10,214.)

Appellant said that, while the other inmate was gathering property in order to go to the shower, he stood by a day room table with a knife in his back pocket, waiting for the inmate. (52 RT 10,214-10,215, 10,244, 10,342-10,344.) When the other inmate walked by, appellant struck him in the side of his neck, cutting it wide open. (52 RT 10,215.) Appellant attempted to stab the other inmate in his carotid artery because, if he could sever it, the inmate's chances of survival would not be good. (52 RT 10,215.)

Appellant said that afterwards he cleaned his hands, but correctional officers conducted a swab test on his hands that resulted in a

Inmate J knew and spoke with Inmates A, C and D, other inmates who testified against appellant. (52 RT 10,228-10,231.) Prior to trial, he had been housed with Inmate C. (52 RT 10,228-10,229.)

Inmate J received no promises from the prosecution in exchange for his testimony other than housing in a protective custody yard. (52 RT 10,225.) After he testified before the grand jury in appellant's case, Inmate J and his cell mate were assaulted while they were housed in a "half and half yard," but the prison authorities would not take any action concerning that attack. (52 RT 10,254-10,256.) Inmate J then wrote the prosecution and threatened to retract everything he had said if he did not get the treatment he wanted. (52 RT 10,237-10,238, 10,254-10,256.)

B. Inmate R

In 1997, Inmate R was incarcerated with appellant in Pelican Bay State Prison. (52 RT 10,260-10,261.) He was in the same yard with appellant for about four to six months, and later was housed in the same building with appellant. (52 RT 10,260-10,261.) He had sustained convictions for attempted premeditated murder with the infliction of great bodily injury and the use of a firearm, two counts of receiving stolen property, and second degree murder. (52 RT 10,260.)

Inmate R knew Inmates C, O, and P, who were also testifying

against appellant. (52 RT 10,266.) It was Inmate P who gave the district attorney Inmate R's name, which led to District Attorney Investigator Craft's interview with Inmate R in January of 2001, almost four years after the incidents. (52 RT 10,269.)

In that interview, Inmate R stated he spoke to appellant about appellant's case at the time appellant was indicted. (52 RT 10,268.) He told Craft that appellant committed a first stabbing with another inmate and that appellant was upset that the attacked inmate survived. (52 RT 10,262.) Inmate R told Craft that appellant believed that the first inmate attacked was a sex offender. (52 RT 10,269.) Appellant said he got away with that stabbing. (52 RT 10,262.)

An inmate stabbed by appellant in a second incident was a child molester. (52 RT 10,262.) Appellant was concerned about inmates who might testify against him. (52 RT 10,263.) Inmate R testified that it was not unusual for inmates to brag in order to make themselves look like "a big man." (52 RT 10,262-10,263.)

Inmate R did not feel it was risky to testify because he was already in protective custody and therefore had nothing to lose. (52 RT 10,265.)

C. Inmate P

Inmate P was a cell mate of appellant at Pelican Bay State Prison for about four months in 1998. (52 RT 10,275-10,276.) Inmate P had been convicted of attempted robbery, attempted second degree robbery, second degree robbery, residential burglary, felony assault, and also possibly of drug possession, and had spent most of his adult life in prison. (52 RT 10,273-10,274, 10,294-10,295.)

Appellant told Inmate P about stabbing an inmate at Salinas Valley State Prison. (52 RT 10,277.) While another inmate held the inmate who was attacked, appellant stabbed him 18 times, but the victim survived. (52 RT 10,277.) Inmate P did not recall the reason appellant stabbed that particular inmate other than the stabbed inmate was on a "hit list." (52 RT 10,302.) Appellant said he was trying to kill the inmate and get to Pelican Bay State Prison. (52 RT 10,278.) Appellant said he knew human anatomy and knew where to stab someone to kill him. (52 RT 10,278.)

After being sent to administrative segregation, appellant and the other inmate involved in the stabbing made an agreement to stab someone else in order to get sent to Pelican Bay State Prison. (52 RT 10,279.) Appellant previously mentioned to Inmate P that he had been to Pelican Bay State Prison before and liked it there. (52 RT 10,279.) Appellant said he was targeting child molesters, Blacks, and "rats." (52 RT

10,279-10,280.) Appellant believed the gene pool should be cleansed of defective persons. (52 RT 10,285.)

Appellant also described a second stabbing to Inmate P. (52 RT 10,280.) Concerning that second stabbing, appellant said he was waiting in his cell and had an "ice piece" in the day room. (52 RT 10,280.) Appellant stabbed that inmate because the inmate was a child molester. (52 RT 10,282, 10,303.) Appellant said he was not sure whether he stabbed the inmate in the neck or not. (52 RT 10,280.) Appellant said the other inmate staggered to the floor officers' podium and bled to death. (52 RT 10,280.) According to appellant, a female correctional officer started throwing up at the sight of the blood. (52 RT 10,280.)

Appellant took off his shirt because he got blood on it and then grabbed someone else's shirt and put it on. (52 RT 10,280.) Appellant said he got blood on his hands, which the authorities detected with some type of test. (52 RT 10,281.) However, appellant planned to tell authorities that blood got on him when the other inmate bumped into him after the stabbing and appellant pushed him off. (52 RT 10,281.)

Prior to being celled with appellant, Inmate P had been in a sensitive needs yard, but he was removed and placed back in general population. (52 RT 10,304-10,305.) He testified that inmates have to have "big issues" in order to get into and stay in a sensitive needs yard. (RT

10,305.) Inmate P wanted to get back in a sensitive needs yard, especially because he had been stabbed by "The Maniacs," which was a group with which he had associated while in prison. (52 RT 10,305-10,306.) This, in part, led Inmate P to come forward with information about appellant. (52 RT 10,287.) Inmate P's religious beliefs were another reason he came forward. (52 RT 10,288.) In addition to providing information about appellant, Inmate P had told prison authorities about other matters. (52 RT 10,307.)

Inmate P knew Inmate R, who testified against appellant, and he was possibly familiar with Inmates C, O, and T,[3] who also testified against appellant. (52 RT 10,290-10,294.) Other than his being placed in protective housing, no promises were made by law enforcement to Inmate P. (52 RT 10,288-10,289.)

Contact Among The Inmate Witnesses

Some of the inmates who testified against appellant knew one another at the time they gave statements about appellant's alleged offenses to law enforcement, but most of the inmate witnesses did not know one another. (50 RT 9850-9851, 9882-9883; 51 RT 10,012-10,013, 10,051,

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[3] Inmate T testified in the penalty phase of the trial.

10,225-10,226, 10,266-10,267; 52 RT 10,289-10,290.) The prosecution introduced into evidence a chart (exh. 38) showing where each inmate witness was housed in prison from the dates of the two stabbings with which appellant was charged to the date they first gave information about the offenses to law enforcement. (54 RT 10,611, 10,645-10,650; 56 RT 11,057-11,058.)

Defense's Case

James Esten had worked at the California Department of Corrections as a vocational instructor, a supervising correctional counselor, a program administrator, an administrator of a correctional training center, and an inmate appeals investigator before retiring after 19 years of service. (55 RT 10,843-10,844.) As a program administrator, he was given the authority to run a general population housing unit. (55 RT 10,843.) At the time of trial, Esten worked as a private correctional consultant. (55 RT 10,842.) Prior to appellant's case, he had testified approximately 50 times in 20 different counties in a variety of cases, including capital cases. (55 RT 10,844.)

Esten testified that a prison inmate can always find a way to look at a cell mate's paperwork concerning his commitment offenses. (55 RT 10,848.) He explained that "[t]here is no way that one inmate can keep

his cell partner from reviewing or looking at his paper work unless he sends all that paper work home or to his attorney." (55 RT 10,848.)

Inmates can communicate with each other through various means, such as third party mail drops and "fish lines." (55 RT 10,844-10,846.) Third party mail drops involve mail inmates send to a third party, who then send the mail back to another inmate at the prison. (55 RT 10,834.) Fish lines involve a thin piece of cloth with a note attached to it being flipped down the tier to the inmate with whom the inmate using the fishing line wants to communicate. (55 RT 10,845.)

In Esten's experience at the Department of Corrections, many times inmates have told him a false story in order to get a personal benefit. (55 RT 10,847.) Inmates consider "soft yards" to be more desirable housing. (55 RT 10,850.) Esten testified that the term "peckerwood" in prison means nothing more than a White male. (55 RT 10,850-10,851.)

Irine[4] Asuncion, a correctional officer at Salinas Valley State Prison at the time of the stabbing of Swartz, helped another officer log the names and prison numbers of the inmates who were in their cells at the time of the investigation. (57 RT 11,205-11,208.) According to her report, Inmate F was in his cell at that time. (57 RT 11,207.) Asuncion responded

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[4] The record reflects that the witness spelled her first name in this manner, as opposed to the more common "I-r-e-n-e." (57 RT 11,204.)

to the alarm from building B1 about 10 to 15 seconds after the alarm sounded, but she did not start making her list until about 30 or 45 minutes after arriving there. (57 RT 11,211.)

Juan Bergamo, a supervisor at the DOJ laboratory in Watsonville, examined appellant's cell on June 18, 1997, in an effort to determine if the ceiling had been used to sharpen a metallic object. (57 RT 11,214-11,215.) He took a sample from a possible scrape mark and sent it to the DOJ laboratory in Sacramento along with the shank that was found, but no metal matching the shank was detected in the sample from the ceiling in appellant's cell. (57 RT 11,216-11,218.) Because any metallic pieces could have fallen from the ceiling, Bergamo could not conclude that the shank was not in fact sharpened in appellant's cell. (57 RT 11,219.)

The parties stipulated that, when appellant was examined by a medical technical assistant around 2:20 p.m. on February 5, 1997, he had no sign of injury. (57 RT 11,220 -11,221.)

Prosecution's Rebuttal

Lieutenant Joseph Moss testified that, before he started filming the videotape of the day room, it was determined that three inmates who were on the top tier had not been involved in the murder and they therefore were taken back to their cells. (57 RT 11,223-11,224.)

PENALTY PHASE OF THE TRIAL

Prosecution's Case

The Three Murders Committed When Appellant Was A Juvenile

About 8:00 p.m. on Saturday, September 5, 1987, 21-year-old Adam Hennessy gave appellant, who was 17 years old at the time,[4] and Inmate T,[5] another young man, a ride to Portuguese Bend, which is a bend in a river near the towns of Woodland and Knights Landing in Yolo County, California. (64 RT 12,625-12,626, 12,634-12,636.) Appellant and Inmate T planned to spend the night there and arranged for Hennessy to pick them up the next day around noon. (64 RT 12,636-12,637.)

On that same night, 17-year-old David Garske and four friends went out to Portuguese Bend to drink beer. (64 RT 12,625-12,627.) When Garske and his friends first arrived, they noticed a man fishing with his pickup truck parked nearby. (64 RT 12,628.) After turning a corner by the river, Garske saw Inmate T and appellant, both of whom he previously knew, by a beach area. (61 RT 12,019; 64 RT 12,627-12,629, 12,632.)

After some conversation, appellant showed Garske a shotgun. (64 RT 12,629-12,630.) The shotgun did not function because it had sand in

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[4] Appellant was born on January 7, 1970. (61 RT 12,019.)

[5] Inmate T was referred to as "Tony" by many witnesses.

it, but Garske cleaned it out, put in some shells, and was able to fire a shot. (64 RT 12,630.) Inmate T had a .22-caliber weapon. (64 RT 12,633.)

As the young men were standing around talking, appellant said he was going to take the truck of the man who was fishing (subsequently identified as Steve Patton [64 RT 12,664]) and use it to rob the bank in Knights Landing. (64 RT 12,630.) Garske asked appellant if he thought the fisherman was simply going to give up his keys and truck. (64 RT 12,631.) Appellant responded that, if the man did not give him his truck, they would shoot him. (64 RT 12,631.) Garske told appellant that he wanted no part of his plans. (64 RT 12,630.) Garske and his friends got into a truck and left. (64 RT 12,632.) As they were leaving, Garske saw Inmate T and appellant walking towards the fisherman. (64 RT 12,632.)

Adam Hennessy returned around noon the following day, which was Sunday, to pick up Inmate T and appellant from Portuguese Bend. (64 RT 12,637.) Shortly after leaving Portuguese Bend, appellant told Hennessy that Inmate T and he shot a fisherman in the head, killing him, and then took his truck. (64 RT 12,637-12,639, 12,642.) Appellant said he shot the fisherman with a shotgun while the fisherman was talking to Inmate T. (64 RT 12,641.) Appellant said the shotgun did not discharge the first time, so he pulled the trigger a second time. (64 RT 12,642.) After appellant killed the fisherman, Inmate T and he pushed his body into the

water. (64 RT 12,642.) Appellant took Hennessy to a gate on a levee where he and Inmate T had rammed the truck into the gate and then drove the truck into the water. (64 RT 12,638-12,640.)

Inmate T testified that, when Adam Hennessy dropped appellant and him off at Portugese Bend so they could drink and target shoot, Inmate T had with him a 12-gauge shotgun and appellant had a .22-caliber handgun. (64 RT 12,648, 12,667.) When appellant told friends who also arrived at Portuguese Bend that Inmate T and he were going to kill the fisherman and take his truck, Inmate T denied they were going to do that. (64 RT 12,650.) Appellant's remarks to their friends was the first time the subject of killing the fisherman had come up. (64 RT 12,650.)

Later, appellant and Inmate T had a friendly, casual conversation with Steve Patton, the fisherman, and shared a beer with him. (64 RT 12,650-12,651.) As Inmate T was talking to Patton, who was kneeling down as if he was going to set a hook on his fishing pole, appellant shot Patton in the back of the head with a shotgun, killing him. (64 RT 12,651; 65 RT 12,821-12,822.) Before appellant shot Patton, there had just been a normal conversation and Patton had not made any threats. (64 RT 12,651-12,652.)

After appellant shot Patton, Inmate T helped appellant throw Patton's body and belongings in the river. (64 RT 12,652.) Inmate T took

Patton's car keys and wallet. (64 RT 12,671-12,672.) Inmate T and appellant left in Patton's truck, with Inmate T at the wheel, and started driving around. (64 RT 12,652-12654, 12,671.) Inmate T drove the truck into a ditch, damaging it. (64 RT 12,654.) He then drove the truck into the slough to get rid of it. (64 RT 12,654.)

On the following Tuesday, Inmate T met appellant at a school bus stop and saw that appellant had two guns – a .38-caliber special handgun and a .44-caliber Magnum, that he had obtained from appellant's uncle's house. (64 RT 12,657.) Inmate T and appellant planned on skipping school and going out target shooting. (64 RT 12,657.) Appellant talked about robbing a bank. (64 RT 12,657.) Later, Inmate T was going to leave appellant, but appellant made some kind of remark to the effect that, if he tried to leave, appellant would kill him. (64 RT 12,658.)

Appellant, carrying the .44-caliber Magnum, and Inmate T, carrying the .38-caliber special, went to a slough on the edge of town and noticed a couple, Raymond and Dawn Rogers, who were fishing. (64 RT 12,658; 65 RT 12,816, 12,818.) They also noticed the Rogers's car and appellant commented to Inmate T that he wanted the car in order to use it to rob the bank. (64 RT 12,659.) Appellant said that, if he started shooting, Inmate T better also start shooting because, if he did not, appellant would shoot him too. (64 RT 12,659.)

Appellant and Inmate T engaged in a friendly conversation with the Rogers. (64 RT 12,660.) According to Inmate T's testimony at trial, during that conversation appellant pulled out his gun and shot Dawn Rogers in the back. (64 RT 12,660-12,661.) However, Inmate T acknowledged that someone named Shane Bramble testified at Inmate T's jury trial for murder that Inmate T told him that it was Inmate T who shot Mrs. Rogers in the back. (64 RT 12,668-12,669.)

After Dawn Rogers was shot, both appellant and Inmate T started shooting in the direction of Raymond Rogers, who was struck and killed by a gunshot to the head. (64 RT 12,661-12,662; 65 RT 12,816-12,818.) Meanwhile, Dawn Rogers was screaming. (64 RT 12,662.) Appellant shot her in the head, blowing off the entire top of her head. (64 RT 12,662.) In addition to the shot which blew off the top of her head, Dawn had been shot three times in back. (65 RT 12,818-12,819.)

Appellant threw the victims' belongings into the slough. (64 RT 12,664.) Inmate T pushed the bodies into the water. (64 RT 12,664-12,665.)

Before the first murder, appellant and Inmate T drank a lot of beer. (64 RT 12,667.) Prior to that date, appellant had been using drugs such as methamphetamine, LSD, and mushrooms, which had resulted in a change to appellant's personality. (64 RT 12,667-12,668, 12,675-12,676.)

Inmate T did not remember appellant using drugs on the night of the Patton murder. (64 RT 12,673.) Appellant did not appear to be under the influence of drugs when the Rogers were killed either. (64 RT 12,673-12,674.) Appellant had not drank beer before the Rogers were killed. (64 RT 12,674.)

On the evening of September 11, 1987, Kerry Boak, a trooper with the Oregon State Police, stopped a car with a California license plate which reportedly contained two runway juveniles who had been involved in a burglary of firearms. (64 RT 12,677-12,680.) Inmate T was the driver, appellant was the front passenger, and a third person in the car was a hitchhiker, who was not detained. (64 RT 12,681-12,682.) A .38-caliber handgun was found under Inmate T's seat and a .44-caliber Magnum was found underneath appellant's seat. (RT 12,682.)

Following a jury trial, Inmate T was convicted of killing Steve Patton, Raymond Rogers, and Dawn Rogers and was sentenced to state prison for a term of 52 years to life. (64 RT 12,666-12,667.) In exchange for Inmate T's testimony in appellant's trial, the prosecution was going to write a letter on Inmate T's behalf that could help him in his parole hearing. (64 RT 12,666-12,667.) Also, Inmate T was to contact the prosecution if the prison authorities wanted to change his housing. (64 RT 12,667.)

The September 1995 Assault On An Inmate

On September 22, 1995, John Zuber was a yard gun officer in an administrative segregation yard at the California State Prison, Sacramento. (64 RT 12,661.) At approximately 8:20 a.m. on that date, a fight began in the yard when two inmates assaulted two other inmates. (64 RT 12,612-12,613.) Zuber ordered all inmates face down on the ground and fired a rubber bullet from his 37-millimeter launcher. (64 RT 12,612-12,614.)

Despite Zuber's order, more inmates joined the fight by attacking the two inmates who originally had been assaulted. (64 RT 12,612-12,613, 12,626-12,627.) Appellant was one of the inmates who joined in the attack on the two inmates who had been assaulted. (64 RT 12,613.) Zuber again ordered the inmates in the yard to get down and fired another round. (64 RT 12,614.) One inmate stopped fighting, but appellant and the other inmates continued fighting. (64 RT 12,614.) Zuber again ordered all the inmates in the yard to get down and fired a third round from his weapon. (64 RT 12,614.) All the inmates then stopped fighting. (64 RT 12,614.)

The January 1997 Assault On An Inmate

Around 1:20 p.m. on January 18, 1997, Carlos Jacobo was a

yard gun officer in an administrative segregation yard at Salinas Valley State Prison. (64 RT 12,620.) At that time, appellant began assaulting an inmate surnamed "Wright" with his fists. (64 RT 12,621, 12,624.) Jacobo told appellant and Wright to stop fighting, but they ignored his order. (64 RT 12,622.) Jacobo fired rubber bullets with his 37-millimeter launcher, but that had no effect. (64 RT 12,622.) Inmate Steve Petty then joined appellant in hitting Wright. (64 RT 12,623.) Jacobo again told the inmates to stop fighting. (64 RT 12,623.) Because his order was ignored again, Jacobo fired a second round. (64 RT 12,623.) The fighting then stopped. (64 RT 12,623.)

Defense's Case

The defense did not present any evidence in the penalty phase of the trial.

ARGUMENT

I.

THE COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY BY DENYING APPELLANT'S MOTION TO HAVE SEPARATE JURIES FOR THE GUILT PHASE AND THE PENALTY PHASE OF HIS TRIAL

Prior to trial, appellant made a motion in which he requested that separate juries be seated in the guilt and penalty phases of the trial. Appellant's trial counsel explained that, unless separate juries were seated, they would be unable to voir dire the prospective jurors concerning the impact of appellant's prior convictions for murder in any penalty phase because such questioning would alert the jurors to those convictions before the jurors had rendered their verdict in the guilt phase. The trial court denied the motion, citing this court's decision in *People v. Nicolaus* (1991) 54 Cal.3d 551.

The trial court's ruling denied appellant his constitutional rights to a fair trial and a fair and impartial jury under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, section 16, of the California Constitution. The prosecution had one very strong factor in aggravation to present in the penalty phase – the three prior murder convictions in Yolo County. The defense had one very strong factor

in mitigation to present in the penalty phase – the fact the victim was a child molester. Because of the court's ruling, the prosecution was able to ask all the prospective jurors about their view of the appropriateness of a death sentence for the murderer of a child molester, but the defense was unable to ask the prospective jurors if they would automatically vote for death in any penalty phase in light of appellant's prior murder convictions, as such questioning would have prejudiced appellant in the guilt phase of the trial. In effect, the prosecutor was provided an unfair advantage in being able to weed out jurors who would give appellant's mitigation serious consideration, whereas appellant was stymied in his effort to address the prosecution's main factor in aggravation.

A. Procedural Background

Before trial, appellant filed a motion requesting that, if he were convicted of first degree murder, a separate jury then be impaneled to decide the special circumstance relating to the prior murder convictions (which had been severed from the main guilt phase of the trial [29 RT 5602-5603]) and, if necessary, the penalty to be imposed. (3 CT 612-616.) Appellant noted that seating a separate jury would insulate the guilt phase jury from prejudicial voir dire concerning the prior murder convictions. (3 CT 613, 615.) Appellant based his motion on the Fourth, Fifth, Eighth, and

Fourteenth Amendments of the United States Constitution and Article I, sections 1, 7, 13, 15, 16, 17, and 27, of the California Constitution. (3 CT 612.)

During discussion with the court concerning the matter (29 RT 5626-5633), appellant's trial counsel explained again that they needed to ask prospective jurors who might preside over any penalty phase about their views concerning appellant's prior murder convictions and, if the motion were not granted, the jurors who would be deciding the guilt phase of the trial would be informed of appellant's prior murder convictions, thereby prejudicing appellant's due process right to a fair trial under the federal and state Constitutions. (29 RT 5627-5629, 5631.) Citing *People v. Nicolaus, supra,* 54 Cal.3d 551, the court denied appellant's motion. (31 RT 6003-6004.)

In voir dire, the prosecution had the opportunity to fully explore the attitude of prospective jurors in any penalty phase concerning the fact that the victim in the case was a convicted child molester. Question 79 of the juror questionnaire asked prospective jurors to respond to the statement, "If the murder victim was a child molester, that fact alone would prevent me from voting for the death penalty," by checking "Strongly agree," "Agree," "Disagree," and "Strongly disagree," and then to explain their answer. (E.g., 4 CT 1089.)

Additionally, as described below, the prosecution often explored the issue during voir dire. The prosecution discovered that certain prospective jurors who were generally strongly in favor of the death penalty might not be jurors desired by the prosecution in a case where the victim was a child molester.

As discussed in Argument II, *post*, Prospective Juror no. 3, who was excused for cause on the prosecution's motion, belonged in that category. Prospective Juror no. 122 said he could vote to impose the death penalty in the appropriate case, but he had concerns that the victim was a child molester. (37 RT 7242.) He did not value the life of a child molester as he would value the life of someone else and the fact that the victim was a child molester would make him tend to vote for life in prison without parole, as opposed to death. (37 RT 7267-7268, 7282.) The prosecution challenged the prospective juror for cause, but the court denied the challenge. (37 RT 7285.) The prosecution later exercised a peremptory challenge as to Prospective Juror no. 122. (45 RT 8848.)

Prospective Juror no. 382 described himself as "pro death penalty, but not to the point where [he] would just close [his] eyes and just say go for it." (44 RT 8639.) But the fact that the victim was a child molester "changed [his] whole thought process" and he would be "very lenient" in appellant's case. (44 RT 8639.) Later, the prospective juror

stated he just did not care that a child molester had been murdered. (44 RT 8665.) He "kn[e]w for a fact" that he would not return a death penalty in the case because the victim was a convicted child molester. (44 RT 8667.) Prospective Juror no. 382 was excused for cause on a motion by the prosecution. (44 RT 8680-8681.)

As she indicated in her juror questionnaire and confirmed during voir dire, Prospective Juror no. 320 also would not vote for the death penalty in a case where the victim was a child molester. (44 RT 8669.) She was challenged by the prosecution for cause and excused by the court for medical reasons. (44 RT 8678-8679.)

Prospective Juror no. 25 stated that, if all child molesters were "wiped out," it would be "okay" with him. (40 RT 7836.) But Prospective Juror no. 25 did not believe he could ever vote for the death penalty. (40 RT 7840-7841.) He was excused for cause on the motion of the prosecution. (40 RT 7875-7877.)

The prosecution exercised all its peremptory juror challenges. (45 RT 8853.)

In contrast to the prosecution's ability to probe all the prospective jurors about their opinion concerning the appropriateness of the death penalty for the murderer of a child molester, appellant's trial counsel could not ask prospective jurors about how they might weigh the prior

murders appellant committed when he was a juvenile because that would have prejudiced appellant during the guilt phase of the trial. Appellant's trial counsel were reduced to asking the type of questions suggested by *People v. Nicolaus, supra,* 54 Cal.3d at page 573, in which defense counsel were advised to ask prospective jurors if they would automatically vote for the death penalty if there were a true finding about a broad range of special circumstances.

In this case, such questioning included, in addition to the special circumstance of a prior murder, some of the following special circumstances: murder for financial gain; murder by poisoning; murder of a judge, peace officer, or prosecutor; murder of a witness; murder by means of a bomb; murder to avoid arrest; and a racially motivated killing.[6] (36 RT 7093-7094, 7100-7101, 7139-7140, 7146; 37 RT 7250-7251, 7273-7274; 38 RT 7491-7492; 39 RT 7681-7682; 40 RT 7898; 41 RT 8079; 42 RT 8283-8285; 43 RT 8480-8481; 44 RT 8676-8677.) None of those questions prompted any meaningful answers from the prospective jurors as to the special circumstance of a prior murder conviction, except when Prospective Juror no. 8 questioned why someone who had killed before "had the

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[6] The evidence in the guilt phase of the trial would show that the only one of these special circumstances that could be relevant to this case was a prior conviction for murder.

opportunity" to kill again.[7] (36 RT 7093-7094.)

Before the penalty phase of the trial began, the defense, as it did before the guilt phase, asked that a separate jury be seated for the penalty phase. (64 RT 12,604.) The court again denied that motion, as well as a motion for further voir dire of the jury. (64 RT 12,604-12,605.)

B. The Relevant Law

While the California Legislature has expressed a preference for single juries in capital cases, the trial courts retain discretion to empanel separate juries for the various phases of a capital case "for good cause shown." (Pen. Code, § 190.4, subd. (c)); *People v. Yeoman* (2003) 31 Cal.4th 93, 119; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 100-102 [under Pen. Code, § 190.4, subd. (c), a trial court had jurisdiction to approve the parties' pretrial stipulation to separate guilt- and penalty-phase juries].)

Also, although a trial judge has broad latitude in structuring and conducting voir dire, a defendant's Sixth Amendment right to an impartial jury and Fourteenth Amendment right to due process requires that the court ask sufficient questions during voir dire so that "fundamental fairness" is guaranteed. (*Mu'min v. Virginia* (1991) 500 U.S. 415, 425-426,

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[7] See Argument III, *post*, for a detailed discussion of the voir dire of this prospective juror.

[114 L.Ed.2d 493] [the judge's refusal to voir dire about the contents of news reports concerning the accused did not violate the Sixth and Fourteenth Amendments under the circumstances of that case]; *Turner v. Murray* (1986) 476 U.S. 28, 36, fn. 9 [90 L.Ed.2d 27] [in an inter-racial case, the trial court's refusal to voir dire the jury on racial prejudice violated petitioner's right to an impartial jury guaranteed by the Sixth Amendment, as well as the due process clause, and required reversal of the death judgment, but not the underlying conviction]; *People v. Wilborn* (1999) 70 Cal.App.4th 339, 345-348 [where a Black defendant was arrested by a White police officer for possession of cocaine, and the defense argued that the police had fabricated a reason to stop and detain him, the trial court's refusal to question on racial bias deprived the defendant of a fair and impartial jury].)

In *People v. Nicolaus, supra,* 54 Cal.3d 551, the defendant in a capital case had prior convictions for murder. The parties agreed that no evidence of the defendant's prior murder convictions would be introduced at the guilt phase of the trial. The defense moved for separate guilt and penalty phase juries, arguing that separate juries were necessary to permit full voir dire of the jury for penalty phase bias while ensuring that the jurors would not learn of the convictions from the voir dire questions prior to the guilt phase of the trial. The trial court denied the motion. (*Id.* at pp. 571-572.)

After noting the statutory preference for a single jury in capital

cases in Penal Code section 190.4, subdivision (c),[8] this court ruled that the defendant's rights had not been violated by the denial of his motion for separate juries. (*People v. Nicolaus, supra*, 54 Cal.3d at pp. 571-574.) This court agreed with the prosecutor's position in the trial court that "there were neutral ways to frame questions to the prospective jurors to probe for potential biases regarding prior murder convictions without arousing their suspicions that defendant had in fact been convicted of murdering his children." (*Id.* at p. 573.) This court explained:

> For example, several special circumstances could have been defined, including the "prior murder" special circumstance, and the prospective jurors asked, regarding each such special circumstance, whether it would cause him or her to automatically vote for death.

(*Ibid.*)

This court stated:

> In almost every capital trial, regardless of the special circumstances alleged, there will be evidence introduced at the penalty phase . . . which would otherwise be irrelevant or inadmissible in the determination of guilt. Defense counsel are routinely faced with difficult tactical decisions in having to fashion voir dire inquiries that probe for possible penalty phase biases regarding such evidence, while stopping short of revealing information otherwise prejudicial and excludable in the guilt phase. Certainly such will almost always be the case where the special circumstance alleged is a prior murder or

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[8] That subdivision provides that the same jury which convicts a defendant of a crime for which he may be subject to the death penalty shall decide the penalty "unless for good cause shown the court discharges that jury in which case a new jury shall be drawn."

> murders. [Citation.] The mere desire to lessen or eliminate such tactical decisions in the voir dire of a capital jury, without more, and absent a mutual arrangement by the parties for separate juries approved by the trial court,[9] does not constitute "good cause" for deviating from the clear legislative mandate of [Penal Code] section 190.4 subdivision (c) – that both the guilt and penalty phases of a capital trial be tried by the same jury.

(*Id.* at pp. 573-574.)

This court re-affirmed the above reasoning in *People v. Catlin* (2001) 26 Cal.4th 81, 114-115, and *People v. Yeoman, supra,* 31 Cal.4th at pp. 119-120.)

C. Appellant's Rights Were Violated

In the present case, the trial court abused its discretion pursuant to Penal Code section 190.4, subdivision (c), by denying appellant's motion that established good cause for a separate jury in the penalty phase of his trial and, in so doing, violated appellant's federal and state constitutional rights to due process and a fair trial by jury. As discussed above, the court's ruling allowed the prosecution to discuss with prospective jurors the sole circumstance of mitigation of any substance in this case – that appellant had killed a child molester. However, fear of letting the prospective jurors know about appellant's prior convictions for

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[9] As noted by this court, such a circumstance had occurred in *People v. Beardslee, supra,* 53 Cal.3d 68, 101-102.

murder prevented appellant's trial counsel from a meaningful voir dire about how those prior convictions may influence a decision in the penalty phase. Appellant's counsel were, in effect, precluded from asking prospective jurors how appellant's status as a juvenile at the time of the prior murders, or his drug use some time prior to the murders which apparently resulted in a personality change (64 RT 12,667-12,668, 12,675-12,676), might affect their approach to the case.

In *State v. Beigenwald* (1991) 126 N.J. 1, 594 A.2d 172, the Supreme Court of New Jersey held:

> Because of the prejudice that could be engendered by *voir dire* prior to the guilt phase about a defendant's other murder convictions that are not otherwise admissible as evidence during that portion of the case, *see Evid.R.* 55, that questioning should almost invariably come only after a jury has found a defendant death eligible. See *State v. Pinnell* (1991) 311 Or. 98, 121, 806 P.2d 110, 116 (finding that "objective of a bifurcated trial was thwarted" by *voir dire* before guilt phase that "implied that defendant had previously been convicted of other crimes").

(*Id.* at pp. 44-45.)

The New Jersey Supreme Court stated that a defendant's right to voir dire prospective jurors about prior murder convictions "most likely will require a two-jury system for all capital cases in which the State seeks to prove that factor." (*Id.* at pp. 43-44.)

In the present case, the trial court's denial of the motion for separate juries resulted in the prosecution's being able to voir dire

prospective jurors on the overriding factor in mitigation (that the victim was a child molester) while appellant's trial counsel were unable to voir dire the prospective jurors on the overriding factor in aggravation (the three prior murders). Because the prosecution was given such a substantial advantage over the defense in voir dire, this case is distinguishable from *People v. Nicolaus, supra,* 54 Cal.4th 551 and its progeny.

In any event, under the particular facts of this case, the trial court's denial of a separate jury for the penalty phase of the trial resulted in a denial of appellant's right to a fair trial and a fair and impartial jury under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, section 16, of the California Constitution. The voir dire process became fundamentally unfair because the prosecution was allowed to voir dire prospective jurors on the overriding factor in mitigation, but appellant's trial counsel were unable to voir dire the prospective jurors on the overriding factor in aggravation. (See *Mu'min v. Virginia, supra,* 500 U.S. at pp. 425-426; *Turner v. Murray, supra,* 476 U.S. at p. 36, fn. 9.) This error is structural, requiring reversal per se because it is impossible to prove to a reviewing court what the verdict of a different jury would have been. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 294 [16 L.Ed.2d 694] [structural defects are immune to harmless error cures and therefore require reversal per se].)

II.

BY GRANTING THE PROSECUTION'S MOTION TO EXCUSE PROSPECTIVE JUROR NO. 3 FOR CAUSE, THE COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY

Without the agreement of the defense, the court granted the prosecution's motion to excuse Prospective Juror no. 3 for cause because of her views concerning the death penalty. But the court's finding that the prospective juror's views on the death penalty substantially impaired her from serving as a neutral juror was incorrect. The juror, who was a supporter of the death penalty in general, believed that the death penalty was "probably" inappropriate for someone who had murdered a child molester, but she nevertheless would have been a fair juror. The court's granting of the prosecution's motion to challenge the prospective juror for cause violated appellant's federal constitutional rights to an impartial jury, due process of law, and a reliable penalty determination, under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. Procedural Background

In her juror questionnaire, Prospective Juror no. 3, when asked her views about the death penalty, placed an "x" to indicate that she supported the death penalty. (4 CT 1085.) In response to the question

asking her to explain her position on the death penalty, she wrote, "I believe an eye for an eye. But make sure they are guilty. But the death penalty can be a little scary for me at times." (4 CT 1085.)

The questionnaire asked both, "Given the fact that you will have two options available to you, can you see yourself in the appropriate case rejecting life in prison without the possibility of parole and choosing the death penalty?" and "Given the fact that you will have two options available to you, can you see yourself in the appropriate case rejecting the death penalty and choosing life in prison without the possibility of parole?" Juror no. 3 confusingly answered, "No" to both questions. (4 CT 1086-1087.) However, in response to another question, she then placed an "x" by the line stating:

> I would not automatically vote for either life without possibility of parole or the death penalty. I would consider all the evidence and vote my conscience.

(4 CT 1088.)

In the questionnaire, Juror no. 3 later indicated her agreement with the statement, "If the murder victim was a child molester, that fact alone would prevent me from voting for the death penalty," explaining, "Child molesters are monsters in my eyes." (4 CT 1089.)

Even before Juror no. 3 was questioned during voir dire, the prosecution moved that she be excused for cause. (36 RT 7011.) Because

appellant's trial counsel did not agree as to the challenge to Juror no. 3, the court did not excuse her at that time. (36 RT 7011-7014.).

When first questioned during voir dire, Juror no. 3 stated she was in category three of the court's four categories for death penalty qualification – that is, she believed in the death penalty, but could not personally vote for it. (36 RT 7049.) During later questioning of Juror no. 3 individually, the court noted that, in her questionnaire, Juror no. 3 raised "some issues" concerning persons convicted of child molestation. (36 RT 7086.) When asked by the court whether, if she were convinced beyond a reasonable doubt that the murder of a child molester had been proved, she could vote for a verdict of guilty, Juror no. 3 answered, "I don't know. I don't know. I'll be honest with you, I don't know." (36 RT 7088.) She agreed with the court that the situation might be a "big" problem. (36 RT 7088.)

When the court asked Juror no. 3 if she felt that the death penalty would not be appropriate for someone who had taken the life of a child molester, she answered, "Probably. Probably." (36 RT 7088-7089.) The court asked counsel if they would be willing to stipulate that Juror no. 3 could be excused for cause. (36 RT 7089.) Appellant's trial counsel stated, "I'll submit it to the Court." (36 RT 7089.) The prosecution requested, and was granted, permission to ask further questions. (36 RT 7089.)

The prosecution referred to Juror No. 3's agreement in the juror questionnaire with the statement, "If the murder victim was a child molester, that fact alone would prevent me from voting for the death penalty," and asked her if that answer was accurate. (36 RT 7089.) Juror no. 3 stated, "You know, I'm kind of – maybe a not sure would have been good there. I really can't answer that question. Honestly, I can't." (36 RT 7089.) The prosecutor asked, "A minute ago I think you used the word 'probably'?" (36 RT 7089.) The juror explained, "You know, kind of between. You know, I'm running that line there. I don't know." (36 RT 7089.)

The prosecutor then asked Prospective Juror no. 3 about her statement that child molesters were "monsters." (36 RT 7090.) Juror no. 3 responded that, as to that statement, she "stood behind what she wrote, 'period.' " (36 RT 7090.)

The court then excused the prospective juror for cause, making a finding that "because of her views as she stated . . . she would be prevented or substantially impaired from being neutral." (36 RT 7090.)

The prosecution exhausted later all its peremptory juror challenges. (45 RT 8853.)

B. The Relevant Legal Principles

A criminal defendant is entitled to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [20 L.Ed.2d 491]; *Turner v. Louisiana* (1965) 379 U.S. 466, 471-472 [13 L.Ed.2d 424].) Article I, section 16, of the California Constitution grants a criminal defendant a similar right to a fair trial by jury.

In *Wainwright v. Witt* (1985) 469 U.S. 412 [83 L.Ed.2d 841], the United States Supreme Court stated:

> [T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

(*Id.* at p. 424; accord *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

In *Lockhart v. McCree* (1986) 476 U.S. 162 [90 L.Ed.2d 137], the United States Supreme Court explained:

> It 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 they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Id.* at p. 76; *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [personal opposition to the death penalty not grounds for exclusion absent a showing that it would preclude engaging in weighing process and returning a capital verdict].)

This court has stated:

> A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.

(*People v. Cunningham* (2001) 25 Cal.4th 926, 975.)

Reviewing courts should consider a prospective juror's entire voir dire, not merely isolated answers. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 433-435; *People v. Carpenter* (1997) 15 Cal.3d 312, 358; *People v. Cox* (1991) 53 Cal.3d 618, 647-648.) In *People v. Horning* (2004) 34 Cal.4th 871, this court explained:

> If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence.

(*Id.* at pp. 896-897.)

In the present case, the jurors were often questioned about a particular aspect of the case – the fact the victim was a child molester. In making the determination whether a prospective juror's views on capital punishment would prevent or substantially impair the performance of their duties as jurors, under the test formulated by the United States Supreme Court in *Wainwright v. Witt*, *supra*, 469 U.S. 424, this court has held that he or she may be questioned about the general facts of the case. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.)

But in *People v. Clark* (1990) 50 Cal.3d 583, this court stated

that "questions directed to jurors' attitudes towards the particular facts of the case are not relevant to the death qualification process." (*Id.* at p. 597.) This court upheld the exclusion of prospective jurors who expressed an inability to impose the death penalty in *any* felony-murder case in *People v. Pinholster* (1992) 1 Cal.4th 865, where the jurors had been questioned about the particular facts of the case. However, the opinion in *Pinholster* made clear that a challenge for cause could not properly be based on a prospective juror's views of the facts of the particular case. In upholding the dismissal of two jurors because they could not apply the felony-murder situation regardless of the evidence, this court observed:

> The people of the State of California have determined that burglary-murder is a category of crime for which a defendant may be subject to death, depending on the circumstances. [Citations.] This prospective juror unequivocally stated his inability to follow the law in this respect. *His position was an abstract one regarding the felony-murder special circumstance, not a matter of evaluating the particular facts of this case.*

(*Id.* at p. 917, emphasis added.)

Addressing the trial court's permitting certain questions regarding the prospective jurors' attitudes toward the facts of the case, this court made the distinction:

> Here the questions provided a basis for deciding something about the juror's views in the abstract; not only was each of these two jurors asked his attitude toward a case phrased in terms of the facts of this case, but the answer to these questions led to the ultimate and crucial question whether the

> juror could vote for the death penalty in any burglary-murder case.

(*Ibid.*)

Thus, while a prospective juror may be excused for cause because he or she will not consider the death penalty under any circumstances, that juror may not be excused if their reticence is based on the facts to be presented at trial.

Finally, the erroneous excusal of even one juror is grounds for an automatic reversal of the death penalty. (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668 [95 L.Ed.2d 622]; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

C. The Exclusion Of Juror No. 3 Constituted Error

In the present case, the trial court erred by granting the prosecution's challenge of Prospective Juror no. 3 for cause. At the end of the questioning by the court, when asked if she felt that the death penalty would not be appropriate for someone who had taken the life of a child molester, Juror no. 3 answered, "Probably. Probably." (36 RT 7088-7089.) That answer necessarily implied that the prospective juror would, in the appropriate case, vote for the death penalty of the murderer of a child molester – notwithstanding her general position that murders of child molesters usually would not call for the death penalty.

Later, when questioned by the prosecution, Juror no. 3 stated that her indication in the juror questionnaire that she agreed with the statement, "If the murder victim was a child molester, that fact alone would prevent me from voting for the death penalty," was incorrect and her answer should have been "not sure" or something similar. (36 RT 7089.) The fact that Juror no. 3 maintained her position that child molesters were "monsters" (36 RT 7090) did not logically contradict the clear implication that she could vote for the death penalty for the killer of a child molester.

Juror no. 3 believed in capital punishment in the appropriate case. (4 CT 1085, 1088.) When Juror no 3's responses in voir dire are fairly considered as a whole, and in light of her final statement that she was unsure if the fact that the victim was a child molester would prevent her from voting for a judgment of death, it is apparent that, while she generally believed that murderers of child molesters did not deserve the death penalty, she nevertheless would have considered all the circumstances before casting her vote. Therefore, she could have performed her duties as a juror in accordance with *Wainwright v. Witt, supra,* 469 U.S. 412.

At trial, appellant did not object to the court's excusing Prospective Juror no. 3 at the time it occurred. However, this court should still consider appellant's claim on appeal that the trial court erred. The law is unclear as to whether a procedural bar applies where a defendant fails to

challenge a court's excusal of a prospective juror for cause on the motion of the prosecution. (Compare *People v. Hill* (1992) 3 Cal.4th 959, 1005 [holding defendant "waived any error" by "failing to object to the prosecutor's challenges"] with *People v. Holt* (1997) 15 Cal.4th 619, 652, fn. 4 [stating "controlling federal precedent holds that [such] error is not waived by 'mere' failure to object"].) However, in *People v. Champion* (1995) 9 Cal.4th 879, this court stated, concerning the issue of the waiver of a prosecution challenge of a prospective juror for cause, "Because the question whether defendants have preserved their right to raise this issue on appeal is close and difficult, we assume that defendants have preserved their right." (*Id.* at p. 908, fn. 6.)

In the present case, this court should not find that appellant waived his claim of error because, before Juror no. 3 was questioned, appellant's trial counsel stated they did not agree with the prosecution's challenge of Juror no. 3 for cause (36 RT 7011-7012) and they did not thereafter indicate their position had changed.

As stated above, the erroneous excusal of even one juror is grounds for an automatic reversal of the death penalty. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 666-668; *People v. Ashmus, supra,* 54 Cal.3d at p. 962.) Accordingly, appellant's judgment of death must be reversed because the trial court erroneously granted the prosecution's challenge of Prospective

Juror no. 3 for cause thereby violating appellant's rights to an impartial jury, due process of law, and a reliable penalty determination, under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

III.

BY DENYING APPELLANT'S MOTION TO EXCUSE PROSPECTIVE JUROR NO. 8 FOR CAUSE, THE COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS

Appellant challenged for cause Prospective Juror no. 8, who would have been biased in favor of a death verdict in any penalty phase of appellant's trial. Appellant later was forced to exercise a peremptory challenge to that juror and ended up exhausting all his peremptory challenges. By denying the challenge for cause of Prospective Juror no. 8, the court violated appellant's federal constitutional rights to an impartial jury, due process of law, and a reliable penalty determination, under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. Procedural Background

In his juror questionnaire, Prospective Juror no. 8 placed an "x" to indicate that he "strongly" supported the death penalty. (4 CT 1145.) In answer to the question asking him to explain his position on the death penalty, he wrote, "Never should have been repealed – let the punishment fit the crime!" (4 CT 1145.) He wrote, "Murderers should never have another opportunity to kill again!" (4 CT 1145.) Prospective Juror no. 8 also wrote that he believed that the death penalty is used too infrequently, explaining,

"Guarantee that the murderers will never kill again!" (4 CT 1147.)

However, Prospective Juror no. 8 placed an "x" by the line indicating that, if a defendant were convicted of first degree murder with a special circumstance, he would not automatically vote for either life imprisonment without the possibility of parole or the death penalty. (4 CT 1148.) He also indicated elsewhere in the questionnaire that he could see himself rejecting the death penalty. (4 CT 1147.)

During voir dire, the court noted that it appeared, at one point in Juror no. 8's questionnaire, that Juror no. 8 would always impose the death penalty because he wrote that murderers should never have the opportunity to kill again but, elsewhere in the questionnaire, the juror indicated he would *not* automatically vote for a death sentence. (36 RT 7091-7092.) Juror no. 8 answered that, although he did not personally agree with the way the death penalty functioned, he would follow the court's instructions concerning how to impose a penalty. (36 RT 7092.)

When appellant's trial counsel listed several special circumstances, including a prior conviction for murder, and asked Juror no. 8 if a true finding of any of those special circumstances would lead him to automatically vote for the death penalty (see Argument I, *ante*), the juror referred to the special circumstance of a prior murder conviction and stated that, although he would "wonder why that person had that opportunity," he

would not let his personal beliefs interfere with his following the law, even though he disagreed with it. (36 RT 7094.)

Later during voir dire, Prospective Juror no. 8 repeated that he would follow the court's instructions even if he disagreed with them. (36 RT 7147-7148.) However, in response to a question from appellant's trial counsel, the juror said that, if he were appellant, he would not feel comfortable having a juror like him. (36 RT 7148.) Prospective Juror no. 8 expanded:

> If I were a person like Mr. Bivert and he is found guilty . . . of this crime beyond all reasonable doubt and all the evidence is such that the instructions are that this is a death penalty case and I would be responsible for making a decision in that matter, if all the evidence points to him, *he knows I'm going to vote for the death penalty*. Or at least he should based upon what he heard me say in this court today.

(36 RT 7148-7149, emphasis added.)

After giving Juror no. 8 another explanation of the procedure involved in the case, the court again asked him if he would automatically vote for a certain punishment in the penalty phase. (36 RT 7150.) Juror no. 8 stated he must have understood the question of appellant's counsel and said he would discuss with the jurors which penalty to impose. (36 RT 7150.) But he added:

> Since he already knows that I am strongly in favor of the death penalty, doesn't mean I would automatically go for it [*sic*]. But since he knows that, he wouldn't want to take a chance on me being on this jury. At least I hope he wouldn't.

(36 RT 7150-7151.)

Appellant later challenged Prospective Juror no. 8 for cause. (36 RT 7159.) The court denied the challenge, stating that, although it was "very clear" that the juror "strongly supports the death penalty," he said he would follow the law and he never said he would vote for the death penalty in all circumstances. (36 RT 7164.)

Appellant was forced to use a defense peremptory as to Juror no. 8. (45 RT 8845.) The defense later exhausted all its peremptory challenges. (45 RT 8852.)

B. The Court Erred

As discussed in Argument II.B, *ante*, a criminal defendant is entitled to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution. (*Duncan v. Louisiana, supra,* 391 U.S. at p. 149; *Turner v. Louisiana, supra,* 379 U.S. at pp. 471-472.) Article I, section 16, of the California Constitution grants a criminal defendant a similar right to a fair trial by jury.

The standard as to whether a prospective juror should be excused for cause due to his position as to the death penalty is whether the juror's 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, supra,* 469 U.S. at p. 424; *People v. Ghent, supra,* 43 Cal.3d at p. 767.) In making that determination, a prospective juror's answers at voir dire should be considered in their entirety. (*People v. Carpenter, supra,* 15 Cal.3d at p. 358.) The *Wainwright v. Witt* standard concerning death qualifications of jurors also applies to a juror who has a bias in favor of the death penalty. (*People v. Danielson* (1992) 3 Cal.4th 691, 712-713.)

From the answers given by Prospective Juror no. 8, it ultimately appeared that his views would "substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Although he at times said that he would not vote to impose the death penalty, his final answers indicate otherwise.

Towards the end of his voir dire, Juror no. 8 stated, "[I]f all the evidence points to [appellant], he knows I'm going to vote for the death penalty. Or at least he should based upon what he heard me say in this court today." (36 RT 7148-7149.) Juror no. 8's later explanation that he made the above statement because he misunderstood the question asked of him (36 RT 7150) is simply not credible. The trial court should have known that, just as he had stated, Juror no. 8 "[was] going to vote for the death penalty" in this case in which appellant had sustained three prior convictions for murder. By refusing to grant the defense challenge for cause in this case where appellant

exhausted all his peremptory challenges, the court violated appellant's constitutional rights to a fair trial by jury.

IV.

THE COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY ADMITTING IRRELEVANT EVIDENCE THAT APPELLANT WAS A WHITE SUPREMACIST

Over defense objection, the court allowed the prosecution to introduce evidence that appellant was a racist on the theory that such beliefs were relevant to appellant's motivation to kill Leonard Swartz even though Swartz, like appellant, was White. The evidence of any racist beliefs on appellant's part was totally irrelevant.

The admission of irrelevant inflammatory evidence can constitute a violation of the federal and state due process right to a fair trial. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [116 L.Ed.2d 385]; *United States v. Agurs* (1976) 427 U.S. 97, 108 [49 L.Ed.2d 342]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *McKinney v. Rees* (9th Cir. 1994) 993 F.2d 1378; *Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 52.) More specifically, evidence of racist attitudes is a potentially inflammatory subject which can result in constitutional error. (See, e.g., *Dawson v. Delaware* (1992) 503 U.S. 159, 165-168 [117 L.Ed.2d 309] [admission of evidence that a defendant was a member of the Aryan Brotherhood prison gang was constitutional error].)

If appellant in fact killed Swartz as the prosecution alleged, he

did so because Swartz was a child molester – not because of any racist beliefs. The admission of the inflammatory evidence that appellant was a racist resulted in a violation of appellant's federal and state due process rights to a fair trial.

Along with other state prison inmates at Salinas Valley State Prison, appellant conformed to the practice whereby inmates would not generally associate with inmates of other races. According to the prison culture, inmates of one race were responsible for dealing with problem members of that race. Even if appellant, in conformity with that practice, expressed the opinion that White inmates should eliminate White child molesters, holding such an opinion did not make him a racist, or show that he believed that non-Whites were inferior to Whites.

Nevertheless, the prosecution, in an attempt to paint appellant as an evil person, persistently tried to show that appellant was a racist. The irrelevant evidence tending to show that appellant was a racist was so inflammatory that it denied appellant his right to due process and a fair trial under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, section 7, subdivision (a), and Article I, section 16, of the California Constitution, and both his death sentence and his underlying convictions must therefore be reversed.

A. Procedural Background

Prior to the beginning of testimony at trial, appellant filed a motion to exclude certain evidence, including all evidence that appellant was a White supremacist. (3 CT 763-765.) In the motion, appellant's trial counsel explained that the prosecution's purpose in presenting such evidence was to appeal to the passion of the jury when the real basis for the prosecution's case was that appellant hated child molesters. (3 CT 764.) The defense also moved to exclude evidence that appellant told other inmates that he would continue to kill in the future. (3 CT 763-764.)

In its opposition to the defense motion (3 CT 645-651), the prosecution argued that appellant wanted to kill Swartz in order "to clean the White gene pool" and obtain enhanced status among White inmates. (3 CT 645.) The prosecution acknowledged that appellant "does not like" child molesters, but went on to argue:

> Any attempt to understand defendant's motivation to kill others for child molestation . . . without reference to defendant's views on race, is flawed as both incomplete and unconvincing. The undertaking is analogous to claiming an understanding of why Hitler wished to eradicate Jews without considering Hitler's views on the Aryan race. To say that Hitler simply did not like Jews is as trite and shallow as saying defendant just doesn't like child molesters.

(3 CT 646.)

The prosecution stated that "[t]he foundation of prison social structure is race" and inmates segregate themselves on the basis of race. (3

CT 646.) The prosecution further represented that each racial group is responsible for "'cleaning their own house.'" (3 CT 647.) The prosecution argued that excluding appellant's racist beliefs would "so severely abridge evidence of defendant's true motives that they become essentially fictionalized and devoid of convincing force." (3 CT 651.)

In the pretrial proceedings, the defense objected to questions concerning what the prosecution termed "racialist perspectives" for inclusion in the juror questionnaires. (29 RT 5603-5607.) The prosecution explained that the questions were designed to uncover jurors who were White supremacists. (29 RT 5604.) The court ruled that the juror questionnaire would include a broadly-worded question asking if prospective jurors were acquainted with "Aryan racialist philosophy." (29 RT 5606-5607.) In accordance with the court's ruling, all prospective jurors were asked in question 67 of the juror questionnaire, "Are you acquainted with any 'Aryan Racialist' philosophy?" and asked to explain their answer if it was affirmative. (E.g., 4 CT 1083.)

In a discussion about the admissibility of evidence of appellant's racist beliefs, the prosecution argued that the killing of Swartz was "racially motivated" because appellant committed the offense "to clean the white gene pool." (45 RT 8820.) Appellant's trial counsel again argued that the evidence was inflammatory and the probative value of the evidence

was outweighed by the prejudice to appellant. (45 RT 8821-8822.)

The court excluded any testimony concerning the racist philosophy of David Lane[10] or any White supremacist philosophy. (45 RT 8822, 8829-8830.) The court excluded any statements that appellant made about what he intended to do *after* the murder of Swartz. (45 RT 8823-8824.) The court also excluded evidence that stabbing child molesters in prison is primarily an activity of White inmates. (45 RT 8830.) However, the court ruled that "[t]he comments that [appellant] made about his motives" would be admissible. (45 RT 8826.)

Right at the beginning of its opening statement to the jury, the prosecution focused on appellant's racist beliefs and stated that appellant had assigned himself the mission to "clean up the trash that white people let slide these days." (46 RT 9004-9005.) Later, the prosecution stated that appellant told Inmate C that he could not understand why the White race was allowing Swartz to live. (46 RT 9009-9010.)

During their testimony, various witnesses explained that inmates at Salinas Valley State Prison segregated themselves by race and that Whites and "Southern Hispanics" congregated in section A of the day

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[10] David Lane is a White supremacist who killed Denver radio talk show host Alan Berg. Appellant had written, "We must secure the existence of our people and a future for white children," which is a White supremacist maxim popularized by Lane. (3 CT 650.)

rooms, Blacks and "Northern Hispanics" gathered in section C of the day rooms, and "others," such as Asians and American Indians, spent time in section B. (47 RT 9240, 9295; 48 RT 9518; 50 RT 9843.)

However, the prosecution presented evidence not only that appellant associated with other White inmates in accordance with the practice at the prison, but that he was a racist. Rick Dixon, who testified he was stabbed by appellant with the aid of inmate Steve Petty, stated appellant was in charge of the "woods," or White inmates, in building B2 where the stabbing occurred. (47 RT 9229.) Dixon explained that an inmate gets to be in charge of a racial group "[b]y being dangerous, crazy, not giving a shit about nothing." (47 RT 9229.) Appellant asked Dixon why his cell mate, who had bought drugs from inmates of other races and then was transferred out of the yard without having paid for the drugs, had not been "dealt with." (47 RT 9230.) Dixon also testified that, in prison, each race was responsible for dealing with its rats or pedophiles. (47 RT 9232.) Appellant told Dixon to stab a child molester named "Dennis" in cell 217 in order to earn the respect of the "woods" in the building. (47 RT 9226-9227, 9254.)

Over defense objections, Sergeant Jose Rocha testified both that a "peckerwood" is a White supremacist in the prison system and that the term "peckerwood" means a White inmate who is a "bleed off" of the Aryan Brotherhood prison gang. (53 RT 10,478, 10,481.) Not only did defense

expert James Esten, a retired former Department of Corrections program administrator, testify that the term "peckerwood" in prison means nothing other than a White male (55 RT 10,850-10,851), but Rick Dixon also testified that "woods" simply meant White inmates (47 RT 9254).

Rocha also testified that, in a letter to inmate Christian Banscombe which law enforcement personnel recovered, appellant wrote, "I haven't had a smoke in ten days, yet I still would gladly beat a Muslim to death with a sack full of pork chops for a cigarette." (53 RT 10,479.)

Inmate C testified that appellant said one of his missions in prison was to take care of "scum" like Swartz who were child molesters. (50 RT 9866.) Inmate C was allowed to testify that appellant said it was the responsibility of the White race to take care of such people. (50 RT 9866.) Appellant said that the White race had "gotten soft" over the years and, years ago, people like Swartz would have been "dealt with." (50 RT 9867.) Appellant said one of his missions in prison was to "clean up" all the "trash" and "scum" that White people now let "slide by." (51 RT 10,019.) Appellant would tell young White inmates new to prison "what the white race is all about and what they should do." (50 RT 9876.)

Most prejudicial of all the testimony concerning appellant's beliefs about race was Inmate P's testimony that appellant told him he was targeting child molesters, Blacks, and rats. (52 RT 10,279-10,280.) Not

only was this testimony that appellant was targeting Black inmates prejudicial, but even the prosecution did not believe it to be true. The prosecution had written in its opposition to the defense motion to exclude evidence of any racist beliefs on appellant's part that appellant "never expressed any desire to kill members of other races, and there is no evidence whatsoever that he desires to do so." (3 CT 649.) Inmate P testified that appellant told him of a "sort of Hitler concept" that the gene pool should be cleansed of all persons with any type of defect. (52 RT 10,285.)

As in its opening statement to the jury and in its presentation of witnesses, the prosecution emphasized appellant's racist beliefs in its argument to the jury after the close of evidence in the guilt phase. The prosecution argued that appellant was motivated to kill Swartz in part to get status, in part to get transferred to Pelican Bay State Prison, and in part to "clean the gene pool" in accordance with his "white supremacist philosophy." (57 RT 11,233-11,234.) The prosecution pointed out that appellant had told Inmate C that the White race had become soft by tolerating the existence of people like Swartz and that appellant would school younger White inmates "in the ways of the white race in prison." (57 RT 11,234-11,235.) Even though appellant's statement in the letter that he could beat a Moslem to death with a sack of pork chops for a cigarette was obviously a joke, the prosecution argued that the statement demonstrated

appellant's White supremacist philosophy. (57 RT 11,265.)

In its argument in the penalty phase of the trial, the prosecution again cited evidence that appellant was a racist, stating appellant was motivated to kill Swartz by his "twisted white supremacist prison philosophy" and therefore there was no moral "extenuation" for the murder. (66 RT 13,010.)

B. The Admission Of The Evidence Violated Appellant's Rights

In the pretrial discussions, the prosecution grossly mischaracterized the impact of any racist beliefs on any motivation appellant might have had to kill child molesters. Even if appellant wanted to kill White child molesters, that desire did not make him a racist. It meant only that he believed child molesters should be killed and that he, as a White inmate acting in conformity with the practice of the prison, was responsible for eliminating White child molesters while members of other races were to deal with non-White child molesters.

In pleadings before the court, the prosecution acknowledged that each racial group in prison was responsible for "'cleaning their own house.'" (3 CT 647.) Therefore, any belief by appellant that he should kill White child molesters did not suggest that appellant was a racist or White supremacist who believed certain racial groups to be inferior to other racial

groups. Accordingly, there was no reason for the court to allow the prosecution to refer to any statement on appellant's part that he wanted to clean the "White gene pool." In order to avoid prejudice to appellant, any such statement should have been redacted to state simply that appellant wanted to clean "the gene pool."

But, in any event, all the other damaging evidence tending to show that appellant was a racist should have been excluded. There was no reason to introduce evidence that appellant was a leader among the White inmates (47 RT 9229), that he made a joke in bad taste about Moslems (53 RT 10,479), or that he would teach young White inmates "what the white race is all about and what they should do" (50 RT 9876). There was even less reason to introduce evidence, acknowledged by the prosecution to be false (3 CT 649), that appellant included Black inmates among his targets. (52 RT 10,279-10,280.)

Also inadmissible was the correctional officer's opinion (which was contradicted by other testimony [47 RT 9254; 55 RT 10,850-10,851]) that the term "peckerwood" means a White inmate who is a "bleed off" of the Aryan Brotherhood prison gang. (53 RT 10,478, 10,481.) Erroneous evidence of membership in a prison gang can constitute inflammatory evidence that results in a violation of a defendant's constitutional rights. (*Dawson v. Delaware, supra,* 503 U.S. at pp. 165-168;

see *People v. Williams* (1997) 16 Cal.4th 153, 193 ["admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged"]; *People v. Champion, supra,* 9 Cal.4th at p. 922; *People v. Cox, supra,* 53 Cal.3d at p. 660.)

As discussed above, although the erroneous admission of prejudicial evidence will not necessarily violate a defendant's federal constitutional rights, such a violation occurs where the evidence is so prejudicial as to deny a defendant a fundamentally fair trial and due process under the Fifth and Fourteenth Amendments. Because there is widespread agreement in American society that racist beliefs are evil, such a constitutional violation occurred in the present case by the prosecution's eliciting of irrelevant and inflammatory evidence that appellant was a White supremacist.

The standard of review for prejudice for such federal constitutional error is whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].) Applying that standard, the admission of the inflammatory evidence that appellant was a racist prejudiced appellant both in the guilt phase and the penalty phase of his trial.

In the guilt phase of appellant's trial, the prosecution's

evidence consisted principally of the testimony of prison inmates or parolees. As detailed in the Statement of Facts, *ante*, all these inmates had multiple prior felony convictions and their testimony was suspect. Additionally, most of the inmate witnesses were given consideration by the prosecution in exchange for their testimony.

Other than the questionable inmate testimony, the prosecution had little evidence tying appellant to the assault on Rick Dixon. That limited evidence was related to officers finding a shank in the first tier section C shower after Dixon was stabbed. (RT 9088-9089.) After the stabbing, two correctional officers saw that appellant and inmate Steve Petty were the closest inmates to the shower in section C. (47 RT 9068-9069, 9104-9106, 9206.) Correctional Officer Rudd also saw red lines and indentations on appellant's hands. (47 RT 9107.) This evidence, by itself, provided little evidence of appellant's guilt. Without the inmate testimony, appellant would not have been convicted of the stabbing of Dixon.

The prosecution's case concerning the murder of Leonard Swartz was also dependent on the jury's acceptance of inmate testimony. Other than inmate testimony, the prosecution's case consisted principally of inconclusive evidence relating to blood. Officer Andy Cariaga performed a positive Hemastix presumptive test for blood on appellant. (49 RT 9634-9636, 9638; 53 RT 10,431.) DNA testing revealed the presence of blood

consistent with Swartz's blood on appellant's pants. (54 RT 10,703-10,705, 10,710; 55 RT 10,803-10,804.) But, someone else could have stabbed Swartz and his blood could have reasonably been transferred to appellant during the chaos that ensued following the stabbing.

In argument to the jury, the prosecutor suggested that the letter appellant wrote to inmate Christian Banscombe and appellant's writing in a book that "Non-existence of the unfit has and will be the law of nature" constituted evidence of appellant's guilt. However, appellant wrote in the letter that he was not guilty of the Swartz murder. Moreover, the above quoted writing certainly does not constitute convincing evidence of appellant's guilt.

The prosecution was able to overcome its weak evidence by painting appellant as a racist. "Inflammatory" is not too strong a term to describe the irrelevant evidence that appellant was a White supremacist. Such evidence permeated the prosecution's case to the extent that the jury essentially had no choice but to view appellant as a White supremacist. This tainted view skewed the jury's decision making. Whether or not appellant was a White supremacist was irrelevant to the prosecution's case that appellant killed Swartz. It cannot be concluded beyond a reasonable doubt that appellant would have been convicted of the crimes charged against him if the inflammatory racist evidence had not been improperly introduced

against him.

Similarly, this evidence prejudiced appellant in the penalty phase of his trial. The jury did not vote for the death penalty merely because appellant had killed a child molester. It reached its verdict in part because of appellant's prior murder convictions sustained when he was a juvenile and in part because the prosecution was allowed to present evidence that appellant was a racist. The evidence that appellant harbored racist beliefs indicated that appellant would present a danger to others even if he were placed in secure housing in prison and, therefore, the death penalty was called for.

Accordingly, this court should reverse both the death sentence and the underlying convictions due to the trial court's error in allowing the prosecution to present irrelevant and inflammatory evidence that appellant was a White supremacist.

V.

THE COURT ERRED BY INSTRUCTING THE JURY WITH A VERSION OF CALJIC NO. 3.20 (CAUTIONARY INSTRUCTION – IN-CUSTODY INFORMANT) WHICH SPECIFICALLY EXCLUDED FROM THE AMBIT OF THAT INSTRUCTION THE INMATES WHO CLAIMED TO BE PERCIPIENT WITNESSES

By denying the defense motion to include within the ambit of CALJIC No. 3.20 (cautionary instruction – in-custody informant) the testimony of three inmate witnesses who claimed to be percipient witnesses to the murder, the trial court erred. The prosecution's case on the murder charge depended substantially on the testimony of these three inmates, who all received some benefit from the prosecution in exchange for their testimony. The testimony of these witnesses was improperly enhanced by the court's instruction, depriving appellant of his federal and state constitutional rights to a fair trial. Appellant's convictions must be reversed.

In instructing the jury in the guilt phase of the trial, the court gave CALJIC No. 3.20 as follows:

> The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling the witness. This does not mean that you may arbitrarily disregard this testimony, but

you should give it the weight to which you find it to be entitled in light of all the evidence in this case.

"In-custody informant" means a person, *other than a codefendant, percipient witness*, accomplice, or coconspirator whose testimony is based upon statements made by a defendant while both the defendant and the informant are held within a correctional institution.

Inmates D, C, J, R and P are in-custody informants.

Salinas Valley State Prison, Corcoran State Prison and Pelican Bay Prison are correctional institutions.

(4 CT 1016; 58 RT 11,457-11,458; emphasis added.)

Prior to the court's instruction of the jury, appellant's trial counsel asked the court to include within that instruction Inmates A, F, and G, who claimed to have witnessed parts of the murder. (56 RT 11,014-11,017.) Appellant's trial counsel pointed out that Inmates A, F, and G were, from a layman's prospective, in-custody informants as much as the witnesses identified as such by the court and excluding those inmates from the ambit of the instruction would imply that the testimony of those three inmates need not be viewed with caution. (56 RT 11,016-11,017.) The court refused the defense request, noting that Penal Code section 1127a, subdivision (a), did not include percipient witnesses in its definition of "in-custody informants." (56 RT 11,017-11,018.)

Penal Code section 1127a, subdivision (b), directs trial courts to give a cautionary instruction at the request of a party in a criminal trial

when an "in-custody informant" testifies. Subdivision (a) of section 1127a states:

> As used in this section, an "in-custody informant" means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.

Because Inmates A, F, and G were percipient witnesses, the court's ruling complied with Penal Code section 1127a. However, as argued by trial counsel for appellant, the instruction was nevertheless erroneous. The jury would have naturally applied the common-sense maxim "inclusio unius est exclusion alterius" to understand that the instruction implied that the testimony of Inmates A, F, and G, should not be viewed with the same caution as that of the other inmate witnesses. In *People v. Castillo* (1997) 16 Cal.4th 1009, this court, in discussing a jury instruction dealing with the defense of involuntary intoxication, stated:

> Although the average layperson may not be familiar with the Latin phrase *inclusio unius est exclusio alterius,* the deductive concept is commonly understood, and if applied in this context could mislead a reasonable juror as to the scope of the voluntary intoxication instruction.

(*Id.* at p. 1020.)

Similarly, the jury in the present case would have understood CALJIC No. 3.20 to exclude in-custody witnesses who claimed to be percipient witnesses and, therefore, would have subjected the testimony of

such witnesses to less scrutiny than the testimony of other inmate witnesses. The jury would have believed that Inmates A, F, and G were more worthy of belief simply because those witnesses claimed to have been percipient witnesses to the attack on Leonard Swartz.

The testimony of those three witnesses was important to the prosecution's case. As discussed in detail in the Statement of Facts, *ante*, Inmate A was the friend of Swartz who testified that he saw appellant behind Swartz with his hand around Swartz's throat. (51 RT 10,056-10,058.) After appellant released Swartz, Swartz was bleeding from his throat. (51 RT 10,056.) Inmate A testified that appellant then walked towards a stairwell where he believed appellant dropped a weapon, although he admitted that he did not actually see that. (51 RT 10,056-10,059, 10,065)

Inmate F allegedly saw appellant punching and slapping Swartz. (50 RT 9903-9904.) Inmate F saw Swartz grab his neck and start walking to the floor officers' podium with blood gushing out of his neck. (50 RT 9904.) Appellant walked off and threw away some type of object. (50 RT 9905-9906.)

Inmate G testified he saw appellant fighting with Swartz before Swartz, who had blood coming from neck, ran towards the floor officers' podium. (51 RT 10,023-10,024.) After seeing Swartz bleeding,

Inmate G saw appellant had some type of object in his hand. (51 RT 10,024, 10,041-10,042.) Inmate G testified that he later saw a weapon on the floor. (51 RT 10,024.)

If believed, the testimony of the above three inmate witnesses was obviously devastating to the defense. All of above witnesses were given favorable housing in prison in exchange for their testimony and the defense argued to the jury that their testimony therefore should not be believed (58 RT 11,406-11,408). By giving an instruction that implied that the testimony of the above witnesses (in contrast with that of the other inmate witnesses) need not be viewed with caution, the court incorrectly implied that the testimony of an in-custody witness who claims to have been a percipient witness should be viewed with less scrutiny than an in-custody witness who claims to have heard an admission or confession.

Appellant recognizes that this court has stated numerous times than CALJIC No. 3.20 need not be given sua sponte. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1209-1210; *People v. Morales* (1989) 48 Cal.3d 527, 553; *People v. Thompson* (1988) 45 Cal.3d 86, 118-119; *People v. Hovey* (1988) 44 Cal.3d 543, 565-566.) However, even where a court has no sua sponte duty to instruct on a particular legal point, when it does so instruct, it must give legally correct instructions. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134; *People v. Castillo, supra,* 16 Cal.4th at p.

1015.)

In the present case, the jurors, while probably not being familiar with the phrase *inclusio unius est exclusio alterius,* would have applied the logical concept to which the phrase refers and, therefore, have subjected the testimony of the in-custody witnesses who claimed to be percipient witnesses to less scrutiny than the other in-custody witnesses. As explained above, the testimony of the witnesses claiming to be percipient witnesses was crucial to the prosecution's case.

Under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, section 7, subdivision (a), and Article I, section 16, of the California Constitution, a criminal defendant has federal and state constitutional rights to a fair trial. By refusing appellant's request to amend the jury instruction dealing with in-custody witnesses, the trial court rendered appellant's trial fundamentally unfair and violated those rights.

VI.

IN LIGHT OF *ROPER V. SIMMONS* (2005) 543 U.S. 551 [161 L.ED.2d 1], APPELLANT'S DEATH SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE WAS GIVEN THAT SENTENCE PRIMARILY AS A RESULT OF MURDERS HE COMMITTED WHEN HE WAS A JUVENILE

In *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1], the United States Supreme Court held that, under the Eighth and Fourteenth Amendments of the United States Constitution, imposing the death penalty on offenders who were under the age of 18 years when their crimes were committed would constitute cruel and unusual punishment. (*Id.* at p. 578.) In appellant's case, the jury returned a verdict of death in less than an hour and a half. (4 CT 918.) The jury did so primarily because of the three murders which appellant committed when he was a juvenile[11] – not because he killed a child molester in prison. Under the rationale of *Roper v. Simmons*, appellant's judgment of death must be reversed.

The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines

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[11] Appellant was born on January 7, 1970. (61 RT 12,019; amended prob. rep. 2 [attached to second supp. CT].) The murders of Steve Patton, Raymond Rogers, and Dawn Rogers were committed in September of 1987. (64 RT 12,625, 12,634, 12,647, 12,656-12,657.) At that time, appellant was only 17 years old.

imposed, nor cruel and unusual punishment inflicted." The Fourteenth Amendment of the United States Constitution, Section 1, provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law." That provision of the Fourteenth Amendment operates to make the Eighth Amendment applicable to punishments imposed pursuant to state law. (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed. 108]; *Furman v. Georgia* (1972) 408 U.S. 238, 239 [33 L.Ed.2d 346] (per curiam); *Robinson v. California* (1962) 370 U.S. 660, 666 [8 L.Ed.2d 758].)

In *Roper v. Simmons, supra,* 543 U.S. 551, Simmons committed a murder when he was 17 years old, for which he was tried and sentenced to death after he turned 18 years of age. (*Id.* at p. 555.) A majority of the United States Supreme Court rejected that court's earlier ruling in *Stanford v. Kentucky* (1989) 492 U.S. 361 [106 L.Ed.2d 306] that the Eighth Amendment to the United States Constitution permits capital punishment for juvenile offenders over 16 years old. (*Id.* at pp. 556-558.)

In reaching its decision in *Roper v. Simmons*, the majority stated there are three general differences between juveniles under 18 and adults that demonstrate that juvenile offenders cannot with reliability be classified among the narrow category of the worst offenders who may constitutionally be subjected to capital punishment. The court noted that "a

lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults," that juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and that "the character of a juvenile is not as well formed as that of an adult." (*Id.* at pp. 568-570.)

The court elaborated:

> [The above] differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." [Citation.] Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. [Citation.] The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

(*Id.* at p. 570.)

The court noted, "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." (*Id.* at p. 574.) The court concluded that the Eighth and Fourteenth Amendments of the Constitution "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." (*Id.* at p. 578.)

However, appellant was sentenced to death primarily due to the murders he committed when he was a juvenile. The trial court instructed the jury that it could consider both the charged offense and appellant's prior murders in determining which penalty to impose. (66 RT 13,030-13,031.) In its argument to the jury in the penalty phase of the trial, the prosecution repeatedly emphasized that appellant had committed four murders in all. (66 RT 13,006, 13,008-13,009, 13,012-13,013, 13,015-13,018.)

The prior murders that appellant committed when he was a juvenile were obviously more of a factor in the jury's reaching its quick verdict that the death penalty should be imposed than the murder of Leonard Swartz. The murders committed when appellant was a juvenile involved three victims, as opposed to just a single victim. If appellant in fact killed Swartz, he did so because Swartz was a child molester. In contrast, the evidence did not suggest that the three other murder victims had committed any crimes at all.

The murders appellant committed as a juvenile were more aggravated than the murder of Swartz in other aspects. Appellant killed Steve Patton because he wanted to use his truck to rob a bank. (64 RT 12,630.) After appellant and Inmate T damaged Patton's truck (64 RT 12,654), they then took the car belonging to Raymond and Dawn Rogers for

the purpose of robbing a bank. (64 RT 12,659.)

By far the most inflammatory testimony relating to any of the four murders was the testimony of Inmate T that, after part of Dawn Rogers's brain landed on appellant's foot, appellant "was making comments that this is kind of cool, jiggling it round [*sic*] like it was Jello or something on the edge of his shoe." (64 RT 12,663.) Appellant flicked the piece of Dawn Rogers's brain into the slough. (64 RT 12,663.) When leaving the murder scene in the Rogers's car, appellant "was acting completely normal, if not even jovial." (64 RT 12,664.)

Accordingly, appellant was sentenced to death primarily because of the murders he committed while he was a juvenile. Under *Roper v. Simmons*, appellant's death penalty must be reversed because that penalty would violate the Eighth and Fourteenth Amendments.

Since *Roper v. Simmons* was decided, appellant has been able to locate only three decisions in which a court has discussed the applicability of that case to the introduction of offenses committed when the defendant was a juvenile. In *England v. State* (2006) 940 So.2d 389, the defendant asked that his death sentence be reversed because the trial judge based two aggravating factors on felony convictions committed when

the defendant was a juvenile.[13] The Supreme Court of Florida dealt with England's claim in a summary fashion, which is repeated in its totality as follows:

> England next claims that *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), prevents the application of the death penalty in his case. England argues that because the trial judge based two aggravating factors on felony convictions for crimes that occurred before England was eighteen years of age, *Roper* prohibits the imposition of the death penalty. In *Roper,* the United States Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper,* 543 U.S. at 578, 125 S.Ct. 1183. The Court provided a bright line rule for the imposition of the death penalty itself, but nowhere did the Supreme Court extend this rule to prohibit the use of prior felonies committed when the defendant was a minor as an aggravating circumstance during the penalty phase. This claim has no merit.

(*Id.* at pp. 406-407.)

In *Melton v. State* (2006) 949 So.3d 994, the Florida Supreme Court again upheld the admissibility of a defendant's juvenile offenses in the penalty phase of a capital case by simply quoting that court's above language from *England.*

In *Johnson v. State* (2006) 148 P.3d 767, there was a retrial of a defendant's penalty phase in a capital case. The penalty trial consisted

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[13] The opinion is unclear what crimes England had committed as a juvenile. England had committed prior murders in 1987 (*id.* at pp. 393, fn. 2, 397), but England's age at that time cannot be determined from the opinion.

first of a death-eligibility phase, in which the jury decided that factors in aggravation outweighed factors in mitigation. The jury then proceeded to a "selection phase," in which it determined that the defendant's punishment should be death. (*Id.* at pp. 767, 771.) In the selection phase, the prosecution presented evidence that the defendant had committed an armed bank robbery in California when he was a juvenile. (*Id.* at pp. 772, 774.)

In rejecting the defendant's claim that the admission of appellant's offense violated *Roper v. Simmons*, the Supreme Court of Nevada stated:

> *Roper* did not prohibit the admission of juvenile records during a death penalty hearing. Because there is no question that Johnson was not a juvenile when he committed the murders, his reliance upon *Roper* is misplaced.

(*Johnson v. State, supra,* 148 P.3d at p. 774.)

The cursory analysis of the *Roper v. Simmons* decision by the above two courts is obviously flawed. In *Roper v. Simmons*, the United States Supreme Court plainly stated, "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." (*Id.* at p. 578.) It logically follows that the United States Constitution forbids the death penalty for a defendant when the death penalty is based in part on offenses committed when the defendant was a juvenile. The application of *Roper v. Simmons* is even more compelling in a case where the jury's death verdict is

based primarily on much more serious murders committed when the defendant was a juvenile.

Yet that is exactly what occurred in appellant's case. When he was a juvenile, appellant committed three senseless murders in two separate incidents. But because appellant was under 18 years of age at the time of the offenses, the prosecution, under California law, could not legally seek the death penalty. (Pen. Code, § 190.5, subd. (a)). The prosecution later sought the death penalty after the murder of Leonard Swartz. Generally, the prosecution is unlikely to seek the death penalty in a case where the defendant murdered the victim because the victim was a child molester. It was the prior three murders, which were much more outrageous, that motivated the prosecution to seek the death penalty.

In any event, the jury surely chose the death penalty for appellant primarily because of the three shocking murders he committed while he was a juvenile, as opposed to the single murder of a child molester in prison. Simply put, appellant was sentenced to death, at least primarily, for murders he committed when he was only a juvenile. Under the rule in *Roper v. Simmons* that the imposition of the death penalty for offenses committed when a defendant was a juvenile violates the Eighth Amendment, this court must reverse appellant's death sentence.

Finally, appellant notes that Article 1, section 17, of the

California Constitution declares that "[c]ruel or unusual punishment may not be inflicted or excessive fines imposed." The state and federal prohibitions against cruel and/or unusual punishment are not coextensive. (*People v. Anderson* (1972) 6 Cal.3d 628, 634.) For the reasons articulated in *Roper v. Simmons, supra,* 543 U.S. 551, this court should find that the imposition of the death penalty in appellant's case also violates California's Constitution.

VII.

CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Although challenges to most of these features have been rejected by this court, appellant presents these arguments here 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.

To date, 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 United States 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) 126 S.Ct. 2516, 2527, fn. 6;[13] see also, *Pulley v. Harris*

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[13] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the

(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]).

When 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, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

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

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appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

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 section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's Death Penalty Is Invalid Because Penal Code Section 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. According to this court, 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.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty, but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained a multitude of special circumstances[14] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special

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[14] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow.

circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

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

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the

Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and prevailing international law.[15] (See Section E of this Argument, *post*).

B. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.3(a) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution

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

Factor (a) listed in section 190.3, directs the jury to consider

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[15] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

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.[16] 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,[17] or having had a "hatred of religion,"[18] or threatened witnesses after his arrest,[19] or disposed of the victim's body in a manner that precluded its recovery.[20] 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.)

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[16]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[17] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[18] *People v. Nicolaus, supra,* 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[19] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[20] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

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.

C. 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 United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 2007 WL 135687 [hereinafter *Cunningham*].

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 p. 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 p. 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 p. 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 p. 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 p. 244.)

In *Cunningham,* the high court rejected this court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. In so doing, it explicitly rejected the reasoning used by this court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. In The Wake Of *Apprendi*, *Ring*, *Blakely*, And *Cunningham*, Any Jury Finding Necessary To The Imposition Of Death Must Be Found True Beyond A Reasonable Doubt

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.[21] As set forth in California's

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[21] This court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

"principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (66 RT 13,033-13,034),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[22] 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.[23]

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[22] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460)

[23] This court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh

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 Determinate Sentencing Law "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The United States Supreme Court explicitly rejected this

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mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

reasoning in *Cunningham.*[24] 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 DSL. 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.* at 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]." (*Id.* at 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." The court explained:

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[24] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p. 8.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham*, it is crystal-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)[25] 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, stating:

This argument overlooks *Apprendi*'s instruction that "the

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

> relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at p. 2431.)

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 p. 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can 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. (Pen. Code, § 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 p. 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." (*Blakely*, 124 S.Ct. at p. 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 factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is A Factual Question That Must Be Resolved Beyond A Reasonable Doubt

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,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,* 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[26])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[27] As the high court stated in *Ring, supra*, 122 S.Ct. at p. 2443:

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

[27]In its *Monge* opinion, the United States Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri,*] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

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

The 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 United States 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

a. Factual Determinations

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth

Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition Of Life Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 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 United States Supreme Court reasoned:

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

(455 U.S. at 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 United States 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.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*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.* at p. 267.)[28] 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. (Pen. Code, § 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the

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[28] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

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.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

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.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), 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 Prosecution May Not Rely In The Penalty Phase On Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For The Prosecutor To Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As A Factor In Aggravation Unless Found To Be True Beyond A Reasonable Doubt By A Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Although the jury found beyond a reasonable doubt that appellant had committed the three prior murders, the jury did not make any findings that

appellant committed the particular actions attributed to him in the prosecution's evidence in the penalty phase of the trial concerning those murders. The prosecution focused on those action in its argument in the penalty phase.

The United States Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. 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.)

7. 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 repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*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. Arias*, *supra*, 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g.,

People v. Montiel (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[29]

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of

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[29] There is one case now before this court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to *aggravate* the sentence. (See *People v. Cruz*, No. S042224, Appellant's Supplemental Brief.)

death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to

ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at 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.

In *Prieto*,[30] as in *Snow*,[31] this court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *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

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[30] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[31] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

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."[32]

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. (See Sections C.1-C.2, *ante*.) 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. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[33]

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[32] In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[33] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

(*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

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*.)

E. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*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 United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 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. 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.")[34] 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;

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[34] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

Atkins v. Virginia, supra.)

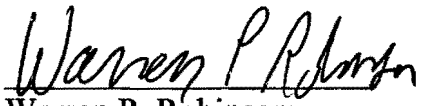
Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

CONCLUSION

Accordingly, for the reasons stated, this court should reverse appellant's convictions. Even if this court were to affirm appellant's convictions, the penalty of death must be reduced to life imprisonment without the possibility of parole.

Dated: August 4, 2007.

Respectfully submitted,

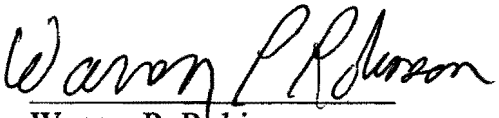


Warren P. Robinson

CERTIFICATE OF COMPLIANCE

Based on the word count of the computer program used to prepare this document, I certify that this brief uses a 13-point Times New Roman font and contains 34,270 words.

Dated: August 4, 2007.



Warren P. Robinson

DECLARATION OF PROOF OF SERVICE BY MAIL

Case Name: People v. Kenneth Ray Bivert Case Number: S099414

I declare that I am over 18 years of age, a resident of San Diego County, and not a party to the above case. My business address is 15412 Caldas De Reyes, San Diego, CA 92128-4456. I served appellant's opening brief on each of the following addressees by placing a copy of that document in a separate envelope for each addressee, sealing the envelope, and then depositing the envelope in the United States mail with the postage fully prepaid in San Diego, California, on August 13, 2007:

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I declare under penalty of perjury that the above information is true and correct.

Dated this 13th day of August, 2007, in San Diego, California.

Barbara J. Zinker