No. S064858 SUPREME COURT COPY COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROYCE LYN SCOTT Defendant and Appellant.	(Riverside County Superior Court No. ICR 16374)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside
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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

CONSTITUTIONS

TABLE OF AUTHORITIES

FEDERAL STATUTES

STATE STATUTES

COURT RULES

TABLE OF AUTHORITIES

Page(s)

JURY INSTRUCTIONS

TEXT AND OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATEMENT OF THE CASE

On February 18, 1993, appellant was charged with committing 15 crimes, relating to six separate incidents that occurred from July through November, 1992.

The charges were initially filed in two separate felony complaints in the Riverside County Municipal Court, Desert Judicial District, Palm Springs. The first complaint, Municipal Court No. 10567, was filed on November 6, 1992 and charged: (Count 1) robbery (Pen. Code, § 211),[1] (Count 2) robbery (§ 211), (Count 3) burglary (§ 459), and (Count 4) assault with a deadly weapon (§ 245, subd. (a)(1)). Each of the charges occurred on November 4, 1992. The complaint also alleged two prior felony convictions (§§ 667, 667.5, subd. (b)). (I First Supp. CT 1-3.)[2]

The second complaint, Municipal Court No. 10599, was filed November 12, 1992, and charged four separate and unrelated burglary counts as well as prior felony conviction allegations: (Count 1) burglary (§ 459), occurring on August 9, 1992; (Count 2) burglary (§ 459), occurring

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Throughout appellant's opening brief the following abbreviations will be used: "CT" will refer to the 23 volume Clerk's Transcript on Appeal, and Roman numerals are used to designate each volume. There are six sets of Supplemental Clerk's Transcripts (First through Sixth); the First Supplemental Clerk's Transcript consists of three volumes, and Roman numerals are used to designate each volume; the Third and Sixth Supplemental Clerk's Transcripts are sealed documents.

"PTRT" will refer to the two volume Reporter's Transcript on Appeal relating to the pretrial proceedings, and alphanumeric numbers are used for each volume; "RT" will refer to the 21 volume Reporter's Transcript on Appeal relating to the trial proceedings, and alphanumeric numbers will be used to designate each volume of the Reporter's Transcript.

on August 5, 1992; (Count 3) burglary (§ 459), occurring on August 25, 1992; and (Count 4) burglary (§ 459), occurring on August 25, 1992. Each count alleged a prior felony conviction pursuant to section 667. (I First Supp. CT 7-8.) The felony complaint in Municipal Court No. 10599 was amended on December 15, 1992, to include the charges alleged with regard to the homicide of Della Morris: (Count 5) murder (§ 187), (Count 6) rape (§ 261), (Count 7) sodomy (§ 286, subd. (c)), (Count 8) burglary (§ 459). The amendment included three special circumstance allegations as to Count 5: robbery (§ 190.2, subd. (a)(17)(I)), rape (§ 190.2, subd.(a)(17)(iii)), and sodomy (190.2, subd. (a)(17)(iv)). (I First Supp. CT 31-33.)

A grand jury proceeding on the charges was held on February 5, 8, 9, 10-11, and 16, 1993. (See XIX CT 5044.) On February 18, 1993, the Riverside County District Attorney filed an indictment by the grand jury in the Riverside County Superior Court in case number ICR-16374. The indictment charged appellant Royce Scott with offenses regarding victim Della Morris: (Count 1) burglary (§ 459), (Count 2) rape (§ 261, subd. (2)), (Count 3) sodomy (§ 286, subd. (c)), and (Count 4) murder (§ 187). Three special circumstances relating to Count 4 were also alleged: that the murder was intentional and had been carried out in the course of burglary (§ 190.2, subd. (17)(vii)), rape (§ 190.2, subd. (17) (iii)) and sodomy (§ 190.2, subd. (17)(iv)). Counts 1-4 all occurred on or about July 10, 1992. The indictment also charged appellant with (Counts 5 - 9) five unrelated and separate burglaries (§ 459), each of which occurred on separate dates in August and November, 1992.[3] Count 9, which occurred on or about

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[3] Count 5 occurred on August 1, 1992; Count 6 occurred on August 2, 1992; Count 7 occurred on August 9, 1992; Count 8 occurred on August

(continued...)

November 4, 1992, included a serious felony with the use of a deadly weapon enhancement (§§ 12022, subd. (b), 1192.7, subd. (c)(23)). The November 4, 1992, incident also resulted in two robbery (§ 211) charges (Counts 10-11), which included a serious felony with the use of deadly weapon enhancement (§§ 12022, subd. (b), 1192.7, subd. (c)(23)); two charges of assault with a deadly weapon or force likely to cause great bodily injury (§ 245, subd. (a)(1)) (Counts 12-13), one of which included a serious felony with the use of a deadly weapon enhancement (§12022, subd. (b), 1192.7, subd. (c)(23)) (Count 12); and two counts of misdemeanor battery (§ 242) (Counts 14-15). The indictment further alleged that appellant had previously been convicted of two prior serious felonies (§§ 667, 667.5, subd. (b)). (XVII CT 4485-4492.)

Appellant was arraigned on the indictment on February 18, 1993, and the Riverside County Public Defender's Office was appointed to represent him. Appellant entered a plea of not guilty to each of the counts charged and denied the special enhancement and prior conviction allegations. (XVII CT 4482-4483.)[4]

On March 8, 1993, the Riverside County Public Defender was relieved as counsel for appellant, and private counsel Barbara Brand was appointed. (XIX CT 5114-5115.) On June 11, 1993, appellant's motion to substitute Grover Porter as counsel was granted; Barbara Brand was

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[3] (...continued)
25, 1992; and Count 9 occurred on November 4, 1992.

[4] On January 10, 1997, the District Attorney's motion to amend the indictment with non-substantive amendments was granted. Appellant entered a not guilty plea to all charges set forth in the amended indictment and denied the special enhancements and prior convictions alleged. (XX CT 5417; 2 PTRT 144.)

relieved as counsel. (XIX CT 5166-5167.)

Appellant's motions to set aside Count 5 of the indictment, one of the alleged unrelated burglaries, pursuant to section 995 and to bifurcate the prior conviction allegations were granted on February 7, 1997. (XXI CT 5525, 5558-5560.)[5] On February 18, 1997, the trial court denied appellant's motion to sever counts 1-4, relating to the homicide of Della Morris, from counts 6-15, the separate and unrelated burglary, robbery and assault charges. (XXI CT 5656.)[6]

On March 10, 1997, appellant plead guilty to Counts 6-15 and admitted the special enhancements pursuant to § 12022, subd. (b), to Counts 9-12. Immediately thereafter, selection of the jury commenced. (XXII CT 5744-5745.) The trial court granted appellant's motion that any objection made by the defense during the trial proceedings be considered to have been based on state law as well as state and federal constitutional grounds. (1 RT 74-75.)

On March 27, 1997, appellant's jury was sworn, the trial court denied appellant's request for a mistrial pursuant to *Batson v. Kentucky* and *People v. Wheeler*,[7] and subsequently the alternates were selected and sworn. (XXII CT 5774; 8 RT 1583-1586.) The prosecution's motion to

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[5] Appellant's motion to set aside count 5 of the indictment was filed on October 18, 1996. (XX CT 5324-5330.) A previous motion to set aside the indictment, filed on April 13, 1993 by prior counsel Brand (XIX CT 5132-5140), was also denied on February 7, 1997. (XXI CT 5559-5560.)

[6] Appellant's motion to sever counts 1-4 from counts 5-15 was filed on October 18, 1996. (XX CT 5362-5416.)

[7] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

introduce other crimes evidence during the guilt phase was granted on March 28, 1997. (XXII CT 5775.) On this date, the court also denied appellant's motion to suppress his statements pursuant to § 1538.5. (XXII CT 5776.)[8]

The guilt phase trial began on April 10, 1997. (XXII CT 5744.) On April 28, 1997, the prosecution rested its case. (XXII CT 5793.) On that same day, appellant presented his case with both parties resting thereafter. (*Ibid.*) Jury deliberations commenced on April 29, 1997, and were completed the following day, on April 30th. The jury found appellant guilty of Counts 1-4 and found that each of the alleged special circumstances was true. Following a court trial, the prior conviction allegations were found true. (XXII CT 5795-5796.)

Appellant's penalty trial began on May 6, 1997, and was completed the following day. (XXII CT 5707-5710.) On May 8, 1997, after approximately five hours of deliberations, the jury returned a sentence of death. (XXII CT 5909.)

On July 2, 1997, appellant filed a motion for new trial as to Counts 1-4 as well as a motion for reduction of the sentence to life without the possibility of parole pursuant to section 190.4, subd. (e). (XXIII CT 6004-6025.) The court denied both motions on September 17, 1997. (XXIII CT 6076.)

The trial court entered its judgment of death on September 17, 1997. (XXIII CT 6077-6078.) With respect to the non-capital convictions, the court sentenced appellant to a total of 35 years, 8 months: five years (upper

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[8] Appellant filed the motion to suppress his statements pursuant to § 1538.5 on October 18, 1996. (XX CT 5317-5323.)

term) for Count 11 (2nd degree robbery), with one year for the use of a dangerous weapon enhancement; one year (one-third midterm), with one year for the use of a dangerous weapon enhancement, stayed for Count 12 (assault); one year (one-third midterm) stayed for Count 13 (assault); one year, four months (one-third midterm) for Count 1 (burglary); one year, four months (one-third midterm) for Count 6 (burglary); one year, four months (one-third midterm) for Count 7 (burglary); one year, four months (one-third midterm) for Count 8 (burglary); one year, four months (one-third midterm) for Count 9 (burglary), with one year stayed for use of a dangerous weapon enhancement; one year (one-third midterm) for Count 10 (second degree robbery), with one year stayed for the use of a dangerous weapon enhancement; eight years (upper term) for Count 2 (rape); eight years (upper term) for Count 3 (sodomy); five years for appellant's first prior conviction (January 18, 1988); and 1 year for appellant's second prior conviction (August 22, 1989). In addition, the terms for Counts 1 and Counts 6-10 were to run consecutively to Count 11; the terms for Counts 2 and 3 were to run consecutively to Count 10; each of the terms for the prior convictions were to run consecutively to Count 3; and the special weapon enhancements for Counts 11-12 were to run consecutive to the terms imposed for those offenses. Following the withdrawal of appellant's guilty pleas to Counts 14 and 15, the court dismissed each of those counts. (XXII CT 6077-6078; 6130-6129.)

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death, and it is automatic. (§ 1239, subd.(b); rule 8.200, Cal. Rules of Court.)

STATEMENT OF FACTS

GUILT PHASE

Appellant Royce Scott was a defendant who admitted his crimes. He was a small-time burglar who entered homes and took easily pilfered items. He admitted to police officers three of the five burglaries with which he was initially charged, and did so with the court as well, pleading guilty to four separate incidents of burglary after one had been dismissed by the prosecution for insufficient evidence. He was rarely confrontational and did nothing to hide his identity, even when the person who resided at a house confronted him. Appellant, who was cooperative when arrested during the commission of a burglary consistently denied any involvement in, or knowledge about, the crime that sent him to death row. Appellant was arrested on November 4, 1992, during the commission of a burglary.

The crime that resulted in a jury sentencing appellant to death was a fundamentally different kind of crime, both in substance and in the manner in which it occurred, than the other crimes for which appellant was arrested, and which he admitted. Appellant denied the homicide and the crimes attendant to it. The homicide occurred on or about July 9, 1992, three months before the crimes that resulted in appellant's arrest.

Prosecution Case

On Thursday, July 9, 1992, Della Morris ("Ms. Morris"), a 78-year-old woman, lived with her younger brother, Webbie Morris ("Webbie"), at their home in Palm Springs. (9 RT 1697; 10 RT 1892-1893.) On July 9, 1992, Webbie went to bed around 10:00 pm, while Ms. Morris stayed in the living room watching television. When he went to bed, two of the three sliding glass doors in the house were open, with only the screen portion of the doors closed. (9 RT 1699, 1711, 1718.) When Webbie woke up the

next morning, on July 10, he noticed that the sliding door to his room was ajar and that the one in the living room was open. Around 8:00 a.m., he went to his sister's room to wake her. He found her lying in her bed, deceased. (9 RT 1700; 1705-1706.)

When the police arrived, they found no sign of forced entry to the house (9 RT 1732-1733, 1776-1777), or any indication as to how the perpetrator had entered (9 RT 1733). The only item that appeared to be missing from the house was Webbie's wallet. (9 RT 1705-1706, 1708, 1712, 1738-1739.) There were no signs of a struggle in Ms. Morris's room. (9 RT 1736.) When the police initially observed her body, there were no wounds and nothing unusual was observed or noticed. (9 RT 1757-1758.)

Deputy Coroner Warren Horton examined Ms. Morris at the scene. He initially did not see any visible signs of trauma other than small bruising below her right eye. (10 RT 1794, 1809-1810.) When he turned her over, however, he saw what appeared to be a small amount of blood, a pubic hair, and dirt or sand underneath her vaginal area. The hair did not look consistent with that belonging to Ms. Morris. (10 RT 1794-1795.) A sequin was found on Ms. Morris' elbow. (11 RT 1961.)

The police used a laser to observe the scene and found stains, believed to be semen, on the body. (9 RT 1783; 10 RT 1813-1814.) Areas on the sheets of the bed also fluoresced using the laser (11 RT 1972); later examination of the sheets revealed two semen stains (12 RT 2076). Semen cells were found on the vaginal and rectal swabs of the victim. (12 RT 2077-2078.) The officers also found semen stains on Webbie's underwear which was recovered from a laundry basket in his room. (9 RT 1783; 11 RT 2006-2007.)

Dr. Darryl Garber, a forensic pathologist, testified that the cause of

death was manual strangulation and smothering. He further testified that Ms. Morris sustained injuries which were consistent with a sexual assault that occurred prior to her death. (10 RT 1889-1892.) Evidence relevant to a sexual assault kit had been collected, including fingernail scrapings. (11 RT 1994.)

ABO typing of the sheets did not match Webbie or Ms. Morris[9] and PGM testing eliminated them as donors of a stain on the sheet. (12 RT 2079; 2081.) Ms. Morris's nephew, Richard, who lived nearby, was also considered a suspect. Family members reported to police that Richard had serious mental health problems and had previously attempted to choke his aunt. (11 RT 2025.)

The PGM/ABO and secreter status profile from the sheet stains was sent to the Department of Justice ("DOJ") in Sacramento for comparison to the database of registered sex offenders. (12 RT 2081-2082.) In August 1992, about a month after the crime, but months before appellant's arrest, criminalist Ricci Cooksey gave one of the investigating officers, Detective Dallas, a printout from the DOJ relating to 19 sex registrants with the same PGM/ABO type secreter status as the stains found on Morris's sheets. The list contained the last known addresses of all but five of the 19 individuals, and included the agency with which they were registered. 10 of the 19 on the list were Black. Six were White and three were Hispanic. (12 RT 2111, 2117-2122.)

The police issued an all points bulletin about the homicide, which included details of the crime. Detective Dallas received names of suspects

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[9] Webbie Morris was first to state a belief that the victim had been raped and choked. (11 RT 2022.) He was initially considered as a suspect by the police. (11 RT 2023.).

who had committed similar crimes as well as information of other incidents involving single elderly women. (11 RT 2026, 2054.) He was given the name of Robert David Summy, who was the suspect in two possible Oregon homicides of single, elderly women, who were killed in their homes. (11 RT 2026-2027, 2054.) Summy was arrested in Cathedral City on September 13, 1992. (11 RT 2054-2055.) No sex kit was obtained from Summy (11 RT 2055), even though a search of his truck did not establish his whereabouts at the time of the homicide (11 RT 2057-2058). It was later learned that Summy's fingerprints, like appellant's, did not match those found at Ms. Morris's house. (11 RT 1985, 2026.) Nonetheless, Summy was excluded, in part because of his fingerprints and also because he was Caucasian (15 RT 2376), despite, as noted below, the only evidence indicating that the perpetrator may have been a Black man was questionable testimony concerning hairs found at the scene, that "may have come from a Black person." (12 RT 2087.) Another suspect was Randy Williams, who in August, 1992, had committed a rape of an elderly woman after entering her home through a sliding glass door. (15 RT 2375, 2378-2379.) Williams, whose DNA was not tested, was eliminated allegedly because simple PGM/ABO blood typing revealed that he was not a donor of the semen found on the sheets. (12 RT 2027, 2081, 2083, 2088.)

Criminalist Ricci Cooksey testified about hairs found under or around Ms. Morris's body. He stated that he thought they could have come from a Black person, but was unable to make such a conclusion because the hairs were "too thin" and "not as coarse." Conceding that hair analysis is not a refined science, Cooksey stated the best he could say about the crime scene hairs was that they did not come from Ms. Morris or her brother. He opined nonetheless that the hairs were consistent with hair samples obtained

from appellant, and thus was of the belief that they could have come from him. (12 RT 2086-2087.) Although the PGM and ABO typing on blood and saliva samples of appellant were of the same "type" that was found on the victim's bed sheet, Cooksey could not say that the samples matched. (12 RT 2087-2089.)

Criminalist Donald Jones conducted RFLP DNA analysis of the stains from the bed sheet and the victim's vaginal swabs. (13 RT 2203, 2207, 2209-2210.) The semen donor profile for three stains appeared to be from a single person. (13 RT 2222, 2228.) It was Jones's opinion that the profile of samples was the same as that of appellant. (13 RT 2224-2225, 2230-2231.) The frequency of sperm fraction that matched appellant's was 1 in 130 million of Black men; 1 in 420 million of Caucasian men and 1 in 250 million in Hispanic men. (13 RT 2236.) Jones was not able to say that the fragment from the crime scene, or the number of base pairs of the fragment, were exactly the same as those of appellant. (13 RT 2271, 2275.)

A number of useable fingerprints were found at the scene, including some on Ms. Morris's bedpost, the inside upper portion of the sliding door frame and drinking glasses in the kitchen. (11 RT 1944-1946.) None of these prints matched appellant. A print recovered from one of the glasses matched Webbie, but the others were not identified as belonging to him, Ms. Morris or other family members. (11 RT 1946-1948; 1952, 2054.)

On November 4, 1992, on a matter unrelated to the Morris homicide, appellant was arrested during a burglary at the home of Kenneth Eastbourne ("Eastbourne") and Jeffrey Cole. (11 RT 2032.) This incident began in the early morning hours of November 4, when Eastbourne and his partner Jeffrey Cole ("Cole") were watching television in their living room. Around 12:50 a.m., someone entered the house through the unlocked

sliding door leading to the dining room. (11 RT 1900-1901.) Eastbourne saw a Black man, who told him and Cole to get on the floor and give him their wallets. (11 RT 1901-1902.) The man then said he needed a microwave and told them to stay on the ground while he went to get their microwave. Eastbourne and Cole heard the man rummaging through the kitchen drawers, and then going out the sliding glass door. The man later came back inside and again directed them to stay on the floor. (11 RT 1903-1904.) Appellant was arrested at the scene by the police; a wallet belonging to Eastbourne was found in his possession. (10 RT 1860-1861.)

Appellant spoke to the police after his arrest and admitted committing two additional burglaries, one that had occurred on August 3, and the other on August 9, 1992. Appellant was asked about another burglary, one that had occurred on August 25th and in which the sliding glass door at the home was broken. Appellant admitted he had committed a burglary that matched the circumstances of the third burglary the police described, but stated that he had no recollection of breaking a sliding glass door to enter the house. (10 RT 1863-1867.) After talking to appellant, the police later obtained blood samples as well as a sexual assault kit from appellant. (11 RT 2039-2040, 2047.)

The first burglary that appellant told the police he had committed occurred on August 3, 1992, around 2:30 a.m. The resident of the house, Dorothy Nancy Pruss ("Pruss"), was watching television when she heard a rustling noise near the kitchen area. (10 RT 1816-1817.) Pruss had recently finishing hanging her laundry in her backyard, and thought she had locked the sliding door when she went back inside. (10 RT 1817, 1820.) Thinking the noise was her dog, Pruss checked around. Pruss heard another noise and then saw a Black man in her house, holding her purse and fanny pack.

Both items had been on a dining room chair near the sliding door. (10 RT 1818-1819.) The man asked Pruss to tell him where her money was. When Pruss screamed, her roommate ran out of a front bedroom and confronted the man, telling him that the police were there. (10 RT 1821-1822.) He ran out the sliding door which was adjacent to the kitchen, taking with him the items he had been holding. (10 RT 1823-1824.)

Appellant also admitted having committed a burglary on August 9, 1992. The resident of the home, Marc Daley ("Daley"), had been out and returned home around midnight. He found the screen door portion of his sliding glass door open. This door, which was adjacent to his kitchen and patio area, had been closed when he had left earlier that evening. Thinking someone might be inside, Daley walked through the house and called out to ascertain whether anyone was there. (10 RT 1825-1827.) When he went into the middle bedroom, Daley saw a Black man hiding by the bedroom door. When confronted as to why he was in the house, the man said he did not want to hurt Daley and that he only wanted his money. (10 RT 1828-1829.) Daley fled to his neighbor's house using the sliding door by the kitchen. The man also ran outside, but he did not follow Daley, and apparently ran away. (10 RT 1830-1831.) A television in the middle bedroom had been knocked off a desk. (10 RT 1831-1833.) A fingerprint obtained from the television matched appellant. (11 RT 1920; 1923-1924; 1934; 1983.) Before this incident, Daley had never seen the man. (RT 10 RT 1833-1834.)

Additionally, appellant admitted that he unlawfully entered a house on the evening of August 25, 1992. The resident of that house was Emily Pollard ("Pollard"). She was watching television in her living room. Around midnight she heard a large crashing noise coming from the kitchen

area. (10 RT 1849-1850.) She ran in the direction of the noise and saw a Black man standing in her kitchen. The man said something to her, but Pollard was screaming and did not know what he was saying. (10 RT 1850-1851.) Pollard yelled for a friend who was sleeping in the bedroom to wake up and Pollard ran to her neighbor's house. When she returned to her house the following morning her purse and a camera, both of which had been on the kitchen counter, were missing. Pollard did not see what the man did when she ran out of the house. (10 RT 1851-1852.) Pollard later determined that the loud noise she had heard was a rock crashing through the sliding door to the kitchen. (10 RT 1852.)

As noted above, appellant admitted to the police that he had committed the aforementioned burglaries that occurred on August 3, 9, 25 and November 4, 1992, and later plead guilty to them. (1 RT 23-27.) All of the admitted crimes were introduced against appellant at the guilt phase of his trial, over objection, pursuant to Evidence Code section 1101, subdivision (b), to show intent at the time of the burglary charge connected with the homicide.

Defense Case

For a few weeks in July, 1992, appellant lived with his step-sister, Audrey Lan Mickens ("Mickens"),[10] and her fiancé Steve Williams. At the time, Mickens was employed by Palm Springs Unified School District. Her usual bed time was around 10:00 - 10:30 p.m. and she generally woke up between 5:00 - 6:00 a.m. During the time that appellant lived with her, he

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[10] Mickens testified that she had attempted to steal meat, hair spray and candy bars in June, 1996, at an Albertson's store in Cathedral City. When she was arrested, she gave a false name to the police. (15 RT 2361-2362.)

slept on the couch in the living room. (15 RT 2364.) During the first two weeks in July, appellant was at the apartment when Mickens woke each morning. (15 RT 2368-2369.) During the latter part of July, however, appellant occasionally stayed out all night. Because appellant did not have a key to Mickens's apartment, if he left he was unable to get back inside on his own. (15 RT 2367-2368.) Mickens was unable to specifically recall whether appellant was at the apartment on the mornings of July 10th or July 11th. (15 RT 2369.)

Appellant also presented testimony demonstrating that the prosecution had failed to provide relevant evidence in a timely manner. Detective Dallas had been in possession of the list of 19 individuals with the same genetic markers as that which had been found at the crime scene for almost five years before turning it over to the district attorney. He testified that he had forgotten he had placed it in the case file, and did not recall why he failed to provide the list to the prosecutor until after the trial in this case had begun. (15 RT 2379, 2382-2383.) Dallas was aware that the defense was entitled to discovery of the list, but the defense did not receive the list until April 15, 1997. (15 RT 2382.) Although he thought the list was important, including the fact that it contained the names of 10 Black individuals with the same genetic markers as the semen found on the victim and at the scene, Dallas did not attempt to contact agencies with whom sex offenders from the list were required to register. Dallas did not have an explanation as to why the list was not referenced in police reports. (15 RT 2380-2382.)

Following the jury's verdict on the homicide charges, appellant was tried before the court regarding the alleged prior felony convictions. The prosecution successfully admitted a certified copy of appellant's prison

packet for two prior convictions (Pen. Code, §§ 664/211 and Health and Sat. Code, § 11350), Exh. No. 68. (17 RT 2609.) Palm Springs Police Department technician Roger L. Snyder compared the fingerprints of appellant, Exh. Nos. 41 and 42, to the fingerprint card contained in appellant's prior prison packet. It was his opinion that the fingerprints in Exh. Nos. 68, 41 and 42 were the same person. (17 RT 2611-2613.) The Court found true both prior conviction special allegations pursuant to Penal Code sections 667 and 667.5, subdivision (b). (17 RT 2614.)

PENALTY PHASE

Prosecution Case

In addition to the circumstances of the crime, the prosecution presented evidence of an assault and attempted robbery that occurred during the burglary at the Cole/Eastbourne home.[11] When appellant entered the house on the night of November 4, 1992, Eastbourne and his roommate Cole were having an argument. (18 RT 2654-2655.) Appellant appeared to be angry with Cole, and started yelling that what he (Cole) had done to Eastbourne was not right. (18 RT 2655.) Appellant screamed and acted belligerent. (18 RT 2655-2657, 2659.) Appellant forced Cole to apologize to Eastbourne a number of times (18 RT 2666), and after he ordered them both to lay on the floor, he kicked Eastbourne, then stomped on Cole's back and hit him with a fire place poker. Appellant then went to the kitchen, took the microwave and placed it outside. He returned and again stomped on Osburn's back and hit and kicked Cole. He demanded money and

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[11] The November 4, 1992, incident regarding Kenneth Osburn and Jeffrey Cole was presented by the prosecution as aggravating evidence of other criminal activity involving violence or threat of violence committed by appellant pursuant to Penal Code section 190.3, factor (b).

threatened Cole. (18 RT 2657-2658.) Eastbourne placed his wallet on the coffee table. Appellant had the poker in his hands when the police arrived and arrested him. (18 RT 2659.) At the time of his arrest, it was determined that appellant had cocaine in his system. (19 RT 2764-2765.)

The prosecution introduced an incident from March, 1988, involving Thomas Meyer ("Meyer") and Dan King ("King"), both of whom worked and lived at a construction site in Palm Springs.[12] One night, while asleep in their camper, Meyer heard the screen door open and then was confronted by appellant who demanded their money. (18 RT 2629-2630.) Meyer threw his jacket to appellant, who remained outside After discovering nothing was in it, appellant became angry, banged on the doorsill and threatened to shoot Meyer and King with a shotgun if they did not give him money. (18 RT 2631-2632.) King took out a gun which he kept under his pillow and fired four shots at appellant, who was still in the doorway. (18 RT 2633.) Appellant was hit and the police were summoned. Appellant did not have a shotgun. In fact, the only items found when the police arrived were a tee shirt and a piece of wood. (18 RT 2633-2636, 2638; 2652-2653.)

The prosecution also introduced victim impact evidence. Ms. Morris's nephew, Raymond Harris Abelin, testified that his aunt was a dancer and had taught dance in Los Angeles before moving to Palm

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[12] The March 26, 1988, incident regarding Thomas Meyer and Dan King (18 RT 2652-2653) was presented by the prosecution as aggravating evidence of other criminal activity involving violence or the threat of violence committed by appellant pursuant to Penal Code section 190.3, factor (b). This incident was also presented as an additional aggravating factor, a prior felony conviction, pursuant to Penal Code section 190.3, factor (c).

Springs. She organized shows for the Wilshire Theater in Los Angeles as well as for various fairs and parties. She was relatively well known in the dance world, and her primary emphasis was on folk dance from the middle east. Dancing was the family business, and involved not only her brother Webbie Morris, but also the testifying witness, Raymond Abelin ("Raymond."). (18 RT 2685-2686.) His Aunt Della cared about dance, and not about money. Dancing was everything to her and she enjoyed choreographing and teaching dance. (18 RT 2691-2692.) As the family matriarch, Aunt Della was in charge of the family productions. (18 RT 2688.) She made most of the costumes, his Uncle Webbie made the set designs and Raymond played the drums and was responsible for photographs. (18 RT 2686.)

Raymond further testified that Della did not have a son and that she spent a substantial amount of time with him, was supportive of him and was more like a mother than an aunt. Because of her influence and inspiration, Raymond studied fine arts in college and graduate school, and eventually also became involved in the arts. (18 RT 2691-2692.) Della had received numerous commendations and awards for her work in the arts both locally and statewide, including woman of the year for which she was presented the award by Mayor Bradley's wife. (18 RT 2701.)

Raymond told the jury that it was mainly due to him that his Aunt Della had moved to Palm Springs. He was concerned about her living alone in Los Angeles and he wanted her to live in a safe neighborhood. Raymond, a realtor, found the house in Palm Springs; he reconditioned it for her studio and his Uncle Webbie put in the floor. About six months before her death, Webbie had a stroke and Della took care of her brother. (18 RT 2687-2690, 2694.) Although his aunt initially had trepidation about

leaving Los Angeles, she was happy she had moved to Palm Springs. (18 RT 2705.)

When Raymond first learned of his Aunt Della's death, he thought she had died of natural causes. When he later learned that she had been murdered, he was devastated and her death became a "living nightmare." (18 RT 2695.) He felt responsible for her murder because he had wanted her to move to Palm Springs. (18 RT 2696-2697.) The police had questioned Raymond about family relationships, and although the police treated them cordially, family members were fingerprinted and considered suspects. Since her death Raymond has had to comfort his Uncle Webbie, and his family has been literally destroyed by their loss. (18 RT 2698-2699.) The prosecution also presented photographs depicting Ms. Morris at earlier times in her life, about which Raymond testified. (18 RT 2701-2704.) Victim impact evidence from the Lebanese community as a whole also was presented through Raymond's testimony, who stated that his Aunt Della's death caused outrage in the Lebanese community, of which his aunt was a member. (18 RT 2702.)

The certified copy of appellant's prison packet for two prior convictions for violations of Penal Code section 664/211 and Health and Safety Code section 11350, which had previously been entered into evidence during the proceeding to determine the truth of the prior conviction allegations (Pen. Code §§ 667 & 667.5, subd. (b)), were included with other exhibits provided to the jury for their review during deliberations.[13] (18 RT 2682; 20 RT 2819-2820, 2847.)

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[13] Appellant's prison packet, entered into evidence as Exhibit No. 68, was provided to the jury as aggravating evidence, pursuant to Penal

(continued...)

Defense Case

Appellant was born in Jacksonville, Texas. He has five sisters and three brothers; one of his brothers is deceased. (19 RT 2719.) Appellant's parents were divorced soon after his birth. His father lived in California, and appellant was not close to him. Appellant had a good relationship with his step-father, and spent time with him, including helping him arrange parties as well as playing basketball, baseball and football together. (19 RT 2720-2721, 2730.) Appellant's step-father loved him. (19 RT 2725.)

Appellant was close to his older brother, who died after being hit by a car. (19 RT 2721-2722.) As he was growing up, appellant's family lived in a two bedroom house, and he and his older brother had shared a bed. Appellant was affected by his brother's death, and was not himself afterwards. Appellant's older brother had been protective of his younger siblings. (19 RT 2728-2729.) When he was 16 or 17 years old appellant enlisted in the Army, but later left and joined the Air Force. When appellant returned from the service he seemed changed. He began keeping the wrong type of company. (19 RT 2722-2723.) After his step-father died, appellant moved to California to see his father. Appellant's mother, Narlena Black ("Black"), thought that the visit would help him. (19 RT 2723-2724.) Black loved appellant and did her best to raise him. She asked the jury to sentence him to life. (19 RT 2724-2725.)

As he was growing up, appellant also had a close relationship with his younger brother Terry. They did a lot together when they were young, including playing sports and riding bikes. (19 RT 2727.) Appellant and

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[13] (...continued)
Code section 190.3, factor (c), that appellant had two prior felony convictions (Pen. Code, §§664/211; Heath & Sat. Code, §11350).

Terry spent time together after their older brother died, and Terry saw changes in appellant afterwards. Appellant got into trouble after his brother died. (19 RT 2730.) Terry testified he wished he could undo everything that had been done, and asked the jury to spare appellant's life. (19 RT 2732.)

Prior to this incident, appellant had been incarcerated in five to six prisons, a number of which were considered medium to light security facilities. (19 RT 2749-2750.) Appellant's time in those facilities, as well his time in county jail for the instant offense, revealed no information which indicated he has been, or would be, a behavioral problem while in custody. Riverside County Jail medical records following his November, 1992, arrest included information that appellant received Mellaril, an anti-psychotic medication. The jail medical records also reported that appellant was hearing voices and experiencing nightmares. (19 RT 2750-2751.)

Based on appellant's prison and jail incarceration records, criminal justice consultant Anthony Casas determined that if appellant were sentenced to life in prison without parole, he would not be a threat to other inmates or to correctional facility officers and personnel. (19 RT 2751-2752.) If the jury were to sentence appellant to life without possibility of parole, he would be going to one of four institutions that could handle every conceivable security issue. Those facilities would have an electrified fence and gun towers, and would house inmates who were more dangerous or aggressive than appellant. (19 RT 2752-2753.)

I

THE PROSECUTION'S USE OF PEREMPTORY CHALLENGES TO STRIKE BLACK PROSPECTIVE JURORS FROM THE JURY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

During jury selection, the prosecutor exercised peremptory challenges to strike two qualified Black jurors from appellant's jury. After the jury was sworn, but before selection of the alternates began, defense counsel objected to the prosecutor's removal of those jurors and made a motion to dismiss the venire pursuant to *People v. Wheeler* (1979) 22 Cal. 3d 258. Finding that appellant's *Wheeler* objection was untimely, the trial court nonetheless ruled that no prima facie case had been established, and articulated what it believed to be legitimate reasons for striking the jurors. Subsequently, as to one of the jurors, the prosecutor provided reasons for the challenge that were essentially the same as those provided by the court.

As appellant will demonstrate, the trial court's denial of his *Wheeler* motion was error because: (1) it was not untimely; (2) appellant had established a prima facie case that the Black jurors had been removed on the basis of group bias; (3) the trial court improperly substituted its own explanation for that of the prosecutor to justify the challenges; (4) the prosecutor's purported justification for challenging one juror was legally and factually inadequate to rebut the prima facie showing; and, (5) the trial court failed to discharge its duty to sincerely and carefully evaluate the explanation proffered by the prosecution as to one of the jurors. The trial court's failure to grant the motion violated appellant's right to trial by a jury drawn from a representative cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution and by article I,

section 16 of the California Constitution, and to equal protection of the law under the Fourteenth Amendment to the United States Constitution. The error entitles appellant to reversal of the judgment. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89, 100; *People v. Wheeler*, *supra*, 22 Cal.3d 258, 283.)[14]

B. The Proceedings Below

During selection of the jury, the prosecutor excused Black prospective jurors Ruth Coleman and Harold Roberts. The prosecutor exercised his seventh peremptory challenge against Ms. Coleman, and Mr. Roberts was the prosecutor's tenth peremptory strike. (8 RT 1568-1570.) The prosecutor ultimately exercised a total of 17 peremptory challenges, and the defense exercised 13 peremptory challenges before both sides agreed to accept the 12 seated jurors. (8 RT 1565-1575.)[15]

After the 12 jurors had been sworn, but before selection of the alternates began, defense counsel objected to the prosecutor's use of peremptory strikes against Black prospective jurors Coleman and Roberts pursuant to *People v. Wheeler*, *supra*, 22 Cal.3d 258. (8 RT 1580-1581.) The trial court ruled that appellant had waived his objection because the jury was sworn. (8 RT 1582.) The trial court nonetheless ruled on the merits of appellant's objection. The court first stated that no prima facie case had been established as to Ms. Coleman, but proceeded to articulate its

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[14] In California, a *Wheeler* motion is the procedural equivalent of a *Batson* challenge. (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1088, fn. 4; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1216, fn. 2.)

[15] The trial court stated the incorrect total number of peremptory challenges exercised by both appellant and the prosecutor. (See 8 RT 1564-1575.)

own reason for why the prosecutor may have challenged her independent of group bias. According to the trial court, because Ms. Coleman had indicated she had been angry with the prosecutor in this case, who had previously prosecuted her son, no prosecutor would have kept her on the jury. When making its assessment of responses Ms. Coleman had provided during voir dire as well as on her questionnaire, the trial court acknowledged that she had said "all the right things" when she was questioned about serving on this case and her feelings regarding the prosecution of her son by the Riverside County District Attorney's Office. (8 RT 1582.)

The trial court went on to state that an argument could be made regarding a prima facie case as to prospective juror Roberts. The court invited the prosecutor to either rest on its ruling that appellant's *Wheeler* objection had been waived, or to offer comments regarding either challenged juror. Stating that he would not respond until required to do so, the prosecutor asked the court to clarify its ruling on waiver and whether a prima facie case had been demonstrated. (8 RT 1582-1583.) The court affirmed its initial ruling that appellant's objection to the peremptory challenges of Ms. Coleman and Mr. Roberts had been waived, and once again stated that no prima facie case had been established as to Ms. Coleman.

The court then also ruled on the merits as to Mr. Roberts. Again, without the benefit of actually knowing the real reason the prosecutor exercised the challenge against Mr. Roberts, the court stated its belief that a legitimate basis to excuse Mr. Roberts existed because of the answers he had provided in his questionnaire, his "substantial reluctance" to the death penalty, and his placement "at one point" in Group Five even though he

ultimately said during voir dire that he was in Group Four. (8 RT 1583.)[16]

The ruling on the merits of appellant's objection continued with the prosecutor eventually providing his purported reasons for excusing Mr. Roberts. The prosecutor did not concede that a prima facie case had been demonstrated, but provided reasons that mirrored those given by the trial court. He alleged that he excused Mr. Roberts because: (1) he provided inconsistent answers on the death penalty, (2) he had marked Groups Three, Four and Five on his questionnaire, and (3) during voir dire he said he was "leaning toward" Group Four. Based on those responses, the prosecutor felt that he did not know where juror Roberts stood on the death penalty. (8 RT

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[16] In the questionnaire prospective jurors were asked to designate which of the following groups best described their views on the death penalty:

> Group One
> I will always vote for death in every case of murder with special circumstances. I cannot and will not weigh and consider the aggravating and mitigating factors.
>
> Group Two
> I favor the death penalty but will not always vote for death in every case of murder with special circumstances. I can and will weigh and consider the aggravating and mitigating factors.
>
> Group Three
> I neither favor nor oppose the death penalty.
>
> Group Four
> I have doubts about the death penalty, but I would not vote against it in every case.
>
> Group Five
> I oppose the death penalty. I will never vote for the death of another person.

(Question No. 75, see e.g., I CT 75.)

1584-1585.) The trial court accepted the justifications proffered by the prosecutor, noting that they were "basically the reasons that [the court] mentioned" at the outset. The court noted that the case as to Mr. Roberts was a "much closer call" in comparison to Ms. Coleman. (8 RT 1585-1586.)

C. Applicable Law

In *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277, this Court held that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to a representative cross-section of the community under article I, section 16 of the California Constitution." Prosecutorial use of peremptory challenges to excuse jurors on the basis of group affiliation has been condemned by the United States Supreme Court as violative of the rights of an accused to fair trial, impartial jury and due process under the Sixth and Fourteenth Amendments to the United States Constitution. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 89, 96-98.)

Defendants "have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." (*Id.* 476 U.S. at pp. 85-86.) For well over a century, the Supreme Court has made clear a State "denies a Black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." (*Id.* at p. 85, citing *Strauder v. West Virginia* (1880) 100 U.S. (10 Otto) 303.)

"Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by an impartial jury." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 237, quoting *J.E.B. v. Alabama ex rel T.B.* (1994) 511 U.S. 127, 128.) But discrimination in jury selection "not

only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government." (*Batson v. Kentucky*, *supra*, 476 U.S., at p. 87, quoting *Smith v. Texas* (1940) 311 U.S. 128, 130.) The use of peremptory challenges to effectuate racial gerrymandering undermines "the very integrity of the courts." (*Miller-El v. Dreke*, *supra*, 545 U.S. at p. 238.) Jury participation by all segments of the community is "critical to public confidence in the fairness of the criminal justice system." (*Taylor v. Louisiana* (1975) 419 U.S. 522, 530.) The discriminatory use of peremptory challenges "'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication." (*Miller-El v. Dreke*, *supra*, 545 U.S. at p. 238, quoting *Powers v. Ohio* (1991) 499 U.S. 400, 412; accord, *Johnson v. California* (2005) 545 U.S. 162, 171-172.) Indeed, such use of peremptory challenges has also been found to violate the equal protection and due process rights of the excluded jurors. (*Edmonson v. Leesville Concrete Co.* (1991) 500 U.S. 614, 618-619; *Powers v. Ohio*, *supra*, 499 U.S. at pp. 407-409; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 87.)

In California, a *Wheeler* motion is the procedural equivalent of a *Batson* challenge. (*Paulino v. Castro*, *supra*, 371 F.3d 1083, 1088, fn. 4; *McClain v. Prunty*, *supra*, 217 F.3d at p. 1216, fn. 2.) Under both state and federal law, the defendant has the initial burden of showing that peremptory challenges are being exercised for discriminatory reasons against a cognizable group. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-97.) Borrowing from the analytical framework that the United States Supreme Court developed for the determination of racial bias under Title VII, *Batson* adopted a "now familiar three-step procedure" for testing the constitutionality of the

prosecutor's peremptory challenges. (*Johnson v. California*, *supra*, 545 U.S. p. 168, footnote omitted; *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1106.)

As the first step of that analysis, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-94.)[17] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. (*Id.* at p. 94; *People v. Fuentes* (1991) 54 Cal.3d 707, 714; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Hernandez v. New York* (1991) 500 U.S. 352, 360.)

Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, "[t]he trial court [has] the duty to determine if the defendant has established purposeful discrimination." (*Batson v. Kentucky*,

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[17] If a "party articulates a race-neutral reason for a challenged strike and the trial court proceeds to the last [and third] step of the *Batson* inquiry to determine whether the party intentionally discriminated in making the strike, the initial question of whether a prima facie showing was established is moot before the reviewing court." (*United States v. Esparza-Gonzalez* (9th Cir. 2006) 422 F.3d 897, 906; accord, *Hernandez v. New York*, *supra*, 500 U.S. at p. 359 [preliminary issues of whether the defendant has made a prima facie case showing become moot once the prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination].)

supra, 476 U.S. at pp. 96-98.) During this third step, where it is determined whether the defendant has carried this burden, the trial court "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" (*Id.* at p. 93, quoting *Arlington Heights v. Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 266; *People v. Silva* (2001) 25 Cal.4th 345, 385 [trial court has an obligation "'to make a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation omitted]."") "Circumstantial evidence of invidious impact may include proof of disproportionate impact." (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93.) Thus, "a total or serious disproportionate exclusion of [Blacks] from jury venires . . . is itself such an "unequal application of the law . . . so as to show intentional discrimination." (*Ibid.*, internal quotations omitted.) Whether the opponent of the peremptory challenge has proved purposeful discrimination at step three turns on the persuasiveness of the prosecutor's justification for his strike. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338.) However, it is not until this last step of the *Batson* test that the persuasiveness of such justification becomes relevant. (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1106.)

The exercise of just one improper challenge on the basis of race is sufficient to establish a violation and is reversible per se. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 100 ["'A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'"]; *J.E.B. v. Alabama ex rel. T.B.*, *supra*, 511 U.S. at 142, fn. 13 ["The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system"]; *Williams v. Runnels*, *supra*, 432 F.3d at p. 1107, quoting *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900,

922 ["The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose'"]; *People v. Silva*, *supra*, 25 Cal.4th at p. 386 ["[E]xclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude" requiring reversal].)

D. Appellant's *Batson/Wheeler* Objection Was Timely

The purpose of the timeliness requirement in a *Batson/Wheeler* situation is to allow the trial court to properly evaluate the challenge and to allow the parties, particularly the party accused of the improper use of the peremptories, to be able to respond. While a *Batson/Wheeler* challenge is "waived" if no objection is made,[18] there is no requirement that defense counsel make the motion instantaneously with the prosecutor's last peremptory challenge.

Generally, a *Batson/Wheeler* objection "alleging discriminatory use of peremptory challenges is untimely if 'first asserted after the jury has been sworn.'" (*People v. McDermott* (2002) 28 Cal.4th 946, 969, quoting *People v. Thompson* (1990) 50 Cal.3d 134, 179.) However, because "'the impanelment of the jury is not deemed complete until the alternates are selected and sworn,'" if an objection is made before jury impanelment is completed, the objection is timely. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 970, quoting *In re Mendes* (1979) 23 Cal.3d 847, 853.) As this Court has recognized, discriminatory motive in exercising peremptory challenges against jurors may only become apparent during the selection of the alternates. Thus, an objection made after the jurors are sworn but before the venire is discharged, is timely both to alternate jurors as well as the 12

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[18] *People v. Bolin* (1998) 18 Cal.4th 297, 316; *People v. Gallego* (1990) 52 Cal.3d 115, 166.

jurors previously seated. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 969.)

In this case, defense counsel made a *Batson/Wheeler* objection after the 12-seated jurors were sworn, but before selection of the alternates had begun. Because impanelment of the jury had not yet been completed, appellant's objection to any race-based peremptory challenge was timely. (*Ibid.*) The trial court's ruling that the objection was untimely, and therefore waived, was unreasonable and an abuse of discretion.

E. The Record Reveals A Prima Facie Case Of Systematic Exclusion

Under *Batson v. Kentucky*, *supra*, 476 U.S. 79, a prima facie case is established by showing that: (1) the defendant is a member of a cognizable group; (2) the prosecution has removed members of such a group; and (3) circumstances raise an "inference" that the challenges were motivated by race. (*Id.* at p. 96.) The burden then shifts to the prosecutor to articulate a race-neutral basis for the peremptory challenges. (*Id.* at p. 97.)

In *Johnson v. California* (2005) 545 U.S. 162, 168, the United States Supreme Court emphasized that a prima facie case for discrimination is satisfied when there is a sufficient showing to permit a mere inference of discrimination. There, the high court described the first step of the three-step procedure for a *Batson* claim of discrimination: "the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*Ibid.*, quoting *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 83-94.) Stating that "an inference of discriminatory purpose" is a lesser standard for a prima facie showing than the "more likely than not" standard, the court clarified that it "did not intend the first step to be so onerous that the defendant would have

to persuade the judge - on the basis of all the facts, some of which are impossible for the defendant to know with certainty - that the challenge was more likely than not the product of purposeful discrimination." (*Johnson v. California*, *supra*, 545 U.S. at pp. 168-170.) Instead, the requirements of the first step of *Batson* are satisfied when there is sufficient evidence to permit the trial court to draw the inference that discrimination has occurred. (*Id.* at p. 170.)

Review of the record in this case shows that the objections by defense counsel and the circumstances of the prosecutor's challenges against the minority jurors at issue substantiate an inference of group bias. (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073,1079-1080.) First, Black persons undeniably constitute a cognizable group for purposes of *Batson* and *Wheeler*. (*People v. Fuentes*, *supra*, 54 Cal.3d at p. 721.) Second, the prosecutor in this case used two of his first ten peremptory challenges to strike the only Black jurors who had been called to the box when the strikes were executed, and other minority jurors (Hispanics) had also already been removed by the prosecutor. (See, e.g., *Johnson v. California, supra,* 545 U.S. at p. 173 [inference of discrimination where prosecutor used three of 12 peremptory strikes to remove all African-American prospective jurors called to the jury box];[19] *Fernandez v. Roe*, *supra*, 286 F.3d at p. 1079 [prima facie case of racial discrimination established where removal of two

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[19] In *Johnson,* the Supreme Court noted that the inference of discrimination was sufficient to invoke a comment by the trial judge that the issue of a prima facie case was "very close," as well as this Court's acknowledgment on review that "'it certainly looks suspicious that all three African-American prospective jurors were removed from the jury.'" (*Johnson v. California, supra*, 545 U.S. at p. 173, quoting *People v. Johnson* (2003) 30 Cal.4th 1302, 1307, 1326.)

African-American jurors was preceded by removal of four Hispanic jurors]; *Turner v. Marshall* (9th Cir. 1995) 63 F3d 807, 812 [inference of bias where prosecutor excused five out of possible nine African-Americans]; *United States v. Chalan* (10th Cir. 1987) 812 F.2d 1302, 1313-1314 [removal of only minority juror constitutes a prima facie case of discrimination];[20] *People v. Allen* (2004) 115 Cal.App.4th 542, 546 [prima facie case where prosecutor exercised third and sixth peremptory challenges against only two Black prospective jurors seated in jury box]; *People v. Fuller* (1982) 136 Cal.App.3d 403 [prima facie case had been established where prosecutor had used three of his eight peremptory challenges to remove Black prospective jurors].)

Further, the excluded Black jurors in this case "apparently only had their race in common." (*People v. Turner* (1986) 42 Cal.3d 711, 719.) The excluded jurors differed in gender as well as in occupations;[21] and where they resided in Riverside County.[22] Moreover, Harold Roberts had a background that appeared strongly pro-prosecution.[23] The foregoing factors

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[20] In *Chalan,* the Court of Appeals explained that "[i]f all the jurors of defendant's race are excluded from the jury . . . there is a substantial risk that the Government excluded the jurors because of their race." (*United States v. Chalan, supra*, 812 F.2d at p. 1314.)

[21] At the time of trial, Ms. Coleman was a housewife, and a retired bank teller. (X CT 2708; Questionnaire, Question No. 4.) Mr. Roberts was a construction maintenance worker. (XIV CT 3928; Questionnaire, Question No. 4; 7 RT 1480.)

[22] At the time of trial, Ms. Coleman resided in Cathedral City (X CT 2708; Questionnaire, Question No. 3) and Mr. Roberts resided in Indio (XIV CT 3928; Questionnaire, Question No. 3).

[23] Prospective juror Roberts's brother was a police officer in Indio (continued...)

clearly add up to a prima facie case of group discrimination against these otherwise "largely heterogeneous" jurors. (See *People v. Turner*, *supra*, 42 Cal.3d at p. 719; *People v. Motton* (1985) 39 Cal.3d 595, 607, fn. 3 ["the Black jurors struck by the prosecution come from a variety of backgrounds, with varied family and employment histories"].)

As set forth above, under *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97, "all relevant circumstances" surrounding the peremptory challenges in question must be considered. Moreover, a statistical showing alone is sufficient to meet the defendant's burden in showing a prima facie case. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 240; *Williams v. Runnels*, *supra*, 432 F.3d at p. 1107.) In *Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 240-241, the United States Supreme Court considered the bare statistics in its evaluation of an objection to the exercise of prosecution challenges against minority jurors:

> The numbers describing the prosecution's use of peremptories are remarkable. Out of the 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. [Citation omitted.] "The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity." [Citation omitted.]

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[23] (...continued)
and his son worked at a state prison in San Diego, California. (XIV CT 3929, 3932; Questionnaire, Question Nos. 14, 26.) He also had nephews who were police officers, one in Long Beach, California, and the other in Dallas, Texas. (XIV CT 3932, Questionnaire, Question No. 28.) One of his nephews was shot and killed. (XIV CT 3935; Questionnaire, Question No. 41.) He had never been arrested or accused of a crime. (XIV CT 3931; Questionnaire, Question No. 25.)

The bare facts in this case reveal a statistical disparity substantiating a prima facie case. (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1107.) There were 87 prospective jurors who were ultimately qualified to serve on appellant's jury. (8 RT 1553-1560.) Of those 87 jurors, only four identified themselves as Black (Ruth Coleman, X CT 2708; Kimette Cunningham, VIII CT 2110; Kimberly Gulley-Holman, IV CT 888; Harold Roberts, XIV CT 3928); one identified herself as Hispanic/Black (Velina Coombs, VIII CT 2206); 14 identified themselves as Hispanic; 59 identified themselves as Caucasian; and nine identified themselves in other groups or failed to identify themselves at all.[24]

Out of the four Black prospective jurors, only two, Ms. Coleman and Mr. Roberts, were actually seated in the jury box and subject to peremptory challenge by either side. Thus, when the prosecutor excused Ms. Coleman and Mr. Roberts, he eliminated 100% of the Black jurors who had actually made it to the box. Even if Ms. Coombs, who identified herself as "Hispanic/Black," is included in the total number of Black prospective jurors who were actually seated, the prosecutor still eliminated two of the

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[24] In the questionnaires, prospective jurors utilized varied race/ethnic group designations. (See Questionnaire, Question No. 2.) For the purpose of this argument, those who stated they were "White," "Serbian," "Italian," "Swedish," or "Caucasian" are referenced as "Caucasian." Prospective jurors who stated they were "Latina," "Mexican-American," "Spanish," or "Hispanic" are referenced as "Hispanic." The nine prospective jurors who are referenced as "Other" includes those who stated they were "Filipino," "Pacific-Islander," "Korean" or who failed to indicate their race/ethnic group on the questionnaire. The qualified jurors in this group who did not indicate their race/ethnic group on the questionnaire are Juror No. 6 (who served in this case), Carol Nunez and Mary Hodur.

three Blacks (66%) who made it to the box.[25]

Prior to the excusal of Ms. Coleman, the prosecutor exercised challenges against two Hispanic jurors. (8 RT 1565 [prospective jurors Tommy Madrid (XI CT 3140) and Rudy Rubio (XIV CT 3880)].) Moreover, before the peremptory challenge of Mr. Roberts, the prosecutor excused an additional Hispanic juror. (8 RT 1569-1570 [prospective juror Irma Banuelos (XII CT 3332)].) Thus, out of his first ten peremptory strikes, the prosecutor removed five minority jurors, which constituted 50% of the total challenges he made through the excusal of Mr. Roberts. In light of all relevant circumstances, and in particular the clear statistical disparity of his peremptory strikes against Black prospective jurors, an inference of discriminatory purpose on the prosecutor's part was established. (*Fernandez v. Roe*, *supra*, 286 F. 3d at p.1079.)

F. The Trial Court Erroneously Substituted Its Own Explanation For That Of The Prosecutor

In *Johnson v. California*, *supra*, 545 U.S. 162, the United States Supreme Court recognized that a trial or appellate court's independent assessment finding satisfactory reasons for the excusal of prospective jurors cannot take the place of asking the prosecutor for an explanation of the actual reason:

> The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See *Paulino v. Castro*, 371 F.3d 1083, 1090 (C.A. 9 2004) ("[I]t does not matter that the prosecutor might have good reasons . . . [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn*, 355

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[25] Defense counsel exercised appellant's ninth peremptory challenge against prospective juror Velina Coombs. (8 RT 1572.)

> F.3d 707, 725 (C.A.3 2004) (speculation does not aid our inquiry into the reasons the prosecutor actually harbored' for a peremptory strike).

(*Johnson v. California*, *supra*, 545 U.S. at p. 172.)

The above reasoning extends to the reviewing courts. In *Miller-El v. Dretke*, *supra*, 545 U.S. 231, the Supreme Court stated that "*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all the evidence with a bearing on it." (*Id.* at pp. 251-252.) The court in *Miller-El* held that the "Court of Appeals' and the dissent's substitution of a reason for eliminating [the panelist] [did] nothing to satisfy the prosecutor's burden of stating a racially neutral explanation for their own actions." (*Ibid.*) Thus, during the first step of a *Batson* challenge, no court may speculate about the prosecutor's possible justifications for the exercise of peremptory challenges and find that no prima facie case has been made on that basis. (See *People v. Johnson* (2003) 30 Cal.4th 1302, 1340, dis. opn. of Kennard, J. [trial judges should not speculate when it is not "apparent that the (neutral) explanation was the true reason for the challenge"].) This is exactly what the trial court did in the present case.

The comments of the trial court that Mr. Roberts had inconsistent views on the death penalty, or a reluctance to impose it, and that Ms. Coleman had expressed anger towards the prosecutor about her son's case sufficed as justifications for their excusal, improperly substituted the court's own assessment for the prosecutor's actual reasons. This procedure, which confounds step one of the *Batson* procedure with step three, has been disapproved by the United States Supreme Court:

> [W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can

> and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextural significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have shown up as false.

(*Miller-El v. Dretke*, *supra*, 535 U.S. at p. 252; see also *Johnson v. California*, *supra*, 545 U.S. at pp. 172-173.) Speculation, whether by the trial or appellate court, does not aid an inquiry into the reasons the prosecutor actually harbored for a peremptory strike, which is required at step three. (*Johnson v. California*, *supra*, 545 U.S. at p. 172.) As noted above, it does not matter that the prosecutor might have had good reasons; instead, what matters is the real reason for the challenge at issue. The trial court's substitution of its reasoning for that which is required of the prosecutor circumvented the *Batson* framework which is "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." (*Ibid.*) In order "to rebut an inference of discriminatory purpose based on statistical disparity, the 'other relevant circumstances' must do more than indicate that the record would support race-neutral reasons for the questioned challenges." (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1108.)[26] Under *Johnson v. California*, *supra*,

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[26] In *Williams v. Runnels*, *supra*, 432 F.3d 1102, the Court of Appeals stated that whether the record may have supported race-neutral grounds for the prosecutor's peremptory challenges, "the Supreme Courts's clarification in *Batson* [*v. Kentucky*] and *Johnson* [*v. California*] and its review of the record in *Miller-El* [*v.Dretke*] lead to the conclusion that this approach did not adequately protect [the defendant's] rights under the Equal Protection Clause of the Fourteenth Amendment or public confidence in the fairness of our system of justice." (*Id.* at p. 1108 [internal quotations omitted].)

and *Miller-El v. Dretke*, *supra*, the trial court's comments in this case were simply improper and inadequate to satisfy the three-step process required by *Batson*.

G. The Prosecution Did Not Sustain Its Burden of Justification As To The Peremptory Challenge Of Prospective Juror Roberts

The prosecutor provided reasons for challenging prospective juror Roberts, who the court stated was a "closer call" (8 RT 1585-1586) than the prosecutor's challenge of Ms. Coleman.[27] The prosecutor's reasons for striking Mr. Roberts, however, mirrored those previously provided by the court. As such, they cannot be given weight as to whether they were the real reasons for the challenge of Mr. Roberts or ones the prosecutor knew the court would readily accept as being sufficiently race-neutral. More importantly, even assuming they were the actual reasons why the prosecutor removed Mr. Roberts, they failed to adequately rebut the presumption of group bias. First, in significant respects, they did not comport with Mr. Roberts's actual remarks made during voir dire or the responses set forth on his questionnaire. Moreover, the prosecutor accepted the jury twice with jurors who provided similar responses to those given by Mr. Roberts, which demonstrates that the reasons were pretextural. (*Miller-El v. Dretke*, *supra*,

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[27] The prosecutor did not offer his reasons for striking Ms. Coleman. Consequently, appellant does not address her specific challenge further. However, this does not alter the fact that the trial court improperly stated its reason for the prosecutor's strike, as discussed above, and that the prosecutor's peremptory challenge of Mr. Roberts, which was subsequent to the excusal of Ms. Coleman, resulted in the removal of all Blacks who had thus been seated in the jury box. As set forth above, after Mr. Roberts's removal from the jury, no other Black prospective jurors were called to the box.

545 U.S. at pp. 241-245 & fn. 4; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 360.)

The prosecutor's alleged reasons for removing Mr. Roberts were that: (1) he provided inconsistent answers on the death penalty, (2) he had marked Groups Three, Four and Five in his questionnaire, and (3) all he would indicate during voir dire is that he was leaning toward Group Four. Based on those responses, the prosecutor felt that he did not know where prospective juror Roberts stood on the death penalty. (8 RT 1584-1585.)

The voir dire proceedings and Mr. Roberts's responses to the questionnaire show that the prosecutor's purported reasons for removing him were simply pretexts for improper racial discrimination. The prosecutor misconstrued information and took this juror's responses out of context. The record indicates that Mr. Roberts did not provide inconsistent answers as to the death penalty and, if anything, that he was more likely to favor the prosecution as to penalty given the specific facts of this case, notwithstanding his characterization as being someone "leaning towards" Group Four (someone who does not favor the death penalty but could vote for).[28]

Mr. Roberts clarified during voir dire that he had not meant to mark Group Three, Four and Five on his questionnaire. He explained that he had misread the questionnaire and had made a mistake. He specifically told the court that he did not consider himself to be in Group Five and made clear that he did not fit the description of that group because he was not someone who could never vote for the death penalty regardless of the evidence. (7

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[28] See fn. 16, *supra*, which sets forth the descriptions of Groups One through Five from the questionnaire.

RT 1481.) When pressed to choose a single category to describe himself, Mr. Roberts said he was "leaning more toward group 4 than other groups." (7 RT 1533.)[29]

Indeed, Mr. Roberts consistently and repeatedly stated during voir that he could impose the death penalty if the evidence so warranted. (7 RT 1481-1482, 1534-1535.) As noted above, Mr. Roberts was unequivocal that he was **not** someone who could never vote for the death penalty regardless of the evidence. (7 RT 1481.)

Moreover, throughout his questionnaire Mr. Roberts made clear that he was not "light on crime," including when the death penalty was concerned. When asked for his "General Feelings about the death penalty," he stated: "I think if the person committed a crime that call [sic] for the death penalty, then he or she must receive it." (XIV CT 3938, Questionnaire, Question No. 51.) Mr. Roberts would also not refuse to vote for guilt in the first trial in order to avoid a decision on the death penalty. (XIV CT 3939, Questionnaire, Question No. 58.) Nor would he always vote for life without the possibility of parole and reject death regardless of the evidence presented at the penalty trial. (XIV CT 3940, Questionnaire, Question No. 61.) In light of the two penalty options available, Mr. Roberts could see himself reject life without possibility of parole and choose the death penalty instead. (XIV CT 3942; Questionnaire, Question No. 70B.)

When specifically asked, Mr. Roberts "strongly agree[d]" with the statement "Anyone who commits murder in the commission of rape, sodomy, burglary, should always get the death penalty," and he "strongly

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[29] See also earlier voir dire conducted by the trial court where Mr. Roberts provided a similar response. (7 RT 1483-1484.)

disagree[d]" with the statement "Anyone who commits murder in the commission of rape, sodomy, burglary, should never get the death penalty." (XIV CT 3942; Questionnaire, Question No. 72.) Thus, to the extent that the prosecutor was uncertain as to where Mr. Roberts stood on the possible imposition of the death penalty to questions which loosely fit with the facts of this case, Mr. Roberts was clear that he could impose a death judgment.

Comparative analysis of the backgrounds and responses of the jurors the prosecutor accepted during jury selection shows that the prosecutor's stated reasons for excusing Mr. Roberts were pretextural. (*Miller El v. Dretke*, *supra*, 545 U.S. at pp. 239-252.) The record shows that a number of non-Black jurors who were accepted by the prosecutor provided responses as to their views on the death penalty which were similar to those given by prospective juror Roberts or provided responses which were "inconsistent" on the issue. Even assuming that the prosecutor was correct that Mr. Roberts was inconsistent on his views of the death penalty, which led the prosecutor into not knowing where he stood on the issue, responses given by jurors accepted by the prosecutor provided stronger evidence that could have been construed to be inconsistent or cause for concern by the prosecutor as to where they "stood" on the death penalty.

For instance, Mary Hodur, who was juror no. 9 when the prosecutor twice accepted the jury as constituted (8 RT 1563-1572), said in her questionnaire that if a defendant was guilty of first degree murder with a special circumstance that the murder was committed in the commission of a felony that she would always vote for life without possibility of parole regardless of the evidence (X CT 2840; Questionnaire, Question No. 61). Like Mr. Roberts, Ms. Hodur clarified the response to Question No. 61 by stating that she had mistakenly provided that answer when she filled out the

questionnaire. (5 RT 1025-1026.)

To the extent that Mr. Roberts may have expressed any reluctance to impose the death penalty by characterizing himself as someone not in favor of it, but could vote for it, Ms. Hodur likewise characterized herself as someone in Group Four. (X CT 2843; Questionnaire, Question No. 75.) In addition, she stated during voir dire that she would have difficulty facing appellant and his counsel in open court while affirming that she had voted for the imposition of such penalty. (5 RT 1036-1038.)

The prosecutor contended that one of his reasons for removing Mr. Roberts from the jury was because he provided "inconsistent" answers on the death penalty. However, the same, if not more, can be said for Ms. Hodur. Although she had said during voir dire that she was not in favor of the death penalty, in her questionnaire she indicated the opposite. (X CT 2842; Questionnaire, Question Nos. 71 & 72.)

Bryon Chaney was juror No. 7 when the prosecutor twice passed and accepted the jury as constituted. (8 RT 1563-1572.) As with Mr. Roberts, Mr. Chaney provided answers which could be construed as "reluctance" to the death penalty. Mr. Chaney characterized himself as being in Group Four - someone who did not favor the death penalty, but could vote for it. (VI CT 1669; Questionnaire, Question No. 75.) In response to the inquiry in the questionnaire regarding his general feelings about the death penalty, Mr. Chaney said that he "[does not] feel comfortable with it, but feels it is necessary in some cases." (VI CT 1664; Questionnaire, Question No. 51.) Similarly, during voir dire, he said that he "had doubts about the death penalty." (5 RT 764-765.)

To the extent that he, like the prosecutor contended about Mr. Roberts, had "inconsistent" views on the death penalty, Mr. Chaney said

that he "Agree[d] somewhat" with the statement: "Anyone who commits murder in the commission of rape, sodomy, burglary, should always get the death penalty." (VI CT 1668; Questionnaire, Question No. 71.) He "Strongly disagree[d]" with the statement: "Anyone who commits murder in the commission of rape, sodomy, burglary, should never get the death penalty." (VI CT 1668; Questionnaire, Question No. 72.)

Dolores Bernd was juror No. 11 when the prosecutor twice accepted the jury as constituted. (8 RT 1562-1572.) Review of her voir dire responses as well as her questionnaire shows that she was even more "reluctant" to impose the death penalty than prospective juror Roberts; moreover, her responses in the questionnaire and during questioning show inconsistencies in her beliefs on the death penalty.

Ms. Bernd characterized herself as someone who has doubts about the death penalty, but would not vote against it in every case (Group Four). (XIV CT 3848; Questionnaire, Question No. 75.) During voir dire, however, she made clear that she was not morally or personally in favor of the death penalty. She said that she was not "positively" saying she could not impose the death penalty. Although she said she could impose the death penalty, she said she could not look at appellant during voir dire and impose it. (7 RT 1419-1424.)

Like Mr. Roberts, Ms. Bernd could be described as having inconsistent views on the death penalty. This inconsistency is indicated by her statements of doubt regarding capital punishment and the fact that she "hoped" that the death penalty was one of the choices for the jury. (XIV

CT 3844; Questionnaire, Question No. 56.)[30] Ms. Bernd also said she did "not believe in [the] death penalty unless under a special circumstance like a pre-planned bombings, etc." (XIV CT 3843; Questionnaire, Question No. 51.) However, when asked about the statement: "Anyone who commits murder in the commission of rape, sodomy, burglary, should always get the death penalty," she said that it "[d]epends on the evidence. Each case is different." (XIV CT 3847; Questionnaire, Question No. 71.)

H. The Trial Court Did Not Make A "Sincere And Reasoned" Effort To Evaluate The Genuineness And Sufficiency Of The Prosecutor's Justification For Removing Prospective Juror Roberts

Notwithstanding its initial finding that appellant's motion was untimely, the court addressed the merits of appellant's motion when it attempted to go through the *Batson* three-step process. Because the court ultimately considered the prosecutor's purported justifications for excusing prospective juror Roberts, it had a duty to make a "sincere and reasoned" effort to evaluate their credibility and sufficiency. (*McClain v. Prunty*, *supra*, 217 F.3d at p. 1220; *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386; *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 715, 721; *People v. Hall* (1983) 35 Cal.3d 161, 167-169.)[31] The court failed to do this.

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[30] Question No. 56 asked: "Do you understand that ONE of the choices is the death penalty?" Ms. Bernd circled "yes" and wrote "I hope so" in response to the question. (XIV 3844.)

[31] As this Court stated:

> [A] truly "reasoned attempt" to evaluate the prosecutor's explanations [under *People v. Hall*, *supra*, 35 Cal.3d at pp. 167-169] requires the court to address the challenged jurors individually to determine whether any one of them has been

(continued...)

As noted above, the prosecutor's reasons for removing juror Roberts were essentially the same as those enumerated by the court when it ruled that no prima facie case with regard to this juror had been shown. It is therefore not surprising that the trial court accepted the prosecutor's stated reasons without further inquiry into or evaluation of them, and denied appellant's *Batson/Wheeler* motion.[32] As demonstrated above, however, the prosecutor's purported justifications for peremptorily excusing Mr. Roberts were implausible and suggestive of bias. They, therefore, "demanded further inquiry on the part of the trial court." (*People v. Turner*, *supra*, 42 Cal.3d at p. 728, quoting *People v. Hall*, *supra*, 35 Cal.3d at p. 169.) The trial court's failure to address the challenged juror beyond its initial comments necessarily precluded a "sincere and reasoned" effort to evaluate the sufficiency of the prosecutor's justifications.

The trial court thus failed to discharge its duty under *Batson/Wheeler* to inquire into and carefully evaluate the explanations offered by the prosecution. (*People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386 [deference not given to trial court ruling that reason is genuine when the trial court has failed to make a sincere and reasoned attempt to evaluate each stated reason

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[31] (...continued)
improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge.

(*People v. Fuentes, supra*, 54 Cal.3d at p. 720.)

[32] As set forth above, the trial court simply accepted the justifications proffered by the prosecutor, and the court commented that the reasons were basically the same as those which had been mentioned by the trial court. (8 RT 1585.)

as applied to each challenged juror]; *People v. Hall*, *supra*, 35 Cal.3d at pp. 168-169 [trial court declined any inquiry into or examination of the prosecutor's proffered explanation for challenging Black jurors before denying *Wheeler* motion]; accord, *People v. Turner*, *supra*, 42 Cal.3d at pp. 727-728 [trial court listened to prosecutor's reasons for challenging Black jurors without question and then denied the *Wheeler* motion without comment]; *People v. Fuentes*, 54 Cal.3d at pp. 720-721 [although trial court took the first step of determining which of the justifications cited by the prosecutor were sham and which were bona fide, it failed to take the next necessary step of asking whether the asserted reasons actually applied to the particular jurors challenged before denying *Wheeler* motion].)

I. Because The Prosecutor's Reasons For Challenging At Least One Of The Removed Black Jurors Was Pretextural, Reversal Is Required

The ultimate question to be resolved is whether "the record as a whole shows purposeful discrimination." (*People v. Silva*, *supra*, 25 Cal.4th at 384.) As appellant has demonstrated, the prosecutor's reasons for removing prospective juror Roberts did not comport with his actual remarks during voir dire or the responses he had provided in his questionnaire. Moreover, the prosecutor allowed non-Black jurors who provided similar answers to remain after having accepted, twice, the jury as constituted. (*Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 239-252 [evidence of pretextural reason and purposeful discrimination shown if prosecutor's proffered reason for striking Black venire person applies as well to similar non-Black venire persons permitted to serve]; *McClain v. Prunty*, *supra*, 217 F.3d at p.1320 ["A prosecutor's motives may be revealed as pretextural where a given explanation is equally applicable to a juror of a different race

who was not stricken by the exercise of a peremptory challenge"]; *United States v. Chinchilla*, *supra*, 874 F.2d at pp. 698-699 [appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were challenged and those who were not fatally undermines the prosecutor's credibility]; *Coulter v. Gilmore* (7th Cir. 1998) 155 F.2d 912, 921 ["crucial and determinative inquiry in a *Batson* claim is whether the state has treated similarly situated venire persons differently based on race"].)

While the passing of certain jurors may be an indication of the opposing party's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Batson/Wheeler* objection, it is not conclusive. (*People v. Snow* (1987) 44 Cal.3d 216, 225.) Indeed, to make such an assumption ignores that Mr. Roberts may have been excluded for improper, racially-motivated reasons. The opposing party's explanation regarding a peremptory challenge must be rejected if it is unsupported by the record (see, e.g., *People v. Turner*, *supra*, 42 Cal.3d at p. 723 [juror allegedly had trouble answering questions – no such trouble appeared in the transcript]), if it is too vague (*id.* at p. 725 ["something in her work" described as "so lacking in content as to amount virtually to no explanation"]), if it is conclusory (*People v. Trevino* (1985) 39 Cal.3d 667, 725), or if like-situated non-Black jurors were not also challenged. (*Miller-El v Dretke*, *supra*, 545 U.S. at p. 252.)

The exercise of one improper challenge is sufficient to establish a violation. "[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." (*United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1085-

1087; see also *United States v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1541; *United States v. Iron Moccasin* (1989) 878 F.2d 226, 229; *United States v. Chalan*, *supra*, 812 F.2d 1302, 1313-1314; *People v. Silva*, *supra,* 25 Cal.4th at p. 386*;* *People v. Fuentes*, *supra*, 54 Cal.3d at p. 715, 716, fn. 4.)

As set forth above, the prosecutor's explanations for striking prospective juror Roberts were suggestive of bias because they were unsupported by the record and non-Black jurors who provided similar responses in their questionnaires and during voir dire were not challenged at times when the prosecutor accept the jury as constituted. Because the prosecution failed to sustain its burden of showing that the challenged jurors were not excluded because of group bias, the judgment of conviction and sentence must be reversed. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 266; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 100; *Holloway v. Horn* (3rd Cir. 2004) 355 F.3d 707, 725, 729-730; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1255; *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 720-721.)

II

THE TRIAL COURT'S REFUSAL TO SEVER COUNTS WHICH WERE SEPARATE AND UNRELATED TO THE CAPITAL MURDER CHARGE RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR BECAUSE IT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND RELIABLE DETERMINATIONS OF GUILT AND PENALTY

A. Introduction

The grand jury indictment against appellant alleged 15 counts, of which only four, including one count of burglary, were connected to the July, 1992 capital homicide of Della Morris. The remaining 11 counts arose out of five separate incidents of burglary unrelated to the capital case, which occurred in August and November, 1992. Following his arrest during the November burglary, appellant admitted to the police that he committed three other burglaries in August, but denied committing the unsolved July homicide of Ms. Morris. With the exception of the November burglary, where there was evidence of appellant's bizarre behavior during the incident and that he tested positive for cocaine ingestion when he was arrested, none of the other burglaries in which appellant admitted involvement included assaultive conduct.

On October 18, 1996, appellant filed his motion to sever the 11 counts regarding the unrelated burglary incidents from those concerning the capital homicide. The trial court denied the severance motion on February 18, 1997, and on March 10, 1997 appellant pled guilty to all counts not related to the homicide, including the special enhancements alleged in

conjunction with the November burglary.[33] Four days later, on March 14, 1997, the prosecution filed its motion pursuant to Evidence Code section 1101, subdivision (b) to admit evidence of the unrelated burglaries during its case-in-chief in the guilt phase, alleging that all four incidents were necessary to prove the requisite intent to steal for the burglary count charged with the homicide. On March 28, 1997 the trial court granted the motion, thus allowing the prosecution to present the other crimes evidence which, by virtue of appellant's guilty pleas, were not part of the pending action for which the jury would determine appellant's guilt for the capital offense.

The trial court's ruling refusing to sever the unrelated burglary counts from those regarding the capital homicide was an abuse of discretion that impacted not only the jury's determination of guilt for the homicide and related offenses, but also the penalty determination. Just as the unrelated offenses were erroneously joined in the indictment, appellant's severance motion, his guilty pleas to each of the unrelated offenses following the denial of the motion, and the prosecutor's subsequent motion to nonetheless bring evidence of the other crimes before the jury in the guilt phase were also erroneously and inextricably connected in this case, thus stacking the deck in the prosecution's favor to obtain the capital conviction it sought as well as a death verdict.

The prosecution had DNA analysis and other forensic evidence which purportedly established appellant's identification as the perpetrator of

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[33] As noted above in the Statement of the Case, prior to the hearing on appellant's severance motion, Count 5, an unrelated burglary, was dismissed pursuant to Section 995, thus reducing the number of unrelated and separate burglary counts to four. (XXI CT 5525.)

the homicide and sexual assaults. That evidence, however, was speculative, subject to challenge and, as the trial court noted, jurors did not always "give [DNA] a great deal of weight." (2 PTRT 257-258.) None of the numerous fingerprints obtained from the scene matched appellant. Additionally, there were at least 19 registered sex offenders who were paroled and identified to have the same genetic profile as the semen obtained from the victim and her bed sheet. Instead, it was the undisputed evidence that appellant had committed a number of burglaries in the same neighborhood which assured the convictions and penalty determination the prosecution sought – i.e., the person who committed the burglary of the Morris residence must have committed the capital homicide and related sexual assaults. To this end, the prosecution vigorously advocated to bring the prejudicial other crimes evidence before the jury under the auspices of proving intent even though the identity of the perpetrator was the real issue in this case.

Although the prosecution theoretically lost the advantage of having the homicide and unrelated burglary cases formally joined for the jury's guilt and penalty determinations, it nonetheless gained the benefit it would have received from the joinder because the unrelated offenses were erroneously admitted in the guilt phase under Evidence Code section 1101, subdivision (b). The three August burglary cases were not properly admissible as section 190.3, factor (b) aggravation during the penalty phase because they did not involve violence or the threat of violence.
Because appellant pled guilty to each of the counts arising from August burglary cases, the jury would not have known about the other crimes during the penalty phase but for the fact that they had erroneously been admitted during the guilt proceedings. Since the jury heard extensive evidence about all four unrelated burglary incidents at the guilt phase, it

cannot reasonably be said that they would have realistically been able to compartmentalize the damaging other crimes evidence so as to not consider it when deciding which penalty to impose.

Appellant discusses the erroneous denial of his severance motion and the erroneous admission of the other crimes evidence in separate claims. (See Arg. III, *infra.*) However, even if the denial of his severance motion was proper at the time it was made, the cumulative prejudice from it as well as the chain of events that ensued from the denial, especially including the erroneous admission of the other crimes evidence under Evidence Code section 1101, subdivision (b) resulted in actual prejudice to appellant because it "'had substantial and injurious effect or influence in determining the jury's verdict'" (*United States v. Lane* (1986) 474 U.S. 438, 449, quoting *Kotteakos v. United States* (1946) 328 U.S. 750, 776; *Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 771-772) as to both guilt and penalty. (Accord, *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084, quoting *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322 ["'high risk of undue prejudice [exists] whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'"].) Appellant was therefore deprived of a fundamentally fair trial, impartial jury, due process, and reliable determinations of guilt and penalty in violation of the federal and state constitutions. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art I, §§ 15, 16 and 17; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *United States v. Lane*, *supra*, 474 U.S. at p. 446, fn. 8; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Bean v. Calderon, supra,* 163 F.3d at p. 1084; *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 448.)

Reversal of the entire judgment and sentence is required.

B. The Proceedings Below

In his severance motion, appellant argued that under Evidence Code section 954 that the counts relating to the homicide and those concerning the unrelated burglaries were not properly joined because there was no "common element of substantial importance" and that they were not the same class of crimes. Appellant argued that even assuming joinder was proper, the two groups of charges should nonetheless be severed "in the interests of justice and for good cause in order to protect his federal constitutional rights to due process and fair trial" and because under Evidence Code section 352, the prejudicial effect of the other crimes evidence outweighed any probative value. Among other grounds, appellant argued that severance was required because: (1) the other crimes evidence was not cross-admissible, (2) the cumulative effect of the charges was unduly prejudicial, (3) a weak group of counts had been joined with a strong group, (4) one group of crimes but not the other would make him eligible for the death penalty, and (5) no substantial judicial benefits would be gained from a joint trial. (XX CT 5362-5406.)

The District Attorney's motion averred that joinder of all the counts was proper because the charges were of the same class and appellant had not met his burden of showing substantial prejudice to justify a severance. (XXI CT 5479-5495.)

At the hearing on the matter, appellant reiterated grounds asserted in the written motion, including that joinder was improper because the offenses relating to the July 10, 1992 Morris homicide (Counts 1-4) were of a different class than the unrelated offenses of August 2, 9, and 25, 1992

(Counts 6-8)[34] as well as the unrelated offenses of November 4, 1992 (Counts 9-15). (2 PTRT 245-247.) Appellant also argued that only identity of the perpetrator of the counts regarding the capital offense was at issue, that the unrelated burglaries were not cross-admissible to show modus operandi, identity or any other material issue, and that substantial prejudice would result from the joinder. (2 PTRT 249-250.) Due to the distinction between Counts 6-8 and Counts 9-15, the latter group of which similarly involved assaultive conduct against the person, appellant argued in the alternative that three trials, or severance of the non-assaultive burglaries (Counts 6-8), was warranted. (2 PTRT 258.)

The prosecution alleged that it did not seek to admit evidence of the charges connected with the unrelated burglaries to establish the identity of the person who committed the homicide. Instead, the prosecution alleged that the other crimes evidence was relevant to show appellant's intent and common design or plan with regard to the burglary charge connected to the homicide. The prosecutor asserted that the facts of the unrelated burglaries were sufficiently similar to that of the capital offense to meet the threshold requirement for admissibility: (1) the crimes occurred at approximately the same time in the evening; (2) the crimes occurred in an eight block radius of Palm Springs; (3) the residences were similar; and (4) entry was made through an open sliding glass door. The prosecutor acknowledged that appellant's identity as the perpetrator of the unrelated offenses was strong because appellant had admitted committing the August burglaries, a fingerprint found at the scene of one of the August burglaries belonged to

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[34] Count 5, an unrelated burglary, was dismissed pursuant to Section 995. (See fn. 33, *supra*.)

appellant, and appellant was arrested during the November 4, 1992 burglary. (2 PTRT 251-254.)

The trial court correctly recognized that the three August burglaries did not involve assaultive conduct. (2 PTRT 246-247.) The court also noted that because appellant had admitted he was responsible for the August burglaries, evidence of the unrelated burglary counts (Counts 6-15) was stronger than those relating to the Morris homicide (Counts 1-4). (2 PTRT 257-258.) Notably, during the discussion on the issue of joining a strong case with one that is weak, the court reasoned that "if the evidence of the burglary was really strong, and the homicide weak, then I think it would be highly inflammatory. . . ." (2 PTRT 257.) The court recognized that if the jury accepted appellant's admissions that he committed the unrelated burglaries, the other crimes evidence was "much stronger than the DNA." The court also noted that "the problem with scientific evidence" is that for some people it is important, yet others "don't give [DNA] a lot of weight." (2 PTRT 257-258.) Notwithstanding those concessions and concerns, the trial court refused to sever any of the unrelated charges, determining that: (1) the offenses were of the same class of crimes due to their characteristics, (2) the offenses were cross-admissible, (3) there was little prejudice to appellant resulting from the joinder, and (4) the unrelated offenses were lesser and not inflammatory. (2 PTRT 325-326.)

C. General Legal Principles

1. California Law

Penal Code section 954 provides in relevant part as follows:

> An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown,

> may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . .

The determination that offenses are "joinable" under section 954 "is only the first stage of analysis because section 954 explicitly gives the trial court discretion to sever offenses or counts 'in the interest of justice and for good cause shown.'" (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 447, quoting *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 135.) Thus, "[p]rejudice may require severance, even though joinder is statutorily permitted under section 954." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 447.)

Whether to sever counts is within the trial court's sound discretion and the court's decision is reviewed in light of the record before the trial court at the time of its ruling. (*People v. Cook* (2006) 39 Cal.4th 566, 581; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120).[35] However, where the charges include capital murder, the exercise of that discretion is reviewed with the highest degree of scrutiny. (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243 [where one of the charged crimes is a capital offense, it is important that a

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[35] Joinder is the preferable course of action when consolidation will avoid harassment of the defendant and avoid the waste of public funds that could arise from having to place the same general facts before different juries. (*People v. Ochoa* (1998) 19 Cal.4th 353, 408.) The grounds which generally support consolidation and demonstrate its efficiency, however, do not apply here. Appellant implicitly waived any claim that separate trials would constitute harassment. (See *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 451 [concern about needless harassment of the defendant is "totally irrelevant [where] it is the defendant who has moved for separate trials, thereby waiving this concern"].) Moreover, the same facts would not have been retried in separate trials, because the facts relevant to the various offenses were distinct.

reviewing court "consider the [joined] cases both separately and together in order to fairly assess whether joinder would tend to produce a conviction when one might not be obtainable on the evidence at separate trials"].) Moreover, this Court has held that severance "may . . . be *constitutionally* required if joinder of offenses would be so prejudicial that it would deny the defendant a fair trial." (*People v. Musselwhite*, *supra*, 17 Cal.4th at pp. 1243-1244, emphasis in original; *People v. Bean* (1990) 46 Cal.3d 919, 935; see also *United States v. Lane, supra,* 474 U.S. at p. 446, fn. 8.) Courts have long recognized that a consolidated trial can potentially deprive the defendant of due process. (See, e.g., *In re Anthony T.* (1980) 112 Cal.App.3d 92, 101-102; *People v. Burns* (1969) 270 Cal.App.2d 238, 252.)

In assessing whether denial of a motion for severance was an abuse of discretion this Court has explained the relevant considerations as: whether evidence of the crimes to be tried jointly would or would not be cross-admissible; whether some of the charges are unusually likely to inflame the jury against the defendant; whether the prosecution has joined a weak case with a strong case (or with another weak case), so that a "spillover" effect from the aggregate evidence on the combined charges might alter the outcome as to one; and whether any of the joined charges carries the death penalty. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1244, citing *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp.452-454.)

Regardless of the correctness of the trial court's rulings as to joinder and severance on the record at the time of the ruling, reversal is required if "joinder actually resulted in 'gross unfairness,' amounting to a denial of due process." (*People v. Arias*, *supra*, 13 Cal.4th at p. 127.) To assess the "actual impact at trial of the consolidation," this Court must "look to the evidence actually introduced at trial to determine whether 'a gross

unfairness has occurred such as to deprive the defendant of a fair trial or due process of law.' [Citation.]" (*People v. Bean*, *supra*, 46 Cal.3d at p. 940.)

2. Federal Law

Generally, for a misjoinder of counts to be reversible error under federal law, it must have "result[ed] in prejudice so great as to deny [the defendant's] Fifth [or Fourteenth] Amendment right to a fair trial." (*United States v. Lane*, *supra*, 474 U.S. at p. 445, fn. 8; *Bean v. Calderon* (1998) 163 F.3d 1073, 1083.) That is, it must have rendered the trial "fundamentally unfair," in violation of due process. (*Featherstone v. Estelle*, *supra*, 948 F.2d at p. 1503; *Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1149.)

Federal courts have recognized that "'a high risk of undue prejudice [exists] whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1084, quoting *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.) That is because jurors at a joint trial cannot adequately "compartmentalize" damaging information about the defendant, and because such a trial often "prejudice[s] jurors' conceptions of the defendant and of the strength of the evidence on both sides of the case." (*United States v. Lewis*, *supra*, 787 F.2d at p. 1322; *Bean v. Calderon*, *supra*,163 F.3d at p.1084.)

The risk of prejudice is higher when charges are joined because they are similar, rather than "based on the same transaction," or "connected together or constituting parts of a common scheme or plan . . . . " (*United States v. Pierce* (11th Cir. 1984) 733 F.2d 1474, 1477; *United States v. Halper* (2nd Cir. 1978) 590 F.2d 422, 430.) But the risk of prejudice is

always high at a joint trial, because jurors are prone to regard a defendant charged with multiple crimes "with a more jaundiced eye" (*United States v. Smith* (2nd Cir. 1940) 112 F.2d 83, 85; see also *United States v. Lotsch* (2nd Cir. 1939) 102 F.2d 35, 36), and to conclude "that [he] must be bad to have been charged with so many things," and may convict on one count based on evidence which only applies to another (*United States v. Ragghianti* (9th Cir. 1975) 527 F.2d 586, 587, citing Wright (1969) Federal Practice and Procedure: Criminal, § 222).

The death penalty is a different kind of punishment from any other. (See, e.g., *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) In light of this qualitative difference, the Supreme Court has repeatedly recognized that the Eighth Amendment demands a "heightened 'need for reliability'" in all phases of a capital trial. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; accord *Lockett v. Ohio* (1978) 438 U.S. 586, 604 ["the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase verdicts in capital cases require heightened reliability].)

D. The Trial Court's Refusal To Sever The Counts Unrelated To The Capital Homicide Was An Abuse Of Discretion

1. The Unrelated Burglary Counts Were Not of the Same Class of Crimes as the Counts Relating to the Homicide

Section 954 authorizes consolidation of charges in two circumstances: (1) where the offenses are connected together in their commission or (2) where the offenses are of the same class. Here, neither instance was present.

As the trial court recognized, and the prosecutor conceded, none of the August burglaries (Counts 6-8) were assaultive crimes against the person. (2 PTRT 246-247.) It therefore cannot reasonably be argued that those three burglaries were of the same class as those relating to the Morris homicide. (*People v. Kemp* (1961) 55 Cal.2d 458, 476 ["same class of crimes" defined to include offenses possessing common attributes such as violent offenses against the person]; see *Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 722 [offenses same class if they possess common characteristics or attributes].)

Similarly, although the November 4th burglary involved some offenses which were assaultive against the person (e.g., the robbery and assault counts; Counts 10-15), the counts relating to the homicide differed distinctly because they involved sexual assaults. (See *People v. Frank* (1933) 130 Cal.App.212, 215-216 [robbery, burglary and assault cannot be joined solely because they fall under Title VIII of the Penal Code, "Crimes Against the Person;" joinder on this basis would lead to absurd results permitting joinder of murder with libel and disallowing consolidation of kidnap and child stealing charges].)

Even assuming, arguendo, that joinder of at least some of the counts regarding the unrelated burglaries was technically proper under section 954 based on being offenses of the same class, other relevant factors necessitated severance of the homicide counts from the unrelated burglaries, thus establishing that the prejudicial effect from the joinder outweighed any probative value. These factors, as will be discussed below, further substantiate that the denial of appellant's severance motion was an abuse of discretion. (See *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1084-1086; *Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 448.)

2. The Evidence Relating to the Separate Offenses Was Not Cross-Admissible

a. General Legal Principles

In assessing the cross-admissibility of evidence for severance purposes, the question is "whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (*People v. Balderas* (1985) 41 Cal.3d 144, 171-172; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1315-1316.) "Cross-admissibility is the crucial factor affecting prejudice." (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) If the evidence is cross-admissible, prejudice is generally dispelled. (*People v. Bradford*, *supra*, 15 Cal.4th at pp.1315-1316.) While lack of cross-admissibility alone is not sufficient to prohibit joinder and demand severance, that factor nevertheless weighs in favor of potential prejudice and, therefore, severance. (See, e.g., *United States v. Lewis*, *supra*, 787 F.2d at p. 1322.)[36]

This Court has long and consistently recognized that "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314,

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[36] Penal Code section 954.1 states, in part, that where "two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, ... evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together." The voters adopted this statute in Proposition 115, which took effect on June 6, 1990. Section 954.1 codified existing case law, however, and did not materially change the rules of severance. (*People v. Arias, supra,* 13 Cal.4th 92, 126, fn. 7.) Section 954.1 does not divest trial courts of their discretion under Penal Code section 954 to sever cases, otherwise properly joined, "in the interests of justice."

disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260; accord, *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) The admission of such evidence "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317; *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 448-450 & fn. 5.) "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044; *People v. Garceau* (1993) 6 Cal.4th 140, 186 [use of such evidence may dilute presumption of innocence].) Thus, "joinder under circumstances where the joined offenses are not otherwise cross-admissible has the effect of admitting the most prejudicial evidence imaginable against an accused." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 429 [citing and discussing supporting authorities].)

These concerns are reflected in Evidence Code section 1101, subdivision (a), which provides that:

> Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

At the same time, under section 1101, subdivision (b), evidence of prior crimes or misconduct is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such act."

Even when the evidence has some bearing on a disputed, material

issue, its admission is not always warranted. Given the extremely inflammatory nature of other crimes evidence, its admission under section 1101, subdivision (b), is sharply circumscribed. It is to be received with "extreme caution," and only when its probative value is substantial and necessary to prove a disputed issue. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) While a not-guilty plea technically places all elements in issue, the element must genuinely be in dispute in order to be proved with other crimes evidence. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 426; *People v. Ewoldt*, *supra*, at p. 406; *People v. Thompson*, *supra*, 27 Cal.3d at pp. 315, 318, & fn. 20.)

Moreover, to be admissible, such evidence "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, quoting *People v. Thompson*, *supra*, 45 Cal.3d at p. 109), under which "the probative value of the evidence must not be substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" (*People v. Harrison* (2005) 35 Cal.4th 208, 229; accord, *People v. Alcala* (1984) 36 Cal.3d 604, 631-632).

Admission of evidence of other crimes cannot be justified by merely asserting an admissible purpose. "[T]he question remains whether the particular evidence of defendant's other offenses is relevant to the ultimate fact in dispute." (*People v. Poon* (1981) 125 Cal.App.3d 55, 71.) The relevance of other crimes evidence "to prove some disputed fact on a theory in addition to its relevancy as character-trait or propensity evidence . . . *must* be *substantial* on the theory tendered in order for the probative value of such evidence to be considered as outweighing the manifest danger of

undue prejudice, to avoid exclusion under Evidence Code section 352. . . ." (2 Jefferson, *California Evidence Bench Book* (2d ed. 1982) § 33.6, p. 1211, emphasis in original.) Moreover, this Court has stated that "it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, *so that the probative value of the evidence can be evaluated for that purpose*." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 406, emphasis added.)

Applying these principles, this Court has held that "[e]vidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.] . . . .' (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) To prove intent, the least degree of similarity between the charged act and uncharged offenses is required. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) However, to be admissible, the uncharged misconduct must be *substantially* similar to have probative value – that is, to support the inference that the defendant probably harbored the same intent in each instance. (*Ibid.*; *People v. Guerrero* (1976) 16 Cal.3d 719, 724.) "A greater degree of similarity is required to prove the existence of a common design or plan. . . . in establishing a common design or plan, evidence of uncharged conduct must demonstrate not 'merely similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402, quoting 2 Wigmore Evidence (Chadbourn rev. ed. 1979) § 304, p. 249, emphasis omitted.)

b. The Unrelated Burglaries Were Not Relevant to Prove Intent or to Show a Common Design or Plan

In this case, the trial court erroneously determined that evidence regarding the unrelated burglary and homicide offenses would be cross-admissible in separate trials. (2 PTRT 325-326.) The prosecutor alleged that the other crimes evidence was relevant to prove intent and common design or plan with regard to the burglary charge connected with the capital homicide. (See 2 PTRT 251-252.) However, neither intent nor common design or plan as to that charge was at issue in this case. Even assuming that they were at issue, the similarity of facts between the evidence of the unrelated burglaries and the instant offense was so unsubstantial that it was of little, if any, probative value to support the inference the prosecutor sought to prove.

i. Intent

The record undisputedly shows that based on the facts in the instant case, the crime of burglary in connection with the Morris homicide occurred. The evidence at the time of the court's ruling on the severance motion was that personal items were missing from the Morris residence and a homicide as well as sexual assaults occurred. (E.g., XVII CT 4519-4520, 4526, 4609-4610.) The reasonable inference from these facts and circumstances is that the perpetrator who entered the Morris residence did so with the intent to commit a theft and/or a felony. Intent, therefore, was not and could not be the issue. Instead, the identity of the perpetrator was the contested issue for which other crimes evidence could have relevance. As well recognized by the trial court, there were "holes" in the similarities rendering the other crimes evidence inadmissible as circumstantial evidence

to establish identity. (8 RT 1626.) Evidence of the unrelated burglaries to show the intent of the perpetrator for the burglary charge connected to the homicide was therefore merely cumulative, and the prejudicial effect of the evidence substantially outweighed its probative value. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 405-406.)

Under Penal Code section 459, an individual who unlawfully enters a dwelling with the intent to commit theft *or* any felony is guilty of a burglary. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041; see *People v. Hughes* (2002) 27 Cal.4th 287, 351 ["intent to commit *any* felony (or theft) suffices for burglary"], emphasis in original.) A necessary element of burglary is that the intent to commit theft or a felony must exist at the time of entry. (*People v. Holt* (1997) 15 Cal.4th 619, 669.) As this Court has recognized, the requisite intent to commit theft or a felony is rarely established by direct proof and may, instead, be inferred from the facts and circumstances disclosed by the evidence. (*Ibid.*) Thus, evidence of theft of property from a dwelling may create the reasonable inference there was intent to commit theft at the time of the entry. (*Id.* at p. 670.) The same inference is true when, as here, there is evidence a felony has been committed within a dwelling. (See *People v. Hughes*, *supra*, 27 Cal.4th at p. 352.)[37]

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[37] Notably, contrary to the prosecution's allegation at this hearing that admission of evidence of the unrelated burglaries was necessary to prove intent that was otherwise lacking for the burglary count connected with the homicide (see Arg. III, *infra*), the prosecutor stated during his subsequent closing argument that intent to steal was established by the fact that property was taken by someone who entered the house in the middle of the night:

(continued...)

Evidence of intent is admissible to prove that, assuming the defendant committed the alleged act, he or she did so with the intent that is required for the crime charged. "'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' (2 Wigmore [Evidence] (Chadbourn rev. Ed. 1979) § 300, p. 238.)." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2; *People v. Guerrero*, *supra*, 16 Cal.3d at p. 726.)

Whenever a defendant is charged with a specific intent crime, intent is hypothetically at issue. Similarly, a plea of not guilty puts at issue all of the elements of the offense, including a defendant's intent. (*People v. Balcom*, *supra,* 7 Cal.4th at p. 422.) However, "[t]he policy of excluding cumulative evidence" prohibits the use of other crimes evidence to prove "intent" when intent is not the disputed issue in a case. (*People v. Thompson*, *supra,* 27 Cal.3d at pp.315-316.) Other crimes evidence is inadmissible if it is merely cumulative to the evidence the prosecutor may

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[37] (...continued)

> Let's look at the proof that shows he had that intent [to steal] at the time that [he] entered the Morris house. [¶] Again we have the testimony of Webbie Morris that nobody had permission to enter his house. Nobody had the permission to take his wallet, and, in fact, he testified he does not know the defendant and has never seen the defendant. Think logically, you don't enter somebody's house that you don't know that you don't have permission to be there in the middle of the night unless, of course, your intent is to steal. So that is the evidence we have here that whoever entered this house obviously intended to steal.

(16 RT 2484-2485; see 16 RT 2495 [whoever entered the house had intent to commit a burglary, rape and sodomy to establish special circumstance allegations].)

use to prove the same issue. (*People v. Alcala*, *supra,* 36 Cal.3d at pp. 631-632.) Thus, where intent is readily inferred from other evidence in a case, evidence of uncharged similar offenses is merely cumulative on that issue. In such an instance "the limited probative value of the evidence of uncharged offenses to prove *intent*, is outweighed by the substantial prejudicial effect of such evidence. [Fn. omitted]." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 422, emphasis in original.)

Here, the requisite intent for the burglary charge connected to the homicide had been met by evidence other than the unrelated burglaries (e.g., theft of the wallet, sexual offenses), and the intent of the perpetrator was not at issue. The crime of burglary had been committed by *someone*, and evidence of the unrelated burglaries to prove intent was cumulative. (*People v. Balcom*, *supra*, 7 Cal.4th at p. 422; see *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 405-406.) Accordingly, the prejudicial effect of the other crimes evidence, which was purportedly offered by the prosecution to prove the intent of the perpetrator, outweighed any probative value. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 405-406.)

ii. Common Design or Plan

Similarly, the evidence of the unrelated burglaries was not relevant to prove a common design or plan. A "common design or plan" refers to a series of crimes that have some connection to one another that gives rise to criminal liability. "Evidence of a common design or plan is admissible to prove that the defendant committed the *act* alleged." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2, emphasis in original.) In other words, the presence of a design or plan to do a given act has probative value to show that the act was in fact done. As this Court has explained, "evidence of common design or plan is admitted not to prove the defendant's intent or

identity, but to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 399.) Moreover, "[t]o establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of spontaneous acts . . . ." (*Id.* at p. 403.) In *People v. Ewoldt*, *supra*, a series of sexual offenses against the same victim and her sister over a period of years was offered to prove that a crime had occurred.

The prosecutor here alleged that the unrelated burglaries and homicide offenses were cross-admissible under the theory of common design or plan. This was not, however, a case where appellant offered an innocent explanation for his conduct or disputed he committed any wrongdoing despite his presence at the scene of the crime – in such circumstances, "the act is still undetermined" and evidence of uncharged conduct to show a common scheme or plan is highly probative on the issue of whether defendant committed the wrongful act as alleged. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 394-395 & fn. 2; see also *People v. Balcom*, *supra*, 7 Cal.4th at pp. 422-426 [evidence of subsequent rape and robbery properly admitted to show common scheme or plan where defendant conceded he engaged in sexual intercourse with the victim but claimed he did not use a gun and victim voluntarily consented].)

Instead, as discussed above, the evidence in this case concerning the burglary charge indicates that someone entered the Morris residence without permission, property was taken, and a homicide and sexual assaults occurred. The only issue in dispute was whether appellant was the perpetrator. Because of these circumstances, the existence of a common design or plan was not relevant to the issues in this case. It was thus erroneous to conclude that evidence of the unrelated burglaries was

admissible to prove a common design or plan. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at pp 405-406.)[38]

c. There Was No Substantial Similarity Between the Offenses

Even assuming that intent or common design/plan was at issue in this case, the shared marks between the unrelated burglaries and the instant offense upon which the prosecutor relied fell short of the threshold degree of substantial similarity to be of probative value. (*People v. Guerrero* (1976) 16 Cal.3d 719, 728; *People v. Harvey* (1984) 163 Cal.App.3d 90, 105 ["Where evidence of defendant's intent in a prior criminal episode is introduced to prove that he harbored a similar intent in the currently charged crime, the desired inference is only as strong as the crimes are similar"]; see *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.)

In order to be admissible to prove intent, the unrelated burglaries must be substantially similar to support the inference that appellant probably harbored the same intent in each instance. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402; *People v. Guerrero*, supra, 16 Cal.3d 719, 728.) For evidence of separate crimes to be cross-admissible to show a common design or plan, an even greater degree of similarity is required, and the crimes must have "'such a concurrence of common features that [they] are

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[38] This Court noted in *People v. Ewoldt*, *supra*, that "in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406.)

naturally to be explained as caused by a general plan of which they are individual manifestations.'" (*People v. Caitlin* (2001) 26 Cal.4th 81, 111, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) Although evidence of a plan is not required to be distinctive or unusual, it must "support the inference that the defendant employed that plan in committing the charged offense." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403, citing *People v. Ruiz* (1988) 44 Cal.3d 589, 605-606.)

Each of the similarities that the prosecutor alleged to exist between the unrelated burglaries and the burglary attendant to the homicide were features common to most residential burglaries. (See *People v. Harvey*, *supra*, 163 Cal.App.3d at pp. 101-103.) Even the fact that the unrelated burglaries and the burglary in the instant case occurred within an eight block radius and in the middle of the night does not make them distinguishable from any of the burglaries reported by law enforcement which occurred in the same neighborhood and were committed by someone other than appellant. (8 RT 1627;11 RT 2027.) Likewise, the fact that the houses at issue were a similar design or build was not a meaningful commonality for which probative value could be attributed. All of the houses in the neighborhood were built by the same company, Alexander Homes. (11 RT 2033.) It was therefore not surprising or unique that they had similar characteristics, including one or more sliding glass doors to the outside. The use of a sliding door was also not a similarity of consequence. Even assuming that the intruder to the Morris residence entered through a sliding glass door, it was apparent that appellant was not the only person who unlawfully entered homes in that *same* neighborhood by that *same*

method.[39]

In contrast, the dissimilarities between the unrelated burglaries and the instant offense were numerous, including that: (1) none of the other crimes burglaries involved sexual offenses; (2) none of the August burglaries involved assaultive conduct; (3) in the August burglaries, the intruder fled the homes when encountered by the residents; and (4) in the August 25th burglary, entry was accomplished by shattering the sliding glass door with a rock.

Because the circumstances of the unrelated burglaries and the instant offense were far from substantially similar to allow the inference sought by the prosecutor – intent or a common design/plan – it was error to determine that the unrelated burglaries were of any probative value with regard to either theory. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 728; *People v. Harvey*, *supra*, 163 Cal.App.3d at p.105.) Even assuming the other crimes evidence was of some probative value other than to show propensity, the probative value was far outweighed by the prejudice posed by admitting in this capital case not one, but four, unrelated nighttime burglaries that occurred in the same neighborhood. (See *People v. Keenan* (1988) 46 Cal.3d 478, 500 ["severance motions in capital cases should receive heightened scrutiny for potential prejudice"].) The unrelated crimes and the

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[39] According to a law enforcement report, in August, 1992, another person, Randy Williams, had committed a similar crime - a burglary and rape of an elderly woman where the perpetrator entered and left through the sliding glass door. Moreover, the trial court agreed with defense counsel that it was common for people to sleep with their sliding doors open when the weather was warm and that as a consequence law enforcement issued warnings about the risk in doing so. (8 RT 1627;15 RT 2375, 2378-2379.)

instant offense were not cross-admissible and the joinder of the charges resulted in substantial prejudice. (See, e.g., *Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 448-451 & fn. 9 [lack of cross-admissibility weighs in favor of potential prejudice and severance]; *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1084-1086; *United States v. Lewis*, *supra*, 787 F.2d at p.1322.)

3. The Unrelated Burglary Charges Were Likely to Inflame the Jury Against Appellant

This Court has recognized that it can be error to join an inflammatory charge with a less egregious one "under circumstances where the jury cannot be expected to try both fairly." (*People v. Mason* (1991) 52 Cal.3d 909, 934.) In considering if the joinder threatened to inflame the jury, the court must "look to whether under the circumstances consolidating an inflammatory offense with a non-or lesser-inflammatory offense would inhibit the jury from trying both fairly." (*Ibid.*) "The danger to be avoided is 'that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime." (*Ibid.*, quoting *People v. Walker* (1998) 47 Cal.3d 605, 623.)

Regardless of whether evidence of other crimes is cross-admissible, the mere fact that a defendant is charged with multiple offenses may contribute to a guilty verdict. Thus, even "when cautioned, juries are more apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one." (*People v. Smallwood*, *supra* 42 Cal.3d at p. 432, fn. 14, internal quotations and citations omitted.) Although a burglary is not more egregious than a homicide, the other crimes evidence in this case – four unrelated burglaries – was nonethethess inflammatory and served to bolster a comparatively less substantial prosecution case with

regard to the homicide charges. Burglaries are serious felony offenses in their own right, and the sheer number of those which appellant had admitted could not have escaped the jury's attention and unduly influenced their view of him as well as the credibility of his defense and the actual strength of the prosecution's case.

"There is 'a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would be otherwise inadmissible.'" (*United States v. Lewis*, *supra*, 787 F.2d at pp.1321-1322, quoting from *United States v. Daniels* (D.C. Cir. 1985) 770 F.2d 1111, 1116 [trial court committed prejudicial error in refusing to sever counts where inflammatory prior crimes evidence was admissible as to only one count].)

At the time of the severance motion, appellant faced five separate burglaries, including one connected to the homicide. All of the burglaries occurred during the nighttime and were committed within a five month time period in the same neighborhood. As set forth above, the evidence that appellant was the perpetrator in the unrelated burglaries was undisputed and substantial.

The unrelated burglaries were admitted to prove intent as to one count only – the burglary charge – and thus carried the high risk of prejudice. (*United States v. Daniels, supra*, 770 F.2d at p. 1116.) Moreover, in light of the multiple burglaries attributable to appellant by his own admission, and which were within the limited geographical area and temporal parameter, the other crimes evidence carried an additional substantial risk of causing "undue prejudice" because the circumstances of them were of a type "which uniquely tend[] to invoke an emotional bias against the defendant as an individual and which has very little effect on the

issues." (*People v. Padilla* (1995) 11 Cal.4th 891, 925.) Although evidence of the unrelated burglaries would have very little *legitimate* effect on the issues related to the prosecution of the Morris homicide, it was of the type that was very likely to invoke an emotional bias against the defendant as an individual, and to create a risk that the jury might convict him of the most serious charges notwithstanding the relative weakness of the evidence implicating him in that case.

4. The Joinder Permitted a Weak Case to Be Joined with a Strong Case

Where it appears that, because of the potential prejudice, a weak case will be made stronger by joinder with unrelated offenses, severance is required. As this Court recognized in *Williams v. Superior Court*, *supra*, "[c]learly, joinder should never be a vehicle for bolstering one or two weak cases against one defendant, particularly where conviction in both will give rise to a possible death sentence." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; see *Bean v. Calderon*, *supra*, 163 F.3d at p.1086 [potential for undue prejudice from joinder of strong evidentiary case with a weaker one]; *Lucero v. Kerby* (10th Cir. 1998) 133 F.3d 1299, 1315 [danger in consolidation of offenses because state may join a strong evidentiary case with a weaker one hoping that an overlapping consideration of the evidence will lead to convictions of both].)

Even where joinder is technically proper, severance is favored if there is a great disparity between the gravity of the offenses (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 452; *People v. Chessman* (1959) 52 Cal.2d 467, 492; *People v. Morse* (1964) 60 Cal.2d 631), or if, in light of the weight of the evidence offered for the different counts, there is the possibility that the defendant will be convicted due to the prejudicial

atmosphere created by the joinder and not by the evidence itself (*People v. Matson* (1974) 13 Cal.3d 35, 39-40).

In this case, there was a substantial risk that the unrelated burglaries, all of which were admitted by appellant, would have a "spillover effect" of improperly bolstering the prosecution's speculative evidence connecting appellant to the Morris homicide and related charges.

At the grand jury hearing, which gave rise to the indictment filed in this case, it was shown that the evidence against appellant was purely circumstantial and did not amount to substantial evidence demonstrating that appellant was the perpetrator of the Morris offenses. There were no eyewitneses to the homicide, and although numerous fingerprints were recovered from the scene, including ones from the sliding glass door of the house and the victim's bedframe, none matched appellant.

The prosecution had DNA analysis evidence which allegedly linked appellant to the homicide. This evidence was not conclusive, and the prosecution expert witness could not say that the fragment from the crime scene stain or that the number of base pairs from the fragment were exactly those of appellant. (13 RT 2271, 2275.) Similarly, it could not be said that simple ABO/PGM typing of appellant's blood matched the semen obtained from the victim and her bed sheet; it could only be said they were of the same general "type." (12 RT 2087-2088.) During trial, the prosecution provided the defense evidence that 19 paroled registered sex offenders had the same genetic profile as the samples obtained from the victim and her bed sheet; ten of those individuals were Black. (15 RT 2379, 2382-2383.) Finally, the "best" the prosecution could say about non-DNA "analysis" of hair found at the scene was that they did not come from the victim or her brother. Nonetheless, the prosecution opined without that they were not

"inconsistent" with hair samples from appellant. (12 RT 2086-2087.)

In contrast, the evidence presented implicating appellant in each of the unrelated burglary cases was substantial. In one case, appellant was arrested at the scene and in another, his fingerprints were found on a television from the residence. During an interview with the police following his arrest at the burglary of November 4, 1992 appellant admitted committing three of the unrelated burglaries.

The evidence presented at the grand jury proceeding demonstrates that while the evidence indicating appellant's identity as the perpetrator of the Morris homicide was not conclusive and based on speculative forensic evidence, there was no dispute that appellant was the perpetrator in the unrelated burglary offenses. As a result, there was a great risk that the joinder of the non-capital offenses with the charges related to the Morris homicide would portray appellant as a criminal who was, by his bad nature, likely to commit the charged burglary and must have thus committed the homicide and sexual assaults. The propensity evidence thus served to obscure the lack of persuasive evidence implicating appellant as the perpetrator of the charged crimes. By joining the non-capital counts, the trial court greatly enhanced the chances that appellant would be found guilty of burglary, and hence was the perpetrator of the homicide and sexual assaults, that the special circumstance allegations would be found true, and that appellant would be sentenced to death.

5. The Charges Relating to the Morris Homicide Carried the Death Penalty While the Unrelated Charges Did Not

Because the Morris case involved a capital offense, this Court must "analyze the severance issue with a higher degree of scrutiny and care than

is normally applied in a noncapital case." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 454; see, *People v. Lucky* (1988) 45 Cal.3d 259, 277; cf. *Gregory v. United States* (D.C. Cir. 1966) 369 F.2d 185, 189.)[40] For the same reason, the trial court was required to assess the likely effect of joinder, and carefully weigh whether any likely conservation of judicial resources outweighed the prejudicial impact of that procedure. The trial court, however, failed to give any weight or consideration to the fact that this was a capital case and disregarded defense counsel's arguments about the prejudice of joinder. The court's treatment of the severance/joinder issue was inadequate, given that "questions of life and death were at stake." (*People v. Smallwood*, *supra*, 42 Cal.3d at pp. 430-431.)

6. The Actual Judicial Benefits to Be Gained by Joining the Trials Were Minimal

After considering the factors enumerated above, the trial court was required to weigh the potential prejudice and the benefits of joinder. (*People v. Bean*, *supra*, 46 Cal.3d at p. 936.) If the court had performed the necessary weighing, it would have determined that a joint trial would not yield any substantial benefits. The unrelated burglary cases involved no witnesses whose testimony would have been repeated at separate trials. Because evidence of the other crimes was not cross-admissible, "there was simply no significant judicial economy to be gained from joinder." (*People*

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[40] In *Gregory v. United States* (D.C. Cir. 1966) 369 F.2d 185, 189, the court stated: where the court stated that: "[i]t may be seriously questioned whether it is proper in any capital case to join trial offenses occurring at different times and places. The danger arising from the cumulative effect of evidence of other offenses on the minds of the jurors is too great to tolerate in such cases."

v. Smallwood, *supra*, 42 Cal.3d at p. 428.)[41]

As in *People v. Smallwood*, *supra*, "'[t]he only real convenience served by permitting joint trial of [these] unrelated offenses against the wishes of [appellant] was the convenience of the prosecution in securing a conviction." (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 430, quoting *United States v. Foutz* (4th Cir. 1976) 540 F.2d 733, 738.) Even if separate trials would have involved additional time and expense, they would have been more efficient in the most important sense, because they would have produced more reliable verdicts, untainted by the prejudicial effect of exposing the jury to evidence of other crimes. (See *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428.) As this Court has stated, "the pursuit of judicial economy must never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 451-452.)

There were no substantial judicial benefits to be gained from the separate trials. There was, however, substantial prejudice that would result from a joint trial. Accordingly, it was an abuse of discretion to join the charges relating to the homicide with the non-capital burglaries.

E. The Joinder Of The Unrelated Counts To The Alleged Capital Offense Was Prejudicial And Violated Appellant's State And Federal Constitutional Rights To Due Process, A Fundamentally Fair Trial and Reliable Jury Verdicts

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[41] Appellant recognizes that the November 4, 1992, burglary which involved alleged assaultive behavior was arguably admissible as aggravating evidence under section 190.3, factor (b). As set forth above, appellant maintains that a joint trial of the November burglary with the Morris homicide was improper and prejudicial. Even assuming joinder was proper, the prejudicial impact of the combined offenses outweighed any judicial economy.

The joinder of the unrelated burglary counts to the alleged capital offense was error which substantially prejudiced appellant (see *People v. Bradford*, *supra*, 15 Cal.4th at pp.1315-1318 [refusing to sever "joinable" charges is reversible error when it results in demonstrable prejudice], and rendered the trial and the jury's verdicts "fundamentally unfair" in violation of appellant's constitutional rights to due process, a fair trial and reliable determinations of guilt and penalty. (U.S. Const., Amends. 5th, 6th, 8th and 14th; Cal. Const., art. I, §§ 1, 15, 16, 17; see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Bean v. Calderon*, *supra*, 163 F.3d at p. 1084; *McKinney v. Rees* (1993) 993 F.2d 1378, 1385-1386; *Featherstone v. Estelle*, *supra*, 948 F.2d at p. 1503; *People v. Arias*, *supra*, 13 Cal.4th at p.127.)

The jury's verdicts, including the death verdict, were the product of a "spillover effect" of the kind that supports severance of unrelated charges. (See *United States v. Lewis*, *supra*, 787 F.2d at p.1322; *Drew v. United States* (D.C. 1964) 331 F.2d 85, 88.) As set forth in sections D(3)-D(4) above, the objective evidence connecting appellant as the perpetrator of the unrelated burglary offenses was substantial – not only had appellant admitted to law enforcement that he had committed at least three of the unrelated burglaries, but in one instance, his fingerprints were found at the residence and in another he was arrested at the scene.

In contrast, the case against appellant as being the perpetrator of the capital offense was based entirely on speculative, inconclusive or questionable circumstantial evidence. There was no eyewitness evidence, and fingerprints found at the scene, including those obtained from potential points of entry to the house as well as the bedroom where Ms. Morris was found, did not match appellant. The capital case, standing alone, depended

on the strength of the forensic evidence linking appellant to the scene. Yet, as set forth in detail in sections D(3)-D(4) above, that evidence was not substantial.

Even though there was DNA analysis evidence which allegedly indicated that appellant was the perpetrator, it could not be said that the fragment from the crime scene or the number of base pairs in the fragment matched appellant. (13 RT 2271, 2275.) As the trial court correctly recognized, appellant's admissions regarding the unrelated crimes was much stronger than the DNA evidence. According to the court, "the problem with scientific evidence" is that some jurors do not "give [DNA] much weight." (2 PTRT 257-258.) Similarly, simple blood typing conducted by the prosecution revealed that appellant was of the same type as semen found at the scene. 19 sex registrants who had been paroled, however, shared the same genetic markers as the semen obtained from the victim and her bed sheet. (16 RT 2379, 2382-2383.) Analysis of hair found at the scene was likewise less than credible to identify appellant as the perpetrator. No DNA analysis on the hair was conducted, and the "best" the prosecution could say about the hair recovered from the scene was that it did not come from the victim or Webbie. Nonetheless, the prosecution opined that the hair was not "inconsistent" with appellant. (12 RT 2086-2087.)

Rather than submit the capital case on the lack of definitive forensic evidence to prove appellant's identity as the perpetrator, the prosecutor successfully sought to strengthen his case by adding the unrelated offense counts where appellant's identity as the perpetrator were not contested. Moreover, the number of the other counts fostered the prejudicial impression of appellant as a serial nighttime burglar. This portrait of

appellant allowed the jury to come to the conclusion that appellant was the perpetrator of the burglary in the instant offense, and therefore was the perpetrator of the capital homicide, simply because he had admitted committing multiple burglaries in the same neighborhood.

In *Bean v. Calderon, supra*, 163 F.3d 1073, the Ninth Circuit Court of Appeal reversed one of the two capital murder convictions based upon the improper joiner of the two murder counts. The circuit court found that joinder had been improper because: (1) the crimes were committed in significantly different ways so as to render the two counts non-cross-admissible as to each other, and (2) evidence on the first count was comparatively strong and evidence on the second count was correspondingly weak. (*Id.* at pp. 1083-1085.) The improper joinder of charges violated Bean's federal constitutional rights to due process and a fair trial. (*Id.* at p. 1084.) The error was prejudicial and the circuit court reversed the second count because the trial court failed to specifically "admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other" (*id.* at 1084), and because the prosecutor "repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of Bean's criminal activities" (*ibid.*).

The present case is similar. The evidence of appellant's identity as to the unrelated burglaries was very strong. However, the evidence of appellant's identity as the perpetrator of the offenses involving Ms. Morris was comparatively less substantial. The facts of the capital offense differed significantly from the noncapital offenses, ruling out any legitimate cross-admissibility of evidence between the capital and noncapital offenses. Where, as here, the joinder of unrelated charges is supported by weak

evidence, a danger arises that the jury will cumulate the evidence against the defendant or, alternatively, conclude that his commission of one of the unrelated charges necessarily implies his commission of the other. (*Williams v. Superior Court*, *supra*, 36 Cal.3d at pp. 452-453.)

The danger the jury will consider the cumulative impact is greater when, as here, the charged crimes bear some similarities, even though not adequately substantial to render the evidence cross-admissible. (*Bean v. Calderon*, *supra*, 163 F.3d at p.1085; *People v. Grant*, *supra*, 113 Cal. App.4th at pp. 588-594; see *People v. Calderon* (1994) 9 Cal.4th 69, 80 [evidence defendant has committed other crime "bearing some similarity to, and of comparable seriousness to the charged offense . . . . creat[es] a serious risk that the jury [will] conclude that defendant has a criminal disposition"].)

That the joinder of the charges in fact rendered the proceedings grossly unfair is made clear when Deputy District Attorney Best, during his guilt phase closing argument, urged the jury to draw the impermissible inference that because appellant had committed burglaries in the neighborhood he had committed the burglary in the instant offense and in turn was the perpetrator of the homicide and sexual assaults. Notably, the emphasis prosecutor Best placed on the unrelated burglaries followed his assertion that the intent to steal at the time of entry, which was allegedly necessary to prove the burglary count in the instant case, was established because personal property from the Morris residence was missing and because the perpetrator unlawfully entered the Morris residence in the middle of the night. The portion of prosecutor Best's argument which highlighted the charges in concert was premised by the assertion that he (prosecutor Best) was "now [getting] to the second part" of the argument to

show that appellant was the person who entered the Morris residence (16 RT 2485), thus making it clear that the other crimes evidence was in fact intended to prove identity versus an intent to steal:

> Now we get to the second part of our argument and we show that the person who entered the house was, in fact, Royce Scott, we have further evidence of what Mr. Scott's actual intent was when he entered that house, and the evidence is all the other burglaries that he committed in the neighborhood. The Court has instructed you that you may look at those other burglaries, the burglary on August 3rd, 1992, where the defendant entered the home of Nancy Pruss, five blocks away at night and stole her purse and her fanny pack. The burglary of August 9, 1992, when the defendant entered the home of Marc Daly three blocks away and tried to steal his TV, the burglary of 8/25/92 [sic] when the defendant entered the home of Emily Pollard and stole her purse and her camera three blocks away, and the burglary of November 4th, 1992 [sic], when the defendant enters the home of Kenneth Osborne two blocks away and takes his wallet and Microwave before he is arrested in the house, so the Court has told you that you can look at all of these burglaries, all of this conduct on Mr. Scott's part, and you can see that clearly in all of those cases he went in and stole property or attempted to steal property when he was caught and you may then take that and look back at the entry into the Morris house, and you may say if he intended to commit theft in all these cases, we may consider that as evidence when he entered the Morris house, he intended to commit theft, and that's why we went through all of those burglaries with you, and that is the relevance of those cases to this charge.

(16 RT 2485-2486.)

At the hearing regarding admissibility of the unrelated burglaries pursuant to Evidence Code section 1101, subdivision (b) (see Arg. III, *infra*), the trial court determined that the unrelated burglaries and the instant offense were not sufficiently similar to permit the other crimes evidence to

prove identity. (See 8 RT 1626.)[42] Nonetheless, as set forth above, prosecutor Best capitalized on the combined weight of the charges and the admission by appellant that he had committed previous and multiple acts of burglary to urge the jury to draw the impermissible inference that appellant was in fact the perpetrator of the Morris burglary and, thus must have committed the homicide and sexual assaults. The fact that the prosecutor effectively used the charges in concert as propensity evidence to establish appellant's guilt demonstrates that the joinder substantially prejudiced the jury's verdicts. (*People v. Grant*, *supra*, 113 Cal.App.4th at pp. 587, 589-591; *Bean v. Calderon*, *supra*, 163 F.3d at pp. 1084-1086, quoting *United States v. Johnson* (9th Cir. 1987) 820 F.2d 1065, 1071 [the jury could not "reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime"]; see *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1085 [reversible error in joining trials of co-defendants with antagonistic defenses based in part on prosecutor's closing argument capitalizing on potential prejudice from the joinder].)

The prejudice resulting from the joinder, as well as from the impermissible exploitation of the unrelated charges during the prosecutor's closing argument, was not ameliorated by the instructions the trial court provided. (*Bean v. Calderon*, *supra*, 163 F.3d at pp.1084-1086; *People v. Grant*, *supra*, 113 Cal.App.4th at p. 592.) Over appellant's objection, the

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[42] During the hearing to admit evidence of the unrelated burglaries pursuant to Evidence Code section 1101, subdivision (b), the court stated "that's why I don't think . . . why the analysis as to identity in my opinion would be appropriate. . . . [¶] Because of the fact that there are some holes in similarity." (8 RT 1626.)

trial court instructed the jury with a modified version of CALJIC No. 2.50, which, in combination with the court's definition of the crime of burglary, told them they could consider the other crimes evidence only to show intent to steal with regard to the crime of burglary. The modified version of CALJIC 2.50 the jury was provided is as follows:

> Evidence has been introduced for the purposes of showing that the defendant committed crimes other than that for which he is on trial. This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. . . . [¶] It may only be considered by you only for the limited purposes [sic] of determining if it tends to show the existence of intent which is a necessary element of the crime of burglary. For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not permitted to consider this evidence for any other purpose.

(16 RT 2456-2457.) The instruction the trial court provided with regard to the crime of burglary is as follows:

> Every person who enters a building with a specific intent to steal, take, carry away the personal property of another and with the further specific intent to deprive the owner permanently of that property . . . .

(16 RT 2471-2472.)

The instruction the court provided relating to the other crimes evidence, however, was of little value. First, intent of the perpetrator was not at issue in this case. (*People v. Felix* (1993) 14 Cal.App.4th 997, 1009 [other crimes evidence was not properly admitted to show identity and limiting instruction did nothing to alleviate harm.) Moreover, contrary to appellant's request, the modified version of CALJIC No. 2.50 did not specifically direct the jury that evidence of the unrelated burglaries could

not be used to establish identity of the perpetrator or appellant's guilt on any other count or special allegation. (Evid. Code, § 355; *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [requirement to instruct the jury on correct use of evidence].)

In lieu of CALJIC No. 2.50, appellant requested that the court specifically instruct the jury that they could not consider the other crimes evidence to establish the identity of the perpetrator, and to provide CALJIC No. 2.09, which told the jury that they could only consider the other crimes evidence for the limited purpose for which it was admitted.[43] The trial court, however, denied each of these requests. (15 RT 2392-2395; 2399-2400.) The court's failure to provide an adequate instruction regarding the jury's use of the other crimes evidence was particularly egregious because one of the theories of first degree murder, as well as one of the specific special circumstance allegations, was premised on the murder having occurred during the commission of a burglary. Thus, while the jury was instructed that evidence of the unrelated burglaries was to prove intent for the "crime of burglary," it is not unreasonable to assume that the jury likely applied the other crimes evidence in a much broader scope than was permissible – i.e., as identity evidence for the burglary, homicide and sexual assaults.

As in *Bean v. Calderon*, *supra*, 163 F.3d 1073, the joinder of counts

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[43] CALJIC No. 2.09 is as follows:

> Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except for the limited purpose for which it was admitted.

here was error of a constitutional magnitude because it resulted in a "gross unfairness" amounting to a denial of federal due process. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Appellant was substantially prejudiced from the joinder because the evidence on the unrelated burglaries and instant offenses was not cross-admissible, the prosecution urged the jury to consider the charges in concert, the trial court did not instruct the jury that it could not consider the evidence to prove identity of appellant as the perpetrator, that evidence admitted on one charge could not be used to determine guilt on the others, and the evidence of appellant's identity as to the unrelated burglaries was much stronger than that which was evident to the instant offense. (*Bean v. Calderon*, *supra*, 163 F.3d at pp.1083-1086.) Moreover, the denial of the severance resulted in the jury being presented with other crimes evidence in the guilt phase that would have normally been omitted due to the pretrial entry of appellant's guilty pleas. Similarly, the denial of the severance motion had the collateral impact of the jury's consideration of other crimes evidence which was not properly within the ambit of section 1101.

In *People v. Garceau*, *supra*, 6 Cal.4th 140, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, this Court noted the "potentially devastating impact" of other crimes evidence which involves the same crime as the one at issue. (*People v. Garceau, supra.*, 6 Cal.4th at p. 186.) In light of the combined weight of the stronger evidence relating to the multiple noncapital burglaries, as compared to the far less substantial evidence that appellant was the person who committed the burglary, and thus committed the capital homicide and other offenses, as well as the lack of cross-admissibility of the charges, appellant had no chance for a fair trial once the charges were joined. This unfairness was

exacerbated by the prosecutor's impermissible exploitation of the unrelated burglaries during his closing argument and the trial court's failure to provide adequate limiting instructions as to the proper scope of the jury's consideration of the other crimes evidence.

Prejudice from the joinder also impacted the penalty determination. Besides the prejudice that resulted from the trial court's refusal to provide adequate limiting instructions regarding the other crimes evidence during the guilt phase, the court failed to provide appellant's proposed instructions at the penalty phase informing jurors that other criminal activity not involving the use or threat of violence could not be considered as factor (b) aggravation. (Proposed Penalty Phase Instruction Nos. 27 and 28,which are set forth below.) These instructions would have made clear that evidence of the unrelated August burglary offenses could not be considered by the jury as section 190.3, factor (b) aggravating evidence in making their determination whether appellant should live or die. (*People v. Robertson* (1982) 33 Cal.3d 21, 55; *People v. Yeoman* (2003) 31 Cal.4th 93, 151; CALCRIM No. 764 ["You may not consider any other evidence of alleged criminal activity as an aggravating circumstance [] about which I will now instruct you"]; Bench notes of CALCRIM No. 764.)

The limiting instructions appellant requested at the penalty phase applicable to the August burglaries are as follows:

> You may not consider as aggravation any evidence of criminal activity by defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence.

(22 CT 5975 [Proposed Penalty Phase Instruction No. 27]), and

> Evidence has been introduced in the guilt and penalty phases of this trial that may show that the defendant engaged in

> criminal activity which you may not consider as a factor in aggravation. You may consider only the crime which I will define for you in determining whether or not the defendant has engaged in criminal activity which involves the use or the express or implied threat to use force or violence.

(22 CT 5976 [Proposed Penalty Phase Instruction No. 28]).

Moreover the prosecutor exploited the unrelated August burglary incidents during his penalty phase closing argument. The August burglaries were not admissible at the penalty phase as factor (a), (b) or (c) aggravating evidence. In his closing argument, however, the prosecutor indirectly referred to them, thus leaving the jury with the impression the evidence of the unrelated burglaries admitted at guilt, but not actually presented as aggravating evidence during the penalty phase, should be considered in deciding whether to impose life or death. The prosecutor's closing argument regarding "people minding their own business in their own homes" coupled with the "screen door element" no doubt reminded the jury of appellant's other nighttime burglaries introduced in the guilt phase. In light of the explicit instructions by the trial court, as well as the prosecutor's argument, that the jury could consider all evidence presented in this case, including that from the guilt phase (20 RT 2788, 2803), evidence of the unrelated burglaries was likely considered by the jurors as non-statutory and impermissible aggravation.

Refusal to grant appellant's severance motion, and proceeding with a joint trial when the potential for prejudice was clear, was both an abuse of discretion and grossly unfair, and violated appellant's constitutional rights to due process, a fundamentally fair trial, and reliable determinations of guilt and penalty. Because the trial court's denial of the severance motion cannot be deemed harmless beyond a reasonable doubt, reversal of the

judgment of conviction and sentence is required. (*Chapman v. California* (1967) 386 U.S. 18, 24; see Arg. III, *infra*, incorporated by reference.)

III

THE ERRONEOUS ADMISSION OF PREJUDICIAL OTHER CRIMES EVIDENCE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND RELIABLE DETERMINATIONS OF GUILT AND PENALTY

A. Introduction

As previously noted in Argument II, *supra*, in the context of ruling on appellant's motion to sever the counts regarding four unrelated burglaries (Counts 6-15)[44] from the counts relating to the Morris homicide (Counts 1-4), the trial court determined that the unrelated offenses were cross-admissible to those charged in the instant capital case, thus permitting the prosecution to proceed on the weight of the joined offenses. Following the court's denial of the severance motion, appellant entered guilty pleas to the counts connected to each of the unrelated burglary charges (Counts 6-15). Appellant had previously admitted to the police that he had committed three of the charged burglary incidents and he was arrested during a fourth. (See Arg. II, *supra*.)

Intent on using the other crimes evidence to bolster its assertion that that appellant was the person who committed the burglary of the Morris residence, and therefore also the person who committed the homicide and sexual assaults, the prosecutor moved to present evidence of the four unrelated burglaries in its case-in-chief even though appellant's guilty pleas effectively removed them from the jury's guilt consideration.

The other crimes evidence was neither properly relevant nor material on any issue relating to the capital case, and was unduly prejudicial

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[44] As set forth above, one of the five initially alleged unrelated burglary counts was dismissed by the prosecution. (See fn. 33, *supra*.)

under Evidence Code section 352 as well as violative of Evidence Code section 1101, subdivision (a), because the only relevance of the other crimes evidence was as improper propensity evidence ultimately to prove the identity of the perpetrator. As such, the erroneous admission of the evidence was so inflammatory that it infected the entire trial and rendered the trial proceedings fundamentally unfair. As appellant will show, the other crimes evidence should not have been admitted because it did not come within a recognized exception to the rule against propensity evidence. The bad character evidence/propensity evidence so unfairly prejudiced the jury's determination of whether the prosecution had met their burden of proving the identity of the perpetrator in violation of statutory law as well as appellant's federal and state constitutional rights to due process, a fundamentally fair trial and reliable determinations of guilt and penalty. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 17; Evid. Code, §§ 1101, subd.(a), 210, 350, 352; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1386; *People v. Guerrero* (1976) 16 Cal.3d 719, 730; *People v. Moten* (1991) 229 Cal.App.3d 1318, 1325-1328.) Reversal of the entire judgment and sentence is required.

B. Factual Background

1. The Motion To Admit The Other Crimes Evidence

The prosecutor sought to introduce evidence of all four of the unrelated burglary charges pursuant to Evidence Code section 1101, subdivision (b), in order to prove intent and common design or plan with regard to the substantive burglary charge connected with the capital homicide. As he alleged in opposition to the severance motion, the

prosecutor asserted that the similarities between the unrelated burglaries and the capital offense were sufficient to admit the other crimes evidence pursuant to section 1101, subdivision (b). (XXII CT 5756-5766.)[45]

Defense counsel objected to admission of the other crimes evidence, arguing that the purported similarities between the offenses were either non-existent or overstated, and therefore did not meet the requirement of substantial similarity to prove either intent or common design/plan. To illustrate that there was insufficient similarity between the offenses, defense counsel argued that: (1) there was no evidence the intruder in the instant offense entered through a sliding door, (2) entry through a sliding glass door was common to burglaries in general, (3) the glass sliding door was shattered during the August 25th burglary; (4) the August burglaries did not involve any assaultive conduct, and (5) unlike the instant offense, the November 4th burglary did not involve sexual assault. Defense counsel also argued that under Evidence Code section 352 the prejudicial impact of admitting the unrelated burglaries far outweighed any probative value, and that the failure to exclude the other crimes evidence violated his federal constitutional right to due process and a fair trial. (XXII CT 5777-5779, 5781-5783; 8 RT 1619-1628.)

The trial court, noting that there were "holes in the similarity" (8 RT 1626) correctly determined that the common factors between the unrelated

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[45] The similarities the prosecutor articulated were that: (1) the offenses were committed within an eight block radius between midnight and 3:00 a.m., (2) the houses had a similar design and build, (3) the perpetrator entered the residences through a sliding glass door; and (4) the perpetrator took or attempted to take property. The prosecutor also alleged that the November burglary, like the homicide, also involved assaultive conduct.

burglaries and the instant offense were *insufficient* to support admissibility under section 1101, subdivision (b), to prove *identity*. However, the court erroneously concluded that the evidence was admissible to show appellant's *intent* to commit a theft to prove the crime of burglary. (8 RT 1626, 1631; see also 8 RT 1609-1610.)[46] The trial court correctly recognized that under Evidence Code section 352, evidence of the unrelated burglaries was "damaging" to appellant, but incorrectly maintained its initial conclusion that "its probative value [was] not substantially outweighed by the prejudicial effect." (See 8 RT 1611.)

2. Other Crimes Evidence Presented to the Jury

At trial, the prosecution presented testimony from the victims of each of the four unrelated burglaries as well as from law enforcement witnesses regarding fingerprint evidence linking appellant to one of those burglaries, and statements appellant had made, including his admission to three of the burglaries and his acknowledgment that he committed a burglary that closely matched the fourth burglary. The trial court failed to give any instruction limiting the jury's consideration of the other crimes evidence, including the fact that it could not be used to prove identity, either prior to or immediately after the presentation of the prosecution witnesses regarding the unrelated burglaries. The jury heard the following evidence regarding

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[46] Although the trial court apparently initially ruled that the other crimes evidence was admissible to show intent or common design/plan, it accepted the prosecutor's concession that the "appropriate method of using this evidence . . . is to prove intent." (8 RT 1631.) In fact, the jury was instructed that the other crimes evidence was admissible only to show the "existence of intent to commit burglary." (16 RT 2456-2457.) Even assuming, arguendo, that the trial court admitted the evidence of the unrelated burglaries to prove common design or plan, the evidence was inadmissible on that ground. (See Arg. II, sec. D(2)(b)(ii), *supra*.)

the burglaries:

Dorothy Nancy Pruss testified that around 2:30 a.m. on August 3, 1992, she was at home doing laundry and watching television. Pruss had been hanging laundry outside, using the sliding glass door which led from the kitchen to her back yard. Pruss thought she locked the door when she came inside. She heard a sound coming from the kitchen area of the house and went to check. She then heard a noise behind her, turned around, and saw a Black man who she had never seen before. The man was holding her purse and fanny pack which had been on a dining room chair within feet from the sliding door. The man asked Pruss where her money was, and Pruss said there was none. The man was standing about three to four feet from her. Pruss did not feel safe, and screamed. Her roommate, who had been sleeping at the time, ran out of a bedroom and confronted the man. The man ran out of the house through the sliding door taking with him the items he had been holding. (10 RT 1816-1824.)

Around midnight on August 9, 1992, Marc Daley had just gotten home from a neighbor's house. Although he had closed the sliding glass door which led from his kitchen to the patio outside when he left, it was open when he returned. Wondering if someone was inside, Daley yelled whether anyone was there. When he went into a bedroom, Daley encountered a Black man hiding behind the door, and asked him what he was doing there. The man responded he did not want to hurt Daley and that he just wanted his money. Daley turned around and ran outside. Although the man ran outside as well, he did not follow Daley. Daley later discovered that the television in one of the bedrooms had been knocked off a table. (10 RT 1825-1836.)

Palm Springs Police Officer Mark Stafford went to Daley's house

after receiving a report of a burglary. He took a statement from Daley and checked the house for possible points of entry and for items that had been disturbed. (10 RT 1837-1845.) It was subsequently determined that the latent prints obtained from the television matched appellant's fingerprints. (11 RT 1923-1925.)

Just after midnight on August 25, 1992, Emily Pollard was watching television in her living room when she heard a loud crash from the kitchen area. As she went towards the kitchen, Pollard saw a Black man, who said something to her. Pollard did not hear him because she was yelling for her friend who was sleeping in a bedroom. Pollard ran out the front door of her house. When she returned the next morning, she discovered that the sliding glass door adjacent to the kitchen had been shattered with a rock. Her purse and a Polaroid camera which had been on the kitchen counter were missing. (10 RT 1848-1853.)

On November 4, 1992, around 12:50 a.m., Kenneth Eastbourne was watching television and talking with his roommate Jeffrey Cole when a man came through the glass sliding door in their dining room. The door, which did not have a screen, was unlocked; it led to the outside pool area. The man told Eastbourne and Cole to get on down on the floor. After asking for their money, the man took Osburn's wallet, which he put on a coffee table. Telling the men to stay on the floor, the man went into the kitchen; Eastbourne heard him going through the kitchen drawers. After the man said he was going to take their microwave, Eastbourne heard him go outside. Eventually, the man came back inside, telling Eastbourne and Cole to stay on the floor. (11 RT 1899-1906.) At that point, Palm Springs Police Officer Donald Way arrived at Eastbourne and Cole's house in response to a call about an intruder. When he arrived, he saw the man, later identified

as appellant, hunched over one of the victims who was lying on the floor. Officer Way arrested appellant. The microwave appellant had moved from the kitchen was found in the backyard. (10 RT 1854-1861.)

Palm Springs Police Officer Gerald Bucklin was assigned to investigate a series of burglaries that occurred in August, 1992. On November 4, 1992, following appellant's arrest at the Osburn/Cole residence, Bucklin interviewed appellant regarding the burglaries. During the interview, appellant admitted committing the burglaries involving Pruss and Daley. Appellant also recalled committing another burglary involving a woman. According to Bucklin, information appellant provided about the third burglary in August fit the description of the incident involving Pollard. (10 RT 1862-1867.)

3. Instruction On The Jury's Use of the Other Crimes Evidence

As set forth in Argument II, section E., *supra*, the prosecutor requested that the jury be provided a modified version of CALJIC No. 2.50, which would instruct the jury that the other crimes evidence could only be considered for the purpose of determining intent for the crime of burglary.[47]

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[47] The modified version of CALJIC No. 2.50 that was submitted and ultimately provided to the jury is as follows:

> Evidence has been introduced for the purposes of showing that the defendant committed crimes other than that for which he is on trial. This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. . . . [¶] It may only be considered by you only for the limited purposes [sic] of determining if it tends to show the existence of intent which is a necessary element of the crime of burglary. For the limited purpose for which you may consider

(continued...)

Defense counsel objected to the instruction, arguing that it improperly focused on the issue of intent, which was not at issue. Defense counsel instead requested that the jury be given CALJIC No. 2.09, which generally instructed the jury not to consider the other crimes evidence for any purpose except the limited purpose for which it was admitted.[48] Defense counsel also requested a specific instruction that the other crimes evidence could not be used to establish the identity of the perpetrator. The trial court denied defense counsel's requests, incorrectly agreeing with the prosecutor that the modified version of CALJIC No. 2.50 would "resolve the issue." (15 RT 2392-2395; 2399-2400.)

C. The Trial Court Erred When It Admitted Evidence Of The Unrelated Burglaries

1. Applicable Law

As set forth more fully in Argument II, section C., *supra*, due process, fundamental fairness and Evidence Code section 1101, subdivision (a), generally condemn the introduction of evidence of past crimes or bad acts to prove culpability for the crime charged. (*McKinney v. Rees*, *supra*,

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[47] (...continued)
this evidence, you must weigh it in the same manner as you do all other evidence in this case. You are not permitted to consider this evidence for any other purpose.

(16 RT 2456-2457; CALJIC No. 2.50.)

[48] CALJIC No. 2.09, which defense counsel requested provides that:

Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except for the limited purpose for which it was admitted.

993 F.2d at p.1386; *People v. Thompson* (1980) 27 Cal.3d 303, 314-316; *People v. Harvey* (1984) 163 Cal.App.3d 90, 100.) Evidence Code section 1101, subdivision (b), however, allows the admission of such evidence in narrow circumstances where it is relevant to prove some material fact other than criminal disposition. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007; *People v. Harvey*, *supra*, 163 Cal.App.3d at p.100; see *People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Gibson* (1976) 56 Cal.App.3d 119, 128.)

In *People v. Lewis* (2001) 25 Cal.4th 610, 637, this Court summarized the process of appellate review regarding the admission of other crimes evidence:

> [E]vidence of uncharged misconduct "is so prejudicial that its admission requires extremely careful analysis" and to be admissible, such evidence "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.'" [Citing *People v. Ewoldt*, *supra*, 7 Cal. 4th at 404] . . . Thus, "the probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* [(1998) 18 Cal.4th 349] . . . 371.) On appeal, a trial court's ruling under Evidence Code sections 1101 and 352 is reviewed for abuse of discretion. [Citations.]

This standard of review applies to determinations that the evidence is relevant and that its admission is not prejudicial. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1239; see *People v. Heard* (2003) 31 Cal.4th 946, 973.)

The erroneous admission of other crimes evidence, and likely misuse of it as bad character evidence, goes beyond mere statutory error and infringes upon the constitutional right to due process and a fair trial. (*Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357; *Garceau v. Woodford*

(9th Cir. 2001) 275 F.3d 769, 776, overruled on other grounds by *Woodford v. Garceau* (2003) 538 U.S. 202.) In fact, "the right to a fair trial may in some instances preclude the introduction of highly inflammatory evidence completely out of proportion to its probative value." (*United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1030; see *McKinney v. Rees*, *supra*, 993 F.2d at pp.1384-1386.)

In examining the trial court's ruling admitting other crimes evidence, the permissible use of the evidence (to prove identity, intent or motive) and the impermissible use of the evidence (to prove criminal propensity) must be distinguished. Indeed,

> [i]t is obvious that there is a thin line between the employment of other crimes evidence to establish a defendant's character trait or propensity and its use for some other purpose. The courts have recognized that, whenever other-crimes evidence is offered under Evidence Code section 1101(b), there is always the potential for great prejudice to a defendant because of its possible misuse by the jury as character trait or propensity evidence.

(*People v. Gibson*, *supra*, 56 Cal.App.3d at p.129.) Thus, while the other crimes evidence might well be "probative" to the ultimate issue as propensity or character evidence, the evidence is prohibited. (See *People v. Guerrero*, *supra*, 16 Cal.3d 719, 728.) As this Court has recognized, "[i]f no theory of relevancy can be established without this pitfall, the evidence of the uncharged offense is simply inadmissible." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317.) In order to be admissible, the evidence must be manifestly relevant and probative to a permissible evidentiary use in such a way as to overcome the danger of misuse. (*People v. Schader* (1969) 71 Cal.2d 761, 772-773.)

[A court] must look behind the label describing the kind of

> similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong.

(*People v. Schader*, *supra*, 71 Cal.2d at p. 775; accord, *People v. Thompson*, *supra*, 27 Cal.3d at p. 316; see also *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 347.)

2. The Unrelated Burglaries Were Neither Relevant Nor Of Legitimate Probative Value To Issues in this Case

In carefully scrutinizing the admissibility of such evidence over objection, the court must first determine that it is actually relevant to an issue in dispute. (See, e.g., *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [the constitutional guarantee to a fair trial requires "that a jury only consider relevant and competent evidence bearing on the issue of guilt or innocence"]; *People v. Thompson*, *supra*, 27 Cal.3d at p. 316 & fn. 210; see also Evid. Code, § 350 [only relevant evidence admissible].) Moreover, the evidence must not be merely cumulative to the evidence the prosecutor may use to prove the same issue; if so, then it is inadmissible. (*People v. Alcala*, *supra*, 36 Cal.3d at pp. 631-632.)

In this case, evidence of the unrelated burglaries was cumulative to the evidence the prosecutor presented to establish the burglary charge connected with the Morris homicide. The requisite intent for the substantive crime of burglary pursuant to Penal Code section 459 was established by evidence that someone had entered the Morris residence in the middle of the night, property had been taken from the house, and a homicide and sexual assaults had occurred. (*People v. Holt* (1997) 15

Cal.4th 619, 669-670.) There was no dispute that these acts occurred, and the only issue for the jury to determine was whether appellant was the perpetrator. As such, the evidence of the unrelated burglaries to prove intent was cumulative (*People v. Balcom*, *supra*, 7 Cal.4th at p. 422), and any limited probative value of the evidence was outweighed by its substantial prejudicial effect (*id.* at p. 423; see *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 405-406). (See Arg. II, sec. D(2)(b), *supra.*, which appellant incorporates by reference.)

Even assuming, arguendo, that evidence of the unrelated burglaries was relevant to prove intent to steal, the similarities between the unrelated burglaries and the instant offenses were not substantial enough for the other crimes evidence to have probative value. (*People v. Guerrero*, *supra*, 16 Cal.3d at p.728.) The similarities between the unrelated burglaries and the instant offense relied upon by the prosecutor were common to most residential burglaries. (*People v. Harvey*, *supra*, 163 Cal.App.3d at pp. 101-103.) Moreover, even purportedly distinct shared marks between the offenses – such as the fact that the offenses occurred in or around the same neighborhood, entry was effectuated by a sliding glass door, the type of home was the same, or they occurred at a certain time of night – did not make the marks distinguishable from burglaries committed by individuals other than appellant in the same or surrounding area where the victim lived.

Consequently, admission of the other crimes evidence for this purpose allowed the prosecutor to impermissibly prove appellant's conduct by means of evidence of his criminal disposition in violation of section 1101, subdivision (a). (*People v. Harvey*, *supra*, 163 Cal.App.3d at pp. 104-105, citing *People v. Thompson*, *supra*, 27 Cal.3d at pp. 319-320 and *People v. Guerrero*, *supra*, 16 Cal.3d at pp. 728-729.) The obvious

collateral impact of this evidence is that appellant's propensity to commit burglaries, and in fact the burglary connected to the homicide, essentially amounted to evidence substantiating appellant's identity as the perpetrator of the burglary and also the perpetrator of the homicide and related offenses. (See Arg. II, D(2)(c), *supra.*, which appellant incorporates by reference.)

3. The Other Crimes Evidence Was More Prejudicial than Probative And Should Not Have Been Admitted

Should this Court conclude that the trial court did not err in finding the similarities between the unrelated burglaries and the burglary connected to the homicide sufficient, it was nonetheless error to admit them because they were more prejudicial than probative. Admitting the other crimes evidence violated Evidence Code section 352 as well as appellant's constitutional rights to due process and a fundamentally fair trial.

Besides relevancy to a matter other than the defendant's bad character or criminal disposition, "[t]here is an additional requirement for the admissibility of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or misleading the jury." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) Pursuant to Evidence Code section 352, the court must consider the proffered evidence and determine whether the probative value of it outweighs any undue prejudice the evidence may cause. (See *United States v. LeMay, supra*, 260 F.3d at p. 1027, quoting *Doe ex-rel Rudy-Glanzer v. Glanzer* (9th Cir. 2000) 232 F.3d 1258, 1268 ["A court should pay 'careful attention to both the

significant probative value and the strong prejudicial qualities' of that evidence"].) The United States Supreme Court has defined "unfair prejudice" as that which "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a different ground from proof specific to the offense charged." (*Old Chief v. United States* (1997) 519 U.S. 172, 180.)

Whenever other crimes evidence is offered under section 1101, subdivision (b), there exists the potential for great prejudice to a defendant because of the possible misuse of the evidence by the jury as character trait or propensity evidence. In this case, the danger that the jury would misuse the evidence of the unrelated burglaries was acute and the trial court erred in not finding that the probative value, if any, was outweighed by the undue prejudice. The prejudicial impact of the evidence of the unrelated burglaries was great especially because evidence of appellant's identity with regard to the evidence of the other crimes/unrelated burglaries was much stronger than that which identified him as the perpetrator in the instant offense, there were more dissimilarities than similarities between the offenses, and because a jury could conclude that appellant had not been punished for the unrelated burglaries. These are all factors this Court has identified as relevant to determining admissibility of the evidence. (See Arg. II, which appellant incorporates by reference.)

The jury knew that appellant had admitted the August and November, 1992, burglaries; however, they were not told that appellant had been convicted of them. In the eyes of the jurors, appellant was not charged for the other burglaries, and there was no information that he had actually received any punishment for them, making it more likely that the jurors would seek to punish appellant for his other wrongdoings. (*People v.*

Balcom, *supra*, 7 Cal.4th 414, *People v. Ewoldt*, *supra*, 7 Cal.4th 380.)[49]

As discussed in Argument II, section D(2)(c), *supra*, in addition to the numerous dissimilarities, the similarities of the unrelated burglaries to the instant offense were minimal; thus, the other crimes evidence lacked probative force. Even assuming, arguendo, that the similarities cited by the prosecutor were of some probative value, any such value was lessened by the number of dissimilarities. (*People v. Thompson*, *supra*, 27 Cal.3d at p. 298.)

Admission of the facts of the unrelated burglaries in the present case was highly prejudicial. The evidence of appellant's involvement in the instant case was purely circumstantial, speculative and rested largely on DNA evidence which, as the trial court itself noted, jurors might not find to be credible evidence identifying him as the perpetrator of the homicide. (2 PTRT 257-258.) The other forensic evidence upon which the prosecution

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[49] In *People v. Balcom*, *supra*, 7 Cal.4th 414, evidence of a rape for which the defendant had been convicted was admitted to show common design or plan. The jury learned that the uncharged acts resulted in a criminal conviction and a substantial prison term. This circumstance decreased the prejudicial impact of the evidence because the jury would not be tempted to convict the defendant of the charged offenses, regardless of guilt, in order to assure punishment for the uncharged offenses. (*Id.* at p. 427.)

In *People v. Ewoldt*, *supra*, 7 Cal.4th 380, this Court held the prejudicial effect of uncharged prior molestations was heightened by the circumstance that the defendant's uncharged acts did not result in criminal convictions. "This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of 'confusing the issues' (Evid. Code § 352), because the jury had to determine whether the uncharged offenses had occurred." (*Id.* at p. 405.)

relied to make its case that appellant was the perpetrator was even less credible as it only generally linked appellant to the semen obtained from the victim and the scene by simple blood type comparison, of which appellant was of the "same type" and 19 paroled registered sex offenders shared the same genetic profile as well. Similarly, the best the prosecution could say about the simple non-DNA hair comparison conducted was that the hair from the scene did not match the victim or her brother Webbie; even so, the prosecution alleged without adequate scientific basis that the hair from the scene was "consistent" with that of appellant. (See Arg. II, secs. D(3)-D(4), E, *supra*, incorporated by reference.)

In contrast, as the court also correctly noted, the evidence of appellant's culpability with regard to the four unrelated burglaries, serious offenses as well, was substantial. (*Ibid.*) The disparity in the strength of the evidence of appellant's identity as the perpetrator of the unrelated burglaries and his identity as the perpetrator of the homicide and related offenses was not lost on the prosecutor. It is no surprise, therefore, that the prosecutor counted upon and advocated for the admission of the evidence of the unrelated burglaries in order to prove that appellant had committed the burglary of the Morris residence, and thus must have been the perpetrator of the homicide and sexual assaults.

Even though the prosecutor alleged that evidence of the unrelated burglaries was admissible to prove intent to steal for the burglary charge, as set forth in Argument II and above, the real issue with regard to the Morris charges was the identity of the perpetrator. As the trial court correctly concluded, the other crimes evidence was not similar enough to support its admission to prove identity. Its primary purpose was as evidence of criminal propensity, with the collateral benefit to the prosecution that if the

jury found appellant to be the burglar, they would also find him to be the perpetrator of the homicide and sexual assaults. Accordingly, the admission of the other crimes evidence by the trial court was an abuse of discretion, a misapplication of Evidence Code section 352, and violative of Evidence Code section 1101, subdivision (a).

D. Admission Of The Other Crimes Evidence Violated Appellant's Federal Constitutional Rights

This Court has repeatedly held that "[f]rom the standpoint of historical practice, unquestionably the general rule against admitting [propensity] evidence is one of long-standing application." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 913 [legislative exception created to admit evidence in sexual assault cases must not unduly offend due process].) "The rule excluding evidence of criminal propensity is nearly three centuries old in the common law." (*People v. Alcala*, *supra*, 36 Cal.3d at pp. 630-631.) The rule "is currently in force in all American jurisdictions by statute or case law." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 392; *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913.) The trial court's erroneous decision in this case permitted the prosecution to present such evidence by labeling inadmissible propensity evidence as circumstantial evidence of intent. The result was a violation of appellant's federal constitutional rights, which rendered the trial proceedings fundamentally unfair.

The United States Supreme Court has held that it is not a violation of due process to admit other crimes evidence for purposes other than to show conduct in conformity therewith, where the jury is given a limiting instruction "that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried." (*Spencer v. Texas* (1967) 385 U.S. 554, 558, 563-564; accord, *Estelle v.*

McGuire, *supra*, 502 U.S. at pp. 74-75.) Due process can be violated, however, when, as here, other crimes evidence solely to prove criminal propensity is admitted. (*McKinney v. Rees*, *supra*, 993 F.2d at p 1384.)

The introduction of evidence of the four unrelated burglaries violated appellant's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the state] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's erroneous admission of the other crimes evidence simply because appellant had committed other bad acts impermissibly lightened the prosecution's burden of proof. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) In addition, the introduction of the evidence of the unrelated burglaries, especially when combined with the lack of adequate instructions properly limiting the jury's use of the other crimes evidence, so infected the trial as to render appellant's convictions fundamentally unfair in violation of federal due process. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

E. The Use Of The Propensity Evidence Was Unduly Prejudicial To Appellant's Case

The prosecution's theory was that the person who entered the Morris residence to commit a theft and that in the course of doing so he murdered the victim as well as committed the charged sex offenses. As set forth more fully in Argument II, supra, and above, the evidence that appellant was the perpetrator of the burglary was based solely on speculative and circumstantial forensic evidence. Moreover, the evidence established that the intent to steal, or intent to commit a felony, required for the offense of

burglary was established apart from the evidence of the unrelated burglaries. These factors made the admission of the other crimes evidence not only cumulative, but highly prejudicial to the jury's determination of guilt regarding identity of the perpetrator of the burglary of the Morris residence, the homicide and other offenses connected to it.

In light of the evidentiary problems with the circumstantial evidence in this case, the prosecutor sought to admit the other crimes evidence as improper propensity evidence to bolster his case that appellant was in fact the intruder, as well as to insure a conviction for first degree murder with special circumstances based on the commission of the alleged burglary.[50]

The prosecutor alleged that admission of the other crimes evidence was necessary to prove that appellant, if in fact the perpetrator, possessed the requisite intent to commit a theft for the burglary charge. As set forth above, the other crimes evidence to establish this point was merely cumulative of evidence already presented to establish that a residential burglary in fact had occurred (i.e., theft of the wallet belonging to Webbie, sexual assault of the victim). Accordingly, the prejudicial effect of the other crimes evidence outweighed its probative value. (See Arg. II, *supra.*, which appellant incorporates by reference.)

Appellant's defense was that he was not the perpetrator of the instant crimes. He largely relied upon the speculative nature and inconclusiveness of the prosecution's forensic evidence to raise reasonable doubts as to his

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[50] As noted above, the prosecutor was well aware that the similarities between the unrelated burglaries and the instant offense were not sufficient to admit the other crimes evidence to establish "identity" and "common design or plan." It appears to be no coincidence that the prosecutor urged admission of the other crimes evidence under the guise of showing "intent."

guilt. The admission of the evidence of the unrelated burglaries to which he admitted guilt amounted to improper propensity evidence and eviscerated any opportunity for the jury to seriously consider whether the prosecution had met its burden of proof as the identity of the perpetrator of the offenses at issue as well as the veracity of appellant's defense. Because of the other crimes evidence, the jury could have only believed appellant was a bad man with a propensity for entering homes in the middle of the night to steal regardless of whether any of the residents are present. Because of that highly prejudicial belief, the jury would have resolved any questions the identity of the perpetrator in support of the prosecution.

The crimes for which appellant was charged in the instant case would have been upsetting to most jurors. The unrelated burglaries to which appellant also admitted, and which the jury heard about, were serious as well. The jury could not have helped but consider the unrelated and undisputed other crimes evidence when calculating appellant's culpability as to the instant offense. Most importantly, the evidence allowed the prosecutor to appeal to the emotions of the jury to condemn appellant by introducing four unrelated and dissimilar crimes and to argue for his culpability as to the burglary count based on the evidence of the numerous residential burglaries in which appellant was allegedly involved.

The prosecutor made much of the evidence of the unrelated burglaries to establish appellant's guilt as to the substantive offense of burglary as well as for the related special circumstance allegation. In his opening statement, the prosecutor described each of the unrelated burglaries without informing the jury that they could only be used for a limited purpose. (9 RT 1677-1680.) Similarly, the prosecution presented extensive and seriatim testimony in its case-in-chief from victims of the

unrelated burglaries as well as law enforcement witnesses attesting to appellant's admission of those crimes. As with the prosecutor's opening statement, the jury was not informed before or immediately after the presentation of the other crimes evidence that it could only be considered for the limited purpose of proving the intent to steal, which was necessary for the crime of burglary and could not be used to show identity.[51] The prosecutor also placed significant and impermissible emphasis on the unrelated burglaries in his closing argument. Not only did he repeatedly remind the jury that appellant was responsible for multiple burglaries in the neighborhood, but he also urged the jurors to use the other crimes as evidence of appellant's propensity to commit crimes, and in particular to commit the instant burglary and related crimes. (16 RT 2485-2486; see Arg. II, sec. E, *supra.*, which appellant incorporates by reference.)

The prosecutor's argument, which impermissibly encouraged the jurors to use the other crimes evidence to prove identity, was contrary to the claim that it was relevant to show intent to steal which he had advanced at the pretrial hearing on the matter. More importantly, the prosecutor's argument was in contravention of the trial court's specific finding that the similarities between the unrelated burglaries and the instant offense were insufficient to justify their admission to prove identity. (8 RT 1609-1610,1626.)

The trial court's instruction based on CALJIC No. 2.50, regarding

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[51] As set forth in Argument II, section E, *supra*, and below, the trial court instructed the jury that the other crimes evidence was relevant to prove intent to steal which was necessary for the crime of burglary. The court did not tell the jury that the other crimes evidence could not be used to prove identity.

the jury's use of the other crimes evidence, did not ameliorate the harm resulting from its admission. (16 RT 2456-2457; see Arg. II, sec. E, *supra.*, which appellant incorporates by reference.) Not only did the court fail to specifically instruct the jury *not* to consider the other crimes evidence to establish *identity*, as appellant had requested, but it failed to direct the jury that the evidence of the unrelated burglaries could not be used to establish guilt on any other count. (See Arg. II, sec. E, *supra.*, which appellant incorporates by reference.)[52] Nonetheless, "[i]t is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect." (*People v. Gibson*, *supra*, 56 Cal.App.3d at pp. 129-130.)

The perpetrator's intent was evident from the acts that were committed. The other crimes evidence was cumulative on the issue of

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[52] As set forth more fully in Argument II, section E, *supra*, defense counsel opposed the jury being given a modified version of CALJIC No. 2.50. Moreover, the trial court denied appellant's requests that the jury be instructed that they could not consider the other crimes evidence to prove identity and that they be given CALJIC No. 2.09, which would have told them to limit the evidence to the purpose for which it was admitted. (15 RT 2392-2395; 2399-2400.) The court's failure to provide adequate instructions to the jury impacted the penalty determination both by the failure to provide the limiting instructions appellant requested at the guilt phase, but also when it refused appellant's Proposed Penalty Phase Instruction Nos. 27 and 28 submitted at the penalty phase. These instructions would have made clear to the jury that other criminal activity committed by appellant which did not involve the use of violence or threat of violence could not be considered as aggravation in determining whether to impose a sentence of life or death. (22 CT 5975-5976; see Arg. II, sec. E., *supra.*[text of appellant's Proposed Penalty Phase Instruction Nos. 27 and 28 set out in full]; CALCRIM No. 764; Bench Notes of CALCRIM No. 764.)

intent, and the prejudicial effect of the evidence substantially outweighed any probative value. Even if the evidence was properly admitted to prove intent, it is likely that the jury used it as improper propensity evidence to infer, without holding the prosecution to its burden of proof, that appellant not only committed yet another burglary in a string of burglaries, but that he also committed each of the offenses charged in the instant case. Here, the admission of the other crimes evidence was vulnerable to jury misuse because there is little difference between evidence that is relevant because it shows a defendant must have acted intentionally on this occasion because he had done so in the past, and evidence that shows a defendant acted in accordance with a particular character trait.

The error in this case violated appellant's Fifth and Fourteenth Amendment rights under the United States Constitution to due process, to a fundamentally fair trial under the Sixth Amendment as well as his Eighth Amendment right to a reliable guilt and penalty determination. Because the error was not harmless beyond a reasonable doubt, reversal is required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Reversal of the entire judgment of conviction and sentence is therefore required.

IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND PREJUDICIALLY ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND-DEGREE MALICE-MURDER UNDER PENAL CODE SECTION 187

After the trial court instructed the jury that appellant could be convicted of first degree murder if the killing occurred during the commission or attempted commission of robbery (CALJIC No. 8.21; XXII CT 5836; 16 RT 2464),[53] the jury found appellant guilty of murder in the first degree (XXII CT 5795-5796, 5799;17 RT 2593-2595). The instruction on first degree murder was erroneous, and the resulting conviction of first degree murder must be reversed, because the indictment did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[54]

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[53] Pursuant to CALJIC No. 8.21, the jury was instructed as follows:

> The unlawful killing of a human being whether intentional, unintentional, or accidental which occurs during the commission or attempted commission of the crimes of rape, burglary, or sodomy is murder of the first degree when the perpetrator had the specific intent to commit those crimes. Specific intent to commit rape, burglary, or sodomy and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(16 RT 2464.)

[54] Appellant is not contending that the Indictment was defective. On the contrary, as explained hereafter, it contained an entirely correct charge of second degree malice-murder in violation of section 187. The error arose when the trial court instructed the jury on the separate uncharged crime of

(continued...)

The Indictment alleged that in "violation of Section 187 of the Penal Code . . . on or about July 10, 1992, in the county of Riverside, State of California, [ROYCE LYN SCOTT], did willfully and unlawfully and with malice aforethought murder DELLA M. a human being." (XVII CT 4486.) Both the statutory reference ("Section 187 of the Penal Code"), and the description of the crime ("did willfully and unlawfully and with malice aforethought murder"), establish that appellant was charged exclusively with second degree malice-murder in violation of section 187, not with first degree murder in violation of section 189.[55]

Section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[56] "Section 189

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[54] (...continued)
first degree felony murder in violation of section 189.

[55] The Indictment also alleged three special circumstances – murder in the commission or attempted commission of a burglary, murder in the commission or attempted commission of rape and murder in the commission or attempted commission of sodomy. (XVII CT 4486-4487.) These allegations did not change the elements of the charged offense. Also, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony murder. A conviction under the felony-murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Green* (1980) 27 Cal.3d 1, 61).

[56] Subdivision (a) of section 187, unchanged since its enactment in
(continued...)

defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies . . . ." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[57]

Because the indictment charged only second degree malice murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon]).

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[56] (...continued)
1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[57] In 1991, when the murder at issue allegedly occurred, section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under Sections 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree.

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought'" (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[58] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder,

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[58] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal.165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

> the defendant could be legally convicted of either degree warranted by the evidence.

(*Id.* at pp. 107-108.)

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472; emphasis added, footnote omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be section 189.

No other statute purports to define murder during the commission of a felony, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by section 189, and the indictment did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[59]

The greatest difference is between second degree malice-murder and first degree felony murder. By the express terms of section 187, second degree malice-murder includes the element of malice (*People v. Dillon*, *supra*, 34 Cal.3d at p. 475; *People v. Watson*, *supra*, 30 Cal.3d at p. 295),

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[59] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.); original emphasis.)

but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "'*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt.'" (*Id.* at p. 476; emphasis added [citation omitted.]; accord, *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Cunningham v. California* (2007) ___ U.S. ___[127 S.Ct. 856, 868].)[60]

The facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in section 189 together with the specific intent to commit that crime) are facts

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[60] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (§ 190, subd. (a).) Therefore, those facts should have been charged in the indictment. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the indictment. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's conviction for first degree murder must be reversed.

V

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, A TRIAL BY JURY, AND RELIABLE VERDICTS, AND REQUIRES REVERSAL OF THE JUDGMENT

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle" (*In re Winship*, *supra* at p. 363) at the heart of the right to trial by jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.01, 2.21.1, 2.21.2, 2.22, 2.27, 2.51 and 8.83. (16 RT 2451-2457, 2468-2469.) These pattern instructions violated the above principles and thereby deprived appellant of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal.

Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here in order for this Court to reconsider those decisions and in order to preserve the claims for federal review if necessary.[61]

A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (CALJIC No. 2.90; 16 RT 2460.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> [I]t is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the

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[61] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly-rejected challenges to standard guilt phase instructions similarly will be deemed "fairly presented" by an abbreviated presentation. Accordingly, appellant more fully presents the claims in this argument.

> jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(16 RT 2460.)

The jury was also given two interrelated instructions – CALJIC Nos. 2.01 and 8.83– that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. These instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (16 RT 2451-2453, 16 RT 2468-2469.) In effect, these instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The defects in this instruction were particularly damaging here where the prosecution's case rested exclusively on circumstantial evidence. The twice repeated directive of these particular instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and reliable determinations of guilt and the special circumstance allegations (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California*, *supra*, 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. 625, 627-646.)[62]

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[62] Although defense counsel did not object to these instructions, the claimed errors are cognizable on appeal. Instructional errors are reviewable (continued...)

First, the instructions compelled the jury to find appellant guilty of the homicide and the related felony charges, as well as to find the three separate felony-murder special circumstances and alleged enhancements as true, using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (16 RT 2453, 2469.) However, an interpretation that appears reasonable is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required convictions, findings that the special circumstances and alleged enhancements were true, and findings of fact necessary to support those verdicts, on a degree of proof less than the constitutionally-mandated one.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In

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[62] (...continued)
even without objection if they are such as to affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood*, *supra*, 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Similarly, to the extent that trial counsel's request that the court provide instructions, including CALJIC Nos. 2.90 and 2.01 during voir dire of prospective jurors (see 3 RT 333-334) may support a determination of invited error, the request constitutes ineffective assistance of counsel. (*Strickland v. Washington* (1984) 467 U.S. 1267.)

this way, the instructions created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, both instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (16 RT 2453, 2468.) In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction which required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of shifting, or at least significantly lightening, the burden of proof, because they required the jury to find appellant guilty of first degree felony murder as well as the underlying charged felonies unless he came forward with evidence reasonably explaining the prosecution's incriminatory evidence. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency prosecution's case. Nevertheless, under the erroneous instructions the jury was required to convict appellant if he

"reasonably appeared" guilty of the homicide and related offenses, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty of the homicide, the related offenses and that the special circumstances and enhancements were true based on a standard which was less than the federal constitution requires.

B. The Instructions Also Vitiated The Reasonable Doubt Standard

The trial court gave five other standard instructions which magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diminished the constitutionally mandated reasonable doubt standard: CALJIC Nos. 2.21.1 [discrepancies in testimony] (16 RT 2454-2455); 2.21.2 [witness wilfully false] (16 RT 2455); 2.22 [weighing conflicting testimony] (16 RT 2455-2456); 2.27 [sufficiency of testimony of one witness] (16 RT 2456); and 2.51 [motive] (16 RT 2457). Each of those instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and vitiated the constitutional prohibition against the conviction of a capital

defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)[63]

CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (16 RT 2454-2455.) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny — that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt — is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or

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[63] Although defense counsel failed to object to these instructions, appellant claims are still reviewable on appeal. (See Pen. Code, §1259.)

> prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(16 RT 2455-2456.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally mandated standard of proof beyond a reasonable doubt with one indistinguishable from the lesser preponderance-of-the-evidence standard. As with CALJIC Nos. 2.21.1 and 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact, likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. (16 RT 2456.) The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." However, CALJIC No. 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact exists" – without qualifying this language to apply only to prosecution witnesses – permitted reasonable jurors to conclude that: (1) appellant himself had the burden of convincing them that he was not the perpetrator of the homicide and related

offenses and (2) this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between the prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, the jury was also instructed with CALJIC No. 2.51 as follows:

> Motive is not an element of the crimes charged and need not be shown; however, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty; absence of motive may tend to show the defendant is not guilty.

(16 RT 2457.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient]; see *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the

disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard under which the prosecution must prove each necessary fact of each element of each offense beyond a reasonable doubt. In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offense was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. This Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false-testimony and circumstantial-evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial-evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [2.01, 2.02. 2.27]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial-evidence instructions].) While recognizing the shortcomings of some of those instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject

unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. That analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Here, there is certainly a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale — that the flawed instructions are "saved" by the language of CALJIC No. 2.90 — requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v.*

Leasco Sierra Grove (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable-doubt instruction. It is just as likely that the jurors concluded that the reasonable-doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

D. Reversal is Required

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of appellant's guilt for the murder was based solely on circumstantial evidence that was not entirely conclusive or reliable. Given the dearth of direct evidence, the instructions on circumstantial evidence were crucial to the jury's determination of guilt. Because these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

Further, CALJIC No. 2.51 permitted the prosecution to only establish motive for the jury to conclude that appellant was guilty. The instructional error was particularly prejudicial in this case given that the prosecution's theory of appellant's guilt for the homicide and assaults was

based largely on his motive to unlawfully take property belonging to others. The instruction allowed the jury to convict appellant on the motive evidence alone and this error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of appellant's conviction.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, the judgment of conviction and sentence must be reversed.

VI

APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY-MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Appellant was subject to the death penalty under three theories of felony-murder special circumstances: murder in the commission or attempted commission of burglary, rape and sodomy. The felony-murder theory of liability, albeit under the three separate felonies, was the only theory that made him death eligible. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. As will be demonstrated below, the lack of any requirement that the prosecution prove that a perpetrator had a culpable state of mind with regard to the homicide before a death sentence may be imposed violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

A. California Authorizes The Imposition Of The Death Penalty Upon A Person If A Homicide Occurs During An Attempted Felony Without Regard To The Perpetrator's State Of Mind At The Time Of The Homicide

Appellant was found to be death eligible solely because he was convicted of committing murder during the course of burglary, rape and sodomy. (XXII CT 5800-5802; see §§ 189; 190.2, subd. (a)(17)(vii); 190.2, subd. (a)(17)(iii); 190.2, subd. (a)(17)(iv).)[64] Normally, the prosecution

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[64] Individual subdivisions for section 190.2 are as they were at the (continued...)

must prove that the defendant had the subjective mental state of malice (either express or implied) in the case of a homicide that occurs during a burglary, rape, sodomy or during any attempted felony listed in section 189. However, no such mens rea with regard to the murder is required for a first degree felony- murder to occur.

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon*, *supra*, 34 Cal.3d at p. 477.) This rule is reflected in the standard jury instruction for felony murder:

> The unlawful killing of a human being, *whether intentional, unintentional or accidental*, which occurs [during the commission or attempted commission of the crime] [as a direct causal result of _____] is murder of the first degree when the perpetrator had the specific intent to commit that crime.

(CALJIC No. 8.21, italics added.)

Except in one rarely-occurring situation,[65] under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in an enumerated felony murder, the defendant also is death

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[64] (...continued)
time as of February 18, 1993, which is when the original indictment was filed. (III First Supp. CT 693-700.)

[65] See *People v. Green* (1980) 27 Cal.3d 1, 61-62 [felony-murder (robbery) special circumstance does not apply if the felony was only *incidental* to the murder].

eligible under the felony-murder special circumstance.[66] (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction'"].) The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, where the Court held that under section 190.2, "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (*Id.* at p. 1147.) The *Anderson* majority did not disagree with Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (*Id.* at p. 1152 (dis. opn. of Broussard, J.).)

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the homicide. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant's argument that, to prove a felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp* (1999) 20

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[66] As a result of the erroneous decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154, which was reversed in *People v. Anderson* (1987) 43 Cal.3d 1104, this Court has required proof of the defendant's intent to kill as an element of the felony-murder special circumstance with regard to felony murders committed during the period December 12, 1983 to October 13, 1987. This Court has held that *Carlos* has no application to prosecutions for murders occurring either before or after the *Carlos* window period. (*People v. Johnson* (1993) 6 Cal.4th 1, 44-45.)

Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn. 15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.[67]

In urging the jury to convict appellant of first degree murder under the felony-murder rule, the prosecutor in this case argued:

> Count IV is the murder count. It is for our purposes first degree felony murder, and basically murder is defined as every person who unlawfully kills a human being during the commission or attempted commission of burglary or rape or sodomy, and those are the three felonies that we are dealing with here, is guilty of the crime of murder, and we say first degree felony murder is proved when you have the unlawful killing of a human being, whether intentional, unintentional or accidental. . . . We don't have to prove that the killing was intentional. It is enough that there was a killing during those felonies, whether that killing is intentional, unintentional or accidental which occurs during the commission or attempted commission.

(16 RT 2491-2492.)

Addressing the three special circumstances alleged, the prosecutor emphasized that the act of killing the victim, by itself, proved the special circumstances:

[I]f you are satisfied beyond a reasonable doubt that Mr. Scott

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[67] Alternatively, this Court found that there was sufficient evidence that the defendant did act with reckless indifference to justify the death penalty. (*People v. Smithey*, *supra*, 20 Cal.4th at pp. 1016-1017.)

> actually killed Della Morris, you need not find that he intended to kill in order to find the special circumstances to be true. As with the case of finding first degree felony murder, it does not matter in the special circumstances if the killing was unintentional or accidental. The law says if it is done during the commission of these felonies, whether it is intentional, unintentional or accidental, we don't care. This is enough for the special circumstance.

(16 RT 2495-2496.) The jury was instructed pursuant to the standard felony-murder instruction CALJIC No. 8.21, set forth above. (16 RT 2464-2465.) The jury was also instructed regarding the three special circumstances alleged in this case:

> To find the special circumstance referred to in these instructions as murder in the commission of rape is true, it must be proved that [sic] murder was committed while the defendant was engaged in the commission or attempted commission of a rape; (2) the murder was committed in order to carry out or to advance the commission of the crime of rape or to facilitate the escape therefrom or to avoid detection. ¶ In other words, the special circumstance referred to in these instructions is not established if the attempted rape was merely incidental, the rape or attempted rape was incidental to the commission of the murder.
>
> To find the special circumstance referred to in these instructions as murder in the commission of the burglary is true, it must be proved: (1) the murder was committed while the defendant was engaged in or attempted commission of a burglary and the – murder was committed in order to carry out or advance the commission of the crime of burglary or to facilitate the escape therefrom to avoid detection. ¶ In other words, the special circumstance referred to in these instructions does not establish if the burglary or attempted burglary was merely incidental to the commission of the murder.
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> To find the special circumstance referred to in these instructions as murder in the commission of sodomy is true, it

must be proved: (1) that murder was committed while the defendant was engaged or was in the commission or attempted commission of a sodomy, and (2) the murder was committed in order to carry out or to advance the commission of the crime of sodomy or to facilitate the escape therefrom or to avoid detection. ¶ In other words, the special circumstance referred to in these instructions does not establish if the attempted – if the sodomy or attempted sodomy was merely incidental to the commission of the murder."

(20 RT 2466-2468.)

B. The Felony-Murder Special Circumstances Alleged In This Case Violate The Eighth Amendment's Proportionality Requirement And International Law Because They Permit Imposition Of The Death Penalty Without Proof That The Defendant Had A Culpable Mens Rea As To The Killing

In a series of cases beginning with *Gregg v. Georgia*, *supra*, 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia* (1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony murder]; *Roper v. Simmons* (2005) 543 U.S. 551, 568 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking: (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 183.)

The Supreme Court has addressed the proportionality of the death penalty for unintended felony murders in *Enmund v. Florida*, 458 U.S. 782, and in *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the "getaway driver" to an armed robbery-murder because he did not take life, attempt to take life, or intend to take life. (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Justice O'Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison v. Arizona*, *supra*, 481 U.S. at p. 158.) Justice O'Connor explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane or all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional. . . . *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a

> mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(*Id.* at pp. 157-158.) In choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers and accomplices. In fact, it was Justice Brennan's dissent which argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*id.* at pp. 168-179 (dis. opn. of Brennan, J.)), but that argument was rejected by the majority.

That *Tison* established a minimum mens rea for actual killers as well as accomplices was confirmed clearly in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves*, a case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund/Tison*, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder*, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that

> "our ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, *so long as their requirement is satisfied at some point thereafter*.

(*Hopkins v. Reeves*, *supra*, 524 U.S. at 99, citations and fns. omitted; italics added.)[68]

Every lower federal court to consider the issue – both before and after *Reeves* – has read *Tison* to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn. 9.)[69] The *Loving* court explained its thinking as follows:

> As highlighted by Justice Scalia in the *Loving* oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*,

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[68] See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) [stating that an accidental homicide, like the one in *Furman v. Georgia*, may no longer support a death sentence].)

[69] See also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.

> had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 [parallel citation omitted] (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624 [parallel citation omitted]. Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving v. Hart*, *supra*, 47 M.J. at p. 443.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. In *Atkins*, the Court emphasized that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 312.)

Roper v. Simmons, *supra*, 543 U.S. 551, supports appellant's Eighth Amendment proportionality argument. In declaring the death penalty for juvenile offenders unconstitutional, the United States Supreme Court reaffirmed that in determining whether a punishment is so disproportionate as to be cruel and unusual, the Court first considers "the evolving standards of decency" as reflected in laws and practices of the United States and then

exercises its own independent judgment about whether the challenged penalty furthers the goals of retribution and deterrence. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 561.) Applying this Eighth Amendment framework, the Court in *Simmons* found a national consensus against capital punishment for juveniles in large part from the fact that the majority of states prohibit the practice. By the Court's calculations, 30 states preclude the death penalty for juveniles (12 non-death penalty states and 18 death-penalty states that exclude juveniles from this ultimate punishment) and 20 permit the penalty. (*Id.* at p. 564.) Even though the rate of abolition of the death penalty for juveniles was not as dramatic as the rate of abolition of the death penalty for juveniles was not as dramatic as the rate of abolition of the death penalty for the mentally retarded chronicled in *Atkins*, the Court found that "the consistency of the direction of the change" was constitutionally significant in terms of demonstrating a national consensus against executing people for murders they committed as juveniles. (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 565-566.) The Court further held that because of the diminished culpability resulting from the adolescents' lack of maturity and underdeveloped sense of responsibility, their vulnerability to negative influences and outside pressures, and their still developing characters, the penological justifications of retribution and deterrence are inadequate to sustain the death penalty for juvenile offenders. (*Id.* at pp. 568-575.)

Simmons, like *Atkins*, leaves no doubt that, at least with regard to capital punishment, the proportionality limitation of the Eighth Amendment is the law of the land and that the most compelling objective indicia of the nation's evolving standards of decency about the use of the death penalty are the laws of the various states. In this regard, appellant has made a far

more compelling showing of national consensus against the death penalty for felony-murder *simpliciter* than either Simmons or Atkins made in their respective cases. There are now only five states, including California, that permit execution of a person who killed during a felony without any showing of a culpable mental state whatsoever as to the homicide.[70] Forty-five states – 90% of the nation – prohibit the penalty in this circumstance.

This Court should revisit its previous decisions upholding the felony-murder special circumstance and hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant had an intent to kill or acted with reckless disregard to human life. Because the factual finding is a prerequisite to death eligibility, which increases the maximum statutory penalty, it must be found unanimously and beyond a reasonable doubt by a jury. (*Ring v. Arizona* (2002) 536 U.S. 584, 602-603; see also *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856; 860, 871]; *Blakely v. Washington* (2004) 542 U.S. 296, 304-305; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 493-494.) There is no jury finding in this case that appellant intended to kill or acted with reckless indifference to human life.

In *McConnell v. State* (Nev., 2004) 102 P.3d 606, the Nevada Supreme Court, overruling its prior case law, unanimously held that Nevada's felony-murder statute violated the Eighth and Fourteenth Amendments, as well as the state constitution, because "it fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies." (*Id.* at p. 624.) *McConnell* held that an aggravating circumstance – the basis for death

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[70] Besides California, only Florida, Georgia, Maryland and Mississippi permit execution of a defendant even when there is no mens rea.

eligibility in Nevada – could not be based "on the felony upon which a felony-murder is predicated." (*Ibid.*) Although *McConnell* is based on the Eighth Amendment's narrowing principle rather than on its proportionality principle, such as that asserted in this case, the decision is nonetheless instructive.

Notably, the Nevada Supreme Court in *McConnell* imposes the very constitutional requisite that appellant advocates – i.e., that there must be proof of a culpable mental state before a felony murder can be death eligible. The Nevada felony-murder aggravating circumstance, unlike the Nevada felony-murder statute, "requires that the defendant '[k]illed or attempted to kill' the victim or '[k]new or had reason to know that life would be taken or lethal force used." (*McConnell v. State*, *supra*, 102 P.3d at p. 623, emphasis omitted.) The Nevada Supreme Court found this requirement to be inadequate because it permits a jury to impose death on a defendant who killed the victim accidentally. (*Id.* at p. 623, fn. 67.) In *McConnell*, the Court held that the mens rea requirement statutorily provided for an accomplice also applies to the actual killer, and made clear that "even if the defendant killed the victim, they must still find that the defendant intended to kill or at least knew or should have known that a killing would take place or lethal force would be applied." (*Ibid.*) Even with this new proportionality limitation, the Nevada Supreme Court held the felony-murder aggravating circumstance failed to genuinely narrow the death eligibility of felony murderers. (*Id.* at p. 624.) Like the Nevada Supreme Court, this Court should recognize the constitutional infirmity of its felony-murder special circumstance.

McConnell reduces the number of states that limit imposition of the death penalty on a felony murderer without regard to his mens rea. As

noted above, before *McConnell*, felony-murder *simpliciter* was the basis for the death eligibility in only six states, including California: Florida, Georgia, Maryland, Mississippi and Nevada. Without Nevada, that number is now five.[71] This dwindling number underscores that capital punishment for felony- murderers without proof of a culpable mental state is inconsistent with contemporary standards of decency that inform the Eighth Amendment's proportionality principle. (See *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 311-312; *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 (plur. opn. of Warren, J.).)

That at least 45 states (32 death penalty states and 13 non-death penalty states) and the federal government[72] reject felony-murder *simpliciter* as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government). Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 312), professional opinion as reflected in the Report of

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[71] In Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* (1997) 72 N.Y.U. Law. Rev. 1283, 1319, fn. 201, the authors list seven states other than California as authorizing the death penalty for felony-murder *simpliciter*, but Montana, by statute (see Mont. Code Ann., §§ 45-5-102(1)(b), 46-18-303), North Carolina, by court decision (see *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665) and Nevada, as noted above in *McConnell v. State*, *supra*, 102 P.3d at p. 624, now require a showing of some mens rea in addition to the felony murder in order to make a defendant death eligible.

[72] See 18 U.S.C. § 3591, subdivision (a)(2).

the Governor's Commission on Capital Punishment (Illinois)[73] and international opinion[74] also weigh against finding felony-murder *simpliciter* a sufficient basis for death eligibility. The most comprehensive recent study of a state's death penalty was conducted by the Governor's Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty.

Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor. (*Report of the Former Governor Ryan's Commission on Capital Punishment*, April 15, 2002, at pp. 72-73, <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf>.) The Commission stated, in words which certainly apply to the California statute:

> Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different

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[73] The Court has recognized that professional opinion should be considered in determining contemporary values. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21.)

[74] The Court has regularly looked to the views of the world community to assist in determining contemporary values. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21; *Enmund v. Florida*, 458 U.S. at pp. 796-797, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

> types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal.

(*Id.* at p. 72.)

> With regard to international opinion, the Court observed in *Enmund*:
>
> "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." (*Coker v. Georgia*, 433 U.S. 584, 596, n. 10 [parallel citations omitted]). It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.

(*Enmund v. Florida*, *supra*, 458 U.S. at p. 796, fn. 22.) International opinion has become even clearer since *Enmund*. Article 6 (2) of the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), ¶ 7; see also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have

not abolished the death penalty, it may be imposed only for the most serious crimes . . . ."].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*)[75] The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

The imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it fails to serve either of the penological purposes – retribution and deterrence of capital crimes by prospective offenders – identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty ... measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund v. Florida*, *supra*, 458

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[75] The Safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the safeguards are not binding treaty obligations, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (*Restatement (Third) of the Foreign Relations Law of the United States*, § 103 cmt. c.)

U.S. at pp. 798-799, quoting *Coker v. Georgia*, *supra*, 433 U.S. at p. 592). With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund v. Florida*, *supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of . . . Clergy" would be spared.

(*Tison v. Arizona*, *supra*, 481 U.S. at p. 156.) Plainly, treating negligent and accidental killers on a par with intentional and reckless-indifference killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia*, *supra*, 428 U.S., at 186, 96 S.Ct., at 2931 (fn. omitted).

(*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-99; accord, *Atkins v. Virginia*, *supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never foresaw.

Since imposition of the death penalty for each instance of felony-murder *simpliciter* in this case (burglary, rape, sodomy felony-murder special circumstances) clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for felony-murder *simpliciter* serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." As interpreted and applied by this Court, the felony-murder special circumstances are unconstitutional under the Eighth Amendment, and appellant's death sentence must be set aside.

Finally, California law making a defendant death eligible for felony-murder *simpliciter* violates international law. Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) In light of the international law principles discussed previously, appellant's death sentence, predicated on his act of killing the victim without any proof that the murder was intentional, violates both the ICCPR and customary international law and, therefore, must be reversed.

VII

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR BARBARA CARR REQUIRES REVERSAL OF THE DEATH JUDGMENT

A. Introduction

Over appellant's objection, the trial court granted the prosecutor's challenge for cause to prospective juror Barbara Carr based on the prosecutor's argument that she could not vote for death.[76] (3 RT 425.) The prosecutor moved to excuse Ms. Carr after she stated she was "not sure" in response to the prosecutor's inquiry whether she could face appellant and say she had voted for death. Despite her unequivocal answers during voir dire that she could follow the law and impose a death sentence, the trial court did not undertake the necessary inquiry or apply the correct legal standard in disqualifying Ms. Carr from service on appellant's jury. The court's disqualification of Ms. Carr was error because the record below does not support the determination that her views on the death penalty

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[76] The prospective jurors were each assigned a number between 1 and 12 as they were seated for voir dire examination and death qualification. Identification of a specific prospective juror, or of the seated and alternate jurors, is therefore dependent upon the date and time the juror was called for voir dire. (See 3 RT 322-328, 335-336.) Because of the way the numbers were assigned, a number of jurors are designated juror no. 1; the same is true for all other numbers up to no. 12. The parties on appeal have stipulated to a settled statement setting forth the date and time to which a prospective juror was called so that voir dire relevant to a specific juror can be identified. (Sixth [Sealed] Supp.CT 28-A-J [Confidential Stipulation Regarding Settled Statement Of The Appellate Record Of Voir Dire Proceedings].) Barbara Carr was a member of the group of twelve prospective jurors who were called to appear on the morning of March 19, 1997. (Sixth [Sealed] Supp.CT 28-B.) At the time of her voir dire, Ms. Carr was designated Juror No. 12. (*Ibid.*; e.g., 3 RT 366.)

would prevent or substantially impair her ability to follow the law, obey her oath as a juror, or return a death judgment. (*Wainwright v. Witt* (1985) 469 U.S. 412; *People v. Heard* (2003) 31 Cal.4th 946, 958.) The trial court's erroneous excusal of Ms. Carr violated appellant's constitutional rights to an impartial jury, a fair capital sentencing hearing, due process, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. Reversal of appellant's death sentence is required.

B. The Proceedings Below

1. Prospective Juror Barbara Carr's Questionnaire

Prior to the commencement of voir dire, prospective jurors in this case who preliminarily survived excusal for hardship were asked to fill out a lengthy questionnaire which solicited, among other things, their views on the death penalty. At the time of trial, prospective juror Carr was 71 years old. She had retired from working as an insurance underwriter, was married, and had three adult children. She was also of the Catholic faith and a Republican. (I CT 242-243, Questionnaire, Question Nos. 1, 4, 6, 7, 9 11; 3 RT 412.) Ms. Carr had no religious, moral or other feelings which would have made it difficult for her to sit in judgment of another. (I CT 248, Questionnaire, Question Nos. 35, 36.)

When asked for her "GENERAL FEELINGS about the death penalty," Ms. Carr wrote: "I would not want to be on a case that would require the death penalty." (I CT 252; Questionnaire, Question No. 51.) Although she wrote that her feelings on the death penalty were due to "religious beliefs" (I CT 252; Questionnaire, Question No. 52), she

indicated that her feelings on capital punishment were not "very strong" (Questionnaire, Question No. 54) and that if the views of the religious organization to which she belonged were in conflict with the law, she would follow the law (I CT 255; Questionnaire, Question No. 68). Question No. 58 asked: "Regardless of the evidence, would you refuse to vote for guilt in the first trial in order to AVOID a decision on the death penalty?" (I CT 253.) Ms. Carr answered "no" to this question. (*Ibid.*)

The questionnaire set forth five group descriptions designed to categorize a prospective juror's views on the death penalty. (E.g., I CT 257, Question No. 75.) Ms. Carr selected "Group Four" as the category that best described her views on the issue. Group Four stated: "I am not in favor of the death penalty, but I would not vote against it in every case." (I CT 257, Questionnaire, Question No. 75.)[77] Question No. 61 asked: "If a defendant was found guilty of first degree murder and the special circumstance that 'the murder was committed during the commission of a felony' was found to be true, would you always vote for Life Without Parole, and reject Death, regardless of the evidence presented at the penalty trial?" (I CT 254.) In response, Ms. Carr circled "yes." (*Ibid.*) She also indicated on her questionnaire, however, that she could see herself in the appropriate case rejecting life without the possibility of parole and choosing the death penalty. (I CT 256, Questionnaire, Question No. 70B.) When the questionnaire asked her to state the type of case where the death penalty might be appropriate, she wrote: "murder in the first degree." (I CT 254, Questionnaire, Question No. 44.) Moreover, she "disagreed somewhat" with the statement that "Anyone who commits murder in the commission of

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[77] See Argument I, *supra*, fn. 16 where all five groups are described.

a rape, sodomy, burglary, should never get the death penalty." (I CT 256, Questionnaire, Question No. 72.)[78] Finally, when asked in Question No. 73 if she would "follow the instruction of the Judge that under our law, you may decide to impose the death penalty only if, in your mind, after weighing and balancing all the evidence in the case, you are persuaded that the aggravating factors substantially outweigh the mitigating factors such that death is warranted," she answered "yes." (I CT 257.)

2. The Voir Dire of Barbara Carr

In beginning Ms. Carr's voir dire examination, the trial court noted that she "fell in the same categories" as Juror No. 11 (Irma Rodriguez) – i.e., that while she (Ms. Carr) had doubts as to the death penalty, she would not vote against it every time and if the appropriate decision was death, she could impose such penalty. (3 RT 366-367.) Ms. Carr agreed with the court's assessment of her views. (3 RT 367.) She stated that once the jury made a determination that the offense committed was first degree murder with special circumstances, she would weigh the aggravating and mitigating factors. (*Ibid.*) She said that if the appropriate decision was death she could impose it; the same was true if she found the appropriate decision to be life. (*Ibid.*) The court's voir dire of Ms. Carr concluded with her unequivocal affirmation that she could make an individual decision to

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[78] Ms. Carr marked the identical option – that she "disagreed somewhat" – to the statement that "Anyone who commits murder in the commission of rape, sodomy, burglary should always get the death penalty." (I CT 256, Questionnaire, Question No. 71.) Question Nos. 71 & 72 listed four options to mark: "agreed strongly," "agreed somewhat," "disagreed strongly," and "disagreed somewhat." (E.g., I CT 256.)

impose death if the evidence was sufficient. (3 RT 367-368.)[79]

The prosecutor began his voir dire examination of Ms. Carr by inquiring about the three to four week vacation she had planned in April. (3 RT 411-412.) Ms. Carr had written in her response to Question No. 98 of the Questionnaire that the length of the trial and her vacation were the reasons why she preferred not to serve as a juror in this case. (I CT 262.) Stating the vacation was not prepaid, Ms. Carr said she could postpone the trip. (3 RT 411-412.) When asked about her response to Question No. 51 where she had written that she "preferred not to serve on a death penalty case," Ms. Carr explained that her preference for not serving on a capital case was not "so strong" that she would be unable to follow the law. (3 RT 412.) The prosecutor also asked her to explain her "yes" answer to Question No. 61. Ms. Carr's reply to the prosecutor's inquiry refuted the answer she marked on her questionnaire because it clarified that she would be open to both penalties, would weigh the factors and evidence, and would not automatically vote for life. (3 RT 412-413.) The following is the colloquy that occurred between Ms. Carr and the prosecutor on Question No. 61:

> Mr. Best [Prosecutor]: Okay. I also note –, and, again, this is not to argue with you but to make sure I know where you are on this issue – I also note in your questionnaire that you indicated on question 61 that you would always vote for life without.
>
> Prospective Juror No. 12 [Ms. Carr]: That was –
>
> Mr. Best: Okay.

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[79] Defense counsel's voir dire of Ms. Carr followed that of the court. Counsel did not ask Ms. Carr questions about her views on the death penalty. (3 RT 371, 379, 383, 392-397, 399-401.)

Prospective Juror No. 12: 61?

Prospective Juror No. 12: Okay. Well, I prefer life without.

Mr. Best: Let me try to put you on the case here. If we get down to the bottom part of this chart, and we come through all this and we're here and it's time to decide life without or death, are you going to be open and weigh the factors, or are you automatically going to go towards –

Prospective Juror No. 12: No. I would be open –

Mr. Best: Okay.

Prospective Juror No. 12: – to that.

Mr. Best: Let – I'm sorry

Prospective Juror No. 12: All the evidence and everything.

(3 RT 412-413.)

The prosecutor twice asked Ms. Carr whether, if the factors warranted, she could face appellant in open court and state that she voted for death. On both occasions, Ms. Carr's response was that "she was not sure" if she "could do that part." The relevant portion of the voir dire when the prosecutor first made this inquiry is as follows:

Mr. Best [Prosecutor]: . . . . If we get down to this bottom part here where it's comes [sic] time to make a decision in life without parole or death, are you going to be able to come back in the courtroom – now, we're not talking abstract or theoretical anymore. We've got a real man sitting here – are you going to be able – if the factors warrant death, are you going to be able to come in here and look at all the people and vote for death?

Prospective Juror No. 12 [Ms. Carr]: Well, would it be just up to me?

Mr. Best: Well, it would be up to the jury.

Prospective Juror No. 12: The jury.

Mr. Best: But if it's your decision, you come in, and it may

> come time where we'll go down the row, and we'll go, 'Juror No. 1, is your verdict death?' 'Juror No. 2 . . . ' And we may get to you, and you'll need to say, facing Mr. Porter, Mr. Scott [appellant], myself and the Judge, 'Yes, my verdict is death.' Would you be able to do that given how you feel about the death penalty?
>
> Prospective Juror No. 12: I don't know if I could.
>
> Mr. Best: I appreciate that.
>
> Prospective Juror No. 12: I really don't.
>
> The Court: I'm sorry? I'm having trouble hearing her.
>
> Prospective Juror No. 12: I'm not sure that I could do that part.

(3 RT 413-414.)

The prosecutor's second inquiry on this topic occurred during a portion of voir dire directed to the group summoned for questioning at the same time as Ms. Carr. Notably, even though the subsequent questioning of Ms. Carr followed the unequivocal statements of two other prospective jurors regarding their inability to return a death verdict in this case, Ms. Carr did not disavow her earlier statements that she could and would impose the death penalty if appropriate. (3 RT 419-420.) The relevant portion of the voir dire concerning Ms. Carr is as follows:

> Mr. Best [Prosecutor]: . . . . Is there anybody among the group who could not come into this courtroom, face Mr. Scott and return a verdict of death? [¶] Okay. . . . [¶] Anybody else?
>
> Prospective Juror No. 12 [Ms. Carr]: I'm not sure.
>
> Mr. Best: Not sure. Okay. You're obviously struggling with a very tough question.
>
> Prospective Juror No. 12: (Juror nods head.)
>
> Mr. Best: Okay. Anybody else? We've had the two jurors in

the back that spoke up, and we've had Juror No. 12 [Ms. Carr], who's indicated she's wrestling with it.

(3 RT 419-420.) There was no further voir dire questioning of Ms. Carr by the court or by either counsel.

2. The Prosecutor's For-Cause Challenge to Barbara Carr

Following a stipulation between counsel to excuse a number of jurors, including the two prospective jurors who had unequivocally stated they could not vote for death,[80] the prosecutor challenged Ms. Carr for cause. (3 RT 422.) Defense counsel objected, correctly pointing out that Ms. Carr had never said that she could not make a decision and impose a death sentence despite her preference for life and the fact that it might be difficult for her. (3 RT 423.)

The prosecutor alleged that Ms. Carr's views on the death penalty would substantially impair the performance of her duties as a juror. In support of this allegation, he stated that Ms. Carr previously wrote on her questionnaire that she did not want to be on a death penalty case. Despite Ms. Carr's earlier explanation to the prosecutor, as well as her voir dire statements to the court making clear that she could and would vote for death if appropriate, the prosecutor also relied on the "yes" answer she checked in response to Question 61 which, according to him, indicated that she would always vote for life without parole. Finally, the prosecutor relied on Ms. Carr's voir dire statement, that she was "not sure" she could state in open court that she had voted to impose death. (3 RT 423-424.)

The court correctly rejected the prosecutor's first justification, that

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[80] Jurors Robert Calvert and Elizabeth Reynosa (Sixth [Sealed] Supp. CT 28B; see fn. 76, *supra.*)

Ms. Carr had said in her questionnaire that she would not want to be on a death penalty jury, noting that Ms. Carr could have simply meant that serving on a capital case would be a "tough job." (3 RT 424.) Although the court acknowledged that the challenge of Ms. Carr was an "extremely close call" (*ibid.*), it erroneously concluded, without asking Ms. Carr any further questions, that she would not be able to vote for death.[81] (3 RT 424-425.) The comments made by the court in reaching this conclusion are as follows:

> She is one of these jurors that – it is my understanding in looking at these cases that there are those jurors who – for example, if you asked them whether or not Adolph Hitler – assuming he was the defendant in this case – whether he would deserve the death penalty, they would say, "Yes." Then you ask them – and you bring them back to the real world. . . what they're really saying is that although they could conceive in the abstract sense of voting for the death penalty, that when you apply it . . . to the real world, that what they're saying is that they could not. [¶] In listening to her testimony, and although this is *certainly a close call* . . . it seems to me that reading between the lines and watching her, her body language, and the way she answered, her reluctance to look up, that what she's really saying is she couldn't vote for the death penalty in the real world. . . . [¶] I must admit to you that it is an *extremely close call*, but it seems to me that what she was signaling to us is that really she couldn't vote for the death penalty in the real world if the . . . factors were

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[81] In discussing the prosecutor's challenge to Ms. Carr, the trial court noted that she had indicated that her "general views" on the death penalty were attributable to "religious beliefs." (3 RT 424.) However, her questionnaire reveals that her views on the death penalty were not strong, she was not aware of any position on the death penalty held by the religious organization to which she belonged, and that she would follow the law to the extent there was a conflict between that position and the law. (I CT 253, 255, Questionnaire; Question Nos. 52, 54, 68.)

established by the People pursuant to the law.

(3 RT 424-425, emphasis added.) The court then sustained the prosecutor's for-cause challenge of Ms. Carr. (3 RT 425.)

C. Applicable Law

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant a fair trial by a panel of impartial jurors. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150; *Irwin v. Dowd* (1961) 366 U.S. 717, 722.) In capital cases, this right applies to determinations of both guilt and penalty. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *Turner v. Murray* (1986) 476 U.S. 28, 36, n. 9.) This right is similarly protected by the California Constitution. (See Cal. Const., art. I, § 16.)

The United States Supreme Court has enacted a process of "death qualification" for capital cases. (See *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 421.) This process produces "juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused" in violation of the Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. (*Witt v. Wainwright* (1985) 470 U.S. 1039 (dis. opn. from den. of cert. by Marshall, J.); *Grigsby v. Mabry* (8th Cir. 1985) 758 F.2d 226, revd. sub nom, *Lockhart v. McCree* (1986) 476 U.S. 162, 184.) The reasons supporting this claim are set forth in Justice Marshall's dissenting opinions in *Witt v. Wainwright*, *supra*, 470 U.S. at pp. 1040-1042, and in *Lockhart v. McCree*, *supra*, 476 U.S. at pp. 184-206, which are incorporated herein to preserve the issue for federal habeas corpus review, if necessary.

The Supreme Court has held that prospective jurors do not lack

impartiality, and thus may not be excused for cause, "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-523, fns. omitted.) Such an exclusion violates the defendant's rights to due process and an impartial jury "and subjects the defendant to a trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) However, under the federal constitution, "[a]juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 421, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45; *Gray v. Mississippi* (1987) 481 U.S. 648, 658; *Gall v. Parker* (6th Cir. 2001) 231 F.3d 265, 331; *People v. Stewart* (2004) 33 Cal.4th 425, 446; *People v. Heard* (2003) 31 Cal.4th 946, 958.)[82] All the state may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

The prosecution, as the moving party, bears the burden of proof in demonstrating that a juror's views would "prevent or substantially impair" the performance of his or her duties. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) The focus of any inquiry is, and must be, on the juror's ability to follow his or her oath.

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[82] The same standard is applicable under the California Constitution. (E.g., *People v. Gray* (2005) 37 Cal.4th 168, 192; *People v. Jones* (2003) 29 Cal.4th 1229, 1246.)

"[E]ven 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." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176; see also *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived his duty to abide by his oath as a juror and to obey the law of the State"]; *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [neither *Witherspoon* nor *Witt*, "nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty"].)

Further, the United States Supreme Court significantly circumscribed the state courts' role in excusing jurors for cause in capital cases by holding that:

> [t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would frustrate the State's legitimate interest in administering constitutional sentencing schemes by not following their oaths. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It stack[s] the deck against petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.

(*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 658-659, internal quotations and citations omitted.) Prior to granting a for cause challenge the trial court must have sufficient information regarding the prospective juror's state of mind to reliably determine whether the juror's views would substantially impair the performance of his or her duties. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

In applying the *Adams-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 433 [ruling that the question is whether the trial court's finding that the substantial-impairment standard was met is fairly supported by the record considered as a whole]; *People v. Heard*, *supra,* 31 Cal.4th at p. 958.) As this Court has explained:

> On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.

(*People v. Heard*, *supra*, 31 Cal.4th at p. 958, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975, internal quotation marks and citations omitted.) The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 659-668; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454.)

Given the per se standard of reversal for *Witherspoon-Witt* errors, the trial court bears a special responsibility to conduct adequate death qualification voir dire. As this Court has emphasized, when a prospective juror's views on the death penalty appear uncertain, the trial court must conduct careful and thorough questioning, including follow-up questions, to determine whether such views "would impair his ability to follow the law or to otherwise perform his duties as a juror." (*People v. Heard*, *supra*, 31 Cal.4th at p. 965.)

In this case, the trial court erred in excusing Ms. Carr because the

record failed to show that her views on capital punishment would prevent or substantially impair her ability to consider and vote for a death sentence. In fact, the record shows that while Ms. Carr did not disavow her disfavor of the death penalty, she consistently indicated that she could put aside those feelings and apply the law in accordance with the court's instructions. Even assuming that Ms. Carr's statements that she "did not know" or was "not sure" she could face appellant in open court and say she voted for death gave rise to uncertainty whether her views would substantially impair her ability to perform the duties required of a juror in this case, the trial court erred when it granted the for-cause challenge without conducting adequate and necessary follow-up questioning.

D. Prospective Juror Carr Was Qualified To Serve In This Case

The prosecutor failed to carry his burden of showing that prospective juror Carr's views on the death penalty would prevent or substantially impair the performance of her duties to follow her oath and the court's instructions. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 652, fn. 3 ["motion to excuse a venire member for cause . . . must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve"].) The record indicates that Ms. Carr did not favor the death penalty, and had marked "yes" on her questionnaire in response to a question whether she would automatically vote for life without parole when the special circumstance found true is murder during the commission of a felony (Question No. 61). However, her comments on the whole, both in the questionnaire and during subsequent voir dire, clarified that she was impartial to both sides with regard to capital punishment, and that she could and would return a death verdict in this case

if appropriate. (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 433.)

While she admitted to the court that her preference was for life, she affirmed she would not vote for it every time. (3 RT 366-367.) Her responses to the court's questioning also made clear that she could set aside her personal feelings, follow the law as instructed, and impose a death sentence if appropriate. She stated that following a determination by the jury that appellant was guilty of first degree murder with special circumstances, she would weigh aggravating and mitigating factors to reach the appropriate sentence. She unequivocally said that she could impose either death or life without possibility of parole if the evidence so warranted and that she could render an individual decision to impose the death penalty. (3 RT 367-368.)

The prosecutor's subsequent voir dire of Ms. Carr did not establish that her views on the death penalty prevented or substantially impaired her ability to perform her duties as a juror. In fact, the responses Ms. Carr provided about her views on capital punishment established otherwise. First, she did not disavow the statements she had previously made to the trial court that she could put aside her personal beliefs, follow the law and would return a death sentence if appropriate. In addition, Ms. Carr's statements that she "did not know" or was " not sure" that she "could do that part," given in response to the prosecutor's inquiries as to whether in open court she could face appellant and say she had rendered a death verdict, do not support the conclusion that because of her views on the death penalty she was "unable to conscientiously consider all the sentencing alternatives and return a death verdict where appropriate." (*People v. Heard*, *supra*, 31 Cal.4th at p. 958.) At best, the statements that she was "not sure" she "could do that part" revealed qualms she might have,

hesitancy or possible reluctance with regard to the difficult task of personally telling someone that she was sentencing him to death. As such, follow-up questioning to clarify the meaning of her answers was necessary prior to any disqualification for cause. (*Id.* at p. 965.)

E. The Trial Court's Exclusion Of Ms. Carr Did Not Satisfy The *Adams-Witt* Substantial Impairment Standard

The trial court's excusal of Ms. Carr for cause was erroneous. Recognizing that the for-cause challenge was an "extremely close call," the court said that it sustained the prosecutor's challenge based on a conclusion that Ms. Carr "couldn't vote for the death penalty in the real world." (3 RT 425.) The trial court stated that the disqualification of Ms. Carr was not based on anything she said, but instead on "reading between the lines" as well as her demeanor. (*Ibid.*) The court did not, however, reveal how Ms. Carr's demeanor somehow reversed her earlier affirmative voir dire statements that she could and would impose a death sentence if appropriate in this case.

Notwithstanding deference generally afforded the trial court, the court's finding with respect to Ms. Carr was insufficient under the standards of *Adams v. Texas*, *supra*, and *Wainwright v. Witt*, *supra*, because the record does not fairly show that her views on the death penalty would substantially impair her performance as a juror. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, fn. 10; *Gall v. Parker*, *supra*, 231 F.3d at pp. 330-332; *People v. Heard*, *supra*, 31 Cal.4th at p. 968.) Ms. Carr never disavowed her unequivocal statements to follow the law and her oath as a juror, and there was no substantial evidence to support the conclusion that her views on the death penalty would substantially impair her ability to

serve on appellant's case. Because the trial court's ruling was not fairly supported by the record, it is not binding on this Court. (See *People v. Stewart*, *supra*, 33 Cal.4th at p. 441; *People v. Heard*, *supra*, 31 Cal.4th at p. 968.)

It is evident that the "special care and clarity in conducting voir dire in death penalty trials" recognized by this Court *People v. Heard*, *supra*, 31 Cal.4th at p. 967, did not occur in this case. When the prosecutor moved to excuse Ms. Carr because in part she said she "did not know" or was "not sure" if she could face appellant in open court and say she had voted for death, it was incumbent upon the court to follow-up and clarify the meaning of her statements to determine whether they were indicative of impairment of her ability to follow her oath, the court's instructions and ultimately impose a death sentence if appropriate. The court did not properly inquire whether notwithstanding any reluctance, uncertainty or discomfort on her part, which is at the most what her statements indicated, Ms. Carr could perform her duties as a juror.

Standing alone, a reasonable interpretation of her statements could be that she was hesitant or reluctant, or that it would be difficult for her, to confirm a death verdict in open court because of her private nature, or some other reason that would not affect her ability to be a fair and impartial juror in appellant's case. (See *Martini v. Hendricks* (3rd Cir. 2003) 348 F.3d 360, 368 [reluctance to read guilty verdict in open court might simply reflect private nature of juror or fear of making controversial statements in public].)

Absent any clarification as to what Ms. Carr meant when she said she was unsure she could face appellant in open court and recite a death verdict it simply cannot be concluded that the statement was indicative of

an inability on her part to vote for death. As this Court explained in *People v. Bradford*, *supra*, 70 Cal.2d at pp. 346-347:

> The venireman herein expressed little more than a deep uneasiness about participating in a death verdict. She complained that a death vote would make her "very nervous" and agreed with the trial court's suggestion that such a vote might have a 'great physical effect' on her. It cannot be said from this limited examination that the venireman was physically "incapable of performing the duties of a juror." The decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste of imposing that penalty. (See *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fns. 8, 9 [parallel citation omitted].)

In this case, the prosecutor, who bore the burden of demonstrating to the trial court that the substantial-impairment test under *Witt* was satisfied, failed to develop facts to support the challenge for cause against Ms. Carr. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) Similarly, before ruling on the prosecutor's challenge, the trial court was required to have sufficient information upon which to make a reliable determination that the *Witt* standard had been met. (*Ibid.*; see *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-968.) Neither of these obligations was fulfilled. The trial court nonetheless failed to require the prosecutor to provide sufficient facts upon which to rule on the motion to excuse Ms. Carr for cause, and failed to make its own inquiries regarding her ability to be a fair and impartial juror. That further inquiry was required was demonstrated by the trial court's own conclusion that none of Ms. Carr's articulable responses provided support for the cause challenge.[83] Without more, however, the court granted the

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[83] As the United States Supreme Court explained in *Wainwright v.* (continued...)

prosecutor's cause challenge of Ms. Carr by "reading between the lines" as well as offering its unsubstantiated perception of her demeanor during voir dire. (3 RT 425.) Indeed, the trial court failed to recognize that neither the questions set forth in the questionnaire nor those presented to Ms. Carr during voir dire elicited sufficient information from which the court could properly determine whether she suffered from a disqualifying bias under *Witt v. Wainwright*, *supra*, 469 U.S. 412, 424. (*People v. Stewart*, *supra*, 33 Cal.4th, at p. 447.) The record in this case, therefore, "suggests that the trial court erroneously equated (i) the nondisqualifying concept of a very difficult decision by a juror to impose a death sentence, with (ii) the disqualifying concept of substantial impairment of a juror's performance of his or her legal duty." (*Ibid.*)

Deference cannot be given to the trial court's judgment about the impartiality of a prospective juror where, as here, the court failed to conduct any inquiry, let alone an adequate inquiry, using the proper legal standard.[84]

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[83] (...continued)
Witt, supra, 469 U.S. at p. 423, "[a]s with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." Thus, when the prosecution wishes to exclude a prospective juror for cause because of his or her views on the death penalty, it must question the juror to make a record of the bias. (*Gray v. Mississippi, supra*, 481 U.S. at p. 652, fn. 3.) After the prosecution offers its challenge for cause,"[i]t is then the trial judge's duty to determine whether the challenge is proper." (*Ibid.*)

[84] Compare *Adams v. Texas*, *supra*, 448 U.S. at p. 49 [granting relief where "the touchstone of the inquiry . . . was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond a reasonable doubt"]; *United States v. Chanthadara* (10th Cir. 2000) 230
(continued...)

Without asking the right questions, the trial court simply does not have the necessary information to determine whether the prospective juror's views on the death penalty would substantially impair her ability to perform as a juror. Accordingly, no deference can be given to the trial court's conclusion that Ms. Carr was unable to vote for death or was otherwise too substantially impaired to perform the duties of a juror. As this Court stated in *People v. Heard*, *supra*, 31 Cal.4th at p. 968:

> Although we accord appropriate deference to determinations made by a trial court in the course of jury selection, the trial court in the present case provided us with virtually nothing of substance to which we might properly defer.

The same determination applies here. Although it did not occur in this case, "additional follow-up questions or observations by the court would [not]

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[84] (...continued)
F.3d 1237, 1272 [granting relief where "none of the questions which [the prospective juror] answered articulated the proper legal standard under *Witt*"]; and *Szuchon v. Lehman* (3rd Cir. 2001) 273 F.3d 299, 300 [granting relief where "[n]either the Commonwealth nor the trial court, however, questioned [the prospective juror] about his ability to set aside his beliefs or otherwise perform his duty as a juror"] with *Wainwright v. Witt*, *supra*, 469 U.S. at p. 416 [holding exclusion proper where prosecutor asked prospective juror if her personal feelings against the death penalty would "interfere with judging the guilt or innocence of the Defendant in this case?"]; *Darden v. Wainwright* (1986) 477 U.S. 168, 177 [holding exclusion proper where "[t]he court repeatedly stated the correct standard when questioning individual members of the venire" such as asking "Do you have any . . . conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?"]; and *Lockett v. Ohio* (1978) 438 U.S. 586, 595-596 [holding exclusion proper where the trial court asked the prospective jurors "'[D]o you feel that you could take an oath to well and truely [*sic*] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?'"]

have been unduly burdensome." (*People v. Heard*, *supra*, 31 Cal.4th at p. 968; see *People v. Stewart*, *supra*, 33 Cal.4th at pp. 454-455.)

Absent the necessary follow-up, the relevant question in this case was whether, notwithstanding her personal views on the death penalty, or any reluctance to serve on a capital case and/or reluctance to impose a death verdict, Ms. Carr could perform her duties as a juror in accordance with the court's instructions and her oath. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) It is well established that Ms. Carr's personal objection to the death penalty was not a sufficient basis to excuse her for cause from service in a capital case. (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176; accord, *People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

Even a prospective juror who is opposed to capital punishment, and thus potentially much more biased than Ms. Carr, may be capable of subordinating her personal leaning towards life to her oath as a juror. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 658, quoting *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 ["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"]; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699 ["A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict"].)

Unlike many prospective jurors who have been excluded properly

under *Witherspoon v. Illinois*, *supra*, 391 U.S. 510 and *Wainwright v. Witt*, *supra*, 469 U.S. 412, Ms. Carr never stated that her personal disfavor of the death penalty would preclude her from considering or rendering a death verdict.[85] As set forth above, she indicated in her questionnaire that regardless of the evidence she would not refuse to vote for guilt in order to avoid a decision on the death penalty. (I CT 253, Questionnaire, Question No. 58.) During voir dire, she repeatedly stated that she could and would impose the death penalty if the evidence was sufficient. She said she could put aside her personal feelings and follow the law.

When specifically asked about her "yes" response to Question No. 61 of the Questionnaire, she clarified during voir dire that she would not automatically vote for life. In fact, she affirmatively said that she would remain open to the imposition of death as well as weigh factors in aggravation and mitigation in determining penalty. Even if her circling the "yes" option to Question No. 61 could be construed as "contradictory" to what she clearly articulated during the voir dire conducted by the court and counsel, her voir dire responses take precedence. (*People v. Lucas* (1995)

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[85] See, e.g., *People v. Cook* (2007) 40 Cal.4th 1334, 1343-1344 [prospective juror expressed unequivocal opposition to the death penalty and unequivocal refusal to consider the possibility of imposing the death penalty in case where two deaths occurred in a single incident]; *People v. Phillips* (2000) 22 Cal.4th 226, 233 [prospective juror wrote in questionnaire that he would not vote to put anyone to death]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [prospective juror stated he was not sure he could ever be able to impose death penalty if he believed it was the proper punishment];; *People v. Pinholster* (1992) 1 Cal.4th 865, 917-918 [two prospective jurors said they would be unable to impose death penalty in burglary-murder case]; *People v. Sanders* (1990) 51 Cal.3d 471, 502 [prospective juror stated he was against the death penalty in every case].)

12 Cal.4th 415, 481-482.)[86] This court has recognized that a bare written response in a juror's questionnaire, or one considered in conjunction with a checked answer, cannot be used alone to justify exclusion for cause under *Witt*. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 448, 450-451 & fn. 14; see *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270-1272.) Thus, "[i]n view of [Ms. Carr's] clarification of [her] views during voir dire . . . [her] earlier juror questionnaire response, *given without benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support [her] excusal for cause*." (*People v. Heard*, *supra*, 31 Cal.4th at p. 964, emphasis in original.)

Ms. Carr's statements to the prosecutor that she was "not sure" whether she "could do [the] part" of reciting in open court in front of appellant that she had imposed death did not themselves demonstrate that she would automatically vote against the death penalty, or that she was too

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[86] In *People v. Lucas*, *supra*, eight jurors indicated on their questionnaires that they thought the state should execute anyone convicted of intentional murder during a robbery. During voir dire, these jurors said they would not automatically impose the death penalty. (*People v. Lucas*, *supra*, 12 Cal.4th at p. 481.) In rejecting the defendant's argument that the trial court should have excluded all eight jurors based on answers they gave in their questionnaires, this Court held:

> It is clear their initial statements in the juror questionnaire, suggesting they would automatically impose the death penalty for certain crimes, did not reflect the views they ultimately expressed during voir dire. None of these jurors stated such views regarding the death penalty during voir dire as would necessarily subject them to excusal for cause. That is, none expressed views that "would prevent or substantially impair" the performance of those juror's duties as defined by the court's instructions and the juror's oath.

(*Id.* at pp. 481-482, internal citations omitted.)

impaired to perform her duties. (*Gray v. Washington*, *supra*, 481 U.S. at p. 659 [improper for cause excusal of juror who was indecisive when asked whether she could impose the death penalty]; *Adams v. Texas*, *supra*, 448 U.S. at pp. 49-50 [record contained insufficient evidence to remove for cause jurors who were equivocal whether views on death penalty would affect penalty deliberations, or did not want to deliberate on a man's fate or believed it would be difficult to serve on capital jury]; *Gall v. Parker*, *supra*, 231 F.3d at pp. 331-332 [juror's uncertainty as to how option of death penalty would affect his decision did not justify excusal for cause]; *People v. Vaughn* (1969) 71 Cal.2d 406, 413-416 [juror's response "she was not sure" or "did not know" if she would automatically vote against death penalty was insufficient grounds for exclusion for cause]; *People v. Goodridge* (1969) 70 Cal.2d 824, 841 [juror improperly excused for cause when she said she did not know and that she was "on the fence" in response to the court's inquiry whether her opposition to death penalty was so strong that she could not participate in verdict imposing it].)

Nothing in the United States Supreme Court jurisprudence suggests that only prospective jurors who can condemn another human being to death without hesitation are qualified to serve on a capital jury. Impartiality is not measured by the ease with which a prospective juror can return a death verdict, and a juror's reluctance to sit in judgment in a capital case has not been found to be an adequate basis for exclusion for cause. In *Witherspoon v. Illinois*, *supra*, 391 U.S. 412, the Supreme Court held that a prospective juror was erroneously excluded where she had stated that "she would not 'like to be responsible for . . . deciding somebody should be put to death.'" (*Id.* at p. 515.) Finding the reluctance to impose a death verdict to be normal, the court in *Witherspoon* recognized that: "Every right-

thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man." (*Ibid.*)

Similarly, in *Adams v. Texas*, *supra*, 448 U.S. 38, the death sentence was reversed because a Texas statute required exclusion of prospective jurors "whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected" by voting to impose the death penalty. (*Id.* at pp. 50-51.) Explicit that such an attribute did not warrant exclusion from jury service, the court stated:

> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty.

(*Id.* at p. 50.) As *Adams* teaches, jurors cannot be excluded simply because "the potentially lethal consequences would invest their deliberations with greater seriousness and a gravity or would involve them emotionally." (*Id.* at p. 49.) Indeed, feelings of unease, conscience or reluctance to impose the death penalty, such as those expressed by Ms. Carr, are an impermissible "'broader basis' for exclusion than inability to follow the law." (*Adams v. Texas*, *supra*, 448 U.S. at p. 48; see also *Moore v. Estelle* (5th Cir. 1982) 670 F.2d 56, 57 [improper exclusion where prospective juror did not wish to serve but would answer questions truthfully and perform duties if made to do so]; *Clark v. State* (Tex.Crim.App. 1996) 929 S.W. 2d 5, 9 [prospective juror who preferred to let God make the penalty decision was erroneously excluded].)

This Court has recognized that the fact a prospective juror would experience difficulty or uneasiness imposing the death penalty is not

enough to disqualify that person from jury service in a capital case:

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote for the death penalty. . . . [H]owever, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled – indeed, duty-bound - to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 446; see *People v. Lanphear* (1980) 26 Cal.3d 814, 841, reiterated in its entirety in *People v. Lanphear* (1980) 28 Cal.3d 463, 464 ["abhorrence or distaste for sitting on a jury that is trying a capital case is not sufficient" to excuse a prospective juror for cause]; *People v. Stanworth* (1969) 71 Cal.2d 820, 837 ["mere fact that a venireman may find it unpleasant or difficult to impose the death penalty cannot be equated with a refusal by him to impose that penalty under any circumstances"]; *People v. Bradford* (1969) 70 Cal.2d 333, 346-347 ["[t]he decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste at the prospect of imposing that penalty"].)

Ms. Carr's willingness to put aside her preference for life and follow her oath and the law was clear. She never said anything to the contrary, or that her views on the death penalty would prevent her from serving as an impartial juror. She never said she could not return a death sentence.

There were sufficient facts on this record to deny the prosecutor's challenge of Ms. Carr for cause. (See *Adams v. Texas*, *supra*, 448 U.S. at pp. 49-50.) Moreover, the trial court's ruling that she was unable to vote for death is unsupported by the factual record as a whole. (*People v. Heard*,

supra, 31 Cal.4th at p. 965.) Accordingly, the trial court's ruling is not entitled to deference. (*Id.* at p. 968 [deference is not accorded when there is an absence of substantial support in the record for the trial court's ruling].)

As the Supreme Court has held, "[u]nless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' [citation omitted] he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." (*Davis v. Georgia*, *supra*, 429 U.S. at p. 123.) Here, it was not established that Ms. Carr would vote against the death penalty regardless of the evidence or that her views on the death penalty would substantially impair her ability to sit as an impartial juror.[87]

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[87] The conclusion that Ms. Carr was excluded erroneously is supported by decisions from other jurisdictions setting aside death sentences under *Witt*. (See, e.g., *Gall v. Parker*, *supra*, 231 F.3d at pp. 330-332 [prospective juror was uncertain about, and showed discomfort with, the death penalty but stated "that he would possibly or 'very possibl[y]' feel the death penalty was appropriate in certain factual scenarios" and "believed he could and would follow the law as instructed"]; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1271-1272 [prospective juror's statement in questionnaire – "I feel the death penalty is proper in some cases but I don't feel I could ever think there was enough evidence to come to that conclusion" – did not satisfy *Witt*'s substantial impairment test]; *Szuchon v. Lehman*, *supra*, 273 F.3d at pp. 327-330 [prospective juror's statement that he did not believe in capital punishment was a broader basis for exclusion than inability to follow the law or abide by a juror's oath]; *Farina v. State* (Fla. 1996) 680 So.2d 392, 396-399 [prospective juror equivocated about support for the death penalty but also stated that she would act fairly in considering whether to vote for a death sentence, would try to be fair to the prosecution, and "would try to do what's right" with respect to the penalty determination]; *Clark v. State*, *supra*, 929 S.W.2d at p. 8 [prospective juror admitted that she was "somewhat" against the death

(continued...)

Reversal of appellant's penalty of death and remand of his case for a new penalty trial are therefore required. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 659-667; *People v. Heard*, *supra*, 31 Cal.4th at p. 965.)

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[87] (...continued)
penalty on religious grounds and "would . . . find [herself] wanting to vote in such a way so that the death penalty was not assessed," but also stated that she could follow the court's instructions even if it resulted in a death penalty]; *Riley v. State* (Tex.Cr.App. 1994) 889 S.W.2d 290, 300 [prospective juror acknowledged that answering the statutory penalty questions leading to a death sentence would be difficult and might violate her conscientious principles, but consistently affirmed that she could answer the questions affirmatively if proven beyond a reasonable doubt]; *Jarrell v. State* (Ga. 1992) 413 S.E.2d 710, 712 [prospective juror believed in the death penalty, but indicated that she had some qualms about imposing a death sentence and that she would go into the trial leaning toward a life sentence]; *Fuselier v. State* (Miss. 1985) 468 So.2d 45, 54-55 [two prospective jurors' comments that they did not think they could return a death sentence in a case based entirely on circumstantial evidence showed they would be hesitant to impose the death penalty but did not prove their abilities as jurors would be substantially impaired].)

VIII

THE TRIAL COURT DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR PENALTY TRIAL AND A RELIABLE PENALTY DETERMINATION WHEN IT ADMITTED PHOTOGRAPHS OF THE VICTIM AND HER FAMILY MEMBERS WHICH WERE PREJUDICIAL AND OUTSIDE THE SCOPE OF PERMISSIBLE VICTIM IMPACT EVIDENCE

A. Introduction

Over objection, the prosecutor introduced victim impact photographic evidence depicting Della Morris and some members of her family. These photographs were offered to illustrate Ms. Morris's life as a young woman through the time of the crime. With the exception of one photo of Ms. Morris taken within a year of the crime, the photographs constituted improper victim impact evidence which was not limited to the "immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 934-935), and prejudiced appellant because of their highly emotional impact.

The photographic victim impact evidence in this case violated appellant's right to due process because its sole purpose was to evoke sympathy only for the victim, and insured the likelihood that the jury's verdict would not be a "reasoned moral response" to the question whether appellant deserved to die. Admission of the evidence, along with the prosecutor's manipulative and prejudicial argument, effectively precluded meaningful consideration by the jury of appellant's evidence on the subject of appropriate penalty, and thus violated his constitutional rights to due process, a fundamentally fair penalty proceeding, equal protection, and a reliable determination of penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16 & 17; see *Payne v. Tennessee*

(1991) 501 U.S. 808, 824-825; *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Accordingly, reversal of the death judgment is required.

B. Proceedings Below

The prosecution sought to admit photographic evidence of Ms. Morris when she was alive as part of its case in aggravation. According to the prosecutor, these photographs were admissible to illustrate Ms. Morris's life from the time she was a young woman through the time of the crime. (18 RT 2670-2673.) The photographs, most of which depicted Ms. Morris and her family members at times well before the crime, were designed to appeal to the jury's emotions.

The defense objected to all the victim impact photographic evidence, arguing that it was cumulative and violated Evidence Code section 352. However, the prosecutor argued, and the trial court agreed, that the photographs were a "capsulization" of Ms. Morris's life for the jury and the probative value outweighed its prejudicial effect. (18 RT 2672-2673.)

The evidence the prosecution sought to admit was a collection of photos of the younger Della Morris. One was a photo of Ms. Morris in her dancing costume taken many years prior to the crime, when she was a young woman. (People's Exh. No. 76; see 18 RT 2701-2702.) Another photo, also taken many years before the crime, was of Ms. Morris and her three nephews. In that photo, Ms. Morris' nephews, including prosecution witness Raymond Harris Abelin,[88] were children. (People's Exh. No. 77; see 18 RT 2702-2703.) There was also a photograph of Ms. Morris with her brother Webbie at a performance which was taken approximately 11

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[88] Raymond Abelin testified that at the time of trial he was 62 years old. (18 RT 2685.)

years prior to the crime. (People's Exh. No. 78; see 18 RT 2703.) Finally, there was a photograph of Ms. Morris with her dog, which was taken within a year of the crime. (People's Exh. No. 79; see 18 RT 2704-2705.)

During the direct examination of Raymond Abelin at the penalty phase, the prosecutor used the photographs to illustrate his description of Ms. Morris's life from the time she was a young woman until the time of her death. (18 RT 2684-2705.) During closing argument, the prosecutor repeatedly reminded the jury to keep in mind the image of Ms. Morris which included the multiple photographs of her as a young woman, many years before the crime. He also reminded the jury to think of how she spent her whole life making others happy, including her family. To help the jury visualize what he wanted them to consider in making their penalty determination, the prosecutor displayed on the overhead projector live photographs of Ms. Morris from the time she was young, along with other photographs of her – ones taken after she was deceased.

In his final remarks, the prosecutor specifically urged the jury to consider the "two views" of Ms. Morris presented and which were displayed in the live and post-mortem photographs. The prosecutor told the jury to compare what Ms. Morris was in life to that which she was in death. (20 RT 2829-2830.) In so doing, the prosecutor appealed to the passions and emotions of the jury to use what they saw as a reason to sentence appellant to death, and that Ms. Morris alive "breathing on the screen deserve[d] justice":

> [I]f you are having problems whether or not you could come back and face Mr. Scott, I offer you two views of Della Morris at her house in Palm Springs. [¶] When you are deciding whether or not you could come back in and face Mr. Scott and say for what you have done, we have decided you

> deserve to die, look at these two views of Della Morris. Think about the top view of her in happy days; think of the bottom view of her and what Mr. Scott did. [¶] In this case, ladies and gentlemen, Della Morris, the woman who was a live, living, breathing person on the screen in front of you deserves justice.

The photographs of Ms. Morris and her family were admitted into evidence and along with other exhibits in the case were sent into the jury room for consideration by the jurors during deliberations. (18 RT 2847-2849.)

C. Applicable Legal Principles

"It is a hallmark of a fair and civilized justice system that death verdicts be based on reason, not emotion, revenge, or even sympathy." (*Le v. Mullin* (10th Cir. 2002) 311 F.3d 1002, 1015.) Evidence that improperly encourages the jury to impose a sentence of death based on considerations of sympathy for the victims may constitute due process error. (*Ibid.*) "If, in a particular case, a witness' [victim impact] testimony . . . so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." (*Payne v. Tennessee* (1991) 501 U.S. 808, 831 (conc. opn. of O'Connor, J.).)

In *Payne* the United States Supreme Court upheld admission of evidence describing the impact of a defendant's capital crimes on a three-year-old boy who was present and seriously wounded when his mother and sister were killed. The Court held that the Eighth Amendment did not preclude admission of, and argument on, such evidence (*id.* 501 U.S. at p. 827), thereby overruling the blanket ban on victim impact evidence and argument imposed by its earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805. The Court

did not hold that victim impact evidence must, or even should, be admitted in a capital case, but instead merely held that if a state decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827; see also *id.* at p. 831 (conc. opn. of O'Conner, J.).) The Court was careful to note that the Due Process Clause of the Fourteenth Amendment would be violated by the introduction of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair. . . ." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see *id.* at pp. 836-837 (conc. opn. of Souter, J.).)

Relying on *Payne*, this Court in *People v. Edwards* (1991) 54 Cal.3d 787, 832-835, upheld the admission of photographs of the victim while she was alive, and the prosecutor's argument referring to the impact of the crime on her family. In so doing, this Court held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim," but "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835.) This Court was careful to note that it was not holding that factor (a) encompasses all forms of victim impact evidence and argument. (*Ibid.*) Rather, there are "limits on emotional evidence and argument . . . [and] the trial court must strike a careful balance between the probative and the prejudicial. . . . [I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836.)

Thus, both *Payne* and *Edwards* recognize that while the federal constitution does not impose a *blanket ban* on victim impact evidence, such evidence may violate the Fifth, Sixth, Eighth and Fourteenth Amendments

where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury.[89] (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) The admissibility of victim impact evidence therefore must be determined on a case-by-case basis. As Justice Souter explained in his concurring opinion in *Payne*:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh* [(1989)] 492 U.S. 302, 319-328 [] (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting *California v. Brown* [(1987)] 479 U.S. 538, 545 [](O'Connor, J., concurring)); *Gholson v. Estelle* [(5th Cir. 1982)] 675 F.2d 734, 738 ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). . . . With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case."

(*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 836-837 (conc. opn. of Souter, J.), citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

The striking feature of the victim impact evidence that *Payne* and *Edwards* deemed appropriate, and not so inflammatory as to risk a verdict based on passion, is the extremely limited nature of the evidence admitted in those cases. In *Payne*, the grandmother of the three-year-old surviving victim testified in response to a single question. (*Payne v. Tennessee*,

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[89] The highest courts of other states have articulated a similar view. (See, e.g., *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891; *Berry v. State* (Miss. 1997) 703 So.2d 269, 275; *Conover v. State* (Okla.Crim.App. 1997) 933 P.2d 904, 921; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180; *State v. Taylor* (La. 1996) 669 So.2d 364, 371-372.)

supra, 501 U.S. at p. 826.) Similarly, in *Edwards*, the victim impact evidence consisted of photographs of the victim while alive, and the prosecutor's argument to the jury, "You can imagine what the experience was like for [the surviving victim] to go through. You can imagine [the deceased victim's] family and what it is like." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 838.) To quote Justice O'Connor's concurring opinion in *Payne*, "surely this brief [evidence] did not inflame [the juror's] passions more than did the facts of the crime[s.]" (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 832 (conc. opn. of O'Connor, J.).)

Thus, to be consistent with the facts and holding of *Payne*, victim impact evidence, if any is to be admitted, must be attended by appropriate safeguards to minimize the prejudicial effect of that evidence, and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision.

Moreover, victim impact evidence should be limited to those effects which were known or reasonably apparent to the defendant at the time he committed the crime or were properly introduced at the guilt phase of the trial to prove the charges. These limitations are consistent with *Payne v. Tennessee*, *supra*, where the victim impact evidence described the effect of the crime on the son and brother of the victims who was himself present at the scene of the crime, and whose existence and likely grief were therefore well-known to the defendant. These limitations are also necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes, and to avoid expanding the aggravating circumstances to the point that they become unconstitutionally

vague.[90]

Further, to be relevant to the circumstances of the offense, the evidence must show the circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) The only type of victim impact evidence which meets this standard is evidence concerning the "the immediate injurious impact of the capital murder" (*People v. Montiel*, *supra*, 5 Cal.4th at p. 935), and evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence properly received during the guilt phase (*People v. Fierro*, *supra*, 1 Cal.4th at pp. 264-265 (conc. and dis. opn. of Kennard, J.)).

D. The Victim Impact Photographic Evidence In This Case Was Irrelevant And Unfairly Inflammatory

Although this Court has not established detailed guidelines for the admission of evidence about the victim's character, the cases in which the admission of such evidence has been approved generally involve brief, factual, and noninflammatory evidence. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 267 [evidence of the victim's plan to enlist in the Army at the time of her death]; *People v. Montiel*, *supra*, 5 Cal.4th at pp. 934-935 [evidence that the victim was in excellent health at time of his death, that he needed to use a walker to get around, but could still enjoy life]; *People v.*

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[90] In California, aggravating evidence is only admissible when it is relevant to one of the statutory factors (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776), and victim impact evidence is admitted on the theory that it is relevant to factor (a) of Penal Code section 190.3, which permits consideration of the "circumstances of the offense" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835).

Edwards, *supra*, 54 Cal.3d at p. 832 [photographs of the victims shortly before their deaths].)

Other states have established more specific standards. For example, the Supreme Court of Tennessee has held that "[g]enerally, victim impact evidence [about the victim's character] should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed." (*State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891.) Similarly, the Supreme Court of New Jersey has held that victim character evidence "can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests," but "should be factual, not emotional, and should be free of inflammatory comments or references." (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.)

The Louisiana Supreme Court has also emphasized the need for restraint in the admission of victim character evidence. Although that court held that the prosecution could "introduce a limited amount of general evidence providing identity to the victim," it also warned that special caution should be used in the "introduction of detailed descriptions of the good qualities of the victim" because such descriptions create a danger "of the influence of arbitrary factors on the jury's sentencing decision." (*State v. Bernard* (La. 1992) 608 So.2d 966, 971.) The Supreme Court of New Mexico likewise held that "victim impact evidence, *brief and narrowly presented*, is admissible" in capital cases. (*State v. Clark* (N.M. 1999) 990 P.2d 793, 808, italics added.)

In the present case, at least three of the photographs overstepped the bounds of admissible victim impact evidence. Not only did the challenged photographic evidence graphically illustrate details about Ms. Morris's

early family life, none of which appellant could possibly have known anything about, but they also manipulated the emotions of the jury in a way which was not properly related to the circumstances of the crime. For instance, one of the photos depicted Ms. Morris with her nephews, who were young boys at the time it was taken. This photo depicted Ms. Morris as well as her nephews at a time over 50 years before the crime, and thus had virtually no relevance to the circumstances of the crime. Nonetheless, it would have left the jury with the image that appellant deprived young children of their relationship with her.

Evidence concerning events that occurred many years before or after the victim's death does not fall within any reasonable common-sense definition of the phrase "circumstances of the crime." (Pen. Code, § 190.3, factor (a).) Accordingly, if the victim impact evidence in this case was in fact admissible as "circumstances of the crime," then Penal Code section 190.3, factor (a), is unconstitutionally overbroad and vague. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17.)[91]

In this case, the prosecutor improperly used the photographs themselves to argue for death, even though at least three of them did not accurately portray Ms. Morris anywhere near the time of the crime. The prosecutor asked the jury to reject life without the possibility of parole based on the contrast between the photographs of Ms. Morris while she was alive and of those following her death. The invitation to compare the

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[91] See *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776) [the jury should be given clear and objective standards providing specific and detailed guidance]; *Tuilaepa v. California* (1994) 512 U.S. 967, 975 [sentencing factors must have a common-sense core of meaning that juries are capable of understanding].

photographs of Ms. Morris at stages in her life many years before the crime with photographs of her taken at the crime scene could only have the effect of inflaming the passions of the jury. As the majority in *Payne* put it: "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question. . . ." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

Here, the photographs were not merely to provide the jury with circumstances of the crime, but instead to inflame the passions of the jury against appellant. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, *based on reason rather than caprice or emotion.*" (*Gardner v. Florida* (1977) 430 U.S. 349, 358, emphasis added.) The emotional nature of the photographs, which was exacerbated by the prosecutor's manipulative use of them in his argument, was so out of proportion to the evidence introduced in *Payne* and *Edwards* as to shift the focus of the jury from "a reasoned moral response" to appellant's personal culpability and the circumstances of his crime (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319), to a passionate, irrational, and purely subjective response to the grief of the victim's family. (See *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 830 ["The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process"]; *People v. Raley* (1992) 2 Cal.4th 870, 916 [in deciding whether victim impact evidence violates the federal Constitution, this Court examines victim impact evidence to determine if it "led the jury to be overcome by emotion"].)

Clearly, this was not the type of evidence the *Payne* and *Edwards*

decisions had in mind when they allowed evidence and argument on the specific harm caused by the defendants in those cases. To the contrary, the emotionally charged and cumulative photos of Ms. Morris when she was alive were precisely the type of evidence that *Payne* and *Edwards* recognized as unduly prejudicial and likely to provoke irrational, capricious, or purely subjective responses from the jury. (*Payne v. Tennessee*, 501 U.S. at p. 825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) This was especially so in light of how they were displayed and utilized by the prosecutor during his highly inflammatory and manipulative closing argument where he urged the jury to impose death by comparing and contrasting the pre and post-mortem photographs, as well as admonishing them that the photograph of Ms. Morris while alive "deserves justice." Admission of the emotionally charged, cumulative and unduly prejudicial photographs of Ms. Morris while alive violated appellant's right to due process and a fundamentally fair trial under the Fifth, Sixth and Fourteenth Amendments, and contravened the need for reliability in the application of the death penalty mandated by the Eighth Amendment. As such, his death sentence must be vacated. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

IX

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON LINGERING DOUBT OF GUILT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant requested that the trial court provide the penalty jury with instructions on lingering doubt of appellant's guilt.[92] The first instruction follows:

> Any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty.

(22 CT 5951 [Proposed Penalty Phase Instruction No. 4].)

The trial court refused to give the instruction, ruling that although lingering doubt of guilt "was an appropriate argument for the defense to make," a specific instruction on the mitigating factor was not required. (20 RT 2784.) The second instruction, which the court also refused to give (see 20 RT 2783-2784), was included in appellant's proposed expansion or modification of CALJIC No. 8.85 on mitigating factors, and would have informed the jury that one of the circumstances that they could consider which extenuates the gravity of the crime was "[a]ny lingering or residual doubt [they] may have about the defendant's guilt." (22 CT 5979 [Proposed Penalty Phase Instruction No. 30].)[93]

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[92] The prosecutor objected to these instructions. (See 20 RT 2784.) Appellant proposed 42 special instructions in total; all but one was opposed by the prosecutor, appellant's Proposed Penalty Phase Instruction No. 26, which was ultimately the only specially requested instruction the trial court provided. (20 RT 2798; XXII CT 5932.)

[93] The trial court's refusal to give appellant's proposed expansion/modification of CALJIC No. 8.85, which included lingering doubt as a factor to consider in mitigation, is discussed in more detail in

(continued...)

Under the facts of this case, appellant was entitled to an instruction that the jurors may consider lingering doubt of guilt as a factor in mitigation. The failure to give any such instruction was prejudicial and not only violated state law, but it also denied appellant's state and federal constitutional rights, and resulted in precluding the jury of its ability to give effect to all available factors in mitigation and resulted in fundamentally unfair penalty phase proceedings. Appellant's proposed instructions appropriately explained the concept of lingering doubt of guilt which the jury could consider in expressing their "reasoned moral response" to mitigating evidence presented at the penalty phase. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 319, quoting *California v. Brown* (1988) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.); accord, *Brewer v. Quarterman* (2007) ___ U.S. ___ [127 S.Ct. 1706, 1709-1710].) The trial court's refusal to give appellant's proposed lingering doubt instructions was error and violated appellant's appellant's right to present a defense (U.S. Const., 6th, 14th Amends.; Cal. Const., art. I, §§ 7, 15; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099); his right to a fair and reliable determination of penalty (U.S. Const., 8th, 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638); and right to a fundamentally fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) The court's refusal to give the proposed instructions also violated appellant's right to

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[93] (...continued)
Argument XIII, *infra*.

trial by a properly instructed jury (U.S. Const., 5th, 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302) and violated federal due process by arbitrarily depriving him of his state right to requested instructions supported by the evidence (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300). The error requires reversal of the penalty judgment.

This Court has recognized that lingering doubt as to guilt can play a part in the jury's assessment of penalty and that defense counsel has a right to argue lingering doubt as a consideration in determining punishment. (See *People v. Cox* (1991) 53 Cal. 3d 618, 677-678.) Although this Court has held that a lingering doubt instruction is not required by either the state or federal constitutions, it has recognized that such instruction may be required by the evidence in any given case. (See *People v. Fauber* (1992) 2 Cal.4th 792, 863-865; *People v. Cox*, *supra*, 53 Cal.3d. at p. 678, fn. 20.) It is appellant's contention that this Court is incorrect in holding that a lingering doubt instruction is not constitutionally required; nonetheless, under the facts of this case, the instruction was required.

This Court's holding that there is no constitutional right to an instruction on lingering doubt is based on the perception that CALJIC No. 8.85 adequately alerts the jury that it can consider lingering doubt in its determination of penalty. (*People v. Lawley* (2002) 27 Cal.4th 102, 166; *People v. Osband* (1996) 13 Cal.4th 622, 716.) Specifically, this Court has held that factors (a) and (k) enumerated in CALJIC No. 8.85 are adequate for a jury to give effect to lingering doubt. (*People v. Osband*, *supra*, 13 Cal.4th at p. 716.) This holding should be reconsidered as neither factor has any language about or provides any direction for the jury to address

residual doubts as to the defendant's guilt.

Factor (a) concerns the circumstances of the crime and the special circumstances found to be true. (CALJIC No. 8.85.)[94] Factor (a) directs a juror to take into account and be guided by the crime itself. It does not direct the juror to consider residual doubt about the person just convicted. In addition, it does not lend itself to consideration of a lingering doubt of guilt. Factor (k) directs the jury to consider any circumstance which may extenuate the gravity of the crime even if it not a legal excuse for the crime. (CALJIC No. 8.85.)[95] Like factor (a), factor (k) does not lend itself to consideration of a lingering doubt of guilt. Indeed, there is absolutely no language in either factor that instructs a juror that he or she may consider a lingering or residual doubt concerning the defendant. Factor (k) also directs the jury to consider any aspect of the defendant's character or record, but

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[94] With regard to factor (a), the jury was instructed pursuant to CALJIC No. 8.85, which stated:

> The circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true.

(20 RT 2798.)

[95] With regard to factor (k), the jury was instructed pursuant to CALJIC No. 8.85 which stated:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(20 RT 2800.)

this does not relate to residual doubt of guilt. Instead, it leads the jury to other considerations, since an aspect of the defendant's character or record, by its own terms, has nothing to do with the crime. Pursuant to factor (k), appellant presented mitigating evidence of his childhood and positive relationships with his mother and brother. Because that evidence focused on appellant's character and background, it is unlikely the jury would have interpreted the relevant portion of CALJIC No. 8.85 (factor (k)) as an instruction allowing them to consider residual doubt they may have had as to appellant's participation in the crime.

The specific instructions proposed by appellant would have provided a method for the jury to give effect to any such lingering doubt. Because California's "standard" instructions do not adequately permit or direct the jury to consider lingering doubt, the failure to give any such instruction, such as the ones proposed by appellant, is a violation of appellant's due process and Eighth Amendment rights. (*Boyde v. California* (1990) 494 U.S.370, 377 [Eighth Amendment requires that jury be able to consider and give effect to all of a capital defendant's mitigating evidence]; *Penry v. Johnson* (2001) 532 U.S. 782, 797 [it is constitutionally insufficient merely to tell the jury it may "consider" mitigating circumstances].) In *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604, the Supreme Court held that states cannot exclude anything from the sentencer's consideration that might serve "as a basis for a sentence less than death." (See *Brewer v. Quarterman, supra,* ___U.S. ___ [127 S.Ct. 1706, 1709-1710]; *Abul-Kabir v. Quarterman* (2007) ___U.S. ___ [127 S.Ct. 1654, 1672-1674]; *Penry v. Lynaugh*, *supra*, 492 U.S. 323; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394, 398-399.)

Even assuming that a lingering doubt instruction is not required, one should have been given in the instant case. The trial court had a sua sponte

duty to instruct the jury on factors to consider in reaching a decision on the appropriate sentence. (*Lockett v. Ohio*, *supra*, 438 U.S. at pp. 604-605; *People v. Benson* (1990) 52 Cal.3d 754, 799.) "It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Additionally, this Court has noted, as a matter of statutory mandate under Penal Code section 1093, subdivision (f),[96] that a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20; see also *People v. Thompson* (1988) 45 Cal.3d 86, 134-135; *People v. Kaurish* (1990) 52 Cal.3d 648, 705-706.) This case falls within that "warranted" situation

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[96] Penal Code section 1093, subdivision (f) provides that:

> The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case. Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

where a lingering doubt instruction was required.

There was evidence to support appellant's proposed lingering doubt instructions because none of the numerous fingerprints obtained from the scene, including those from the sliding doors and the victim's bed, matched appellant, and forensic evidence allegedly linking him to the crime was speculative and inconclusive. There were 19 individuals who shared the same genetic profile as the semen obtained from the victim and the bed sheet. (See Arg. II, secs. D(3)-(D-4), *supra*, incorporated by reference.) Defense counsel's closing argument was designed to show the jurors that there were still grounds on which one or more of them might doubt their determination of guilt. He argued that lingering doubt was about "certainty," and that the jury should be "one hundred percent sure" of appellant's culpability in order to render a death verdict. Defense counsel asserted there was a lack of certainty in this case because physical evidence from the scene, such as the fingerprints, did not match appellant, and the forensic evidence upon which the prosecutor relied to prove the identity of the perpetrator was merely speculative. (20 RT 2834-2840.) To the extent that any juror had doubts as to his or her finding on guilt, the trial court's instructions did not provide a legal basis for the juror to apply such considerations to his or her penalty determination. (See *Carter v. Kentucky*, *supra*, 450 U.S. at p. 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law"].)

The trial court's refusal to instruct on lingering doubt deprived appellant of due process and a fair opportunity to present his defense. (*Bradley v. Duncan*, *supra*, 315 F.3d at p. 1099 [failure to instruct jury on defense may deprive defendant of his due process right to present a

defense].) "This is so because the right to present a defense 'would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.'" (*Ibid.*, quoting *Tyson v. Trigg* (7th Cir.1995) 50 F.3d 436, 448.)

Here, the instructions requested were appropriately phrased, unlike instructions on lingering doubt which have been rejected by this Court. (See *People v. Thompson*, *supra*, 45 Cal.3d at p.134.) Unlike those in *People v. Thompson*, *supra*, appellant's proposed instructions on this issue did not "invit[e] readjudication of matters resolved at the guilt phase." (*Id.* at p. 135.) Instead, appellant's proposed instructions properly called the jury's attention to the issue of residual feelings of doubt, and merely permitted them to consider any such doubt they may have had. The proposed instructions were carefully and narrowly constructed, informing a juror who may have entertained doubts that he or she "may" (not "must") consider them in determining the appropriate penalty. (22 CT 5951, 5979.)

In the sentencing phase of a capital case, it would have been justified to use the term "must consider" (rather than "may consider") because a penalty juror is required to at least consider any relevant mitigating factor. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-117; *People v. Brown* (1985) 40 Cal.3d 512, 537-538.) Moreover, the requested instructions were neutrally phrased, and asked the jurors to do less, not more, than that to which appellant was legally entitled. Even assuming the trial court had the discretion under state law to refuse to give a requested lingering doubt instruction, it was an abuse of discretion to do so in this case. The lingering doubt instruction was not just warranted by the evidence (*People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20); it was also required.

The trial court's refusal to provide the jury with the proposed

instructions on lingering doubt violated appellant's constitutional rights to due process, a fair trial, present a defense, equal protection, and a reliable and non-arbitrary penalty determination as provided by the Fifth, Sixth, Eighth and Fourteenth Amendments. By its refusal to specifically instruct on lingering doubt, the trial court also failed to provide the jury with guidance as to all potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See *Eddings v. Oklahoma*, *supra*, 455 U.S. at p 110; *Lockett v. Ohio*, *supra*, 438 U.S. 586; *Heiney v. Florida* (1984) 469 U.S. 920, 924 (dis. opn. cert. den. of Marshall, J.) ["The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice"].) The failure to give an instruction on residual doubt in this case also violated appellant's Sixth Amendment right to a properly instructed jury. (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

California law requires that lingering doubt be considered as mitigation when warranted by the evidence. (*People v. Terry*, *supra*, 61 Cal.2d at pp. 145-147.) Appellant requested "pinpoint" instructions which were "intended to supplement or amplify more general instructions" as he was entitled under state law. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 257.) The trial court's refusal to give the proposed lingering doubt instructions violated Due Process under the Fourteenth Amendment by arbitrarily depriving appellant of his right to a fundamentally fair penalty proceeding and reliable determination of penalty. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Moreover, it violated his state-created liberty right not to be sentenced to death by a jury that did not consider lingering doubt under appropriate instructions as a basis for a lesser sentence. (*Hicks*

v. Oklahoma, *supra*, 447 U.S. at p. 346; *Fetterly v. Paskett*, *supra*, 997 F.2d at pp. 1300-1301.) The denial of a state-created liberty right granted to other capital defendants also violated the Equal Protection Clause of the Fourteenth Amendment. (See *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 425.) In this case, the trial court's refusal to instruct on lingering doubt cannot be deemed harmless because not only did the evidence support such an instruction, but appellant's argument for the jury to impose life focused on a residual doubt of guilt. Accordingly, the judgment of death must be reversed. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)
(See Arg. XIII, sec. A., *infra*, which is incorporated here by reference.)

X

THE TRIAL COURT'S REFUSAL TO GIVE PROPOSED INSTRUCTIONS INFORMING THE JURY THAT THEY COULD DISPENSE MERCY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Factual Introduction

Defense counsel requested that the trial court provide a number of instructions which would have informed the jury of its ability to dispense mercy with regard to the penalty determination. The first instruction told the jury that it could be influenced by mercy, and that a sentence of life without possibility of parole might be appropriate based upon feelings of mercy engendered from the evidence:

> An appeal to the sympathy or passions of a jury is inappropriate at the guilt phase of a trial. However, at the penalty phase, you may consider sympathy, pity, compassion or mercy for the defendant in determining the appropriate punishment. [¶] You are not to be governed by conjecture, prejudice, public opinion or public feeling. [¶] You may decide that a sentence of life without possibility of parole is appropriate for the defendant based upon the sympathy, pity, compassion and mercy you felt as a result of the evidence adduced during the penalty phase.

(22 CT 5955 [Proposed Penalty Phase Instruction No. 8].) The second instruction also advised the jurors that they could exercise mercy on appellant's behalf in making its penalty decision:

> In determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant.

(22 CT 5954 [Proposed Penalty Phase Instruction No. 7].) A third instruction explained that mercy could be granted based on other factors – that is, including factors which were not directly adduced from evidence

presented at the trial. This instruction stated: "A juror might be disposed to grant mercy based upon other factors," and cited as authority *Kubat v. Thieret* (7th Cir. 1989) 867 F.2d 351, 373. (22 CT 5949 [Proposed Penalty Phase Instruction No. 2]; *Kubat v. Thieret, supra*, 867 F.2d at p. 373, fn. 19 ["A juror might be disposed to grant mercy based on other factors, such as a humane perception of the defendant developed during trial."].)

Appellant requested that the court provide other instructions which, although not specific to mercy, would have allowed the jury to consider all evidence presented by appellant in support of a sentence of life without possibility of parole and necessarily included the non-statutory mitigating factor of mercy. These instructions would have informed the jury that the factors in mitigation they could consider to determine the appropriate sentence were unlimited and that mitigating factors specifically enumerated by the court were merely examples of factors they could take into account in deciding penalty. One of the instructions proposed stated:

> Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without possibility of parole.

(22 CT 5948 [Proposed Penalty Phase Instruction No. 1].) Another proposed instruction stated:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. [¶] But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [¶] Any one of the mitigating factors, standing alone, may support a decision that death is

not the appropriate punishment in this case.

(22 CT 5983 [Proposed Penalty Phase Instruction No. 32]).

Finally, a third instruction, related to the issue of mercy in this case which appellant proposed stated:

> You may consider as mitigation that Royce Lynn [sic] Scott has a family that loves him if you find that to be a fact.

(22 CT 5982 [Proposed Penalty Phase Instruction No. 31]; (See Arg. XIII, sec. A, *infra*, which is incorporated by reference.)

The trial court refused to give any of the defense proposed instructions (see 20 RT 2783-2784), and the jury received no instruction which specifically explained that mercy was a possible basis for imposing life without possibility of parole.[97] Pursuant to CALJIC No. 8.85, the jury was merely told in general terms as to what it might consider to reach a determination of life without the possibility of parole:

> [subdivision] (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(20 RT 2800.) Similarly, pursuant to CALJIC No. 8.88, the jury was only generally told that it could assign moral or sympathetic value to any factors considered for making its penalty decision:

> You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

(20 RT 2845.)

As appellant will show, his proposed instructions appropriately

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[97] The prosecutor objected to these instructions. (See 20 RT 2784.)

explained the role that mercy, sympathy or compassion plays in the jury's "reasoned moral response" to mitigating evidence presented at the penalty phase. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 319, quoting *California v. Brown* (1988) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.).) The trial court's refusal to instruct the jurors that they were permitted to exercise mercy in determining which sentence to impose was erroneous and violated appellant's right to present a defense (U.S. Const., 6th, 14th Amends.; Cal. Const., art. I, §§ 7, 15; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099); his right to a fair and reliable determination of penalty (U.S. Const., 8th, 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638); and right to a fundamentally fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) The court's refusal to give the proposed instructions also violated appellant's right to trial by a properly instructed jury (U.S. Const., 5th, 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302) and violated federal due process by arbitrarily depriving him of his state right to requested instructions supported by the evidence (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.) Reversal of the death judgment is therefore required.

B. Appellant's Request For Instructions On Mercy Should Have Been Granted

1. Consideration of Mercy Is A Constitutionally Valid Response To Mitigating Evidence And A Guide For Juror Discretion In Determining Penalty

When the Supreme Court struck down the death penalty in the United States, juries exercised unbridled discretion in their sentencing decisions, such that the penalty could be, and was, imposed in an arbitrary and capricious manner. (See *Furman v. Georgia* (1972) 408 U.S. 238.) Sentencing schemes that mandated a sentence of death for particular crimes were also held to be unconstitutional because they excluded consideration of particularized characteristics of the defendant which may have evoked a compassionate or merciful response from jurors. (See *Roberts v. Louisiana* (1976) 428 U.S. 325.)

> A process that accords no significance to relevant facets of the character and record of the individual offender . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind . . . . [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death.

(*Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

When the Supreme Court approved a revised death penalty scheme, it required that jurors be guided in their discretion to determine the appropriate sentence and acknowledged that such discretion included a determination of those cases fit for mercy. "[T]he isolated decision of a jury to afford mercy does not render unconstitutional death sentences

imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." (*Gregg v. Georgia* (1976) 428 U.S. 153, 203.) In *Lockett v. Ohio* (1978) 438 U.S. 586, 604, the Supreme Court subsequently held that states cannot exclude anything from the sentencer's consideration that might serve "as a basis for a sentence less than death." (See *Brewer v. Quarterman* (2007) ___U.S. ___ [127 S.Ct. 1706, 1709-1710]; *Abul-Kabir v. Quarterman* (2007) ___U.S. ___ [127 S.Ct. 1654, 1672-1674]; *Penry v. Lynaugh*, *supra*, 492 U.S. 323; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394, 398-399.) The unfettered mitigation inquiry has been defended on grounds that it preserves the defendant's right, and the jury's prerogative, to mercy. By freeing mitigation evidence from any strict requirement of legal relevance, the *Lockett* principle reinforces the entitlement of the sentencer to exercise "discretion to grant mercy in a particular case." (See *Callins v. Collins* (1993) 510 U.S. 1141, 1144 (dis. opn. of Blackmun, J.); *Woodson v. North Carolina, supra,* 428 U.S. at pp. 303-305 [the jury must always be given the option of extending mercy]; *People v. Brown* (1988) 46 Cal.3d 432, 468 (conc. opn. of Mosk, J.) [observing after review of authorities that jury has "absolute discretion to choose life"].)

This Court has also acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. Trial courts "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*People v. Haskett* (1982) 30 Cal. 3d. 841, 864.) This statement recognizes that although mercy is not itself a listed, statutory factor in mitigation, and is not an aspect of the defendant's character, it is a

critical and legitimate "reasoned moral response" to mitigating evidence permitting imposition of a penalty less than death. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 222 (conc. opn., White, J.) [it is constitutionally permissible for jury to dispense mercy on the basis of factors too intangible to write into a statute"]; *Zant v. Stephens* (1983) 462 U.S. 862, 875-876, fn. 13.)

Mercy is an evidence-based consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty despite the defendant's culpability in the commission of the murder. (See *People v. Lanphear* (1984) 36 Cal.3d 164, 169 [trial counsel's plea of "mercy" and "compassion" relevant only to whether death was an appropriate penalty for the defendant notwithstanding his culpability in the commission of the murder].) Justice Blackmun's dissent in *California v. Brown*, *supra*, expresses concern about the imposition of the death penalty without juries having considered mercy for the defendant:

> In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value.

(*California v. Brown*, *supra*, 479 U.S. at pp. 562-563 (dis. opn. of Blackmun, J.).) Without adequate instructional guidance, however, there is a substantial likelihood that a jury may exclude any consideration of mercy, or believe that it is out of their reach, even though the concept is implicated by the evidence as well as the arguments of counsel. (See *Brewer v. Quarterman*, *supra*, ___ U.S. ___ [127 S.Ct. at pp. 1712-1714]; *California v. Brown*, *supra*, 479 U.S. at p. 546 (conc. opn. of O'Connor, J.) & pp. 547,

555 (dis. opn. of Brennan, J.) .) In fact, a jury could be misled by the prosecutor's argument into believing mitigating evidence relating to mercy must be disregarded. (See *Brewer v. Quarterman*, *supra*, ___ U.S. ___ [127 S.Ct. at p. 1712 [likelihood jurors accepted prosecutor's argument which necessarily disregarded any independent concern that defendant may not deserve death sentence due to his troubled background]; *California v. Brown*, *supra*, 479 U.S. at p. 546 (conc. opn. of O'Connor, J.), citing *Eddings v. Oklahoma* (1982) 455 U.S. 104, 119 (conc. opn. of O'Connor, J.) [instructions and comments of prosecutor may create legitimate basis for finding ambiguity concerning factors jury actually considered].)

Even in the absence of mitigating evidence, a mercy instruction should be required when requested. "Discretion to grant mercy -- perhaps capriciously -- is not curtailed." (*Moore v. Balkcom* (11th Cir. 1983) 716 F.2d 1511, 1521.) Mercy offers a means for the jury to deliver a just verdict even if they fail to find any mitigating factors as defined by the legislature and presented by the defendant. Indeed, this Court has consistently recognized that a jury may determine that the evidence is insufficient to warrant death even in the absence of mitigating circumstances. (See *People v. Duncan* (1991) 53 Cal. 3d 955, 979 [jury may decide that aggravating evidence not comparatively substantial enough to warrant death]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192 [same].)

A jury must be provided with a means for evaluating all mitigating evidence relevant to mercy, so they may express their "reasoned moral response" in a sentencing decision. The trial court has a sua sponte duty to instruct the jurors on the factors to consider in reaching that decision. (*Lockett v. Ohio, supra*, 438 U.S. at pp. 604-605; *People v. Benson* (1990)

52 Cal.3d 754, 799; Bench Notes of CALCRIM No. 763.) If a jury is not told that it has the power to consider mercy, in the same way that it must consider all the statutory mitigation offered by the defendant, it may falsely believe that the sentencing process involves merely a calculated weighing of factors, leaving them no method of effecting a moral response to evidence falling outside the enumerated factors and that a death sentence would simply be unjust.

2. Mercy Is A Concept Separate and Distinct from Sympathy, And Because Standard Penalty Phase Instructions Fail To Guide Juror Discretion To Consider Mercy, Special Instructions Such As Those Proposed By Appellant Are Necessary

Mercy is an intrinsic part of the guided discretion afforded to jurors, yet it holds a unique position in the sentencer's decisional process. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 331, quoting *Caldwell v. State* (Miss. 1983) 443 So.2d 806, 817 (dis. opn. of Lee, J.) ["'The [mercy] plea is made directly to the jury as only they may impose the death sentence'"].) Mercy can be defined as "compassion or forbearance shown especially to an offender," and sympathy as "an inclination to think or feel alike, the act or capacity of entering into or sharing the feelings or interests of another." (*Webster's Collegiate Dictionary* (1981) Tenth Ed. at pp. 727, 1195.) In addition, mercy is "a virtue that tempers or 'seasons' justice – something one adds to justice (the primary virtue) to dilute it and perhaps, if one takes the metallurgical metaphor of tempering seriously, to make it stronger." (Murphy & Hampton, *Mercy and Legal Justice in Forgiveness and Mercy* (1988) p. 166.)

Sympathetic background and character evidence is only one potential

source of a juror's decision to be merciful. While much of the evidence introduced pursuant to Penal Code section 190.3, factor (k), may evoke sympathy from jurors, significant aspects of a defendant's background and character can be said to have no sympathetic value, nor do they extenuate the gravity of the crime. Justice Mosk recognized the distinction between mercy and sympathy by stating that mercy "is the power to choose life over death – whether or not the defendant deserves sympathy – simply because life is desirable and death is not." (*People v. Andrews* (1989) 49 Cal.3d 200, 236 (dis. opn. of Mosk, J.).)

Appellant presented mitigating character evidence regarding the positive relationships he had with his mother and brother as well as some evidence about his childhood. (19 RT 2718-2733.) This evidence was intended to evoke sympathy for appellant. Appellant's mother and brother also testified that they did not want appellant to die, and at the close of their individual direct examinations, each made an independent request that the jury spare his life. (19 RT 2724, 2732.) Although the evidence that appellant's mother and brother did not want him executed was likely to inspire sympathy for those family members, it was not likely to inspire sympathy for appellant.

Accordingly, if the jury believed that mercy should be exercised, and the penalty of life without possibility of parole based on the pleas of appellant's family because life "is desirable and death is not" (*People v. Andrews, supra*, 49 Cal.3d at p. 236 (dis. opn. of Mosk, J.)), there was no instruction explaining to them that they could do so. Without an instruction about the relationship of mercy to the jury's sentencing decision, there is a substantial likelihood the jury believed they were precluded from considering this constitutionally relevant evidence that did not fit neatly into

any statutory mitigating factor, including factor (k). (See Pen. Code, § 190.3, factors (d)-(k).)

Appellant also presented the testimony of Anthony Casas, a criminal justice consultant, on the issue of appellant's prison adjustment. According to Casas, if appellant was sentenced to life imprisonment without parole, he would adjust well to the prison system and not be a threat to inmates, guards or staff. (19 RT 2749-2753.) The jury was constitutionally required to consider, as relevant evidence in mitigation of punishment, evidence of appellant's prison adjustment. (*Tennard v. Dretke* (2004) 542 U.S. 274, 285; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5.) However, appellant's positive adjustment to the prison system does not generate "sympathy" or "extenuate the gravity of the crime," as described in factor (k).

Thus, as with the pleas to spare appellant's life made by his mother and brother, a jury appropriately instructed could reasonably have relied on evidence of appellant's prison adjustment to determine that, despite the relative weight of statutory aggravating and mitigating factors, he was deserving of the jurors' mercy and a death sentence was inappropriate. Absent an instruction to adequately guide the jury's reasoned moral response to grant mercy, the family's plea for mercy and prison adjustment evidence became virtually irrelevant as it did not portray appellant in a sympathetic light, nor did it extenuate the gravity of the crime to fall within the ambit of factor (k) mitigation.

In a capital case, penalty phase instructions, as well as the arguments of counsel, must be examined as a whole to determine whether the jury was adequately informed. (*People v. Melton* (1988) 44 Cal. 3d 713, 759.) In *People v. Melton*, *supra*, although the jury received an instruction in the

literal terms of factor (k), they also heard that mitigating circumstances may be considered in "fairness and mercy," and were informed that mitigating factors were unlimited. (*Id.* at p. 760.) In *People v. Andrews* (1989) 49 Cal.3d 200, 227-228, this Court also found no mercy instruction was necessary because the prosecutor's argument acknowledged that the jury could consider mercy as a reason to impose life over death.

In contrast, the jurors in this case were not adequately informed of their ability to dispense mercy. They were instructed only pursuant to the literal and general terms of statutory mitigating factors pursuant to pattern instructions. They were also not told that mitigating factors were unlimited or that the factors enumerated by the court were merely examples of what they could consider in making their penalty decision. (See Arg. XIII, sec. A, *infra.*, incorporated by reference.)

In addition, the prosecutor's argument was anything but acknowledgment that the jury could consider mercy as a reason to spare appellant's life. The prosecutor instead argued that appellant was not deserving of sympathy and deserved to die. Insinuating that the lack of mitigation under factors (d) through (j) constituted aggravation (20 RT 2821-2825), the prosecutor also made clear that even under factor (k), there was no "reason to be sympathetic to [appellant] and spare his life" (20 RT 2825). It is therefore reasonably likely the jury believed that mitigating factors presented on appellant's behalf, such as the pleas for life by appellant's family or his positive prison adjustment, did not properly fall under any concept of factor (k) ("sympathetic or other factors as to defendant's character and background). The prosecutor's argument that there was no reason to be sympathetic necessarily reinforced that incorrect belief and precluded any possibility that the jury would have considered

otherwise. (See *California v. Brown, supra*, 479 U.S. at p. 546 (conc. opn. of O'Connor, J.).)

The failure to provide appellant's proposed instructions on mercy effectively precluded the jury's ability to give effect to mitigating factors which did not fall squarely into factor (k), thus violating the principle that a capital defendant should receive an individual sentence based on the consideration of all relevant mitigating evidence. (See *Lockett v. Ohio*, *supra*, 438 U.S. 586.) Because mercy is an acknowledged part of the jury's capital sentencing determination (see *People v. Haskett*, *supra*, 30 Cal. 3d. at p. 864; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 203), it is constitutionally unacceptable for jurors to be uninformed of their right to exercise mercy in response to any mitigating evidence. Accordingly, instructions regarding the jury's ability to dispense mercy were constitutionally mandated.

C. The Trial Court's Refusal To Instruct The Jury With Appellant's Proposed Instructions On The Role Of Mercy In Determining The Appropriate Penalty Precluded Consideration Of Mitigating Evidence Intended To Inspire The Jury To Be Merciful

The special instructions proposed by appellant explained the relevance of mercy apart from the statutorily enumerated mitigators, including the concepts set forth in factor (k). The instructions also clarified that the jury could exercise mercy on behalf of the defendant, based on evidence adduced at the penalty phase. (22 CT 5949, 5954-5955.) Appellant's proposed instructions regarding mercy made clear that the mitigating factors the jury could consider were unlimited and not merely restricted to those enumerated in CALJIC No. 8.85. (22 CT 5948, 5983.) Based on the facts presented, the proposed instructions provided the

guidance necessary for the jury to consider and dispense mercy, a framework critical to their determination whether death was an appropriate sentence. Because the majority of appellant's mitigating evidence was designed to elicit mercy as a "reasoned moral response" from the jury, he was entitled to an instruction explaining the role mercy could play in the sentencing decision.

The prosecutor began his penalty phase summation by asserting that appellant "has asked and will ask for mercy," but that "by his actions, [he] has earned the death penalty." (20 RT 2804.) The prosecutor then urged the jury to disregard any consideration of mercy because of the circumstances of the crime - the acts of violence inflicted on Ms. Morris (20 RT 2809-2813) as well as violent acts appellant had committed on others (20 RT 2816-2819).[98] The law, however, does not require jurors to dispense mercy proportionate to the amount of "mercy" shown by a defendant to his victim. The absence of the proposed instructions combined with the prosecutor's argument would have reasonably led the jury to believe they were so restricted. Such a misunderstanding during their deliberations would have created a false limitation on their right and ability to consider and exercise mercy. As a result, the prosecutor was able to secure a death sentence, based in part, on the jurors' misunderstanding that

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[98] For instance, the prosecutor argued that appellant had "far more chances than he ever gave Della Morris." (20 RT 2818, 2821.) The prosecutor also argued that life in prison is not punishment enough for "what [he] did to Della Morris." (20 RT 2827.) Disparaging of the mitigation evidence presented for sparing appellant's life, the prosecutor claimed that appellant's family had "made a plea for mercy for a man who has demonstrated that he does not know the meaning of the word" (20 RT 2827), and that while the victim deserved justice, appellant deserved death. (20 RT 2830.)

the facts of the crime or that of his prior criminal acts prohibited consideration of mercy for appellant. Appellant's proposed instructions, explaining the role of mercy in determining the appropriate sentence, would have removed any such false restriction on the jury's consideration of mercy as a reason to find life over death in spite of the balance of mitigating and aggravating factors.

Defense counsel's closing argument emphasized the lack of any necessity to execute appellant, lingering doubt as to appellant's involvement in the crime, and the requirement of certainty in order to find death to be the appropriate sentence. After having been denied the proffered instructions on mercy, as well as others relating to the scope of mitigating factors, defense counsel did not argue to the jury its ability and right to exercise mercy. (20 RT 2834-2850.) Although he described in his argument the compassion that one of the victims from a prior offense (King) exhibited towards appellant, even this portion of the argument would not have informed the jury that it had the prerogative to be similarly merciful, without the court offering any instruction as to the means by which they could reach such a result.

Even if this Court were to assume that the arguments of counsel informed the jury, with any clarity at all, that it could exercise mercy, it is well settled that arguments of counsel cannot substitute for proper jury instructions. (See *Taylor v. Kentucky* (1978) 436 U.S. 478.) Moreover, the jury here was specifically instructed to consider the law only as stated in the court's instructions. (20 RT 2788.)

The penalty phase instructions must eliminate any ambiguity concerning the factors actually considered by the sentencing body in imposing a judgment of death. (*People v. Easley* (1983) 34 Cal. 3d 858,

879.) Appellant's proposed instructions were appropriate to guide the jury's consideration and eliminate any ambiguity concerning mercy. Instead, the jury was left without guidance, the ramifications of which were compounded by the prosecutor's argument to disregard any consideration of mercy. At best, the jury would have believed only *sympathetic* evidence relating to mercy was relevant to a determination of the appropriate sentence. (See CALJIC 8.85; 20 RT 2800.) Notably, however, the prosecutor asserted that with the exception of factor (k), there was no evidence of mitigation, and "even that evidence suggest[ed] that death is the appropriate punishment." (20 RT 2825.) Had the trial court provided the jury with the clarifying instructions appellant offered to explain the role of mercy to determine the appropriate sentence, even if the jury agreed with the prosecutor, they may have still reasonably decided to dispense mercy on appellant and sentence him to life imprisonment.

D. Reversal Of The Penalty Judgment Is Required

Appellant introduced relevant evidence in mitigation that was intended to inspire mercy in the jurors. The state may "not preclude the jury from giving effect to any relevant mitigating evidence." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276, citations omitted; accord, *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) Because the trial court's charge to the jury omitted appellant's requested instructions on the role of mercy in determining the appropriate sentence, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.)

The standard pattern jury instructions provided no means to give effect to evidence not necessarily displaying "sympathetic" aspects of

appellant's background and character, but nevertheless warranting the jurors' merciful response. Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde v. California* (1990) 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty" (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*) Accordingly, the judgment of death must be reversed.

XI

THE TRIAL COURTS REFUSAL TO GIVE AN INSTRUCTION PROPERLY DEFINING THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE WAS ERRONEOUS AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant requested that CALJIC No. 8.84, which informed the jury that the penalties for first degree murder with special circumstances were death or life without possibility of parole, be augmented to include an instruction defining the sentence of life without the possibility of parole.[99] His request was to add the following instruction to paragraph two of CALJIC No. 8.84:

> These sentences mean what they say. If you recommend that the defendant Royce Lyn Scott, be sentenced to death, he will be sentenced to death and executed. [¶] If you recommend life imprisonment he will be so imprisoned for the balance of his natural life.

(22 CT 5968 [Proposed Penalty Phase Instruction No. 20].) The trial court

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[99] CALJIC No. 8.84, as provided to the jury in this case, is as follows:

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

(20 RT 2787.)

refused to augment CALJIC No. 8.84 with the proposed instruction. (See 20 RT 2783-2784.) Neither CALJIC No. 8.84, nor any other instruction given in this case, informed the jurors that a sentence of life without possibility of parole meant just that – i.e., that appellant would never be considered for parole.[100]

The failure to define for the jury "life without possibility of parole" violated due process by failing to inform the jury accurately of the meaning of the sentencing options, thereby violating appellant's right to a properly instructed jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1 § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *People v. Sedeno* (1974) 10 Cal.3d 703, 720.) The trial court's refusal to provide the jury with the proposed definition of life without possibility of parole violated appellant's right to present a defense (U.S. Const., 6th, 14th Amends.; Cal. Const., art. 1, §§ 7 & 15; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099), his right to a fair and reliable penalty determination (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638), and his right to a fundamentally fair trial secured by due process of law (U.S. Const.,, 14th Amend.; Cal. Const., art. 1, §§ 7 & 15; *Estelle v. McGuire* (1991) 502 U.S.

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[100] See CALJIC No. 8.88, which merely stated that the sentencing alternative to death was life without possibility of parole. That instruction stated, in relevant part:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

(20 RT 2844.)

62, 72; *Estelle v. Williams* (1976) 425 U.S. 501, 503). The error also violated federal due process by arbitrarily depriving appellant of his state-created right to requested instructions supported by the evidence. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.)

By not defining the meaning of a sentence of life without possibility of parole, it is likely that the jurors, out of concern that the defendant might be released, did not properly consider appellant's mitigating evidence. This concern was more likely than not because the prosecutor focused significantly on appellant's numerous criminal activities, occurring prior and subsequent to the instant offense, during his closing argument. Relying upon those activities, the prosecutor urged the jury to consider his future dangerousness as a compelling reason to return a death verdict. (See Arg. XII, *infra*, which is incorporated by reference.) Thus, the court's refusal to give the proposed instructions prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Although this Court has rejected this argument (see, e.g., *People v. Wilson* (2005) Cal.4th 309, 355; *People v. Gordon* (1990) 50 Cal.3d 1223, 1277; *People v. Thompson* (1988) 45 Cal.3d 86, 130-131), appellant respectfully requests that this Court reconsider its decisions in light of rulings on this issue by the United States Supreme Court.

In *Simmons v. South Carolina* (1994) 512 U.S. 154, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment and state law prohibits the defendant's release on parole, due process requires that the sentencing jury

be informed that the defendant is ineligible for parole. The plurality relied upon public opinion and juror surveys to support the common sense notion that jurors are confused about the meaning of the term "life sentence." (*Id.* at pp. 168-170 & fn. 9.)

The opinion in *Simmons v. South Carolina*, *supra*, has been twice reaffirmed by the United States Supreme Court. In *Shafer v. South Carolina* (2001) 532, U.S. 36, the Court reversed a second South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. The Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at p. 52 [citation omitted].) More recently, in *Kelly v. South Carolina* (2002) 534 U.S. 246, the Court again reversed a South Carolina death sentence for failure to give an instruction defining life without the possibility of parole in a case where the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Supreme Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 256.)

In this case, just as in *Kelly* and *Shafer*, there was an inference of future dangerousness sufficient to warrant an instruction on parole ineligibility. In *Kelly v. South Carolina*, *supra*, the Court ruled that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point

does not disappear merely because it might support other inferences or be described in other terms." (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 254, footnote omitted.) The Court found that future dangerousness was a logical inference from the evidence and injected into the case through the State's closing argument.(*Id.* at pp. 250-251; see also *Shafer v. South Carolina*, *supra*, 532 U.S. at pp. 54-55; *Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 165, 171, plur. opn. [future dangerousness an issue because the "State raised the specter of . . . future dangerousness generally" and "advanc[ed] generalized arguments regarding the [same]"]; *id.* at p. 174, (conc. opn. of Ginsburg, J.); *id.* at 177 (conc. opn. of O'Connor, J.).) As Justice Rehnquist stated in his dissent from the *Kelly* decision, "the test is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 261 (dis. opn. of Rehnquist, J.); see also *Bronshtein v. Horn* (3rd Cir. 2005) 404 F.3d 700, 716-717.) The evidence in this case shows that this criteria was met.

In this case, the evidence introduced by the prosecution as well as the prosecutor's closing argument placed future dangerousness in issue. First, the prosecution introduced as aggravation evidence of violent criminal activity by appellant that occurred both prior to and following the Morris homicide. As the United States Supreme Court has recognized, evidence of past criminal conduct may be indicative of future dangerousness. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 5.) Second, appellant's other acts of misconduct, including burglaries and alleged assaultive conduct, as well as his prior felony convictions, were capitalized on by the prosecution during its penalty closing argument to argue appellant's "future

dangerousness to society." Apart from arguing that appellant deserved the death penalty because of his "violent nature" and "violent past" (20 RT 2817-2818), the prosecutor argued that appellant had a proclivity for entering residences in the middle of the night and committing burglaries.

In referring to appellant's 1988 prior act of violence and felony conviction for the attempted robbery incident involving Thomas Meyer and Dan King, the prosecutor argued:

> Here we have, as we have with so many people who are minding their own business, in this case, in their sleeping quarters, a camper at the construction site where they are working, and we have, again, a screen door, another factor that seems to be present when Mr. Scott strikes. . . . [¶] We have the defendant who is angry, demanding, threatening, and simulating a weapon . . . . We have a clear episode four years before the murder showing the violent nature of Mr. Scott.

(20 RT 2816-2817.) In referring to the incident involving Jeffrey Cole and Kenneth Eastbourne, which occurred after the Morris homicide, the prosecutor argued that appellant's conduct demonstrated a continued pattern of inflicting violence on unsuspecting victims in their own homes:

> You heard how Mr. Scott came in and, again, how he is demanding; he is angry; he is threatened. [Sic] Again, you have people minding their own business in their own house, and again we have this screen door element, Mr. Scott coming in where he does not belong; Mr. Scott bringing his violence on people that are minding their own business. . . . [¶] You get a clear indication of the anger and violence present in this incident, present in the defendant.

(20 RT 2817-2818.) The message from the prosecutor's argument is that appellant was a clear and present danger that needed to be stopped or he

would commit serious harm again.[101] In light of the evidence presented and the prosecutor's argument, the *Simmons* instruction was required in this case.

This Court has erroneously concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is life without parole. (E.g., *People v. Wilson* (2005) 36 Cal.4th 309, 355; *People v. Arias* (1996) 13 Cal.4th 92, 172-174.) This holding is erroneous and must be reconsidered. There is simply no evidence that juries accurately understand the meaning of life without the possibility of parole. Instead, empirical evidence establishes widespread confusion about the meaning of such a sentence in California.

One study revealed that, among a cross-section of 330 death-

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[101] The three unrelated burglary incidents that occurred in August 1992 which were presented at the guilt phase as evidence of appellant's intent for the burglary charge connected to the homicide were not admissible at the penalty phase as factor (a), (b) or (c), aggravating evidence. In his closing argument, however, the prosecutor indirectly referred to them, thus leaving the jury with the impression the evidence of the unrelated burglaries admitted at guilt, but not actually presented as aggravating evidence during the penalty phase, should be considered in deciding whether to impose life or death. The prosecutor's closing argument regarding "people minding their own business in their own homes" coupled with the "screen door element" no doubt reminded the jury of appellant's other nighttime burglaries introduced in the guilt phase. In light of the explicit instructions by the trial court, as well as the prosecutor's argument, that the jury could consider all evidence presented in this case, including that from the guilt phase (20 RT 2788, 2803), evidence of the unrelated burglaries was likely considered by the jurors as non-statutory and impermissible aggravation. These other criminal acts would have only served to reinforce the prosecutor's argument strongly implying appellant's future dangerousness.

qualified potential venire persons in Sacramento County, 77.8% disbelieved the literal language of life without parole. (Ramon, Bronson & Sonnes-Pond (1994) *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever*, 21 CACJ Forum No. 2 at pp. 42-45.) In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point. (Haney, Hurtado & Vega (1992) *Death Penalty Attitudes: The Beliefs of Death Qualified Californians*, 19 CACJ Forum No. 4, at pp. 43, 45.) California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death jurors cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (Haney, Sontag & Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1995) 50 J. Soc. Issues 149, 166; see Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L. Rev. 605, 643-671; *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 168.) The information given California jurors is not significantly different from that found to be deficient by the United States Supreme Court.

The jurors determining the penalty to impose on appellant were instructed that the sentencing alternative to death is life without possibility of parole, but they were never informed that life without possibility of parole means that defendant will never be released. In *Kelly v. South*

Carolina, *supra*, counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. In that case, the judge told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. (*Kelly v. South Carolina*, *supra*, 534 U.S. at p. 257.) In *Shafer v. South Carolina*, the defense counsel similarly argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." (*Shafer v. South Carolina*, *supra*, 532 U.S. at p. 52.) Nonetheless, the United States Supreme Court found these statements inadequate to convey a clear understanding of parole ineligibility. (*Id.* at pp. 52-54.) In *Simmons v. South Carolina*, *supra*, the Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 170.)

In this case, the instructions merely stating that the sentencing alternative to death was life without possibility of parole did not adequately inform the jurors that a life sentence for appellant would make him ineligible for parole. (CALJIC Nos. 8.84, 8.88; contra, CALCRIM No. 766 ["In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole will be carried out."].) The core principle from *Simmons v. South Carolina, supra,* is that the Constitution will not permit a false perception, whether brought about as a result of inadequate instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence. Since California's instructions do nothing to dispel the usual misconception about the sentence

of life without the possibility of parole, a clarifying instruction such as that proposed by the defense must be given.

The inadequate instruction in this case also violated the principles of *Caldwell v. Mississippi* (1985) 472 U.S. 320, as interpreted in *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn. 15, because the instructions taken as a whole "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without adequate instructional guidance on the meaning of life without parole, the jurors undoubtedly deliberated under the mistaken, but common misperception, that the choice they were asked to make was between death and a limited period of incarceration. (See *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility.

The prejudicial effect of the trial court's failure to instruct the jury with the definition of life without possibility of parole is clear. There is a substantial likelihood that at least one of the jurors concluded that the non-death option offered was neither real nor sufficiently severe and chose a sentence of death not because the juror deemed such punishment warranted, but because he or she feared that appellant would someday be released if they imposed any other sentence. (See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (conc. opn. of Gould, J.), quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, 691-692 ["in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence'"].)

Given the prosecution's use of the criminal conduct occurring

subsequent to the crime for which appellant was being sentenced, coupled with the prosecutor's closing argument focusing on future dangerousness, the jurors should have been instructed that a sentence of life without the possibility of parole meant that appellant would never be eligible for parole or that to base a sentencing decision on speculation about possible future release would be a violation of the jurors' oaths.

The prosecution suggested to the jury that appellant would be dangerous, urging it to sentence appellant to die because he had committed multiple violent acts against others, and that it was "lucky" for victims Cole and Eastbourne that the police arrived at the scene to preclude further violence and more serious harm. (20 RT 2818.) The implicit message from the prosecutor's argument was that appellant was a danger to all people. The prosecutor's argument increased the harm inherent in failing to instruct the jury on the definition of life without the possibility parole. Without the requested instruction, there was a substantial chance that the jury would sentence appellant because it believed that he was a dangerous person who might get out of prison and harm someone.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) Had the jury been accurately instructed concerning appellant's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 536-538; *Chapman v. California*, *supra*, 386 U.S. at 24.) It cannot be established that the error was harmless beyond a reasonable doubt and therefore had "no effect" on the penalty verdict.

(*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death must be reversed.

XII

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT IT WAS IMPROPER TO RELY SOLELY UPON THE FACTS SUPPORTING THE MURDER VERDICT AS AGGRAVATING FACTORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant requested that the court instruct the jury that it could not sentence appellant to death based solely upon the same facts that caused it to find appellant guilty of first degree murder as well as find the special circumstances true. Appellant proposed two instructions on this point. The first stated:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found Mr. SCOTT guilty beyond a reasonable doubt of murder in the first degree is not itself an aggravating circumstance.

(22 CT 5974 [Proposed Penalty Phase Instruction No. 25].)

The second proposed instruction read as follows:

> You may not treat the verdict and finding of first degree murder committed under [a] special circumstance[s] in and of themselves, as constituting an aggravating factor. For, under the law, first degree murder committed with a special circumstance may be punished by either death or life imprisonment without possibility of parole. [¶] Thus, the verdict and finding which qualifies a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over the other. You may, however, examine the evidence presented in the guilt and penalty phases of this trial to determine how the

underlying facts of the crime bear on aggravation or mitigation.

(22 CT 5973 [Proposed Penalty Phase Instruction No. 24].)

The trial court refused to give these instructions. (See 20 RT 2783-2784.) The failure to do so violated appellant's right to present a defense (U.S. Const., 6th, 14th Amends.; Cal. Const., art. I, §§ 7, 15; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099); his right to a fair and reliable determination of penalty (U.S. Const., 8th, 14th Amends.; Cal. Const., art. I, §§ 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638); and right to a fundamentally fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) The court's refusal to give the proposed instructions also violated appellant's right to trial by a properly instructed jury (U.S. Const., 5th, 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302) and violated federal due process by arbitrarily depriving him of his state right to requested instructions supported by the evidence (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.) Reversal of the death judgment is required.

It is well settled that a state's capital-sentencing scheme must channel the sentencer's discretion to "reasonably justify the imposition of a more severe sentence on the defendant as compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877, quoted in *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244; see also *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.) [striking down capital

sentencing statutes because "there is no meaningful basis for distinguishing the few cases in which [a death sentence] is imposed from the many cases in which it is not"].) The instruction appellant proposed was necessary to channel the jury's discretion at the penalty phase and to ensure that the jury would not sentence appellant to death merely because it had found him guilty of capital murder.

California has a three-step procedure for the imposition of the death penalty. In the first two steps, the jury determines death eligibility. In the first step, the jury must determine if a defendant has committed first degree murder (Pen. Code, §§ 187, 189); then, in the second-step, after it has found the defendant guilty of first degree murder, it must determine whether the alleged special circumstances are present (Pen. Code, § 190.2). Only if these two findings are made is the defendant eligible for the death penalty and will the case proceed to a third-step, the penalty phase. In the third phase the jury has a different, but equally important, function: it must determine whether the defendant who is eligible for the death penalty deserves to die. The jury does this by weighing evidence of aggravating factors against evidence of mitigating factors. (Pen. Code, § 190.3; see *Pulley v. Harris* (1984) 465 U.S. 37, 51 [summarizing California's procedure].)

In other capital sentencing schemes, the death eligibility determination and the death-worthiness determinations are combined. In these systems, the role of special circumstances (to determine death eligibility) and aggravating circumstances (to determine death worthiness) are presented together. (See, e.g., Nev. Rev. Stat. § 200.030(4)(a).) These systems contemplate only a two-step process, with the first step involving the murder determination and the second step involving the penalty

determination which combines death worthiness and death eligibility. Under this type of two-step system, whatever the additional finding at penalty phase is called, be it a "special circumstance" or an "aggravating factor," the jury determines whether the extra fact or facts exist and then weighs such facts against the mitigating evidence to determine whether a death sentence should be imposed. (See *Valerio v. Crawford* (9th Cir 2002) 306 F.3d 742, 752, quoting Nevada Revised Statutes section 200.030, subdivision (4)(a) ["In arriving at a penalty decision in a capital case, a Nevada jury is directed to weigh aggravating against mitigating circumstances. A Nevada jury may return a verdict of death for a death eligible defendant 'only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances'"].)

Under such a capital-sentencing system, the constitutional requirement that the sentencer's discretion be channeled is met at the penalty phase by having the jury determine death eligibility by ascertaining the existence of an aggravating factor from a limited category of such factors. The sentencer then weighs those aggravating factors against the mitigating factors, with the characteristics of the aggravating factors serving simultaneously to narrow death eligibility and to constrain the jury's discretion in the weighing process. This determines death worthiness. This type of capital-sentencing system precludes the jury from reaching a death determination based merely upon the same factors that caused it to find the defendant guilty of murder because it must first find an aggravating circumstance and then must weigh that fact against mitigating evidence to determine death worthiness.

Without instructions such as those which appellant proposed on this

issue, the California system provides no such constitutional safeguard. A jury is told simply to weigh aggravation against mitigation. However, there is no assurance that the required constitutional channeling of discretion will occur simply by weighing aggravation against mitigation. The penalty phase in California does not in and of itself accomplish the required channeling task because, as the scheme currently is structured, the jury is given minimal guidance at the penalty phase. (See *Tuilaepa v. California*, (1994) 512 U.S. 967 [California's system of aggravating factors not unconstitutional because it fails to instruct a jury on how to weigh any particular fact in the capital sentencing decision].)

Rather than being given guidance as to how to channel its discretion, the jury is given free reign to consider all of the evidence previously admitted in the guilt phase as a circumstance of the crime of which the defendant was convicted and the existence of any special circumstances found to be true. (See Pen. Code, § 190.3 factor (a).)[102] Indeed, appellant's jury was so instructed. (20 RT 2797-2798.) Without the instructions appellant proposed, which would have explicitly told the jury that it could not base a decision to sentence appellant to death on the facts it used to establish first degree murder and the special circumstance allegations, a jury is given no indication that it should not consider these very same facts as the *only* facts it utilizes to assess the death penalty. Thus, the jury's death sentencing determination is not channeled in a constitutionally acceptable manner.

The importance of channeling the jury's discretion regarding the

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[102] In Argument XIII, sec. B, *infra* and Argument XV, *infra*, appellant argues that the lack of guidelines in California's scheme for weighing aggravating factors violates the Eighth Amendment.

balancing of aggravating and mitigating circumstances is magnified in California because the lengthy list of special circumstances minimally narrows the class of persons who are death eligible. Commentators have even questioned whether California's capital-sentencing statute is sufficient to perform this narrowing function in a proper manner.[103] (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283.) Indeed, only seven limited categories of first degree murders are not death eligible, and between 1988 and 1992 approximately 87 percent of first degree murders had findings of special circumstances. (*Id.* at 1324-1326, 1331.) This basic problem was noted by Justice Broussard, who stated that the California capital-sentencing statute "sweeps so broadly that most murderers are subject to the death penalty, and only a few excluded." (*People v. Adcox* (1988) 47 Cal.3d 207, 275 (conc. opn. of Broussard, J.) Given the minimal narrowing accomplished by the special circumstances and the open-ended nature of the aggravating factors in section 190.3, the jury's discretion must be channeled at the penalty phase so that there can be a meaningful distinction between persons sentenced to death and persons who are death eligible, but not sentenced to death. (Pen. Code, § 190.3.)

If the California capital sentencing scheme is to pass constitutional muster, the use of the same facts to find the defendant guilty of capital

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[103] Appellant is not raising a "failure-to-narrow" claim here, but is addressing the fact that when a capital sentencing scheme is problematic as a whole it is even more important to ensure that the jury's discretion is narrowed at the penalty phase. Any claim that California's capital scheme is unconstitutional because it fails to narrow requires the development of facts not in the appellate record and must therefore be raised by way of a petition for writ of habeas corpus.

murder and also to find that the defendant deserves to die must be curtailed. Permitting such double-counting would mean that the same facts that rendered a defendant death eligible could then be used to sentence him to death, even in the absence of any additional facts being proved. Such a system is constitutionally impermissible. The death penalty is supposed to be reserved for those few who are the most culpable perpetrators of crime. (See *Spaziano v. Florida* (1984) 468 U.S. 447, 460, fn.7 ["There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death"].) This is why it is impermissible to have a mandatory death penalty statute. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 301.) Appellant's proposed instructions would have told the jury that it may not sentence appellant to death solely on the same facts that resulted in finding him death eligible.

Using the same evidence that the jury relied upon to find a defendant death eligible as the only evidence supporting the imposition of a death sentence eviscerates the distinction between death eligibility and death worthiness. This is apparent where, as in this case, the defendant was convicted of committing first degree felony murder based on three separate felonies, and the felonies were also used as the basis for the special circumstance allegations. The same evidence that is used to prove the murder, as well as the underlying felonies and special circumstances, also constitutes "a circumstance of the crime." Unless the jury is instructed otherwise, and assuming it finds the existence of a special circumstance, it can then impose a death sentence based on no evidence other than that which was used to prove the elements of first degree felony murder.

Using the evidence that was necessary to find appellant guilty of first degree felony murder as aggravating evidence, collapses the multi-step

(eligibility/worthiness) inquiry required of capital-sentencing schemes. If the very facts needed to establish his death eligibility are also the exclusive facts used to demonstrate death worthiness, then the selection phase's capability to ensure that only the most culpable defendants receive death sentences is hampered. Requiring different evidence at the worthiness phase would alleviate this problem. This is all that appellant asked from the trial court with his proposed instruction.

Appellant recognizes that the United States Supreme Court's cases have appeared to focus the channeling decision to the eligibility phase and emphasized that the sentencing phase is the place for a broad inquiry into all relevant mitigating evidence so that the jury can make an individualized determination regarding the appropriateness of a capital sentence. (See, e.g., *Buchanan v. Angelone* (1988) 522 U.S. 269, 275-276 ["It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition"].) However, decisions such as *Buchanan* do not contemplate a sentencing scheme such as that in place in California. The United States Supreme Court decisions de-emphasizing the need to constrain jury discretion at the penalty phase are rooted in the assumption that a capital-sentencing scheme effectively narrows the class of people eligible for the death penalty. (See *Tuilaepa v. California*, 512 U.S. at p. 98, Stevens, J., concurring.) Because California's scheme allows for only minimal narrowing at the eligibility phase, however, the jury's discretion must be channeled at the selection phase in order to pass constitutional muster. Without instructing the jurors that they cannot sentence appellant to death based solely upon the same facts that resulted in the first degree murder

conviction and special circumstance allegations, California's capital-sentencing scheme would not "adequately channel[] the sentencer's discretion so as to prevent arbitrary results." (*Harris v. Alabama* (1995) 513 U.S. 504, 511; see *Graham v. Collins* (1993) 506 U.S. 461, 468 ["States must limit and channel the discretion of judges and juries to ensure that death sentences are not meted out 'wantonly' or 'freakishly'"].)

"The Eighth Amendment requires that jury instructions in the penalty phase of a capital case sufficiently channel the jury's discretion to permit it to make a principled distinction between the subset of murders for which a death sentence is appropriate and the majority of murders for which it is not." (*Valerio v. Crawford*, *supra*, 306 F.3d at p. 750, citing *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319.) This is what appellant's requested instructions would have accomplished. By telling the jury that it could not sentence appellant to death based *merely* upon the facts it utilized to find the elements of first degree murder and the special circumstances, appellant's proposed instructions effectively served to tell the jury that it must find something to distinguish appellant from other first degree murderers.

The trial court's erroneous refusal to give the proposed instructions at issue requires the reversal of appellant's death sentence. In a situation where the jury is assessing the circumstances of the crime to determine whether a death sentence is to be imposed, it is virtually impossible to determine with any degree of certainty that the jury did not assess a death sentence by finding no more culpability than that required to find the appellant guilty of first degree murder with a special circumstance. This is especially the case here because the prosecution extensively and graphically emphasized the facts of the crime which were used by the jury to determine

not only first degree felony murder, but also the felony-murder special circumstances and each of the separately charged underlying felonies. (See 20 RT 2809-2813, 2829-2830.)

If the trial court had properly channeled the jury's consideration at the penalty phase, the balance between the aggravating and mitigating circumstances would have been significantly altered. The failure to give the proposed instructions at issue may well have been dispositive with respect to the jury's decision to sentence appellant to death. It cannot be shown that the error had no effect on the jury's weighing process and was thus harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIII

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT REFUSED TO DELIVER ADDITIONAL INSTRUCTIONS AT THE PENALTY PHASE WHICH WOULD HAVE CLARIFIED THE JURY'S TASK AND GUIDED THEIR INDIVIDUALIZED MORAL ASSESSMENT OF MITIGATING AND AGGRAVATING EVIDENCE

In addition to the proposed instructions discussed in Arguments IX, X, XI, XII, *supra*, appellant requested a number of specially tailored instructions which would have informed the jury that their task at the penalty phase was significantly different than it had been during the guilt proceedings. These instructions would have alleviated confusion engendered by the pattern CALJIC instructions provided to the jury as to the meaning and scope of mitigation as well as aggravation. Moreover, the instructions would have guided the jury in making their individualized moral and reasoned assessment of the appropriate penalty to impose. None of the instructions appellant proposed was argumentative, or contained incorrect statements of law, and they were not properly refused on either of those grounds. (See *People v. Sanders* (1995) 11 Cal.4th 475, 560; *People v. Mickey* (1991) 54 Cal.3d 612, 697.) Finally, these instructions pinpointed appellant's theory of the case, rather than specific evidence, and were thus proper. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1068; *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.)

The prosecution opposed the instructions, alleging that they were duplicative of the CALJIC pattern instructions relating to the penalty phase or were inappropriate. The trial court refused to give all but one of the

proposed instructions. (See 20 RT 2780-2784.)[104] The trial court's refusal to deliver the instructions alone, or in combination, constituted reversible error.

A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 865; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099; see *Penry v. Lynaugh* (1989) 492 U.S. 302.) Accordingly, "in considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of . . . CALJIC . . . ." (Cal. Stds. Jud. Admin., § 5.) It is equally well-established that the right to request specially tailored instructions applies at the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

The trial court's error in refusing to give the proposed instructions discussed below was prejudicial and violated state law as well as appellant's federal constitutional rights. The court's error deprived appellant of his right to present a defense because without the suggested instructions the jury would fail to give due weight to appellant's mitigation

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[104] The trial court did not expressly state its explicit reasons for denying the instructions appellant proposed. Based on earlier comments the court made about the instructions, however, it appears that the court's refusal to give them was because of the erroneous belief that most were duplicative of CALJIC pattern instructions and some were inappropriate. (See 19 RT 2755-2757, 2765; 20 RT 2780-2784.) The only instruction the court gave out of the 42 requested by the defense was No. 26, which told the jurors that they could not double-count "any circumstances of the crime" that were also "special circumstances" in determining aggravation. (22 CT 5932 [Proposed Penalty Phase Instruction No. 26].)

evidence (U.S. Const., 6th, 14th Amends.; Cal. Const.,, art. I, §§ 7, 15; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294-295; *Bradley v. Duncan*, *supra*, 315 F.3d at pp. 1098-1099); his right to a jury that deliberated with a full understanding of its responsibility for their individualized penalty determination (U.S. Const., 8th, 14th Amends.; see *Zant v. Stephens* (1983) 462 U.S. 862, 879); his right to trial by a properly instructed jury (U.S. Const., 6th, 14th Amends.; Cal. Const., art. 1, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145, 147-154); and his right to a fair and reliable penalty determination (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 1, 17; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638). The error also violated appellant's right to due process because the omission of the instructions rendered the penalty proceedings fundamentally unfair (U.S. Const., 14th Amend.; *Estelle v. McGuire* (1991) 502 U.S. 62, 72), and arbitrarily deprived him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const., 5th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300). This error requires reversal of the judgment of penalty.

This Court has previously rejected arguments similar to the ones appellant presents here. Appellant, however, urges this Court to reconsider those opinions, particularly in light of the facts of this case and empirical studies of capital juries showing repeatedly that juries do not understand the concepts necessary to render their penalty determination.[105]

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[105] Appellant also asserts these claims to preserve them for federal review.

A. The Trial Court Erred By Rejecting A Number Of Proposed Instructions Which Together Clarified The Meaning And Scope Of Mitigation

Appellant requested a series of instructions which would have elaborated on the meaning and scope of "mitigation" in a death penalty trial. Appellant's proposed instructions defined mitigating circumstances both generally and more specifically to the facts of this case. One of the instructions stated:

> A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offense or about the defendant which, in fairness, sympathy, compassion, or justifies [sic] a sentence of less than death, although it does not justify or excuse the offense.

(22 CT 5984 [Proposed Penalty Phase Instruction No. 33]; see 22 CT 5993 ["A mitigating circumstance is any fact, condition, or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty."] [Proposed Penalty Phase Instruction No. 42].) Another instruction, which included facts relating specifically to appellant, is as follows:

> You shall weigh, consider, take into account and be guided by the following mitigating factors, if applicable. However, you are not limited to considering only these mitigating factors. You should also consider and weigh any other aspect of the defendant's character or record that suggests that death is not the appropriate punishment. [¶] Mitigating factors may include the circumstances surrounding the defendant's commission of the crime, and facts concerning defendant's background, history or character. Examples of mitigating factors surrounding the commission of the crime that you should consider if raised by the evidence are the following:

(d) Whether or not the offenses were committed while the defendant was under the influence of any mental or emotional disturbance, regardless of whether the disturbance was of such a degree as to constitute a defense to the charges, and regardless of whether there is a reasonable explanation or excuse for such disturbance. The term 'mental or emotional disturbance' includes, but is not limited to, any violent, intense, high-wrought or enthusiastic emotion. For example, fear, revenge and the emotion induced by and accompanying or following an intent to commit a felony may be involved in a mental or emotional disturbance that causes judgment to give way to impulse and rashness. And a defendant may act under a mental or emotional disturbance as a result of a series of events which occur over a considerable period of time.

(h) The age of the defendant at the time of the crime. Age alone is plainly a factor over which one can exercise no control and as such is not relevant to the issue of penalty. However, the term "age" used in this instruction refers to any age-related matter suggested by the evidence or by common experience that might reasonably inform the choice of penalty. You must consider the defendant's age only as a mitigating factor, to be accorded whatever weight you believe it deserves; you may not, under any circumstances, consider defendant's age as an aggravating factor.

(I) Any other circumstance which extenuates the gravity of the present crimes even though it is not a legal excuse for the crimes. These other circumstances include, but are not limited to, the following:

(1) Whether the defendant did not attempt to escape at the time of his arrest;

(2) Whether the defendant did not use force or violence in an effort to avoid arrest;

(3) Any lingering or residual doubt you may have about the defendant's guilt;

(4) Whether the victim's own conduct contributed to creating the circumstances under which the defendant committed the crimes.

> Mitigating factors also include any sympathetic, compassionate, merciful, or other aspect of the defendant's background, character, record, or social history that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.
>
> These aspects of the defendant include, but are not limited to the following:
>
> (1) Whether the defendant's psychological growth and development affected his adult psychology and personality;
>
> (2) The defendant's ability to engender feelings of love and respect for him by his sisters, daughter, brother, friends, fellow inmates, prison staff and correctional officers;
>
> (3) Whether the defendant was raised by a father who was an alcoholic;
>
> (4) Whether the defendant has positively adjusted to the type of structured and institutionalized environment in which he will live the rest of his life if given a sentence of life in prison without the possibility of parole;
>
> (5) Whether the defendant exhibited good behavior while incarcerated;
>
> (6) The likelihood that the defendant will not be a danger to others if sentenced to life imprisonment without the possibility of parole;
>
> (7) Whether there are any facts which may be considered as extenuating or reducing the defendant's degree of moral culpability for the crimes he has committed, or which might justify a sentence less than death even though such facts would not justify or excuse the offense.

(22 CT 5978-5981 [Proposed Penalty Phase Instruction No. 30]; see Arg. IX, *supra*, which is incorporated by reference.)

A number of related instructions clarified that there was no limit as

to what may be considered as mitigating evidence, and that any one factor may support a decision of life over death:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case. [¶] But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [¶] Any one of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case.

(22 CT 5983 [Proposed Penalty Phase Instruction No. 32]),

> Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without possibility of parole.

(22 CT 5948 [Proposed Penalty Phase Instruction No. 1]),

> "There is . . . no limitation on what you may consider as mitigating"

(22 CT 5993 [Proposed Penalty Instruction No. 42]), and

> Any aspect of the offense or of the defendant's character or background that you consider mitigating can be the basis for rejecting the death penalty even though it does not lessen legal culpability for the present crime.

(22 CT 5985 [Proposed Penalty Phase Instruction No. 34]).

An additional instruction explained that there was no standard of proof with regard to a mitigating circumstance:

> A mitigating circumstance need not be proved beyond a reasonable doubt nor even by the preponderance of the evidence, and each juror may find a mitigating circumstance to exist if there is any evidence to support it.

(22 CT 5987 [Proposed Penalty Phase Instruction No. 36].) Another

instruction explained that the jury is not required to unanimously agree on any mitigating factor before it can be used by a single juror as a basis for a sentence less than death:

> A finding with respect to a mitigating factor may be by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established, regardless of the number of jurors who concur that the factor has been established.

(22 CT 5957 [Proposed Penalty Phase Instruction No. 10]. Finally, one of the instructions stated that if true, the jury could "consider as mitigation that Royce Lynn [sic] Scott has a family that loves him." (22 CT 5982 [Proposed Penalty Phase Instruction No. 31]; see Arg. X, *supra*.)

The trial court refused to give any of the above proposed instructions. (See 20 RT 2781-2784.) Appellant's jury was given no other instruction which would have definitively explained that they could consider all matters offered in mitigation, that mitigation was not restricted to the statutorily enumerated factors, that appellant did not have to prove mitigation beyond a reasonable doubt, or that the jury did not have to unanimously agree on a factor mitigation before an individual juror could consider it in making his/her decision as to penalty. Instead, appellant's jury was only instructed with CALJIC No. 8.85 which, in relevant part, told the jury that it could consider:

> Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime and any other sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(20 RT 2797-2800.)

These instructions should have been given because the trial court had a sua sponte duty to instruct the jury to consider any relevant mitigating evidence and sympathy which is proffered by the defendant as a reason to find a sentence less than death (see *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285; *People v. Marshall* (1990) 50 Cal.3d 907, 932; *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605; *People v. Benson* (1990) 52 Cal.3d 754, 799; Bench Notes to CALCRIM No. 763 ["The court has a sua sponte duty to instruct the jury on the factors to consider in reaching a decision on the appropriate sentence"]), they were proper statements of law, and the pattern instructions provided by the court did not adequately clarify the meaning and scope of mitigating evidence. The failure to provide the proposed instructions denied appellant his Eighth and Fourteenth Amendment rights to a fair, non-arbitrary and reliable sentencing determination (see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72), to have the jury consider all mitigating circumstances (see, e.g., *Skipper v. South Carolina* (1989) 476 U.S. 1, 4; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604), and to make an individualized determination as to penalty based on all circumstances (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879).

"The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540.) The jury must be given that freedom because the penalty determination is a "moral assessment of [the] facts as they reflect on whether [a] defendant should be put to death." (*People v. Haskett* (1982) 30 Cal.3d 841, 863.) Since that assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the

circumstances." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035.)

The proposed instructions would have "'provided a helpful framework within which the jury could consider the specific circumstances in . . . mitigation set forth in section 190.3.'" (*People v. Adcox* (1988) 47 Cal.3d 207, 269-270, quoting *People v. Dyer* (1988) 45 Cal.3d 26, 77-78.) The instructions would have also clarified for the jury the nature of the process of moral assessment in which they were to engage, and that any single factor in mitigation might provide a sufficient reason for imposing a life sentence over death. In *People v. Sanders* (1995) 11 Cal.4th 475, this Court noted with approval an instruction that "expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that a single factor could outweigh all other factors." (*Id.* at p. 577, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 845.) This instruction was determined to help eliminate the possibility that the jury will "misapprehend [] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate penalty] through the weighing process . . . . " (*People v. Sanders*, *supra*, 11 Cal.4th at p. 577; see *People v. Anderson* (2001) 25 Cal.4th 543, 599-600 [approving instruction which stated that "any one mitigating factor, standing alone" can suffice as a basis for rejecting death].)

Moreover, all non-trivial aspects of a defendant's character or circumstances of the crime constitute relevant mitigating evidence. (*Tennard v. Dretke*, *supra*, 542 U.S. 274, 284-287.) The requested instructions would have clarified for the jury that they were not limited in their consideration of mitigating factors to those enumerated by the court. Because it likely would not have been clear to the jury that evidence of

appellant's relationship with his family constituted section 190.3, factor (k) mitigating evidence which the jury could properly consider in making their moral assessment to determine penalty, the instruction appellant proposed explaining this fact was necessary. (Proposed Penalty Instruction No. 31; see *McKoy v. North Carolina* (1990) 494 U.S. 433, 441 [a State cannot bar "the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death"]; see Arg. X, incorporated by reference.) Similarly, the instructions appellant proposed accurately informed the jurors that mitigation is not limited to the enumerated factors but includes any mitigating information that may convince them to impose a sentence less than death. (See *Blystone v. Pennsylvannia* (1990) 494 U.S. 299, 309; *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306; *People v. Mayfield* (1997) 14 Cal.4th 668, 807.)

Appellant had a right for the jury to be given illustrative examples of the types of evidence that could be considered as factors in mitigation beyond those specified by the statute. The instructions appellant proposed would have focused the jury's attention on particular theories of mitigation on which the defense was relying. They also explained that the evidence appellant had introduced could only be mitigating. (See also sec. B., *infra.*) The instructions clarified and illustrated in a non-argumentative manner the application of the general principles to appellant's case.

Without proper guidance as to the broad scope of available mitigating factors the jury could consider, as well as the process for which such factors were to be assessed by each juror, it is unlikely the jurors would have realized that just one mitigating factor could outweigh all aggravating factors. In this case, there was little mitigating evidence presented. Because the jury had few options to consider, the proposed

instructions on this issue were especially necessary.

The proposed instructions would have also clarified that a defendant is not required to prove mitigation beyond a reasonable doubt and that the jury is not required to unanimously agree on any mitigating factor before it can be used by a single juror as a basis for a sentence less than death. (*McKoy v. North Carolina* (1990) 494 U.S. 433.) None of the pattern instructions given explained these principles, and the court's failure give the proposed instructions likely resulted in the jury believing that the same standard of proof and unanimity requirement which was utilized during the guilt phase applied in making their penalty determination. This belief would have resulted in a barrier to the jury's proper consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

The trial court's refusal to give the proposed instructions on mitigation left the jury without the guidance they required to properly make their penalty assessment. The failure to tailor the instructions prejudicially misled the jury into disregarding pertinent evidence and therefore failed to give the jury an opportunity to consider and give full effect to constitutionally relevant mitigation. (*Lockett v. Ohio*, *supra*, 438 U.S. 586.) As a result, appellant was denied a fundamentally fair and reliable penalty determination, the right to be free from the arbitrary and capricious imposition of the death penalty, and the right to the heightened protections of due process that are required at the penalty phase of a capital case under the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.)

B. The Trial Court Erred By Rejecting Appellant's Request To Instruct The Jury That The Absence Of A Mitigating Factor Cannot Be Considered To Be An Aggravating Factor And That Aggravating Factors Are Limited To Those Specified In the Instructions

Appellant requested that the jury be instructed that the "absence of a mitigating factor is not, and cannot be considered . . . . an aggravating factor." This specific directive was included in Proposed Instruction Nos. 22 and 23, both of which explained that only certain factors could be considered by the jury as aggravation. (22 CT 5970-5971.) Proposed Penalty Phase Instruction No. 22 stated:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except evidence that I have ordered stricken or have instructed you to disregard. You shall weigh, consider, take into account and be guided by the following aggravating or mitigating factors, if applicable:
>
> (a) As either an aggravating or mitigating factor:
>
> The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) As either an aggravating or mitigating factor:
>
> The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) As either an aggravating or mitigating factor:
>
> *The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.*

(22 CT 5971 [Proposed Penalty Phase Instruction No. 22], emphasis added.)

Proposed Penalty Phase Instruction No. 23 similarly stated:

> The factors which I have just listed are the only factors that can be considered by you as aggravating factors. ¶ However, you may find one or more of these factors are aggravating. It is up to you to determine whether these factors exist, and if they do exist, whether they are mitigating or aggravating. The factors which I will soon list can only be considered by you to be mitigating factors. *The absence of a mitigating factor is not, and cannot be considered by you as an aggravating factor.*

(22 CT 5972 [Proposed Penalty Phase Instruction No. 23], emphasis added.) Notably, this instruction also told jurors that statutory aggravating factors could be considered as mitigating evidence, and that jurors were not required to find any of the factors to be aggravating. (*Ibid.*)

Appellant requested an instruction that informed the jurors that the fact the jury found appellant guilty of first degree murder is not itself an aggravating circumstance:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found Mr. SCOTT guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance.

(22 CT 5974 [Proposed Penalty Phase Instruction No. 25].) Appellant also requested that the jury be instructed that they could not consider as aggravating factors evidence of criminal activity that did not involve violence or the attempted use of violence which had been admitted at the guilt phase:

> You may not consider as aggravation any evidence of

> criminal activity by defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence

(22 CT 5975 [Proposed Penalty Phase Instruction No. 27]), and

> Evidence has been introduced in the guilt and penalty phases of this trial that may show that the defendant engaged in criminal activity which you may not consider as a factor in aggravation. You may consider only the crimes which I will define for you in determining whether or not the defendant has engaged in criminal activity which involves the use or the express or implied threat to use force or violence.

(22 CT 5976 [Proposed Penalty Phase Instruction No. 28]).

The proposed instructions correctly stated the law. The trial court had a sua sponte duty to instruct the jurors on the factors to consider in making a decision on the appropriate penalty. (*Lockett v. Ohio*, *supra*, 438 U.S. at pp. 604-605.) Contrary to the prosecutor's assertion, giving the jury CALJIC No. 8.85 (20 RT 2798-2800) did not render the requested instructions duplicative.

It is improper for the prosecution to argue that the lack of evidence in support of one of the statutory mitigating factors converts it to an aggravating factor. (*People v. Davenport* (1985) 41 Cal.3d 247, 288-290; see *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034 [improper for state to imply that each enumerated factor is either aggravating or mitigating and that if not shown to be mitigating it must be considered aggravating].) CALJIC No. 8.85 does not adequately convey the fact that the absence of a mitigating factor is not an aggravating factor, and the instructions proposed by appellant on this point were necessary to so inform the jury. Accordingly, the jury have been told that the absence of a mitigating factor could not be considered as aggravation. (CALCRIM No. 763 ["Do not

consider the absence of a mitigating factor as an aggravating factor"].) Because the trial court failed to explicitly instruct the jury that they could not consider the absence of a mitigating factor to be aggravating, there was a strong likelihood that the jurors turned the absence of those factors into de facto aggravating factors. This danger was especially likely where, as in this case, the prosecutor's closing argument focused seriatim on each factor in mitigation for which there was no evidence, thus encouraging the jury's consideration of mitigating factors which were absent, as aggravating evidence, in rendering their decision on penalty. (20 RT 2821-2824.)[106]

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[106] In his closing argument, Deputy District Attorney Best went through the enumerated factors in mitigation – factors (d) through (k) – and asserted that there was no evidence of each factor, thus strongly suggesting that the absence of evidence in support of each mitigating factor constituted aggravation. A portion of prosecutor Best's argument in this regard is as follows:

> [Prosecutor Best]: Let's look now at the factors that are in fact factors in mitigation. [¶] The first one up is called Factor D. Factor D states that you may consider whether or not the offense was committed by the defendant while he was under the influence of extreme mental or emotional disturbances. . . . [¶] What is the evidence we have on that? Nothing. Zero. There is no evidence on this. This factor does not apply. We had no mental defense in this case. . . . [¶] Let's go to Factor E. [¶] Factor E states you may consider whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [¶] What evidence do we have that this is a factor in mitigation such that you should spare the life of Mr. Scott? [¶] Nothing. No evidence here. Clearly, we have a victim who is not a participant in a homicidal act, is not consenting to the homicidal act.

(continued...)

CALJIC No. 8.85 does not address this concern, but appellant's requested instructions would have created a safeguard against this improper method of engaging in the weighing process. This point could have been made by providing the proposed instructions which specified that no other factors than those listed by the court could be considered as aggravation. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [court required on request to instruct the jury to consider only the aggravating factors listed]; CALCRIM No. 763 ["You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You must not take into account any other facts or circumstances as a basis for imposing the death penalty"]; Bench Notes of CALCRIM No. 763.) Similarly, the jury should have been given an instruction such as the one proposed which would have told the jury that they had to disregard a factor for which there was no evidence. (CALCRIM No. 763 ["If you find there is no evidence of a factor, then you should disregard the factor."].)

The jury should have also been instructed that evidence of other criminal activity committed by appellant that did not involve violence or force of violence – the three incidents of burglary that occurred in August, 1992 – could not be considered as aggravating evidence for their reasoned moral assessment of the evidence and determination of which penalty to impose. (*People v. Yeoman* (2003) 31 Cal.4th 93, 151; *People v. Robertson, supra,* 33 Cal.3d at pp. 53-55; Pen. Code, § 190.3, factor (b); Bench Notes of CALCRIM No. 763; CALCRIM No. 764 ["You may not

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[106] (...continued)
(20 RT 2821-2822.)

consider any other evidence of alleged criminal activity as an aggravating circumstance [] about which I will now instruct you"]; Bench Notes of CALCRIM No. 764 ["Evidence of prior crimes is limited to offenses involving the 'use or attempted use of force or violence or the express or implied threat to use force or violence'"].)[107]

Finally, the jury should have also been told that they could not consider as an aggravating factor any fact that was used to find appellant guilty of first degree murder unless the fact establishes something other than the crime of first degree murder.

The failure to give the requested instructions left the jury without the guidance necessary to properly make its penalty assessment. (*Lockett v. Ohio*, *supra*, 438 U.S. at pp. 604-605.) As a result, appellant was denied a fair and reliable penalty determination, the right to be free from the arbitrary and capricious imposition of the death penalty, and the right to the heightened protections of due process that are required at the penalty phase of a capital case. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.)

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[107] See Arguments II and III, *supra*, where appellant asserts that the charges for the unrelated burglary offenses should not have been joined with the capital offense because the unrelated offenses constituted highly prejudicial and impermissible other crimes propensity evidence. Moreover, three of the unrelated burglaries, those committed in August, 1992, were not properly admissible as factor (b) aggravating evidence. (See fn. 101, *supra*.)

C. The Trial Court Erred By Failing To Instruct The Jury That It Could Return A Verdict Of Life Imprisonment Without The Possibility Of Parole Even If It Failed To Specifically Find The Presence Of Any Mitigating Factors

Appellant requested that the jury be instructed as follows:

> You need not find any mitigating circumstances in order to return a sentence of life imprisonment without possibility of parole. A life sentence may be returned regardless of the evidence.

(22 CT 5950 [Proposed Penalty Phase Instruction No. 3]), and

> . . . . You may return a verdict of life imprisonment without possibility of parole even if you find that the factors and circumstances in aggravation outweigh those in mitigation.

(22 CT 5958 [Proposed Penalty Phase Instruction No. 11]). Although the trial court initially appeared to believe that Instruction No. 3 should be provided to the jury (20 RT 2780), the court ultimately refused to give it or related Instruction No. 11. (See 20 RT 2781-2784.)

This Court has determined that when an instruction pursuant to CALJIC No. 8.88 is given, "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances merely because no mitigating circumstances were found to exist." (*People v. Johnson* (1993) 6 Cal.4th 1, 52.) Appellant contends, however, that the question is not whether a juror would assume death had to be imposed even if there were insubstantial aggravating factors, but whether a juror would feel free to return a verdict of life without the possibility of parole in the face of substantial aggravating circumstances and no mitigating circumstances. (*People v. Duncan* (1991) 53 Cal.3d 955, 979 ["The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial to warrant death"];

CALCRIM No. 766.)

The instructions appellant proposed would have informed the jury to consider this option when making their reasoned moral assessment of the penalty phase evidence. The failure to give the instructions rendered the penalty determination fundamentally unfair in violation of appellant's right to due process under the Fourteenth Amendment of the United States Constitution. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) The omission also arbitrarily deprived appellant of his state-created liberty interest of the right to have a penalty phase instruction that relates the particular facts of his case to any legal issue or to pinpoint the crux of his defense (*People v. Sears*, *supra*, 2 Cal.3d at p. 190; *People v. Duncan*, *supra*, 53 Cal.3d at p. 190) in violation of the Fourteenth Amendment. Without the instructions the jurors were not able to fully engage in the type of individualized consideration the Eighth Amendment requires in a capital case. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

D. The Court Erred In Not Providing Instructions Relating To The Jury's Different Task At The Penalty Phase To Render An Individualized Moral Determination

Appellant requested, but was refused, instructions which would have informed the jury that penalty phase deliberations were significantly different than those of the guilt phase. These instructions would have conveyed that jurors must use their individual judgment in evaluating the circumstances offered in mitigation, as well as in making the decision whether to impose life or death. The first instruction stated:

> With regard to factors in mitigation, offered by the defendant as reasons to impose a sentence of life imprisonment without parole, each juror must make his or her individual assessment of the weight to be given to such evidence. [¶] There is no

> requirement that all jurors unanimously agree on any matter offered in mitigation. Each juror makes an individual evaluation of each fact or circumstance offered in mitigation of penalty. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(22 CT 5956 [Proposed Penalty Phase Instruction No. 9].) The second stated:

> Since you, as jurors, decide what weight is to be given the evidence in aggravation and the evidence in mitigation, you are instructed that any mitigating evidence standing alone may be the basis for deciding that life without possibility of parole is the appropriate punishment.

(22 CT 5986 [Proposed Penalty Instruction No. 35].) The third instruction stated:

> In weighing the aggravating and mitigating factors, you are not merely to count numbers on either side. You are instructed rather to weigh and consider the factors. One mitigating circumstance may be sufficient to support a decision that death is not the appropriate punishment in this case. The weight you give to any factor is for you individually to decide.

(22 CT 5989 [Proposed Penalty Instruction No. 38].) Finally, a fourth instruction stated:

> A finding with respect to a mitigating factor may be by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established, regardless of the number of jurors who concur that the factor has been established.

(22 CT 5957 [Proposed Penalty Phase Instruction No. 10].)

Under California and federal law, the tasks the jury is to perform for the guilt proceedings differ from that of the penalty phase. Guilt phase jurors are expected to find facts and apply the law to facts without injecting

their personal sense of justice. (See CALJIC No. 1.00; 16 RT 2446-2448.) In contrast, penalty phase jurors are expected to find facts and bring their individual values into play. Both this Court as well as the United States Supreme Court have recognized that penalty phase jurors represent the "conscience of the community." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 519; *People v. Thompson* (1990) 50 Cal.3d 134, 185; *McClesky v. Kemp* (1987) 481 U.S. 279, 311 [it is the death penalty jury's function to "make the difficult and uniquely human judgments that defy codification"].) The jury is charged with the "truly awesome responsibility of decreeing death for a fellow human." (*McGautha v. California* (1971) 402 U.S. 183, 208.) This Court has stated that "the sentencing function is inherently moral and normative [citation omitted] and therefore the weight or importance to be assigned to any particular factor or item of evidence involves a moral judgment to be made by each juror individually." (*People v. Crandell* (1988) 46 Cal.3d 833, 882-883.)

Each juror must express his or her own sense of sympathy, compassion and morality. (*People v. Easley* (1983) 34 Cal.3d 858, 875-876 [sympathy]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [compassion]; *California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.) [morality]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 261 (conc. opn. of Marshall, J.) ["[T]he question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime"]; *People v. Haskett* (1982) 30 Cal.3d 841, 863 [a penalty phase jury "decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death"].) The death sentence "is the one punishment that cannot be prescribed by a rule of law

as judges normally understand rules." (*Spaziano v. Florida* (1984) 468 U.S. 476, 468-469 (conc. & dis. opn. of Stevens, J.).) This is something that is beyond strict legal definition. (See Higginbotham, *Juries and the Death Penalty* (1991) 41 Case W. Res. L.Rev. 1047, 1048-1049 [asserting that death penalty "decision must occur past the point to which legalistic reasoning can carry"].)

Therefore, while the jurors are not to be influenced by prejudice (see CALJIC No. 8.84.1), nor by mere emotion (*California v. Brown*, *supra*, 479 U.S. at p. 543), the death penalty decision may include the "possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304). The death penalty decision necessarily involves subjective elements not present when a jury decides the question of guilt. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 333; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 254-255 (dis. opn. of Marshall, J.) ["The capital sentencing jury is asked to make a moral decision about whether a particular individual should live or die. Despite the objective factors that are introduced in an attempt to guide the exercise of the jurors' discretion, theirs is largely a subjective judgment"].)

This Court first recognized evidence in penalty phase matters must be individually morally evaluated in *People v. Brown* (1988) 46 Cal.3d 432, 448; accord, *People v. Harris* (2005) 37 Cal.4th 310, 375 (conc. & dis. opn. of Kennard, J.).) No other instruction read to the jury conveyed the information appellant sought to communicate. Although this Court has held that the jury is adequately informed of its penalty phase tasks by CALJIC Nos. 8.85 and 8.88 (see, e.g., *People v. Monterrosso* (2004) 34 Cal.4th 743, 793; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054), most empirical evidence has shown otherwise.

Contrary to the unexamined assumption by this Court, studies show that capital juries instructed with pattern penalty phase instructions do not understand that their task at penalty phase is in any way different from the fact finding task at guilt. Interviews with capital jurors in California show that pattern instructions as currently crafted "fail to acknowledge (let alone clearly frame or carefully guide) the inherently moral nature of the task that they direct jurors to undertake." (Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings* (1995) 70 Ind. L.J. 1043, 1077.) As perceived by jurors, the instructions on the sentencing decision had little or nothing to do with a moral decision by the jurors. Capital jurors instructed with nothing more than the pattern instructions believe that a death penalty decision "involves nothing more than simple accounting, an adding up of the pluses and minuses, aggravation against mitigation, on the balance sheet of someone's life." (Haney, Sontag, & Constanzo, *Deciding to take a Life: Capital Juries, Sentencing Instructions and the Jurisprudence of Death* (1994) 50 J. Soc. Issues 149, 172.)

Additional empirical evidence shows that jurors who believe that the sentencing decision was an "amoral task" or simply a matter of counting up mitigating and aggravating factors, were likely to assume that the decision to impose death was not a matter of his or her individual judgment; and saw the instructions as dictating a "legally correct" outcome, for which the "law" or the "judge" had responsibility, rather than the jury. (Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 Stan. L. Rev. 1447, 1484; Hoffman, *Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases* (1995) 70 Ind. L.J. 1137, 1138, fn. 11.) Jurors who saw the penalty phase as analogous to guilt were more

likely to assume that the law required that the death penalty be imposed. (Haney, Sontag, & Constanzo, *Deciding To Take a Life: Capital Juries, Sentencing Instructions and the Jurisprudence of Death*, *supra*, J. Soc. Issues at p. 172; Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death, supra,* 49 Stan. L.Rev. at p. 1482.)

The Eighth Amendment and Fourteenth Amendments were implicated by penalty phase instructions emphasizing the jury's fact finding function, without also informing the jury that it must make individualized normative judgements. Under the Eighth Amendment right to a reliable penalty verdict, appellant was entitled to a jury that deliberated with accurate information about its responsibility for a decision to sentence him to death. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 333 ["[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere"]; *People v. Farmer* (1989) 47 Cal.3d 888, 931.) A right to a jury that deliberates with a clear view about its responsibilities is also guaranteed by the Fourteenth Amendment right to a fair trial. (*McGautha v. California*, *supra*, 402 U.S. 183, 221; see also *New Jersey v. Rose* (N.J. 1988) 548 A.2d 1058, 1087 [" In no other determination in the criminal law is it more important to make absolutely certain the jury is aware, not simply of the consequences of its actions, but of its total responsibility for the judgment"].) It is also reversible error for a jury to deliberate a sentence of death under the mistaken belief that a sentence is mandatory. (See *People v. Brown*, *supra*, 40 Cal.3d 512, 544; *People v. Farmer*, *supra*, 47 Cal.3d at p. 931; *United States v. Tucker* (1972) 404 U.S. 443, 446 [defendant may

not be sentenced on the basis of misinformation of "constitutional magnitude"].)

Without the instructions proposed by appellant, it is likely that the jury was misled into believing that its only, or primary, role was to find facts, when, in fact, objective fact finding plays a limited role in a penalty phase. Since appellant's jury likely believed that its essential role was to find facts, it was likely to misunderstand and neglect its normative role, *i.e.*, that each juror individually had a role as the voice of the "conscience of the community." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 519; see CALCRIM No. 766 ["Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. If any juror individually concludes that a factor exists, that jury may give the factor whatever weight he or she believes is appropriate"].)

E. This Court's Reliance On Pattern CALJIC Instructions To Convey Adequately The Meaning Of The Penalty Phase Law Must Be Reconsidered

The above arguments illustrate the many ways in which aspects of the penalty phase process are routinely misunderstood by juries, and show the necessity for appellant's proposed instructions which augmented and clarified pattern instructions provided by the trial court. However, this Court has routinely held that there is no need to further define mitigation or define the weighing process because the terms are ordinary words that do not have to be defined. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1036.) The Court's unexamined assumption that the word "mitigate" is a commonly used, commonly understood, word must be reexamined. In actuality, "mitigate" is an obscure word that few people understand – at

least in the death penalty context. Justice Thurgood Marshall noted that "'mitigating evidence' is a term of art with a constitutional meaning that is unlikely to be apparent to a lay jury." (*Watkins v. Murray* (1989) 493 U.S. 907, 910 (dis. opn. of cert. den. of Marshall, J.); see also *Dix v. Kemp* (11th Cir. 1985) 763 F.2d 1207, 1209 ["The words 'mitigating circumstances,' while they have meaning to most jurors, still do not adequately communicate the precise nature or function of that concept in the context of a sentencing trial"].) Similarly, the Seventh Circuit has observed that "words such as 'mitigating' . . . are foreign to jurors' daily discourse." (*Welborn v. Gacy* (7th Cir. 1993) 994 F.2d 305, 314.)

This Court held in *People v. Malone* (1988) 47 Cal.3d 1, 55, that "mitigation" is a term an average citizen would understand without further elaboration. In that case, this Court did not analyze the legal meaning of mitigation, holding without elaboration that statutory language is presumed to be clear. (*Ibid.* citing *People v. Page* (1980) 104 Cal.App.3d 569, 577.) However, this Court's own death penalty opinions post-dating *Malone* show that this presumption is false. Whatever meaning "mitigation" has in day-to-day language, jurors simply do not understand the meaning of "mitigation" in the death penalty context. In California, there have been a number of persons sentenced to death where during penalty phase deliberations the jury either sent a note to the trial judge asking for further definition of the term "mitigation," or resorted to a dictionary to figure out for itself the meaning of "mitigation."[108] Perhaps the most telling of these

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[108] See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1202 [jury sought court's guidance on meaning of terms "extenuate," "mitigate" and "aggravate"]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1191 [jury sent (continued...)

cases is *People v. Hamilton* (1988) 46 Cal.3d. 123, 148, where the jury asked to have the instructions on aggravation and mitigation read three times and then finally sent out a note: "Please read all of the instructions again explaining mitigating and aggravating circumstances. Can you give us additional definitions of these words in layman's terms?"

Nor has the addition of the language in CALJIC No. 8.88 that mitigating factors are "extenuating" increased capital jurors's understanding of "mitigation." (See 20 RT 2844-2846.) The word "extenuating" is at least as confusing to ordinary citizens as "mitigation." For example, in

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[108] (...continued)
trial court a note asking for a dictionary to obtain definitions of the terms "aggravating" and "mitigating."]; *People v. Lucero* (2003) 23 Cal.4th 692, 723-725 [jury asked for meaning of aggravation and mitigation]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017-1018 [Jury sent out a note asking for "the legal definitions for aggravating and mitigating circumstances as they apply to the instructions in making the determination of this sentence"]; *People v. Montiel* (1993) 5 Cal.4th 877, 940 [jury on second day of deliberation asked for written definitions of aggravation and mitigation]; *People v. Mincey* (1992) 2 Cal.4th 408, 469 [the jury asked the trial court for either a legal dictionary or a legal definition of the terms mitigation and aggravation]; *People v. Marshall* (1990) 50 Cal.3d 907, 936 [trial court asked to define aggravating and mitigating circumstances]; *People v. Lang* (1989) 49 Cal.3d 991, 1035 [same]; *People v. Adcox* (1988) 47 Cal.3d 207, 269 [same]; *People v. McCain* (1988) 46 Cal.3d 97, 117 [jury sent out a note: "being unfamiliar with the term of mitigation we would like the dictionary meaning of both mitigation and aggravation, please"]; *People v. Poggi* (1988) 45 Cal.3d 306, 345 [jury asked for definition of phrases "aggravating circumstances" and "mitigating circumstances"]; *People v. Karis* (1988) 46 Cal.3d 612, 642 [jurors used a dictionary to define mitigation]; see also, *People v. Friend* (1957) 54 Cal.2d 749, 762 [in response to court question, foreman replied: "I am not certain how the law defines mitigating and I don't know what Webster says on it frankly"]; see Tiersma, *Dictionaries and Death: Do Capital Juries Understand Mitigation?* (1995)1995 Utah L.Rev. 1, 13.

People v. Smith (2003) 30 Cal.4th 581, 636-637, the jury sent a note to the court asking for the definition of "extenuating circumstances." (See also *People v. Harris* (2005) 37 Cal.4th 310, 362 [Juror asked: "Please explain to me mitigating and extenuating circumstances and how it fits in with factor (k) extenuating circumstances. Does that mean what positive (mitigating) things you can argue for [*sic*] what has happened [*sic*] to the victim [*sic*] to not give him the death penalty"].) In an empirical study of subjects who were read California penalty instructions and then asked to explain them, less than a quarter of subjects understood the word "extenuation." (Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* (1997) 21 Law & Hum. Beh. 575, 579.)

These cases show "mitigation" in the death penalty context has a meaning remote from everyday usage, which jurors do not understand. If a word or phrase is used in a technical sense, differing from its commonly understood meaning, clarifying instructions should be given. (*People v. Bland* (2002) 28 Cal.4th 313, 334; *People v. Smithey* (1999) 20 Cal.4th 936, 981.) The terms "mitigation" and "weighing" have a "technical sense peculiar to the law," that is, a "statutory definition differ[ing] from the meaning that might be ascribed to the same terms in common parlance." (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575.) Thus, the trial court in appellant's case had an obligation to instruct on the definitions of this phrase, particularly given the defendant's request for instructions as to the meaning and scope of "mitigation."

Each of the instructions discussed above was designed to address the multiple short-comings of California pattern instructions. None of the instructions was an incorrect statement of the law or improper in its manner

of presentation. All of the principles embraced by the instructions have been endorsed by this Court. In short, these instructions presented to the jurors information that is an accepted part of death penalty jurisprudence in this state. Yet this Court continues to permit jurors to deliberate without the help of any instructions clarifying the law. This Court's practice of finding pattern instructions sufficient because a reasonable juror might just be able to divine what the instructions really mean, regardless of how inaptly they may be phrased, is a constitutionally unacceptable practice.

The rules for death penalty deliberation are too complex for pattern instructions. As one court recently put it, courts have "established a set of increasingly reticulated rules for capital sentencing, including shifting burdens, unanimity on some issues but not on others, and consideration of mitigating factors that do not appear in state statues." (*Welborn v. Gacey* (7th Cir. 1993) 994 F.2d 305, 312.) Even justices of the United States Supreme Court sometimes complain that the rules are too complex. (See *Graham v. Collins* (1993) 506 U.S. 461, 483-495 (conc. opn. of Thomas, J.); *Walton v. Arizona* (1990) 497 U.S. 639, 656-674 (conc. opn of Scalia, J.).)

The issue is not simply one of the jury misunderstanding. Instead, the evidence shows pattern instructions systematically miscommunicate core penalty phase concepts in a way which creates a tilt toward death. The nature of the jurors' misunderstandings of mitigation and weighing is such that they virtually always skew the process in favor of death. (See Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided* (1995) 70 Ind.L.J. 1161, 1176-1177; Haney & Lynch, *Comprehending Life and Death Matters* (1994) 18 Law & Hum. Behav. 411, 428.) As one study summed up, "if the final penalty decision is death,

there is a high probability [i.e., not just a 'reasonable likelihood'] that this final penalty verdict is partially a product of the faulty interpretation of the law." (Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided*, *supra,* 70 Ind.L.J. at p. 1180.) Far from providing a "helpful framework" with which citizens can understand the concepts of capital decision-making (*People v. Steele* (2002) 27 Cal.4th 1230, 1258; *People v. Dyer* (1988) 54 Cal.3d 26, 82), California's pattern instructions confuse many jurors, who misunderstand and misapply the concepts. (See Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, *supra*, 21 Law & Hum. Behav. at p. 582.) Appellant urges this Court to reconsider its decisions holding otherwise.

Had the jury been properly instructed, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 536.) It certainly cannot be established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde v. California* (1990) 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) Accordingly, the judgment of death must be reversed.

XIV

THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE JURY TO FIND BEYOND A REASONABLE DOUBT FACTS THAT ARE USED EITHER TO AGGRAVATE A DEFENDANT'S SENTENCE OR TO IMPOSE CONSECUTIVE SENTENCES

A. Introduction

Appellant was sentenced to death for his conviction of first degree murder with special circumstances. As to the non-homicide offenses for which he was also found guilty, or the alleged enhancements found true, appellant received a determinate sentence which included upper term, consecutive and full sentences for the rape and sodomy counts; an upper term sentence for one count of second degree robbery; and all other counts as subordinate and consecutive to the second degree robbery principal term. The court's imposition of the upper term, full and consecutive sentences to these counts was based on aggravating circumstances which consisted of extrinsic facts that had not been found by the jury beyond a reasonable doubt. (21 RT 2901-2908; Third Supp. CT 6086-57–6086-60.)

The imposition of the elevated, full and consecutive sentences to the non-homicide offenses in this case violated appellant's federal constitutional rights to due process and a jury trial because they were based on factual determinations made by the judge, did not meet the required standard of proof, and appellant did not waive his right to have a jury determine the existence of those facts beyond a reasonable doubt. (U.S. Const., 6th and 14th Amends; Cal. Const., art. 1, § 16; *Cunningham v. California* ___ U.S. ___ [127 S. Ct. 856]; *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Ernst* (1994) 8 Cal.4th 441, 448 [waiver of jury trial must be expressly

made on the record].) Because the federal constitutional error that occurred in this case was not harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), this Court should vacate appellant's sentences for the rape and sodomy counts, as well as for one count of second degree robbery, and impose instead the midterm sentence for each offense. Additionally, the order that the sentences for all counts and special enhancements run consecutively should be vacated and concurrent terms imposed instead. In the alternative, this Court should remand the matter for re-sentencing in compliance with the Sixth and Fourteenth Amendments.

B. The Sentencing Hearing

Following the denial of appellant's motion for new trial, as well as the denial of his application to modify the verdict pursuant to Penal Code section 190.4, subdivision (e), the trial court sentenced appellant to death for the special circumstance murder of Ms. Morris. As to the remaining non-homicide counts, the court imposed an aggregate determinate sentence of 35 years and eight months. In making its sentencing determination, the court considered the probation report by Riverside County Deputy Probation Officer Diane Baisdell, an alternative sentencing report by defense Sentencing Consultant Don Flau, a written statement by Ms. Morris's nephew Raymond Abelin, and the evidence that had been presented at trial. No further evidence was presented at the time of sentencing. (21 RT 2901-2908.)

The trial court determined that the principal term for the non-homicide convictions was Count 11, second degree robbery (§ 211) with a special weapon use enhancement pursuant to section 12022, subdivision (b). The court imposed the aggravated term of five years for this count based on the "analysis" and "weighing of the factors set forth by the

probation officer in the probation report." The court also imposed one year consecutive for the section 12022, subdivision (b) use enhancement. (21 RT 2809-2810; 2901-2904.) The probation report set forth the following "Circumstances in Aggravation" pursuant to former rule 421 (now rule 4.421) as well as the "Circumstances in Mitigation" pursuant to former rule 423 (now rule 4.423) of the California Rules of Court:

> Rule 421(a): Facts relating to the crime, whether or not charged or chargeable as enhancements including the fact that:
>
> Rule 421(a)(1): The crimes involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.
>
> Rule 421(a)(2): Enhancement (The defendant was armed with or used a weapon at the time of the commission of the crime.)
>
> Rule 421(a)(3): The victim was particularly vulnerable.
>
> Rule 421(a)(8): The manner in which the crime was carried out indicates planning, sophistication, or professionalism.
>
> Rule 421(a)(9): The crimes involved an attempted or actual taking or damage of great monetary value.
>
> Rule 421(b): Facts relating to the defendant, including:
>
> Rule 421(b)(1): The defendant has engaged in violent conduct which indicates a serious danger to society.
>
> Rule 421(b)(2): The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.
>
> Rule 421(b)(3): The defendant has served a prior prison term.
>
> Rule 421(b)(4): The defendant was on probation or parole when the crime was committed.
>
> Rule 421(b)(5): The defendant's prior performance on

probation or parole was unsatisfactory.

. . .

Rule 423(b): Facts relating to the defendant, including the fact that:

Rule 423(b)(3): The defendant voluntarily acknowledged wrongdoing as to Counts VI through XV prior to arrest or at an early stage of the criminal process.

(Third Supp. CT 6086-57–6086-58.)

With regard to the assault with a deadly weapon charges (Counts 12 and 13), the court imposed a one year sentence for each conviction, representing one-third the midterm. The court stated that although the terms for Counts 12 and 13 would be stayed under section 654, the two one year terms imposed for those counts were to be consecutive to Count 11. The court's determination that the counts were to be consecutive to Count 11 was "based on the sentencing factors" enumerated in the probation report. (21 RT 2904; Third Supp. CT 6086-57–6086-58.)

The court imposed a sentence of one-third the midterm for each of the subordinate terms – Counts 1, 6, 7, 8, 9, 10. The sentence for Counts 1, 6-9 (§ 459) were each one year, four months; the sentence for Count 10 (§ 211) was one year. Based on the "reasons previously stated," the court ordered that each sentence for the six counts be served consecutively to count 13. (21 RT 2905.)

Pursuant to section 667.6, subdivision (c), the court imposed two consecutive maximum eight year terms for Count 2 (§ 261, subd. (a)(2)) and Count 3 (§ 286, subd. (c)). The court stated that the aggravated, full and consecutive terms for these counts were based on "the reasons so stated in the probation report." (21 RT 2905-2906.) Finally, the full and consecutive terms for the prior conviction allegations pursuant to sections 667.5 (one

year) and 667 (five years), which were found true,[109] were also imposed for the "reasons set forth herein." (21 RT 2906.)

C. The Aggravated Terms And Consecutive Sentences Imposed By The Trial Court Violated The Federal Constitution Because The Court Relied On Factors Not Found True Beyond A Reasonable Doubt By A Jury

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "[a]ny fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Four years later, in *Blakely v. Washington* (2004) 542 U.S. 296, the Supreme Court held that the trial court's use of an aggravating factor not found to be true by the jury to increase the defendant's sentence above the statutory maximum, other than the fact of a prior conviction, violated the rule articulated in *Apprendi*.

In January, 2007, the United States Supreme Court held that California's determinate sentencing law violates a defendant's federal constitutional right to a jury trial and proof beyond a reasonable doubt by allowing the judge to impose an aggravated sentence based on facts found by a judge by a preponderance of the evidence. (*Cunningham v. California* (2007) ___ U.S. ___[127 S.Ct. 856, 860, 871].) As the Supreme Court in *Cunningham* stated, "[b]ecause circumstances in aggravation are found by the judge not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt . . . the [California] DSL

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[109] As set forth in the Statement of the Case, *supra*, appellant waived his right to a jury trial on the prior conviction allegations. At the bifurcated hearing on the matter, the court found the allegations pursuant to sections 667 and 667.5 to be true.

[Determinate Sentencing Law] violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*Id.* 127 U.S. at p. 868.)[110] The *Cunningham* Court reemphasized that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" (*Ibid.*, quoting *Blakely v. Washington, supra*, 542 U.S. at p. 303.)

The Supreme Court's decision in *Cunningham v. California, supra*, 127 S.Ct. 856, applies to both the imposition of the aggravated term and consecutive sentences. *Cunningham* was based on a criminal defendant's constitutional right under the Sixth Amendment to have a jury determine beyond a reasonable doubt any fact "that exposes a defendant to a greater potential sentence." (*Cunningham v. California*, *supra*, 127 S.Ct. at pp. 863-864, citing *Jones v. United States* (1999) 526 U.S. 227 and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466.) Because a criminal defendant is not

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[110] The *Cunningham* Court disapproved of this Court's opinion in *People v. Black* (2005) 35 Cal.4th 1238, and held that neither 1) a trial court's broad discretion to determine what facts may support an enhanced sentence, 2) the benefits that criminal defendants may have received under the California's Determinate Sentencing Law ("DSL"), nor 3) a defendant's right to a jury trial on statutory enhancements shielded the DSL from constitutional scrutiny. (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 869.) Moreover, the Supreme Court in *Cunningham* found that California's DSL was unconstitutional and infringed on a criminal defendant's Sixth and Fourteenth Amendment rights to a trial by a jury because it permitted a judge to impose a sentence in excess of the statutory maximum based on a fact, other than a prior conviction, that was not found by a jury beyond a reasonable doubt nor admitted by the defendant. (*Id.* at pp. 860, 871.)

exposed to aggravated or consecutive sentencing absent a finding of extrinsic facts, the principles set forth in *Cunningham* regarding aggravated terms and the requirement that the fact-finding be by a jury beyond a reasonable doubt apply as well to consecutive sentencing. Just as *Cunningham* made clear that the midterm is the presumptive choice when sentencing a defendant pursuant to California's DSL, pursuant to sections 667.6 and 669, concurrent sentences are the default absent reasons to impose a consecutive term and fall within *Cunningham/Blakely/Apprendi* restrictions as well.

In this case, only two of the 10 aggravating factors considered and relied upon by the trial court to impose a sentence more than the statutory maximum arguably pass muster under *Cunningham*. Because those factors were the basis of other status enhancements, however, they could not be properly used to also aggravate a sentence by imposing an upper or consecutive term.[111] Moreover, the trial court's probable consideration of

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[111] Prior to trial, appellant admitted the use of a weapon enhancement pursuant to section 12022, subdivision (b) with regard to non-homicide counts 9-12. (XXII CT 4744-4745.) Following a court trial, the alleged prior prison term enhancement pursuant to section 667.5 was found true. The probation report listed the use of a weapon and the fact that appellant had served a prior prison term as sentencing factors in aggravation pursuant to California Rules of Court, rule 4.421, subdivisions (a)(2) and (b)(3). At sentencing, the trial court imposed a one year term for each enhancement under sections 12022, subdivision (b) and 667.5. The use of these factors to impose an aggravating sentence as well as an enhancement would violate the rule against dual use of facts. (Cal. Rules of Court, rule 4.441, subd. (c) ["A fact used to enhance the defendant's prison sentence may not be used to impose the upper term"]; *People v. Coleman* (1989) 48 Cal.3d 112, 164; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 681.)

Similarly, the trial court's repeated general reliance on the

(continued...)

appellant's prior convictions to support recidivist factors set forth in the probation report pursuant to rule 4.421, subdivisions (b)(2)-(b)(5) would have been based on qualitative, subjective conclusions which are the type of judgment calls that *Cunningham*, *Blakely* and *Apprendi* reserve for the jury. As noted above, pursuant to *Cunningham*, *supra*, all such factors in aggravation, excepting a prior conviction, must be tried to a jury and/or found beyond a reasonable doubt. That was not done in this case.

In making its sentencing determination, the trial court referenced by incorporation the aggravating and mitigating circumstances enumerated by the probation officer in her report as the basis for imposing the upper term and consecutive sentences. It is thus impossible to determine on the record before this Court which of the individual factors the trial court specifically relied upon, or which factors weighed the heaviest, to make its determination that the upper term and consecutive sentences at issue were appropriate for appellant.[112]

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[111] (...continued)
aggravating and mitigating circumstances enumerated in the probation officer's report violated § 1170, subdivision (b) and rule 4.441 because the same facts may not be used to impose both an upper term and consecutive sentence. (*People v. Coleman*, *supra*, 48 Cal.3d at p. 163.)

[112] The trial court's "blanket" incorporation of the aggravating and mitigating circumstances set forth in the probation officer's report fails to properly explain the basis for any sentencing choice. Moreover, incorporation of the probation officer's report frustrates meaningful appellate review and violates the rule against dual use of facts as well as that meaningful, fact-based reasons must be articulated for making more punitive sentencing choices such as a consecutive or full term. (Pen. Code, §§ 664; 667.6(c),1170, subds.(b)-(c), 1170.1, 1170.3; Cal. Rules of Court, rules 4.405, 4.439, 4.425, 4.441, 4.443; *People v. Fernandez, supra*, 226 Cal.App.3d. at pp. 678-684.)

Notably, one of the factors listed in the probation report, that appellant had engaged in "violent conduct which indicated a serious danger to society" pursuant to rule 4.421, subdivision (b)(1) (see Third Supp. CT 6086-57–6086-58), was one of the two facts found in *Cunningham* to require submission to a jury and proof beyond a reasonable doubt. (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 860 & fn. 1.) This factor was likewise invalid here because it had not been found by the jury beyond a reasonable doubt. With the exception of two factors which had been admitted by appellant or found true by the court (§§ 12022, subd.(b); 667.5), and the limited exception recognized by *Apprendi* – the bare fact of a prior conviction - all other factors upon which the trial court apparently relied required additional fact-finding beyond the judicial record.

1. The Imposition of the Upper term Sentence for Count 11 Violates the Federal Constitution under *Cunningham*, *Blakely* and *Apprendi*

The trial court imposed the upper term of five years for Count 11, a second degree robbery (§ 211), based on "weighing the aggravating and mitigating factors" enumerated in the probation report. (21 RT 2809-2810; 2901-2904.) As a result, the court elevated appellant's sentence for this offense from the midterm of three years (36 months) to five years (60 months) based on its own factual finding by a preponderance of the evidence, and where virtually all of the circumstances enumerated on the probation report which could properly be used to support an aggravated term were never submitted to, nor found true by a jury beyond a reasonable doubt.

California's Determinate Sentencing Law ("DSL") permits three related sentencing choices. (§ 1170, subd.(a)(3).) Section 1170,

subdivision (b) requires that the court select the middle term unless there are mitigating or aggravating circumstances (see *People v. Leung* (1992) 5 Cal.App.4th 482, 508; Cal. Rules of Court, rule 4.420, subd.(a)), and provides in relevant part:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.

The implementing provision, California Rules of Court, rule 4.420, specifies that circumstances in aggravation shall be established by the preponderance of the evidence and states in relevant part:

> (a) . . . The middle term shall be selected unless imposition of the upper or lower term is justified by the circumstances in aggravation or mitigation. [¶ (b) Circumstances in aggravation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. . . . [¶] (d) A fact that is an element of the crime shall not be used to impose the upper term. [¶] (e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

Because California expressly forbids the dual use of facts included in the element of the offense to impose the aggravated term (Cal. Rules of Court, rule 4.420, subd.(d)), the DSL necessarily requires facts beyond those determined by the jury and contained in the judicial record.

As set forth above, *Apprendi* and *Blakely* established the bright-line rule that any fact which elevates the sentence for a criminal offense above the proscribed statutory maximum term must be submitted to and found true by the jury beyond a reasonable doubt. Because *Cunningham* holds that the

bright-line rule applies to findings of aggravating factors under California's DSL, the upper term imposed as to Count 11 cannot stand. (*Cunningham v. California*, *supra*, 127 S.Ct. at pp. 873-877.)

Even assuming, arguendo, that the upper term for Count 11 could be attributed to a factual finding by the trial court that one or more of the "recidivist factors" justified an aggravated term (e.g., Cal. Rules of Court, rule 4.421, subds.(b)(2) and (b)(5)), the purported exception to *Apprendi's* bright-line rule of a prior conviction pursuant to *Almendarez-Torres v. United States* (1998) 523 U.S. 224 is not applicable and dispositive here.[113] As with the other aggravating circumstances set forth in the probation report, any such factual allegation based on recidivist factors was never submitted to, nor found true, by the jury.

Appellant recognizes that in *People v. McGee* (2006) 38 Cal.4th 682, this Court held that "*Apprendi* does not preclude a court from making sentencing determinations related to recidivism." (*Id.* at p. 707.) *McGee*, however, largely relied upon *Almendarez-Torres v. United States, supra*, 523 U.S. 224, where the United States Supreme Court held that the fact of a prior conviction need not be alleged in an indictment to elevate a defendant's criminal sentence. (*Id.* at pp. 228-235.) The holding of *Almendez-Torres* is applicable only to challenges to a pleading or charging document and not to issues concerning a defendant's right to a jury trial. (*Id.* at p. 246.) Moreover, subsequent decisions of the United States Supreme Court have all but explicitly overruled *Armendarez-Torres*. (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 487-490 ["It is arguable that

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[113] As noted above, the probation report listed a number of recidivist factors as aggravating circumstances pursuant to rule 4.421, subdivision (b)-(d) of the California Rules of Court.

Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested . . . . "]; *Shepard v. United States* (2005) 544 U.S. 13, 25 (conc. opn. of Thomas, J.), quoting *Harris v. United States* (2002) 536 U.S. 545, 581-582 ["*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence and a majority of the Court now recognizes [it] was wrongly decided. . . . Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule. . . despite the fundamental 'imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements'"].)

Accordingly, the aggravated term of five years for the second degree robbery conviction (Count 11) should be vacated, and instead the midterm of three years imposed.

2. The Full Maximum Consecutive Terms Imposed As To Counts 2 and 3 Pursuant To Section 667.6, Subdivision (c), Violate The Federal Constitution And Should Be Vacated

Not only did the trial court impose two eight year upper terms for the rape (Count 2) and sodomy (Count 3) convictions, but the court set the terms to run fully and consecutively pursuant to section 667.6, subdivision (c), on the basis of a factual determination of the aggravating and mitigating circumstances set forth in the probation officer's report. (21 RT 2905-2906; Third Supp. CT 6086-57–6086-59.) As noted above, the majority of those circumstances were not found true beyond a reasonable doubt by a jury.

Section 1170.1 provides that where a criminal defendant is convicted of two or more felonies, and consecutive terms are to be imposed, the

sentence shall generally consist of a principal term, one or more subordinate terms, and any applicable enhancement terms. Section 1170.1 further provides:

> The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed.

(Pen. Code, § 1170.1, subd. (a).) Clearly, the plain language of section 1170.1 (i.e., use of the word "shall") creates a mandatory sentencing presumption in favor of imposing only one-third of the middle term for all consecutive/subordinate terms imposed.

Section 667.6, on the other hand, provides for the imposition of full, separate and consecutive terms for each subordinate term for certain enumerated sex offenses, "in lieu of the term provided in section 1170.1." (Pen. Code, § 667.6, subds. (c) and (d).)[114] Thus, section 667.6 allows for an upward departure from the general and more lenient consecutive sentencing provisions of section 1170.1, under certain specified circumstances.

Imposition of full, separate and consecutive sentences under section 667.6, subdivision (c), rests within the court's discretion, but the court is nonetheless required to first make specific factual findings justifying the "much harsher sentencing measure" than the presumptive consecutive

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[114] Section 667.6, subdivision (c) provides, in relevant part:

> In lieu of the term provided in Section 1170.1, a full separate and consecutive term may be imposed for each violation of . . . subdivision (a) of Section 261 . . . [or] Section 286 . . whether or not the crimes were committed during a single transaction.

sentencing scheme prescribed by section 1170.1. (*People v. Belmontes* (1983) 34 Cal.3d 335, 344-348; *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1489; *People v. Smith* (1984) 155 Cal.App.3d 359; see California Rules of Court, rules 4.426, 4.425.)[115] This Court has recognized that a

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[115] California Rules of Court, rule 4.426, subdivision (b) provides, in relevant part:

> [T]he sentencing judge shall . . . determine whether to impose a full, separate and consecutive sentence under 667.6 (c) for the violent sex crime or crimes in lieu of including the violent sex crime or crimes in the computation of the principal and subordinate terms under section 1170.1(a). A decision to impose a fully consecutive sentence under section 667.6 (c) is an additional sentence choice which requires a statement of reasons, but which may repeat the same reasons. The sentencing judge is to be guided by the criteria listed in rule 4.425, which incorporates rules 4.421 and 4.423, as well as any other reasonably related criteria provided in rule 4.408.
>
> Rule 4.425, setting forth the criteria affecting concurrent or consecutive sentencing, states in relevant part that:
>
> [(a)] Facts relating to crimes, including whether or not:
>
> (1) The crimes and their objectives were predominantly independent of each other;
>
> (2) The crimes involved separate acts of violence or threats of violence; or
>
> (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.
>
> . . .
>
> [(b)] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:

(continued...)

decision to sentence under section 667.6, subdivision (c), requires the trial court to make a series of sentencing choices, the basis of which must be stated for the record:

> In deciding whether to sentence consecutively or concurrently, and if consecutively, whether to do so under section 1170.1 or under the harsher full term provisions of subdivision (c) of section 667.6, the court is obviously making separate and distinct decisions. [Footnote omitted.] A decision to sentence under section 667.6, subdivision (c) is an additional sentence choice which requires a statement of reasons separate from those justifying the decision merely to sentence consecutively.

(*People v. Belmontes*, *supra*, 34 Cal.3d at pp. 347 & 348.) The decision to impose full, consecutive and separate terms "must be made thoughtfully because the Legislature obviously intended by the alternative language in section 667.6, subdivision (c), that the more punitive statute be utilized for the more serious sex offenders." (*People v. Wilson* (1982) 135 Cal.App.3d 343, 353.)

The imposition of "full strength consecutive sentencing" for sex offenses under section 667.6, subdivision (c), requires judicial fact-finding beyond what is implicit in an underlying jury verdict. Thus, like the DSL sentencing scheme for aggravated offenses, this particular sentencing procedure violates a criminal defendant's constitutional rights to a jury trial and due process of law according to the bright-line rule of *Apprendi v. New*

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[115] (...continued)

(1) A fact used to impose the upper term;

(2) A fact used to otherwise enhance the defendant's prison sentence; and

(3) A fact that is an element of the crime may not be used to impose consecutive sentences.

Jersey, *supra*, and *Blakely v. Washington*, *supra,* which has been recently reaffirmed by *Cunningham v. California*, *supra*.

The reasoning of *Cunningham v. California*, *supra*, regarding upper term sentencing of California's DSL applies to the imposition of a consecutive term. There is no qualitative difference between the manner in which California's sentencing scheme allows for the imposition of an upper term following a determination of aggravating circumstances and the manner in which California allows for the imposition of maximum, full and consecutive terms for sex offenses under section 667.6, subdivision (c). Just as section 1170 provides a statutory presumption in favor of the midterm sentence (*Cunningham v. California*, *supra*, 127 S.Ct. at pp. 861-862), section 1170.1, which is the general operative statute for aggregate and consecutive sentencing, provides for a statutory presumption in favor of one-third the midterm for all subordinate terms (*People v. Miller* (2006) 145 Cal.4th 206, 214). Under section 1170.1, the sentencing judge may only depart from the presumptive term, thus proceeding to aggravate a sex offense via section 667.6, subdivision (c) (imposing full, separate and consecutive terms), after specific additional facts justifying the departure from the norm are stated on the record. (See *People v. Fernandez*, *supra*, 226 Cal.App.3d at p. 682.) This procedure is identical to the California DSL procedure for upper term sentencing that *Cunningham* invalidated because there was no finding by the jury beyond a reasonable doubt with regard to the justification for the departure upward.

The sentencing structure for aggravated sex offenders in California presents the same concerns that were addressed in *Apprendi*. As the Supreme Court aptly observed,

If a defendant faces punishment beyond that provided by

> statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not -- at the moment the State is put to proof of those circumstances -- be deprived of protections that have, until that point, unquestionably attached.

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 484.) Like California's DSL sentencing scheme, the sentencing scheme under section 667.6, subdivision (c), unconstitutionally deprives defendants of due process and jury trial protections because it gives the sentencing judge discretion to impose full, aggravated and consecutive terms by a preponderance of the evidence. As the Supreme Court recognized in *Cunningham*:

> [B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment is not satisfied.

(*Cunningham v. California*, *supra*, 127 S.Ct. at p. 858.)

In the present case, the full, consecutive eight year upper terms for the rape and sodomy convictions imposed by the trial court pursuant to section 667.6, subdivision (c) violated appellant's rights to due process and a jury trial under *Apprendi/Blakeley/Cunningham*. The sentence imposed for each of these counts should therefore be vacated, and the midterm as well as concurrent sentencing imposed.

3. The Consecutive Terms Imposed for the Remaining Counts Violate the Federal Constitution and Should Be Vacated

As noted above, the trial court imposed consecutive terms for Counts 1 (§ 459), 6-9 (§ 459), and 10 (§ 211) pursuant to section 669, stating that

the basis for the sentencing choice was for the "reasons previously stated." (21 RT 2905.) The court also imposed consecutive sentences for counts 12 and 13, although those terms were to be stayed pursuant to section 654. (21 RT 2906.)

As with the imposition of the greater sentencing terms discussed above, the additional consecutive terms violated appellant's Sixth and Fourteenth Amendment rights because the factual basis to aggravate the sentences for those counts was not determined by a jury beyond a reasonable doubt. (*Cunningham v. California*, *supra*, 127 S.Ct. 856; *Blakely v. Washington*, *supra*, 542 U.S. 296; *Apprendi v. New Jersey*, *supra*, 530 U.S. 466.)

Sections 654 and 669 create a presumption that sentences will be imposed concurrently, since a trial court may impose consecutive sentences only on the basis of specific findings which justify doing so. (*In re Walters* (1995) 39 Cal.App.4th 1546, 1552-1553 [rule 669 requires concurrent sentence in absence of express order otherwise].) Section 654 prohibits the imposition of separate punishments for a single offense, and also provides that where the defendant has been convicted of multiple offenses, the offense carrying the longest prison term will be the sentence imposed.[116] However, this Court has long held that, "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If

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[116] Section 654 provides, in relevant part, that: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11,19; see *People v. Latimer* (1993) 5 Cal.4th 1203, 1208, 1216-1217.)

Section 669 provides that, where there are multiple convictions, the sentencing court may order the sentences for those convictions to run concurrently or consecutively and must issue an order stating its sentencing choice.[117] The statute explicitly states that, where the sentencing court fails to make this determination, "the term of imprisonment on the second or subsequent judgment shall run concurrently." (§ 669.) In *People v. Caudillo* (1980) 101 Cal.App.3d 122, where the sentencing court had failed to make an explicit order for consecutive sentences, the reviewing court amended the abstract of judgment to indicate that the sentences were to run concurrently. (*Id.* at pp. 125-127; *In re Walters*, *supra*, 39 Cal.App.4th at pp. 1552-1553 [section 669 requires concurrent sentencing in absence of express statement of reasons otherwise]; see *People v. Bruner* (1995) 9 Cal.4th 1546, 1552-1553 ["The court failed to specify whether new term would be concurrent with, or consecutive to, the revocation term. Accordingly, it became a concurrent sentence by operation of law"].)[118]

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[117] Section 669 provides, in relevant part, that: "When any person is convicted of two or more crimes . . . the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively."

[118] California Rules of Court, rule 4.425 sets out criteria to guide the sentencing courts' "decision to impose consecutive rather than concurrent sentences," and when sentencing a defendant under California's determinate sentencing scheme, the court "shall apply the sentencing rules

(continued...)

Appellant's convictions by the jury in his case, without more, mandated concurrent sentencing as the "default" choice under this state's sentencing laws. As with imposition of the aggravated or upper terms for certain counts, as well as the full consecutive term under section 667.6, subdivision (c), the trial court's election to impose consecutive terms increasing appellant's aggregate sentence required that the court articulate specified reasons for doing so. Because the basis for the greater sentencing choice was not by the jury beyond a reasonable doubt, imposition of the consecutive terms pursuant to sections 669 and 654 violated appellant's due process and jury trial rights under the Sixth and Fourteenth Amendments and should be vacated. (*Cunningham v. California, supra*, 127 S.Ct. at p. 860 & fn. 1.)

D. The Lack Of Jury Fact-finding And/Or Proof Beyond A Reasonable Doubt Was Not Harmless In This Case

The denial of a right to a jury trial as to the aggravating circumstances relied upon by the trial court to aggravate the determinate sentence is not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *Washington v. Rucenco* (2006) ___ U.S. ___, [126 S.Ct. 2546, 2553 [pursuant to *Blakely*, failure to submit sentencing factor to jury may be reviewed for harmlessness under *Chapman v. California*]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Apprendi* error subject to harmless error review under *Chapman*].)

In appellant's case, the prosecution cannot establish that the error was harmless beyond a reasonable doubt. It is speculative whether the jury

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[118] (...continued)
of the Judicial Council." (§ 1170, subd. (a)(3).)

would have found a sufficient number of the aggravating factors to be true.[119] The majority of the aggravating circumstances enumerated on the probation officer's report and used by the judge were primarily subjective conclusions. In contrast, the only arguably undisputed facts in this case were the weapons use enhancement concerning the second degree robbery count not related to the Morris homicide (Count 11) and the prior prison term enhancement (§667.5).

Moreover, a number of the circumstances listed in the probation report, such as the seriousness of the offense, violence, great bodily harm, cruelty and vulnerability of the victim, were inherent in the crimes themselves and could not be used as an aggravating circumstance for sentencing. (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 868 [fact that is element of crime or essential to jury's guilt determination may not be used to impose upper term]; Cal. Rules of Court, rule 4.420, subd. (d).) There is also a reasonable doubt that the jury would have found appellant's two prior convictions to be numerous and increasing in seriousness. (*People v. Fernandez*, *supra*, 226 Cal.App.3d at p. 681, quoting *People v. Berry* (1981) 117 Cal.App.3d 184, 191 ["two prior convictions . . . are not 'numerous'"].) Without elaboration as to why the aggravating factor that the manner in which the crimes were carried out indicated planning, sophistication, or professionalism made the rape, sodomy or robbery counts

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[119] As set forth previously and in footnote 112, *supra*, the trial court "blanketly" incorporated the probation officer's report and the aggravating and mitigating factors enumerated therein in rendering its sentencing decision imposing the aggravated term for Counts 2, 3, and 11 as well as for imposing consecutive, separate and full terms. On this record it is impossible to know which factors the court relied upon for its individual sentencing decisions.

any worse than they would have ordinarily been, it is not likely that the jury would have found this factor applicable beyond a reasonable doubt. (*People v. Fernandez*, *supra*, 226 Cal.App.3d at p. 680, citing *People v. Young* (1883) 146 Cal.App.3d 729, 734 [aggravating factor must make offense distinctively worse than it would have been].) Similarly, it is not likely that the jury would have found applicable or given much aggravating effect to the factor that there was a taking or attempted taking or damage involving great monetary value. Finally, a jury may not have found that appellant was on probation or parole when the homicide was committed, or that appellant's prior performance on probation or parole was unsatisfactory.

Even though there were arguably two aggravating circumstances found true beyond a reasonable doubt or by appellant's admission - the use of a weapon enhancement (§ 12022, subd. (b)) during the November 1992 second degree robbery involving Jeffrey Cole and Kenneth Eastbourne (Count 11) and the prior prison term enhancement (§ 667.5) – neither circumstance could properly be used to aggravate the terms or impose a consecutive sentence. Appellant received a one year term for the prior prison term enhancement pursuant to section 667.5, and to rely on the same factor to impose an upper or consecutive term would constitute an improper dual use of facts. (Cal. Rules of Court, rule 4.41, subd.(c); *People v. Coleman*, *supra*, 48 Cal.3d at p. 163; *People v. Fernandez*, *supra*, 226 Cal.App.3d at p. 681.) Similarly, appellant received a one year term for the weapon use enhancement pursuant to section 12022, subdivision (b), and this factor could not be used to aggravate the counts relating to the Cole/Eastbourne incident due to the same prohibition of dual use of facts. (*Ibid.*) Nor could the use of a weapon circumstance be used to aggravate

the other counts because evidence of the use of a weapon only occurred during the November 1992 incident.

Even assuming, arguendo, that the jury would have determined that the factors relating to appellant being on probation or parole at the time of the crimes or that his prior performance on parole or probation was unsatisfactory, these two factors would not have outweighed the mitigating factor that appellant voluntarily admitted committing the unrelated burglary offenses. Moreover, there is no indication on this record that the trial court relied solely on either or both of these factors to aggravate or impose consecutive sentences.

Under these circumstances, the prosecution cannot demonstrate that the denial of appellant's right to a jury trial and proof beyond a reasonable doubt was harmless.

XV

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 30 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme 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.

B. The Broad Application Of Section 190.3 Subdivision (a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (CALJIC No. 8.85; 20 RT 2797-2800.) 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. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the impact of the victim's death, the method of the homicide, the motive for the homicide, the time of the homicide, and the location of the homicide. In the instant case, the prosecutor repeatedly argued that the method of the homicide (20 RT 2809-

2813, 2829-2830), as well as the impact of the victim's death on her family and the community (20 RT 2813-2814, 2830), were aggravating factors.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.85; 20 RT 2797-2800.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 863-864], now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 20 RT 2844-2846.) Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely*

and *Cunningham* require that each of these findings be made by the jury beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural sentencing protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (20 RT 2797-2800, 2844-2846), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof,

the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra,* 536 U.S. at p. 609 (because Arizona's enumerated aggravating factors operate as the functional equivalent of elements of the offense, the Sixth Amendment requires that they be found by a jury). (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 586-587; see *Richardson v. United States* (1999) 526 U.S. 813, 817.) "Jury unanimity ... is an accepted, vital

mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the federal constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require

jury unanimity as mandated by the federal constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 20 RT 2801-2802.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant (18 RT 2629-2637, 2652, 2654-2668) and devoted a considerable portion of its closing argument to arguing these alleged offenses (20 RT 2815-2818).

The United States Supreme Court's recent decision in *Cunningham v. California*, *supra*, ___ U.S. ___ [127 S.Ct. 856], as well as earlier decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury and the jury should have been so instructed.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88, 20 RT 2844-2846.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (20 RT 2844-2846.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court previously has rejected this claim (*People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges this Court to reconsider those rulings.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. The jury was so instructed in this case. (20 RT 2844-2846.) By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the pattern instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Failed to Inform the Jurors that Even If They Determined That Aggravation Outweighed Mitigation, They Still Could Return a Sentence of Life Without the Possibility of Parole

Pursuant to CALJIC No. 8.88, appellant's jury was directed that a death judgment cannot be returned unless the jury unanimously finds "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (20 RT 2844-2846.) Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. Under *People v. Brown* (1985) 40 Cal.3d 512, 541, the jury retains the discretion to return a sentence of life without the possibility of parole even when it concludes that the aggravating circumstances are "so

substantial" in comparison with the mitigating circumstances. Indeed, under California law, a jury may return a sentence of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979 ["The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial to warrant death."]; CALCRIM No. 766 ["Even without mitigating circumstances, you may decide that the aggravating circumstances, are not substantial enough to warrant death"].) Appellant requested that the jury be so instructed. (Proposed Penalty Phase Instruction Nos. 3 & 11; see Arg. XIII, sec. C, *supra*, incorporated by reference.) The pattern instructions given in this case, failed to inform the jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346).

The decisions in *Boyde v. California* (1990) 494 U.S. 370, 376-377 and *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307, do not foreclose this claim. In those cases, the High Court upheld, over Eighth Amendment challenges, capital-sentencing schemes that mandate death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. That, however, is *not* the 1978 California capital-sentencing standard under which appellant was condemned. Rather, this Court in *People v. Brown, supra*, 40 Cal.3d at p. 541, held that the ultimate standard in California is the appropriateness of the penalty. After *Boyde*, this Court has continued to apply, and has refused to revisit, the *Brown* capital-sentencing standard. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 949, fn. 33; *People v. Hardy* (1992) 2 Cal.4th 86, 203; *People v. Sanders* (1990) 51 Cal.3d 471, 524, fn. 21.)

This Court has repeatedly rejected this claim. (See *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 170.) Appellant urges the Court to reconsider these rulings.

8. The Instructions Failed to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman*, *supra*, ___ U.S. ___ [127 S.Ct. 1706, 1712-1714]; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the trial court refused to give appellant's proposed instruction that a mitigating circumstance need not be proved beyond a reasonable doubt, and the jury was thus left with the impression that the defendant bore some particular burden in proving facts in mitigation. (Proposed Penalty Instruction No. 36; see Arg. XIII, sec. A., *supra*., incorporated by reference.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. No explicit instruction to the contrary was given at the penalty phase. Although appellant requested instructions which would have made clear that the jury is not required to unanimously agree on any mitigating factor before it an be used by a single juror as a basis for a

sentence less than death, the trial court refused to give any of those instructions. (Proposed Penalty Phase Instruction Nos. 9, 10 & 36; see Arg. XIII, secs. A. & D., *supra,* incorporated by reference.) In the absence of such instructions, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal constitution

9. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of*

Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. 14th), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. 8th & 14th), and his right to the equal protection of the laws. (U.S. Const., Amend. 14th.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing To Require That the Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.)

This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85, factors (d) and (g); 20 RT 2797-2800) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal constitution. (*Mills v. Maryland*, *supra*, 486 U.S. 367, 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) The Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (20 RT 2821-2824 [prosecutor argued that mitigating evidence under factors (d), (e), (f), (g), (h), (i) and (j) was "nonexistent" in this case].) The trial court failed to omit those factors from the jury instructions (CALJIC No. 8.85, 20 RT 2797-2800), thus likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. (*Monge v. California*, *supra*, 524 U.S. at p. 732, citing *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604; CALCRIM No. 763 ["If you find there is no evidence of a factor, then you should disregard that factor," "Do

not consider the absence of a mitigating factor as an aggravating factor" and "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You may not take into account any other facts or circumstances as a basis for imposing the death penalty"]; see also Arg. XIII, sec. B., incorporated by reference.)

Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (See 20 RT 2797-2800.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – 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. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant specifically requested that the trial court provide an instruction which explained to the jury that the absence of mitigating factors did not constitute aggravation. (Appellant's Proposed Penalty Instruction Nos. 22, 23, 25; CALCRIM No. 763 ["Do not consider the absence of a mitigating factor as an aggravating factor" and "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this

case"]; see Arg. XIII, sec. B., incorporated by reference.)

Appellant's 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. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Clemons v. Mississippi* (1990) 494 U.S. 738, 752; *Stringer v. Black* (1992) 503 U.S. 222, 230-232, 235-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during the penalty phase closing argument. During argument the prosecutor addressed factors (d) - (j) seriatim, highlighting that there was "zero" or "nonexistent" evidence of any of these factors, and thus likely left the jury with the impression that the lack of mitigation in this case constituted aggravation. (20 RT 2821-2824.)

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme 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* (1991) 1

Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. (See *Solem v. Helm* (1983) 463 U.S. 277, 290-292.) For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates The Equal Protection Clause

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 in violation of the equal protection clause of the Fourteenth Amendment to the federal constitution. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Griffin v. Illinois* (1956) 351 U.S. 12, 28-29.)

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; California Rules of Court, rule 4.42, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has previously rejected these equal

protection arguments. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider that ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court numerous times has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments to the federal constitution, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Hillhouse*, *supra*, 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment (see Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" at <http://web.amnesty.org> [as of 5/23/2007]) and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

XVI

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[120] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 [combined effect of errors of federal constitutional magnitude and non-constitutional errors should be reviewed under federal harmless beyond a reasonable doubt standard]; *People v. Archer* (2000) 82 Cal.App.4th 1380,

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[120] Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

1394-1397; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The cumulative effect of the errors in this case so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

Conceivably, an error that we would hold nonprejudicial on

> the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Reversal of the death judgment is mandated here because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

CONCLUSION

For all of the reasons stated in appellant's Opening Brief, appellant's convictions and death judgment must be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Susan Ten Kwan, am the Senior Deputy State Public Defender assigned to represent appellant, Royce Lyn Scott, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this supplemental opening brief is 94, 307 words in length excluding the tables and certificates.

Dated: July 16, 2007

Susan Ten Kwan

SUSAN TEN KWAN

DECLARATION OF SERVICE

Re: *People v. Royce Lyn Scott* No. S064858

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Royce Lyn Scott
(Appellant)
(Delivered by Hand)

Each said envelope was then, on July 16, 2007, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on July 16, 2007 at San Francisco, California.

_____
DECLARANT