IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	S097363
Plaintiff/Respondent	Ventura County CR45651
vs.	
JUSTIN JAMES MERRIMAN	
Defendant/Appellant	

APPELLANT'S OPENING BRIEF

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Ventura County Superior Court, Honorable Judge Vincent J. O'Neill Presiding

Glen Niemy
Attorney at Law
P.O. Box 764
Bridgton, ME 04009
(207) 647-2600
State Bar # 73646

Attorney for Appellant

DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	S097363
	)	
Plaintiff/Respondent	)	Ventura County
vs.	)	
	)	CR45651
JUSTIN JAMES MERRIMAN	)	
	)	
Defendant/Appellant	)	
	)	
	)	

APPELLANT'S OPENING BRIEF

On Automatic Appeal from the Judgment of the Ventura County Superior Court, Honorable William Bailey, Judge.

STATEMENT OF THE CASE

A consolidated indictment was filed on November 27, 2000, charging appellant with 28 counts of criminal activity.[1] The indictment

1. A summary chart will follow. It also should be noted that 8 of these counts were severed prior to trial.

charged the first degree murder of Katrina Montgomery, on or about November 28, 1992, with the allegations of use of a deadly weapon (a knife) and special circumstances of rape and forcible oral copulation (Count I; P.C. section 187, 190.2 (a) (17) (C), 1192.7 (c) (23), and 23033 (b)); the rape, oral copulation, and penetration by a foreign object of Robyn G., on or about and between October 1, 1994 and March 20, 1995 (Counts II, III and IV; P.C. section s 261 (a) (2), 288 (c), and 289 (a)); three incidents of rape of Billie B., between August 1, 1994 and January 31, 1995, as well as an attempted oral copulation during the third incident (Counts V, VI, VII and VIII; P.C. sections 261(c) (2) and 644/288 (c); resisting an executing officer, with the special allegation of personal use of a hand gun, exhibiting a deadly weapon to a police officer to resist arrest, assault on a police officer, vandalism with damages over $5000, and being under the influence of a controlled substance on January 30-31, 1998 (Counts IX-XV; P.C. sections 69, 12022.5 (a) (1), 417.8, 245 (c), 594 (b) (2) and Health and Safety Code section 1155 (a)); conspiracy to dissuade a witness by force or threat with a special allegation that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang, to wit, the Skin Head Dogs, with the specific intent to promote, further and assist in criminal conduct of gang members on or about January 6, 1998, to

May 20, 1999 (Count XVI; P.C. sections182 (a) (1),136.1 (c) (1), and 186.22); solicitation to dissuade a witness and dissuading a witness by force or threat, on or about January 6, 1998 to March 31, 1999 (Counts XVII-XX; P.C. Sections 136.1 (c) and 653 (f).)

COUNT	ALLEGED VICTIM	CHARGE	DATE
1	Katrina Montgomery	Murder and special circumstances	11/28/92
2	Robyn Gates	Forcible Rape	10/1/94-3/30/95
3	Robyn Gates	Forcible Oral Copulation	10/1-94-3/30/95
4	Robyn Gates	Foreign objection	10/1/94-3/3/95
5	Billie Bryant	Forcible Rape	8/1/94- 1/31/95
6	Billie Bryant	Forcible Rape	6/1/95-9/30/95
7	Billie Bryant	Forcible Rape	10/1/95-11/30/95
8	Billie Bryant	Att. Forcible Oral Cop	10/1/95-11/30/95
9	Miller and Beery	Resisting Executive Officer (PC69)	1/30/98-1/31/98

10.		**Exhibiting Deadly Weapon to a police officer to Avoid Arrest (417.8)**	**1/30/98-1/31/98**
11	**Sgt Taylor**	**Assault on Police Officer (245 (c))**	**1/30/98-1/31/98**
12	**Sgt Taylor**	**Resisting Executive Office**	**1/30/98-1/31/98**
13		**Exhibiting Deadly Weapon to a police officer to Avoid Arrest (417.8)**	**1/30/98-1/31/09**
14	**Jeanette Rail**	**Vandalism Over $5,000**	**1/30/98-1/31/98**
15		**Under Influence of Controlled Substance**	**1/30/98-1/31/98**
16		**Conspiracy to Dissuade Witness by Force or Threat PC 182 (a) (1) and 136 .1 (c) with section 186.22 allegation**	**1/6/98-5/20/99**

17		**Solicitation to Dissuade Witness PC136.1 (c) 653f (a)**	**1/6/98-3/31/99**
18	**John C.**	**Dissuading a Witness by Force or Threat PC136.1 (c)**	**1/6/98-3/31/99**
19	**Larry N.**	**Dissuading Witness by Force or Threat PC 136.1 (c)**	**1/6/98-3/31/99**
20	**Chris B.**	**Dissuading Witness by Force or Threat PC 136.1 (c)**	**1/6/98-3/31/99**

Jury selection began on November 29, 2000 (VII CT 1530 et seq.) and the jury was empaneled on January 4, 2001. (VII CT 1701 et seq.; 35 RT 6069.) The prosecutor's case commenced on that same day. The government rested on January 31, 2001. (VII CT 1846 et seq.; 52 RT 9251.) Appellant rested on February 2, 2001. (VII CT 1861 et seq.; 54 RT 9632.) On February 7, 2001, the prosecutor presented a very short rebuttal case. (VIII CT1891 et seq.; 54 RT 9634.) On February 8, 2001, the jury received the case for deliberation. (VIII CT 2019 et seq.; 57 RT 10230.) On

February 13, 2001, the jury returned a guilty verdict on all counts and true findings on all allegations. (VIII CT 2057 et seq.; 58 RT 10313.)

The penalty phase of the trial commenced February 27, 2001. (VIII CT 2101 et seq.; 59 RT 10484.) The prosecutor rested the same day, whereupon appellant commenced presentation of his case, resting on March 1, 2001. (VIII CT 2117; 60 RT 10598-61 RT 10927.) The prosecutor began its rebuttal case on March 5, 2001. (VIII CT 2140 et seq.; 61 RT 10970.) On March 8, 2001, appellant testified in his own behalf. (VIII CT 2221 et seq.; 64 RT 11398.) On March 12, 2001, the jury returned a verdict of death. (VIII CT 2228 et seq.; 65 RT 11558.)

A Motion for a New Trial and Reduction of Penalty was filed on April 24, 2001. (VIII CT 2269 et seq, VIII CT 2276 et seq.) On May 1, 2001, the motion was denied by the trial court and a judgment of death was entered. (VIII CT 2298; 65 RT 11613.)

STATEMENT OF FACTS

MURDER OF KATRINA MONTGOMERY (COUNT I)

Katrina Montgomery, known to her friends and family as Trina, was 19 years old in November, 1992. At that time, she was living with her parents in Los Angeles. (37 RT 6483.) On November 26th she attended a

Thanksgiving celebration with her very large extended family. (37 RT 6489.) While her family had plans to go to a relative's house in Santa Barbara the following day, Trina had other plans. She told her mother that she would join the family in Santa Barbara that Saturday. Trina told her mother that she would be working on Friday, then meeting a friend, Keith Ledgerwood, in the evening. (37 RT 6490-6493.)

Trina's mother, Kathryn, was sick that Saturday and did not go to Santa Barbara. At approximately 2:00 p.m. on Saturday, Mrs. Montgomery received a call from Apryl Porcho, a friend of Trina's. Mrs. Montgomery was surprised to hear from Apryl because she had not heard from her in some time. Apryl asked Mrs. Montgomery if Trina was home. Mrs. Montgomery told Apryl that Trina had gone to Santa Barbara. While Mrs. Montgomery was not concerned at this call, she did not like Apryl calling because she did not approve of Apryl's lifestyle. (37 RT 6493-6495.)

An hour later, Mrs. Montgomery received a far more troubling phone call. She was told by a law enforcement officer that the La Crescenta Sheriff's Office had found Trina's truck abandoned over an embankment in the Angeles Crest Forest. (37 RT 6495-6496.) The truck was off the road on a dirt turnout over a dirt beam. There seemed to be blood on the truck bed

and tailgate area. (39 RT 6906-6907.)[2]

The police called shortly after this first call to inform Mrs. Montgomery that her daughter had not been located. (37 RT 6497.) Mrs. Montgomery immediately called her sister in Santa Barbara and was informed that Trina had never shown up. Mrs. Montgomery continued to make calls to Trina's friends in a futile attempt to find her. (37 RT 6497.) At approximately 7:00 pm that evening, Mrs. Montgomery received a call from Scott Porcho, Apryl's husband, asking if Trina was there. Mrs. Montgomery told Porcho about the calls from the police and he replied that he hadn't seen Trina for the past few months. (37 RT 6499.)

Mrs. Montgomery then called other members of her family in an attempt to find Trina. (37 RT 6500.) She also called the Porcho house and spoke again to Apryl, who said that she hadn't seen Trina for months. She followed this up with a call to Keith Ledgerwood, who told her that there was a possibility that Trina was at the Porcho house. (37 RT 6501-6502.)

After speaking to Ledgerwood, Mrs. Montgomery called the Porchos once again. This time, Apryl admitted speaking with Trina earlier that

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2. This blood was later analyzed by a criminalist from the LAPD. While the source of the blood could not be positively identified, the analysis showed that it was the blood of a biological child of Michael and Katherine Montgomery, Trina Montgomery's parents. (39RT 6917.)

week and said Trina mentioned something about visiting the Porchos in the near future. However, Apryl still denied seeing Trina recently. (37 RT 6502.) She told this lie because her husband, Scott, had ordered her to do so and she was afraid of him. (40 RT 7127-7129.)

Earlier that evening, Mrs. Montgomery had spoken to Trina's close friend, Lee Smith, who suggested that she call appellant. (37 RT 6504.) Mrs. Montgomery had some knowledge of appellant and his relationship with Trina. In early 1992, Mrs. Montgomery became aware that Trina was communicating with someone in jail by the name of Justin Merriman. She knew that appellant was a friend of Trina's boyfriend, Mitch Sutton. She also knew that Trina had been accepting collect calls from appellant while he was in jail. She told Trina not to accept these calls any longer. (37 RT 6484-6485.)

One morning in March 1992, Mrs. Montgomery and Trina were at home and Trina seemed very upset. Mrs. Montgomery asked her why. Trina told her that the previous night she had visited appellant. Due to the late hour, Mrs. Merriman had offered her a place to spend the night. Sometime during the night, appellant entered her guest room, climbed into bed with her and made sexual advances. Trina said she felt sick and needed to use the bathroom. Instead of going to the bathroom, she fled the house

and drove home. (37 RT 6486-6487.)

Mrs. Montgomery followed Lee Smith's advice and called appellant, who said that he last saw Trina a couple of nights before at a "get together" at the Porcho house. (37 RT 6504-6507.) At 2:00 that morning, Mrs. Montgomery called the Porcho house once again. This time, Apryl admitted that Trina was at their house on Friday night. Apryl told Mrs. Montgomery she did not want to tell the truth before because she did not want Mrs. Montgomery to think that they "did anything bad" to Trina. Apryl never explained this statement to Mrs. Montgomery. (37 RT 6521-6522.)

Over the next several years, Mrs. Montgomery continued in her futile efforts to find Trina. Mrs. Montgomery now believes that her daughter is dead. (37 RT 6524-6526.)

Apryl Porcho[3] had known Trina Montgomery for several years prior to 1992. She first became friends with Trina when they were both living in the Ojai area. (39 RT 7009.) Trina was invited to a party at the Porcho house, at 1231 Azalea Street in Oxnard, on the Friday after Thanksgiving, 1992. At that time, John Cundiff and Juno Diaz were also living with the Porchos. (39 RT 7101-7104.)

At the time of this party, Scott Porcho was a member of a street gang

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3. By the time of the trial, Apryl had remarried and assumed her new husband's name of Bronley.

known as the Skin Head Dogs. This gang was a violent, racist gang associated with other white supremacist gangs. (39 RT 6996, 7000.)

Although women associated with gang members, no women were allowed to join. Gang members considered each other as "family" and felt that they owed their allegiance to each other. They referred to each other as "brothers." (39 RT 7002-7003.) Appellant was a member of this gang and was referred to by his monikers "Mumbles" or "Knucklehead." (39 RT 7013.) Both Porcho and appellant were considered leaders of the Skin Head Dogs. (39 RT 7022.)

Scott Porcho considered himself a good friend of Trina Montgomery. He said that they were like brother and sister, having met through Mitch Sutton, Trina's ex-boyfriend and a fellow Skin Head Dog. (39 RT 7019) Many of the attendees at the party were Skin Head Dogs and their girlfriends. In addition, 12-15 members of another affiliated gang, the Sylmar Peckerwood Family, attended the party, including Ryan Bush and Larry Nicassio. (39 RT 7023; 7028.)

Trina was already drunk when she arrived at the party. She arrived by herself in her truck before appellant got to the party. She had an overnight bag with her as she was supposed to stay overnight at the Porchos. (39 RT 7043-7044.) There was a lot of drinking and LSD use during the party. In

addition, there were several incidents of violence. One of these incidents involved a Sylmar kid who was taking a snake out of the case and spraying beer in the living room. Appellant took offense at this and punched this person, who eventually was taken out of the party. (39 RT 7047-7050)

Scott Porcho remembered a few specific incidents involving Trina's conduct at the party. He remembered Trina giving her car keys to Apryl and telling her "no matter what, don't give me my car keys back." (39 RT 7051.) He also remembered at some point that evening he was playing cards with appellant, who told Porcho "no matter what, keep Trina away from me." After this, he saw Trina with her arm around appellant trying to talk to him and Porcho had to escort her away. (39 RT 7051-7052.)

Trina continued to drink throughout the evening. (39 RT 7052.) At some point, Scott Porcho heard a scream coming from his bedroom. When he arrived at the bedroom, he saw Trina on the bed holding her stomach, like she had been hit. Appellant was one of seven or eight men standing around her in a semi-circle. When Porcho appeared in the bedroom, the men looked at their feet and acted as if they had no idea what was going on. Appellant told Porcho that nothing was going on. Apryl Porcho then escorted Trina out of the bedroom. It was obvious to her that Trina had been struck. (39 RT 7053-7055.)

Trina continued drinking. She was one of the drunkest people at the party. At approximately 2:00 a.m., a few hours after the altercation in the Porcho's bedroom, there was another incident involving Trina. Scott Porcho was playing cards in the dining room with John Cundiff. Only ten people or so remained at the party. Larry Nicassio pushed Trina against the kitchen wall and began choking her with both hands. (39 RT 7056-7057.) Ryan Bush and appellant were standing next to Nicassio. Nicassio had also held a knife to Tina's throat. Bush pulled a knife out of his boot, showed it to Porcho and smiled. (39 RT7057; 7059-7060.)

At that point, Porcho jumped up out of his chair and smashed appellant over the head with a beer bottle. He also struck both Nicassio and Bush. He attacked appellant first because he felt that appellant was the best fighter, therefore, the most dangerous. Appellant had a large shard of glass in his head from the beer bottle. (39 RT 7061-7063.)

Porcho continued to struggle with appellant, who was bleeding badly from the head. As the altercation spilled into the dining room area, the two of them almost tipped over a terrarium and simultaneously went to right it. At that point, the fight suddenly stopped. (39 RT 7065-7067.) Trina took appellant to the bathroom to tend to his head wound. (39 RT 7067-7069.) Either Bush or Nicassio then said to Scott Porcho, "Thank you for stopping

us from doing what we might have done." (40 RT 7277.)

At this point Apryl returned to her house after driving a partygoer home. She observed the blood and disarray and wanted everyone to leave. (39 RT 7069-7070; 40 RT 7112; 7118.) Apryl took Trina into her bedroom and then drove appellant, Nicassio and Bush to appellant's house, a forty minute round trip. (40 RT 7118; 7124.) When she returned to her house, Trina was on the phone with appellant. Apryl believed that the phone conversation ended and appellant called back. (40 RT 7120-7121.) Scott Porcho intervened and stopped Trina from speaking further with appellant. (40 RT 7290.)

Trina wanted her keys back but Apryl refused to give them to her because she wanted to keep Trina from going to see appellant. (40 RT 7288-7889.) Trina became very upset. She began calling Apryl names and berating Apryl for trying to run her life. Trina was throwing things and seemed drunk. (40 RT 7122-7123.) Apryl eventually relented and threw Trina her keys. Trina left the house and Apryl never heard from her again. (40 RT 7123.)

Larry Nicassio, one of the people at the party testified at appellant's trial. On Thanksgiving weekend, 1992, he was 16 years old. He belonged to the Sylmar Family Peckerwoods. He looked up to the elder members of the Skin Head Dogs, including Porcho and appellant. His cousin, Ryan Bush,

was also a member of the Sylmar gang. (45 RT 8026-8029.) Prior to the Thanksgiving weekend party at the Porchos he had met Trina Montgomery on a few occasions. (45 RT 8036-8038.)

Nicassio had been a gang member since he was 10 years old. (46 RT 8242-8244.) His gang fought a lot and Nicassio willingly joined in these violent altercations. (46 RT8247-8249; 8252-8253.) The gang was Nicassio's life and he shared their white supremacist views. (46 RT 8251; 8255.)

Nicassio attended the Porcho party with Wayne Gibson, Gibson's brother and Roman Dobratz. They got to the party about 8:00 p.m. There was a lot of drinking and use of LSD. (45 RT 8042-8044.) Nicassio did not talk to Trina at the party. However, he saw her with appellant and it was his impression that they were not getting along. (45 RT 8048-8050.)

At some point during the evening, appellant approached Nicassio and said that he wanted him to "do something" to Trina. Nicassio thought that appellant was joking with him, as the older gang members often played jokes on the younger ones. Appellant handed Nicassio a steak knife and said "We're going to get that bitch." He did not take appellant seriously and put the knife down. Appellant approached him the same way once again, and Nicassio again just laughed it off. (45 RT 8052.)

Appellant handed Nicassio a knife for the third time and said, "take this, this is the last one I am giving you. You're going to do it, and this is the last one I am giving you." Nicassio then walked up to Trina from behind and, without her seeing him, mimed stabbing her in an effort to make the other people watching him laugh. He then discarded the knife. (45 RT 8053-8055.)

Nicassio denied ever choking or threatening Trina. He also denied that Scott Porcho ever hit him or Ryan Bush. (45 RT 8061.) In addition, he recalled another fight in the kitchen in which appellant told Scott that appellant was going to do something to Trina and Scott said, "You're not going to fucking touch her" and then hit appellant over the head with a beer bottle. (45 RT 8057-8058.) He also remembered Trina started yelling at Porcho and appellant. Nicassio told Trina to "Get the fuck out of here, you're just making it worse." Trina slapped him and said "You can't talk to me that way, I'm property of the Skin Head Dogs." Nicassio pushed Trina out of the way reflexively and she fell. (45 RT 8063.)

According to Nicassio, Trina went into the bathroom to tend to appellant's head wound. When Trina was washing appellant's head, appellant looked at Nicassio and mouthed, "Are you going to do it, do it now, do it now." Nicassio again did not take this seriously. (45 RT 8068.)

Nicassio indicated that after this altercation, Apryl Porcho dropped appellant, Ryan Bush and himself off at appellant's house. They had something to eat in the kitchen and went upstairs to appellant's bedroom to go to sleep. Bush and Nicassio slept on the floor and appellant used the bed. At some point, Nicassio heard a phone conversation in which appellant asked Scott Porcho to put Trina on the phone. (45 RT 8072-8073.) Nicassio recalled appellant telling Trina she could come over to his house and stay. Nicassio believed that this call occurred between 4:00 and 5:00 a.m. Nicassio had no reason to believe that anything was wrong. (45 RT 8073-8074.)

Trina arrived at appellant's house in her truck and appellant went to get her. Trina walked into the bedroom, wearing the same clothes she was wearing at the party. It seemed like she had sobered up quite a bit. She left the room, changed into sleeping clothes, and got into bed with appellant. (45 RT 8075-8078.)

After Trina and appellant had some conversation, appellant got on top of Trina, straddling her with his knees on her shoulders. Appellant said "Come on, just do it" and Trina replied, "Not with them in the room." Nicassio heard appellant smack Trina in the face and say, "Do it now, bitch." Nicassio, afraid of appellant, just looked away. He heard the sounds of oral

copulation and Trina saying, "No." Nicassio still did nothing to stop this. (45 RT 8079-8081.)

Appellant got on top of Trina and started having vaginal sex with her. Trina was begging him to stop, repeatedly saying, "Justin, don't do this." Trina was unclothed at this point and she was whimpering that she was sore. Nicassio had no doubt that Trina was being raped, but neither he nor Bush did anything to stop it. (45 RT 8082-8083.)

Appellant got out of bed, put some lotion on his genitals, got back into bed and started to have sex with Trina again. Trina again asked appellant to stop, saying that she did not want to get pregnant. Appellant finished having sex with her, got off of her and said, "There, you're pregnant." Nicassio claimed that appellant then made Trina perform oral sex on him once again, with appellant sitting on the bed and Trina on the floor before him. She said that her mouth was hurting. Appellant then asked Bush and Nicassio, "Do you guys want some of this?" Neither replied. (45 RT8084-8086.)

Trina said she had to go to the bathroom, but appellant told her to go in the garbage can. Finally, Nicassio spoke up and told appellant to let her go to the bathroom. When Trina started to get dressed appellant suddenly stabbed her in the throat. She grabbed her throat and fell over, curled in a

ball, begging appellant not to hurt her. Appellant threw a blanket over Trina, got a big crescent wrench out of a drawer, knelt down and struck Trina in the head. Nicassio heard a loud thud and felt the floor shake. Due to his fear of appellant, he again did not intervene. (45 RT 8089-8090.)

Nicassio still heard labored breathing. When he looked again, he saw appellant holding Trina by the hair with a knife to her throat. He looked away. (45 RT 8090-8091.)

The next time Nicassio looked, appellant had rolled Trina up in some blankets or sleeping bags. Appellant told Nicassio and Bush that they were going to have to make a plan to cover up the murder. Nicassio told appellant that he was going to walk out the door but wouldn't tell anyone what happened. However, appellant told him that he wasn't going anywhere. As appellant had a knife in his hand at the time, Nicassio felt threatened. (45 RT 8091-8092.)

Appellant then placed the knife and wrench that he used to kill Trina in a plastic bag along with some of Trina's personal possessions. Bush and appellant were discussing what to do next. Appellant wanted Bush and Nicassio to carry Trina's body downstairs. Nicassio told appellant he was afraid to touch it. Appellant told Nicassio to go down to the street and pull Trina's truck around. Nicassio said he did not want to do it but appellant told

him that he was the only one who could drive a stick shift. Nicassio did as he was told, fearing retaliation from appellant. (45 RT 8093-8094.)

Between 8:00 and 9:00 a.m., Ryan Bush and appellant carried Trina's body out of the house and placed her in the back of her truck. Ryan was panicking because he believed that appellant's mother, Sue Merriman, saw them carrying the body, but appellant said that his mother wouldn't say anything. (45 RT 8096-8098.)

The three set off in the truck to a house on Carlsbad Street in Sylmar where Sylmar gang members often stayed. Appellant gave a very nervous Nicassio directions, telling him to "drive cool," as Trina's body was in the back of the truck. Nicassio believed that he was as legally responsible for Trina's death as appellant and was very afraid of being apprehended. (45 RT 8098-8102.)

The three men arrived at the Carlsbad Street house. Nicassio had no idea about the plans for the body, as he was not consulted. Ryan went into the house, and Nicassio said to appellant, "I'm only 16, I can't believe that this is happening." Appellant said "I'm sorry for getting you involved." (45 RT 8102-8103.) Bush then came out of the house with paint thinner and rags. He put them in Wayne Gibson's truck and drove off, motioning for Nicassio and appellant to follow. Nicassio never thought about asking the

people at the house for help because he believed that they would all side with appellant. (45 RT 8103-8105.)

The three men were going to go to a location in Sylmar to dispose of the body but there were too many people around. Nicassio then followed Bush to Sunset Farms, a secluded rural area, where they followed a dirt road approximately 200-300 yards before pulling over. In a ravine that paralleled the dirt road, there was a drainage pipe. Bush and appellant put Trina's body in the drainage pipe and covered the pipe with tumbleweeds and garbage to hide it. Nicassio claimed that he never touched the body. (45 RT 8106-8109.)

The three then left the Sunset Farms area, with Ryan again driving the Gibson truck and Nicassio and appellant in Trina's truck. They stopped at a Santa Carita Valley gas station to get gas for Trina's truck and then proceeded to Little Tujunga Rd. in the Angeles National Forest. They stopped the trucks at a turn out. Nicassio saw blood in the back of the truck. They used the paint thinner and the rags to wipe down Trina's truck. (45 RT 8109-8111, 8114)

After they wiped down the truck, Bush attempted to roll it down an embankment off the side of the road. However, the truck became stuck on the berm and would not move any further. The three then got into Gibson's

truck and then proceeded to a Denny's restaurant to discuss what their next move would be.[4] (45 RT 8117-8118.) Appellant told Nicassio and Bush that if anyone asked questions they should say that Nicassio paged Wayne Gibson that early morning from appellant's house and Gibson picked Nicassio and Bush up and brought them back to Sylmar. (Vol. 45 RT8119.)

The three then left Denny's and drove appellant back to his house. After doing this, Bush and Nicassio dumped the plastic bag containing Trina's things, along with the knife and the wrench, in a dumpster in an industrial area off the highway. They stopped to buy Bush some new clothes because the ones he was wearing were bloodstained. (45 RT 8123-8125.)

Two days later, Bush and Nicassio borrowed a car and returned to where they had left Trina's body. They arrived at the scene at approximately 11:00 p.m. Both had shovels, but Bush dug the grave while Nicassio served as a lookout. Bush buried Trina less than 5 feet from where the body was originally left. Again, Nicassio never touched the body. (45 RT 8128-8129.)

Nicassio claimed that he was afraid and ashamed after the killing. A few weeks later he was at a drive-in movie with Brandi Exposito and told her what happened to Trina. Nicassio told her that he was ashamed and had

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4. While Nicassio claimed not to recall much about the conversation, he did recall that the decision was that he and Bush would eventually go back and bury Trina. (*Ibid.*)

to "get it out." (45 RT 8130-8131.)

Nicassio saw appellant at another party two to four weeks later. Appellant told Nicassio not to worry because his mother had cleaned up the blood. Appellant also asked Nicassio about whether Trina's body was buried, and suggested that the decomposition of the body could be accelerated by spreading lye over the burial site. Nicassio never did this. (45 RT 8133-8134.) Around this time, Nicassio took a ride past the location where the body was buried to see whether there was any police tape in the area. Nicassio saw none. (45 RT 8134-8135.)

Over the next few years a lot of "rumors" started to surface and Nicassio believed that people he knew were accusing him of "things." In November, 1997, Nicassio heard that a new grand jury was going to be hearing evidence about the case. (45 RT 8137-8138.)

Around this time Nicassio received a call from an acquaintance, Tara Tamaizzo. Nicassio had no idea whether she was working as an informant for the prosecution, but began to suspect that she was when she persisted in asking him questions about Trina. Ms. Tamaizzo said she wanted to meet with Nicassio in person.She told him she had been subpoenaed to testify before the grand jury and wanted to talk with him first. They met at a Motel 6 on November 18, 1997. Nicassio told her to tell the

grand jury that she didn't remember anything about the case because otherwise she would jeopardize the lives of three people.

A few days later, Nicassio was arrested for the murder of Katrina Montgomery and taken to either the Oxnard or Ventura police station. Ryan Bush and Brandi Exposito were arrested as well. (45 RT 8138-8140.) The police asked Nicassio to lead them to the body. He thought about cooperating but he was afraid. He told the police that he needed a lawyer to give him guidance. Nicassio told the police that if Ryan cooperated he would as well. Brandi Exposito came to see Nicassio at the jail and told him that she had told the police what Nicassio had told her about the crime. Nicassio was both angry and afraid that he would spend the rest of his life in prison because appellant had previously told him that he was going to go to jail for life if they were caught. (45 RT 8141-8142.)

Nicassio then met Mr. Bamieh, appellant's prosecutor. Mr. Bamieh told him that if he showed the police where the body was located, Nicassio would be charged on a non-capital crime. Nicassio refused, both because he didn't trust the district attorney's office and because "in his heart" he knew he was guilty of murder. (45 RT 8143.)

Nicassio was taken to the Ventura County jail and booked for Trina's murder. He then called Ryan, who told him to make no deals with the

authorities. Nicassio wanted to make a deal but was afraid of gang retaliation.

In December, 1997, Nicassio appeared in juvenile court. He was represented by attorney Darrin Kovinsky, who told Nicassio to talk to the prosecutor about a deal in the case. Nicassio's lawyer worked out an arrangement by which he would be sentenced under Penal Code section 32, accessory after the fact, but he would technically be pleading guilty to manslaughter. (People's Exhibit 69.) This deal was memorialized in a letter dated March 12, 1998 which provided that Nicassio would have to cooperate fully in the investigation of Trina's death. The letter also indicated that Nicassio would receive the maximum term for manslaughter. (45 RT 8144-8148.)

After entering this agreement, Nicassio led Mr. Bamieh and other police authorities to Sunset Farms to look for Trina's body. However, the area had undergone development and was completely changed from 1992. The body could not be located. (45 RT 8149.) Nicassio never pled to a manslaughter charge, instead pleading guilty to accessory to murder after the fact. He was sentenced to three years in prison. For safety reasons, he served his time in the Ventura County Jail. (46 RT 8239-8241.)

Detective William Heim of the Los Angeles Police Department

Missing Person's Unit also testified at appellant's trial. When the detective arrived at the Merriman's house, shortly after Trina's disappearance, he observed a man cleaning the carpets. This man said that he was called to the house because of a coffee spill. Detective Heim spoke to appellant's mother, Sue Merriman, and told her he was investigating a missing person and wanted to speak with appellant. (41 RT 7377-7379.) Upon hearing this, Mrs. Merriman became nervous and said, "I don't want to talk anymore." However, she did say that she was sure that her son had come home with two other boys because she could hear them. She said nothing about seeing Trina. (41 RT 7379-7380; 7382-7383.) A few days thereafter, Detective Heim transferred the case to a homicide unit. (40 RT 7283.)

After the police spoke to him on November 29, 1992, Porcho's parole was violated for associating with other gang members. The police then came to jail to speak with him again. At that time Porcho told them that appellant left the party with Nicassio and Bush to go to appellant's house. He also told them that Nicassio, who was armed with a knife, had Trina up against a wall and appellant and Ryan Bush were standing in the general area. (40 RT 7215-7217.)

On December 1, 1992, LAPD homicide detective James Harper re-interviewed Apryl Porcho. He read Apryl her rights but she refused to talk to

him without first consulting with her husband. That same day, Detective Harper contacted Scott Porcho in the county jail. (41 RT 7390.) Scott told Detective Harper that he had known Trina for seven to eight years. He told Detective Harper that Trina was invited to the party and she was planning on spending the night at his house. Porcho also said that there was an altercation at the party over a card game and he hit appellant over the head with a beer bottle because he thought appellant was cheating. He then said the party ended about 1:00-2:00 a.m. and Apryl drove appellant home. He also stated that Trina told him that she hated appellant. (41 RT 7390-7392.)

Later in the interview, Porcho changed his story. He now told Detective Harper that the fight was really about Larry Nicassio having his hands around Trina's throat. He stated that at about 1:00 a.m., he noticed that Larry had Trina against the wall with Ryan Bush to Nicassio's left and appellant in front of Bush. (Vol. 41 RT 7393-7394.) Porcho then said that he saw Ryan pull a knife out of a sheath, smile widely, and then put the knife away. Right afterward, Nicassio pulled out a knife. Porcho then told Detective Harper that he hit appellant with a beer bottle, hit Nicassio in the face and kicked Bush in the ribs. (41 RT 7394-7395.)

Porcho stated that by this time everyone was very drunk. He told Detective Harper that at approximately 4:00 a.m., Apryl took Bush, Nicassio

and appellant to appellant's house. Before Apryl returned, appellant called his house to speak with Trina but Porcho wouldn't let him. When Apryl returned home, an argument erupted between Trina and Apryl concerning Trina's accusations that Apryl was trying to run her life. Scott then stated that at approximately 5:00 a.m. Trina left his house, alone in her truck. Scott said that at approximately 6:00 a.m., appellant called the Porcho house and asked to speak with Trina. Scott told appellant Trina had gone. (41 RT 7395-7396.)

On December 2, 1992, Detective Harper once again interviewed Apryl Porcho. Apryl said she was good friends with Trina. Trina arrived at the party at approximately 6:00 p.m. with the intent of spending the weekend with the Porchos. Appellant arrived at the party an hour or so later. Apryl told Detective Harper she drove appellant, Nicassio and Bush home at 4:00 a.m. Before she left she had taken Trina's car keys because Trina was very upset and said she was going to drive to "Keith's"[5] house. After Apryl returned from dropping appellant and the other two men off at appellant's house, appellant called and asked for Trina. Apryl gave the phone to Trina and walked away, without hearing any of their conversation. Trina then continued arguing with Apryl until Trina grabbed her overnight bag and left

5. Presumably "Keith" was a reference to Keith Ledgerwood, Trina's friend.

in her truck. (41 RT 7397-7399.)

Ember Wyman[6] is appellant's sister. During the Thanksgiving season of 1992, she was living with appellant and their mother at the Miller Court residence. She woke up one morning in November, 1992, to see her mother cleaning up blood on the stairs with a pot and some rags. She helped her mother clean. (42 RT 7591-7592.)

Ember remembered the police coming to the house about the same time as the carpet cleaner the day after she helped her mother clean up the blood. She was troubled because she heard that a girl named Katrina Montgomery was missing and appellant was a possible suspect in her disappearance. When she asked appellant if he had anything to do with her disappearance, he said something along the lines of "we don't need to talk about that." (42 RT 7593-7594.)

During this period of time, Ember became friends with Lisa Nichols, who was her prayer partner in church. Ember remembered talking to Lisa about cleaning up the blood and told her she was scared. She also told Lisa the morning that she helped her mother clean up the blood, appellant went on a long ride with someone named "Ryan." (43 RT 7596-7597.)

In January of 1996, Ember spoke to District Attorney Investigator

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6. Ember Merriman married prior to the trial and changed her name.

Dennis Fitzgerald. She was not truthful with him about her cleaning up the blood because she was trying to protect her family. She later admitted to lying to the grand jury and failing to tell them about the blood. (43 RT 7597-7599.)

Lisa Nichols recalled the conversation with Ember. According to Lisa, Ember told her that she and her mother cleaned up a lot of blood tracked on the stairs. Ember told Lisa that right after she saw the missing person fliers for Trina, she thought the blood may have had something to do with the missing girl. Lisa also remembered Ember saying that when she confronted her brother about the blood, appellant said that he would be "going to hell" for what he did. (43 RT 7632-7633.)

Susan Vance, 27 years old at the time of the trial, testified she first met appellant when she was 14 years of age and appellant was a few years older. She began a sexual relationship with him. She associated with appellant and other Skin Head Dogs such as James Tibbs, Scott Porcho, Mike Wozny and their female associates, Billie Bryant, Bridget Callahan and Apryl Porcho. Ms. Vance testified that she started to stay away from these people once she became pregnant and that her lifestyle is very different from her lifestyle when she associated with the Skin Head Dogs. (39 RT 6866-6869.)

In 1992, Ms. Vance became aware that Trina Montgomery disappeared after a party. (39 RT 6868-6869.) In 1995 she had a conversation with John Cundiff, a Skin Head Dog, about Trina's disappearance. Shortly after this conversation, Ms. Vance visited appellant at his home. She had been seeing appellant off and on for the past three years but she was not sure why she went on that particular occasion. Before she could come into the house, appellant came downstairs and started to beat her in the face. She retreated into her car to escape him. However, he talked her back out of the car, and hit her multiple times in the face once again. (39 RT 6870-6875.)

Appellant took Ms. Vance by the arm and they proceeded to his room. He asked her what she and John Cundiff had talked about regarding the disappearance of Trina Montgomery. Ms. Vance refused to answer any questions about her conversation because she was afraid appellant might hurt John. She eventually left and never went back again. (39 RT 6875-6877.)

Mark Volpei, an investigator for the Ventura County District Attorney, was assigned the Montgomery investigation in the summer of 1997. His role was to assist Investigator Dennis Fitzgerald with investigations involving the Ventura County Jail. As part of the investigation concerning the Trina Montgomery homicide, Investigator Volpei executed a

search warrant at the home of Sue Merriman at 853 Miller Court in Ventura. Volpei was looking for a connection between appellant and Trina and also for evidence of gang affiliations. (37 RT 6580-6582.)

As part of the search, photos and hundreds of letters were seized. Some of the letters were written by appellant to Trina while he was in jail. There were no letters from Trina to appellant found. (RT 6583-6584.) However, appellant's letters evidenced a relationship between Trina and appellant. The first of these letters were written on January 5, 1990 and the last on March 4, 1992. (37 RT 6652.) Taken as a whole these letters indicated appellant's desire to establish a personal and sexual relationship with Trina. As time progressed these letters became more sexually explicit as appellant tried to convince Trina he would make a good boyfriend when he was released from jail. (37 RT 6586; 6592; 6595; 6603; 6608; 6612; 6620; 6623; 6629; 38 RT 6634; 6641.) While these letters are ambiguous as to Trina's reaction to appellant's entreaties, they evidenced that she engaged in some sort of phone sex with appellant (37 RT 6609), came to visit him in jail (37 RT 6635), and sent him revealing photos of herself. (37 RT 6616.) In addition, there was a sexually explicit "Application for Companionship " that Trina filled out at appellant's request. According to Investigator Volpei, these applications are commonly sent to women by inmates in search of

women who will engage in fantasies with them. (38 RT 6651.)

COUNTS II-IV SEXUAL OFFENSES AGAINST ROBYN GATES

Robyn Gates met appellant through a mutual friend, Ian Morrow. She would socialize and use drugs with appellant, and they had a sexual relationship. (42 RT 7484, 7510.) During the time period November, 1994 through January, 1995, Ms. Gates was living on her father's boat, which she turned into a drug party location. One day, during this period of time, appellant came over to the boat to use both heroin and methamphetamine with her. There were two other people on the boat with them. (42 RT 7486-7489; 56 RT 9837-9838.) At some point Ms. Gates and appellant went below to a small bedroom. Ms. Gates went willingly and planned to take more drugs with appellant once they got to the bedroom. (42 RT 7489-7490.)

The two started kissing but appellant started to get aggressive, restricting Ms. Gates's freedom of movement. He told her to "sit (my) ass down" on the bed. She wanted to stop what was going on but felt that she really could not leave. Appellant was making her afraid but she really could not say why. She was not sure whether she made it clear to him that she wanted to leave but she "thought" she did. Appellant had pornographic magazines, which made her uncomfortable. He ordered her to perform oral

sex on him. (42 RT 7492-7493.)

Ms. Gates did have oral sex with appellant. She was afraid but could not specify what she thought would happen if she refused. While she was performing oral sex, appellant was looking at the pornographic magazines. She tried leaving the room a few times but appellant called her names and kept putting her on the bed. They then had vaginal sex after she told him that she wanted to leave. Appellant refused her requests to stop. She told him that she was physically sore but he continued having sex with her. (42 RT 7493-7496.)

At some point, Ms. Gates felt something other than appellant's penis inside of her. She didn't know what it was at first but it was cold and hard. She eventually realized that it was a gun.[7] This scared her but she never screamed because she did not think anyone would come and help her. At one point, one of appellant's friends opened the door while they were on the bed and she was naked with appellant looking at a magazine. Appellant just started talking to this person as if nothing unusual was happening. (42 RT 7497-7499.)

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7. Elaine Byrd was a casual acquaintance of Ms. Gates. In late 1994 or early 1995, she was at Shawna Torres' house. Ms Gates was there as well and was crying and seemed traumatized. Ms. Byrd overheard Ms. Gates say that appellant "took a gun and shoved it up inside of her pussy." (43 RT 7647-7648.)

Appellant upset Ms. Gates by calling her a "bitch" and a "whore." The entire incident of sexual behavior lasted 2-3 hours and she didn't feel that she could do anything to make him stop.Appellant became angry because he could not ejaculate. At some point she just gave up trying to leave and she just wanted it to end. Eventually, appellant and his friends left the boat. (42 RT 7499-7500.)

Ms. Gates indicated that, after the incident, she told only Elaine Byrd about what happened. Ms. Gates felt ashamed and embarrassed. She didn't get any medical attention and just wanted to forget that it had happened. (Vol. 42 RT 7500-7502.) Ms. Gates saw appellant after this incident but never talked to him about it. She continued to take drugs with appellant but never had sex with him again. Eventually, Ms. Gates went to prison for drug related offenses. (42 RT7503-7505.)

COUNTS V-VIII - SEXUAL OFFENSES AGAINST BILLIE BRYANT

Billie Bryant first met appellant in the summer of 1988. She met him at Scott Porcho's house when she began to associate with the Skin Head Dogs. Mitch Buely, who was a Skin Head Dog, was her boyfriend at the time. Ms. Bryant began a friendship with appellant and became "a good friend" of his. (38 RT 6683-6685.)

She began a sexual relationship with appellant in March, 1992, after she had broken up with Buely. Appellant told Ms. Bryant not to tell Buely about their relationship or appellant "would choke her out." Ms. Bryant did not take this threat seriously but she had no intention of telling Buely. (38 RT 6685-6688.) However, she still had feelings for Buely and began contacting him again in the fall of 1992. Appellant didn't like the idea but didn't try to stop her from seeing him. (38 RT 6688-6689.)

After appellant was released from jail for his 1992 parole violation for associating with fellow gang members at the November, 1992, Porcho party, Ms. Bryant resumed her sexual relationship with him. However, appellant resumed using methamphetamine and had become verbally abusive. She remembered one occasion, at her apartment, when her infant daughter woke him up and he went into a rage. When Ms. Bryant told him to quiet down he hit her several times in the face until she was bleeding. When a neighbor came by to tell appellant to back off, appellant just laughed at Billie, telling her how stupid she looked. He also told her not to think about calling the police or he would "take care of her." (38 RT 6694-6696.)

There was another incident, during this general period of time, when Ms. Bryant was in her apartment at 3:30 a.m. and appellant and Ryan Bush came to visit. Appellant was angry at her because he found out she had

kissed Bush at some prior date. Appellant kept harassing her about this and made what she perceived to be a threatening gesture toward her. Ms. Bryant responded to this gesture by falling to the ground. Appellant acted like he could not believe that Billie could be that frightened of him. Appellant and Bush left after Bush said, "Let's get out of here." (Vol. 38 RT 6699-6704.)

Ms. Bryant's relationship with appellant became increasingly more violent. In August 1994, Billie moved to the Pepper Tree Apartments on Saratoga Street, where she lived for five months. Her roommate was Shanna Kelly. During this time, appellant became sexually assaultive toward Ms. Bryant. He would often come over to the apartment, sometimes invited and sometimes not. He would often kick open the front door or pound on the door or window until someone let him in. (38 RT 6705-6707.)

One night appellant, high on drugs, came over to Ms. Bryant's apartment late at night when no one was home. At some point, Mike Wozny knocked on the apartment door. Appellant did not want Wozny to know he was alone in the house with Ms. Bryant. Appellant positioned himself in the hallway and used his body weight to stop Bryant from getting to the door. He then demanded that she orally copulate him. (38 RT 6707-6711.)

Appellant pushed her head down toward his penis and grabbed her by the hair so she would orally copulate him. Ms. Bryant was scared. He also

made her masturbate him by placing her hand on his penis, not letting her stop or leave the hallway area. This went on for several hours. (38 RT 6711-6713.)

Ms. Bryant also related that there was another incident at appellant's house during the time period of August 1994-January 1995. The incident started out as consensual vaginal sex in his room. However, the sex went on for hours and Ms. Bryant asked appellant to stop because it hurt and that she was bleeding from her vagina. He told her to shut up and continued. When he was finished, he verbally degraded her for staining the sheets. He dragged her by her hair to the washing machine, where he washed the sheets, screaming at her and saying degrading things. (38 RT 6729-6731.) At some point, Ember Merriman came into the laundry area. Appellant pointed out the sheets to Ember and said how sick it was for Ms. Bryant to come into someone else's house and make such a mess. Ember giggled and said, "oh, you silly guy." (38 RT 6732.)

Ms. Bryant also claimed that while she was living at this same apartment house, appellant forced sexual intercourse on her several different times, as well as forcing her to orally copulate and masturbate him. This happened in the same hallway as the first occasion. She also stated that he sexually attacked her in her daughter's in September or October of 1995.

This attack began on her couch. She tried to fend off appellant by going to the bathroom and trying to get busy with chores around the apartment. However, he kept grabbing her. Eventually, she made it into her daughter's room, where appellant tackled her and straddled her. She decided that it would be easier if she just let him have intercourse with her, which is what occurred. (38 RT 6715-6718.)

After the act of intercourse, appellant started to call her degrading names, telling her she should spend more time in the shower because she was dirty and a whore. (38 RT 6718-6719.) Ms. Bryant locked herself in the bathroom and told appellant to leave. (38 RT 6719.)

During the period of August 1994 through January 1995, there were several instances of forced sex as well as consensual sex between Ms. Bryant and appellant. According to Ms. Bryant, there were incidents where the masturbation and oral sex would go on for hours. She did not wish to participate but he used his body weight and strength to impose his will on her. (38 RT 6721-6722.) Ms. Bryant said that during their sex, appellant would look at pornography, as well as virtually any other printed material that portrayed women. This included calendars and magazines such as Cosmopolitan. (38 RT 6738.)

There was a point in time between September and October of 1995

that Ms. Bryant was working at the Acapulco Restaurant. To get to work from her home, she would have to walk past appellant's house on Miller Court in Ventura. On one occasion, she stopped by appellant's house because appellant had stopped by the Acapulco earlier in the day to see her. Appellant had just been released from jail and Ms. Bryant had concerns that if she did not go over to see him, he would simply show up at her house any time he wanted. (38 RT 6723-6724.)

Ms. Bryant was not afraid to be in the house because appellant's mother was home at the time and she considered Mrs. Merriman a friend. The two of them went to appellant's room. (Vol. 38 RT 6726-6727.) Appellant wanted to be masturbated and "the usual stuff." When Ms. Bryant tried to leave the room, appellant tackled her and started laughing a "stupid, stupid laugh" and said things like "you know you want it, you know how good it feels." (38 RT 6727-6728.)

Appellant then ripped off Ms. Bryant's panty hose and had sex with her. He forced her to have sex on the floor against her will, using his superior size to control her, saying he was tired of hearing her "bitching and moaning." (38 RT 6728.)

CHARGES RELATING TO THE JANUARY 30-31, 1998 ARREST

(COUNTS IX-XV)

In the late evening of January 30, 1998, Ventura County Deputy Sheriff Jesse Howe and his partner Sergeant Miller were on patrol in their cruiser. (36 RT 6271-6272.) They were driving in a high crime area on Ventura Avenue, in Ventura, California. Both were dressed in jackets with embroidered badges that identified them as law enforcement officers. (36 RT 6272-6274.)

Deputy Howe noticed Justin Merriman and a woman on bicycles stopped on Ventura Avenue. The two officers approached these two individuals, because their bicycles had no illuminated headlight, which was a violation of the vehicle code. (36 RT 6274-6275.) Upon seeing the two officers, the bicyclists attempted to leave the scene. (36 RT6274-6275.)

Deputy Howe identified himself as an officer and ordered Merriman to stop. Merriman pedaled away rapidly, telling Deputy Howe to "leave me the fuck alone." (36 RT 6275-6276.) The two bicyclists pedaled away on the sidewalk heading northbound before turning east into an Arco Station. (36 RT 6313.) Sgt. Miller caught up to appellant mid-block on Ramona and cornered him. While still in his car, Sgt. Miller made a grab for appellant, made contact with his shirt, but was unable to subdue him. (36 RT 6314-

6318.) At trial, Sgt. Miller identified appellant as the suspect, although he testified that appellant had shorter hair, less facial hair and was thinner at trial than at the time of the encounter. (36 RT 6318.)

Appellant pulled free of Miller's grasp and ran through an adjacent vacant lot. Sgt. Howe and Deputy Beery gave chase on foot. Deputy Beery yelled "gun," and the other officers observed appellant draw a steel blue revolver and hold it to his own head. (36 RT 6319.) Deputy Beery ordered appellant to put the gun down and lie down on the ground, but appellant warned the officers not to come any closer or he would shoot himself. (36 RT 6319-6320; 6361-6362.) Later that early morning, Sgt. Miller returned to the vacant lot and found a holster, but no gun was ever found. (36 RT 6333.)

Sgt. Miller heard a chain link fence rattle and cautiously proceeded across the lot in appellant's direction. He went over the chain fence and proceeded down a narrow corridor and turned northbound on Kellogg Street. (36 RT 6320-6322.)

Upon reaching the corner of Kellogg and Cedar, Sgt. Miller was informed that the Ventura Police Department had begun setting up a perimeter around a house on that corner. Sgt. Miller saw someone inside of this house who had the same type of hair and facial hair as defendant. (36 RT 6325.)

Janette Rail lived at 228½ Kellogg Street. Her daughter Aja, her granddaughter Lucette, Annette Berryhill, who was appellant's girlfriend, and Jennifer Hendrix Bowkley, a house guest, were in the house when appellant entered at approximately 9:00 p.m. (37 RT 6462.) Appellant was agitated, angry, hostile, hysterical, out of breath and sweating. Ms. Rail ordered him out of the house but he refused to leave. (37 RT 6467.) She saw that appellant had a kitchen towel tented over something triangular that he appeared to be holding in his hand. When Lucette started to cry, appellant turned to Ms. Rail and stated, "either you fucking shut her up now or I will shut her up permanently." (37 RT 6470.) Soon thereafter, while Annette distracted appellant, Ms. Rail, Aja, and Lucette were able to escape from the house. (37 RT 6470.)

Sgt. Taylor, a SWAT commander with the Ventura Police Department, took charge of the scene. (36 RT 6391-6393.) From outside of the house, the police were able to hear furniture being moved about and things being thrown and saw someone trying to cover the windows with blankets. (37 RT 6494; 6435.) A half hour after the police surrounded the house, three persons, none of whom being appellant, exited. Thirty minutes later, Sgt. Taylor called for a SWAT team after failing to persuade the other persons inside the house to establish contact. (37 RT 6494-6495.)

Around this time, Ventura Police Office Thomas Mendez saw Annette Berryhill exit the house and climb over a fence. She was taken to the police command post where she related that appellant was irrational and wanted to make a bomb out of Drano. She also told the police that appellant was not going to come out and that he was "going to go out with a bang." (37 RT 6440-6442.)

Further attempts to establish contact with appellant were futile. (37 RT 6398-6899.) After approximately six hours, a decision was made to extricate appellant by the use of tear gas. One or two shots of tear gas were fired into the house at a time, to no effect. The police then threw a much stronger dose of tear gas, in the form of a cannister, into the house. Eventually, a coughing and gagging appellant opened the front door from inside, took a breath of air and then closed the door again. This was repeated a second time. (36 RT 6404-6406.)

Appellant eventually crawled out of the house on all fours. Sgt. Taylor stepped forward to arrest appellant, but when he saw that appellant had a knife in his hand, he stopped and ordered the other officers to back off. (36 RT 6406-6408.) Blinded by the teargas, appellant commenced to slash with the knife in the direction of any noise. Sgt. Taylor ordered that his officers attempt to subdue appellant with rubber bullets. However, the

bullets had no apparent effect on appellant, who crawled back into the house and shut the door. (36 RT 6408-6410.)

Within a very short time, appellant opened the door again and exited the house as gas came pouring out the door. This time, appellant had nothing in his hand. As Sgt. Taylor and some of his officers approached appellant to effect the arrest, it appeared that appellant was reaching for a gun. Appellant was ordered to lie down on the ground, but he refused. (36 RT 6414.) Six officers then took appellant to the ground, subdued him, and placed him under arrest. (36 RT 6414-6417.)

After the arrest, the police proceeded into the residence. The place was in great disarray with furniture trashed and glass broken. (36 RT 6418; 37 RT 6445.) When Ms. Rail went back to her residence, she found only a few salvageable items. The entire house was "knee deep in debris." (37 RT 6475.) Antiques, heirlooms, wedding gifts and other personal items also had been destroyed. She estimated the total damage at $55,000. (37 RT 6474-6475.) Ms. Rail also heard appellant's mother, Beverlee Sue Merriman ("Sue") say to Aja that if she did not talk to the police, Ms. Merriman would take care of the damages. (Vol. 37 RT 6480)

Due to injuries suffered by appellant during his arrest, he was transported to the hospital by Ventura Police Officer Samuel Arroyo. During

the ride to the hospital, appellant was unresponsive, with his head hanging down. Based upon his training and experience, Officer Arroyo believed that appellant was under the influence of drugs. This was confirmed by observations the officer made at the hospital. A blood test on appellant was positive for amphetamines. (38 RT 6676.)

APPELLANT'S UNCHARGED OFFENSES[8]

Kristin Spellins

Kristin Spellins Arnold was an acquaintance of appellant since approximately 1994. She met him at a party where they did drugs together. (44 RT 7873-7874.) One evening after this first meeting, appellant asked her to go for a ride. They first went to Jack Garcia's house and then to appellant's house. Ms. Spellins used methamphetamine with appellant that night. (44 RT 7875-7877.) In fact, in her own words, Ms. Spellins was, in her own words, an "out of control little girl," who used large quantities of drugs such as methamphetamine. (44 RT 7934-7935.)

Ms. Spellins memory of that night was hazy, at best. She didn't remember whether she arrived at the Garcia house with appellant and could not remember if she planned on having sex with appellant once they got to

8. This evidence was admitted over objection, under Evidence Code sections 1101 (b) or 1108.

his house, although her grand jury testimony indicated she knew they were going to have sex. (44 RT 7944-7948; 7958-7959.) She couldn't state with any degree of certainly whether she and appellant were boyfriend and girlfriend on the night this sexual encounter occurred. (44 RT 7965.)

However, there is no doubt that Ms. Spellins willingly went with appellant to his room. Everything was consensual and the two started kissing. According to Spellins, the sexual acts turned to things that she did not particularly like to do. She said that he had her touch his anus and masturbate him while he was looking at pornographic magazines. He wanted her to orally copulate him and she said she "probably did," although she could not say for sure what happened. (44 RT 7878-7880.)

Ms. Spellins stated that this went on for "a couple of days." However, she never tried to run away, and doesn't remember if appellant tried to restrain her. (44 RT 7881.) She said she was scared of his behavior but could not articulate what was frightening to her. (44 RT 7882.) Eventually, both she and appellant voluntarily left the apartment and both went their own separate ways. She never reported any of this to the police. (44 RT 7884-7885.)

Ms. Spellins next remembered seeing appellant one night at a tattoo shop where she was getting a "white power" tattoo, designed by appellant

and put on her buttocks by "Tattoo Bob." After she received the tattoo, she and appellant went into the bathroom together, where appellant started shooting drugs into his arm. In addition, he began to use the syringe to squirt his blood at her. According to Ms. Spellins, she got upset and tried to leave. Appellant told her to shut up or he would "slit her throat" like Trina. (44 RT 7886-7890.) Again, she never called the police. (Vol. 44 RT7995.) Further, after all of this she continued to see appellant on a regular basis, explaining that she couldn't explain her behavior except for the fact that she was a "junkie." (44 RT 7978-7979.)

Ms. Spellins also remembered being on a boat with appellant and Robyn Gates. She remembered Gates and appellant going below for a few hours. When Ms. Gates reappeared she looked "weirded out" but didn't say anything to Ms. Spellins. (44 RT 7893-7895.) However, Ms. Spellins was jealous because Ms. Gates had been alone with appellant. (44 RT 7976.)

Corie Gagliano

Corie Gagliano met appellant in approximately 1985, when she was about 16 years old and Merriman a year younger. They became sexually active and remained so over the ensuing years. (41 RT 7313-7314.)

On one occasion, she and appellant drove to Ojai in Clint Williams'

truck. She and appellant rode in the back of a covered pickup truck with Williams driving. When they arrived in Ojai, Ms. Gagliano tried to get out of the truck but appellant would not let her. She sensed that he wanted sex but she did not want to oblige him in the truck. He held her arms so she could not move. She knew that it would only be worse if she fought back because he was much bigger than she was and she knew his reputation for violence. She started to scream but no one came to her aid. Appellant had sexual intercourse with her. (41 RT 7319-7324.)

Ms. Gagliano was using a lot of drugs during this period of time. She also frequently associated with the Skin Head Dogs and shared their white supremacist views. (41 RT 7329-7333.) She said that she did not report this incident to the police and only revealed it a long time after it happened. (41 RT 7334-7336.) She saw appellant after this incident and felt safe with him because he was the toughest guy she knew. (41 RT 7340-7342.) She also continued to hang out with the Skin Head Dogs and continued to take drugs with them. (41 RT 7340-7341.)

Katrina Montgomery (Spring/Summer 1992)

Shawna Torres was a good friend of Trina's. They attended both St. Bonaventure and Ventura High School together. She was with Trina in the

summer of 1992 when Trina went to see appellant. Trina had told Shawna that she needed to see appellant to "straighten some things out." (37 RT 6547-6549.)

When they got to appellant's house, Trina went inside. When she eventually came out she was very upset, saying appellant had just attacked her. She showed Shawna red marks on her throat. Trina told her that appellant attacked her in front of his mother and Trina was angry at Mrs. Merriman for doing nothing to help. (37 RT 6550-6551.)

Kathryn Montgomery testified that there was a morning in March, 1992, when her daughter, Trina, told her about an incident that occurred with appellant. (37 RT 6485.) Trina said that she had visited appellant at night. During the visit it became very late, so appellant's mother offered her a room to stay in. While she was asleep, appellant snuck into the room, climbed in bed with her and made sexual advances. (37 RT 6485-6486.) Trina told appellant that she felt sick and needed to use bathroom. He let her go and she jumped in her car and fled from the house. (37 RT 6487-6488.)

FURTHER POLICE OPERATIONS/OTHER EVIDENCE AGAINST APPELLANT

After appellant's arrest on January 31, 1998, the prosecution conducted various operations in an attempt to obtain information concerning his involvement in Trina Montgomery's disappearance. The first of these operations involved Larry Nicassio. Pursuant to his plea bargain, Nicassio participated in a series of operations from within the Ventura County Jail with the purpose of getting information from appellant. (45 RT 8167-8168.) In order to help Nicassio gain appellant's trust, the prosecutor arranged for the creation of a counterfeit probation report that indicated that Nicassio had refused to cooperate with the police. (45 RT 8169-8170.)

On or about April 22, 1998, a "wired" Nicassio showed appellant this report. Appellant asked Nicassio if he was going to "hold his mud," that is, not talk to the police. Appellant also told Nicassio that he would take care of John Cundiff, a potential witness, by beating him up, noting that he had beaten him up before being incarcerated. (45 RT 8172.) Nicassio and appellant also talked directly about Trina. Referring to her, appellant stated, "If that shit comes out of the ground, we'll both be going to L.A. County." (45 RT 8178.) During this meeting, appellant told Nicassio that he would arrange for outside visits in such a way that both he and Nicassio were in the visiting room at the same time so they could talk. (45 RT 8174.)

Nicassio and appellant had other wired discussions while in jail. On one occasion, appellant told Nicassio they would explain away the blood in appellant's room by saying it came from appellant's forehead and from when appellant and his friends injected drugs. (45 RT 8180; 46 RT 8206-8207.)

Subsequently, the prosecutor's investigators instructed Nicassio to write a "kite" (a message from one inmate to another) to appellant falsely telling him that Trina's body had been found by Los Angeles County authorities. (45 RT 8186.) In addition, the investigators arranged a counterfeit letter on Nicassio's attorney's letterhead, also falsely indicating that the body had been found. This letter was sent to Kristin Spellins, who was also working for the prosecution, with Spellins being instructed to give this letter to appellant's mother. (45 RT 8187-8190.)

While in jail, appellant told Nicassio that he should never tell the whole truth to his attorney. (46 RT 8207-8208.) Appellant told him Nicassio's lawyer could say that the blood in the back of Trina's truck came from menstrual blood during sex. (Vol. 46 RT 8209.) Appellant also told Nicassio that if he were to rat" to the police, he should tell them that they took the body out the window so as not to implicate Sue Merriman. (46 RT 8219.)

In November or December, 1997, John Crecelius, a felon and methamphetamine user, had a conversation with appellant at Sam Paterson's house. Appellant was nervous because he had heard that his "crime partner" got arrested for the rape and murder of a woman that appellant said he cut" five years ago. (42 RT 7448-7452.)

About three or fours months after this conversation, Crecelius was arrested. Because he already had one prior felony conviction, he wrote to Deputy District Attorney Bamieh, telling Mr. Bamieh that he needed a friend." Crecelius's stepson was currently helping out the district attorney's office on another murder and Crecelius thought that he might get some benefit for himself by contacting Mr. Bamieh. (42 RT 7452-7453.)

In response to Crecelius's letter, Mr. Bamieh went to the Ventura County Jail to speak with him. Crecelius indicated that he was facing three years in prison and wanted a sentence reduction. An arrangement was struck with the District Attorney's Office by which Crecelius would wear a wire in the jail and talk to appellant about Trina Montgomery. Crecelius was very nervous about doing this and felt his life may be in danger but decided to do it anyway. (42 RT 7454- 7457.)

At this time, Crecelius was being housed with Nicassio. Crecelius told appellant that Nicassio was going to rat on appellant and that Nicassio

wanted appellant to take the rap for both himself and Ryan Bush. Appellant responded by telling Crecelius to "take care of" Nicassio, meaning Crecelius should beat Nicassio up or do something even worse. Appellant also told Crecelius that as Nicassio was the youngest, Nicassio should take the rap." In exchange for his cooperation with the district attorney, Crecelius received a sentence of one year county time, plus probation. (42 RT 7458-7460.)

Chris Bowen was another informant employed by the police. In late 1996, before appellant's arrest, appellant came to his house. At the time, Bowen's then wife Billie Bryant had just given birth to their daughter. (38 RT 6814-6816.) Appellant started to ask Bowen, a recidivist felon with multiple drug and burglary convictions, whether he had ever killed anybody. Appellant then told Bowen that he had killed "Trina." Bowen had no idea what made appellant say this to him. Bowen thought that appellant was perhaps trying to feel him out to see what Bowen knew about the crime. (38 RT 6817-6818.)

Bowen didn't tell the police what appellant allegedly told him about Trina's murder until Bowen was arrested on other charges and a Detective Snowling asked him if he knew about any murders. At that point, Bowen told the detective that he did. After this discussion Bowen was contacted by Mr. Bamieh and an investigator. Mr. Bamieh asked Bowen to cooperate by

trying to get a taped statement from appellant. (38 RT 6819-6821.)

Bowen agreed to wear a wire to attempt to get a statement from appellant while they were in jail together. In addition, he agreed to be placed in a bugged cell with appellant He was instructed not to discuss any case that appellant was already incarcerated for and to make sure that he relayed anything that appellant said to District Attorney Investigator Volpei. (38 RT 6821-6822.)

At first, appellant was very suspicious about talking around Bowen. Bowen tried talking to appellant in their cell, but appellant was not interested. At the time they were in the cell together, appellant was withdrawing from heroin. Bowen asked appellant whether he raped Billie Bryant but appellant refused to answer saying that was a police type question. Appellant also never repeated his assertion that he killed Trina. (38 RT 6823-6826.)

Bowen also participated in a wire operation while he was in the holding tank. Bowen told appellant that the District Attorney was trying to bring Scott Porcho down from prison to cooperate with them. Appellant responded "[t]ell him to stop talking to the motherfucker." (38 RT 6826-6827.)

The District Attorney then asked Bowen to try to get statements from

Scott Porcho, who was also in the jail. Bowen was facing 7-15 years in prison for the crimes pending against him and was subject to a possible three strikes prosecution. Instead, because of his cooperation with the authorities, he only served two years and ten months. (38 RT 6831-6834; 6858-6859.) Bowen admitted that at the time of these operations, he hated appellant. (38 RT 6849.)

In April of 1998, at the request of Investigator Volpei, Kristin Spellins agreed to visit appellant in the jail and wear a wire in the hope that she could get some information from him about Trina. Appellant did not want to speak with her but asked her to write a letter to his mother for him. (44 RT 7903-7908.)

Volpei then asked Ms. Spellins to contact Mrs. Merriman to attempt to learn something about Trina's disappearance. During this initial contact, Mrs. Merriman asked Spellins to go with her to visit appellant and to ask to see Larry Nicassio. Ms. Spellins told Mrs. Merriman she didn't know Nicassio. (44 RT 7917.)

After agreeing to accompany Sue Merriman, Ms. Spellins agreed to participate in a police operation at the jail. This involved doing as Sue Merirman asked and getting Nicassio and appellant in the same visiting area so they could speak. Ms. Spellins was to wear a recording device during

these meetings. (44 RT 7919-7920.) She participated in this operation several times and after each visit was debriefed by Volpei. (44 RT 7923.)

At some point, Nicassio wrote Ms. Spellins a letter with the return address of "Joey Buttafuco." (People's Ex 67-68.) Volpei told her to give Sue Merriman that letter, along with a letter written by Nicassio's attorney that was placed in the same envelope. Spellins did as she was instructed. (44 RT 7924; 7926-7928.) After receiving the letter in question, Sue Merriman wanted to go back to the jail to visit Larry and Justin so she could tell Larry what to say to his attorneys. (44 RT 7927.)

Spellins said she testified before the grand jury in 1998 and at Sue Merriman's trial. She said has concerns for her safety for testifying. (44 RT 7930.) She said that she cooperated with the prosecution because she hated appellant. (44 RT 7933.)

INTIMIDATION OF WITNESS CHARGES (COUNTS XVI-XX)

The evidence presented by the prosecutor as to these counts consisted of two basic types. It first called two expert witnesses to explain basic gang structure, and, more specifically the structure and ethos of the Skin Head Dogs. These experts also testified that "rats" were people that the gang believed betrayed a gang member by working with law enforcement. It was

part of the Skin Head Dog code that anyone identified as a rat must be prevented from or punished for "ratting" in any way possible, including deadly force. The rules of the gang indicated that if person was identified as a rat, all members of the Skin Heads Dogs would take the appropriate action against them and it was not necessary to advise the gang members of any specific actions to be taken.

The second type of evidence presented were percipient witnesses who testified as to appellant's activities in disseminating information to various gang members as to who "ratted" on him and were potential witnesses against him at trial.

Wesley Harris was a corrections officer at Wasco State Prison who worked as an institutional gang investigator, gathering information on prison gangs. (47 RT 8408-8409.) He defined a "prison gang" as one that didn't form on the streets but has its roots in the prison system. (47 RT 8412.)

Mr. Harris testified that all such gangs consider anyone who cooperates with the law enforcement in any way as a traitor. (47 RT 8421.) If someone is thought to be an informant, a gang member will take the matter to a "shot caller," the "top" criminal from each particular racial or social group for a particular geographical area of the state. If the shot caller orders it, it would be incumbent on individual gang members to carry out

retribution on the informant. (47 RT 8424.)

After being assigned to this case, District Attorney's Investigator Mark Volpei educated himself on the structure of the Skin Head Dogs. He interviewed members of the gang, examined correspondence and obtained information from the Ventura Police Department. (48 RT 8574-8576.) He told the jury about the criminal convictions of the various members and their violent and racist leanings. (48 RT 8577-8588.)

Volpei also learned about the attitude of the Skin Head Dogs toward people who co-operated with the police against one of their members. They were prone to use violent retribution against these people but needed "paperwork," that is, written proof of such cooperation. They would also use the words "rats" and "snitches" to describe these people. (48 RT 8589-8591)

Gene Ebright had been a member of the Skin Head Dogs since 1991. (49 RT 8899.) As part of that culture, if a member of the Skin Head Dogs found out that another member was a "rat," that member would do anything necessary to shut him up and the gang would be obligated to "deal with" this rat. (49 RT 8810.)

Ebright went to visit appellant at the jail in December, 1998. During this visit, appellant told Ebright he should try to persuade Porcho into "saying something different than what he was." (49 RT 8912-8913.)

Ebright interpreted this to mean that appellant wanted Porcho killed even though appellant did not use these words. (49 RT 8913.)

In January 1999, after appellant had been indicted for murder, Investigator Volpei was informed by a classifications deputy at the jail that a piece of mail left the facility that was addressed to the Merriman residence, but with a return address that indicated it was not sent by appellant. (48 RT 8591.) Investigator Volpei subsequently obtained this letter from jail officials through a search warrant.[9] The letter in question turned out to be a letter from appellant instructing his mother to mail another enclosed letter to Brandon Sprout, an inmate at Corcoran State Prison. (People's Exhibit 83.) Volpei instructed that the letter be resealed and sent on to Sprout. Volpei was concerned because the letter from appellant to Sprout indicated that Merriman needed some help from him and Volpei knew Sprout would soon be released from prison. (48 RT 8592-8594; People's Exhibit 97.)

Pursuant to a search warrant executed at the Ventura County Jail on February 5, 1999, several letters were seized. One was a letter from appellant to his mother asking her to send two included letters to Mike Gawlik and Harlan Romines, both inmates in Wasco State Prison. (49 RT 8789-8790,

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9. Unless otherwise stated in the Statement of Facts, all of the letters seized at the jail pursuant to a warrant were already in the possession of sheriff's deputies having been seized by the authorities pursuant to jail policy. (40 RT 8790.)

8792-8794; People's Exhibit 84.)

The letter to Gawlik told him to pass along certain information, especially to the "woods from Ventura County." Appellant went on to tell Gawlik the names of the people who had worn wires, but did not ask Gawlik to encourage any violence against them. (49 RT 8794-99.)

During the execution of the same warrant on February 5, 1999, a letter to Stacey Warnock was also seized. (People's Exhibit 124.) This letter informed Ms. Warnock of various people who were wearing wires but, again, appellant did not ask Ms. Warnock to take any action. (49 RT 8800-8803.)

On March 4, 1999, a search of Skin Head Dog Mike Bridgeford's cell was conducted at Wasco State Prison. During this search, a letter from appellant was discovered. (People's Exhibit 85.) This letter, postmarked February 13, 1999, informed Bridgeford about the activities of Wozny, Bowen and Nicassio but again requested no action. (49 RT 8805-8811.)

Bridgeford's response to this letter was also seized. It was dated February 24, 1999 (People's Exhibit 125.) Other than wishing appellant luck with his case, there was no discussion of the informants or promises to do anything for appellant. (49 RT 8812-8815.)

At the time of her testimony, Samantha Medina was on probation for

conspiring with appellant to intimidate and dissuade witnesses. (48 RT 8618.) Ms. Medina used to associate with appellant and other members of his gang. (48 RT 8619-8620.) In 1999, she found out that appellant was in custody and went with Kara Allen to visit him at the county jail. She said that during her visit, appellant never brought up the subject of anyone "ratting" on him. (48 RT 8621-8622.) However, according to Investigator Volpei, he interviewed Medina on May 26, 1999, at which time she told him that during their visit, appellant told her Kristin Spellins had worn a wire and that she should talk to Spencer Arnold, Spellins' boyfriend, about this. (50 RT 8956) Ms. Medina also admitted that she had then traveled to Ventura to confront Spellins about the wearing of the wire. (50 RT 8958.)

Tori Szot had known appellant for four years prior to her testimony at trial. (48 RT 8633.) She associated with white supremacist groups and was proud to espouse their beliefs. (48 RT 8635-8636.) During this period of time she frequently communicated with various inmates in jails and prisons. (*Ibid*)

In 1999, appellant would call her from the jail. At some point, she became aware that he had been indicted for murder and rape. (48 RT 8638.) While on the stand, the prosecutor showed her a letter she received from the Ventura County Jail. The return address was from an inmate named

"Kendricks," but the letter was in fact from appellant. In this letter appellant asked Ms. Szot to get him the phone number of a person named Robert." He also asked for Mitch Buely's address so appellant could tell him what his first baby's mother was doing, stating, "He needs to know what is popping with his first baby's mom. That little sawed off pasty-faced troll Bildo [Billie Bryant], I know that troll's dirty little secret." (48 RT 8640-8645; People's Exhibit 98.)

Jasmine Guinn was also a friend of appellant. She had known him since approximately 1995. She knew a lot of people in appellant's gang and had been jailed for any number of things. (48 RT 8673-8675.) At one point appellant sent her a letter detailing some of the people who had been wearing wires as informants in his murder case and telling her to let people "with hand" (having influence) know about it. (48 RT 8678-84.) Ms. Guinn most likely told Ms. Szot about the people appellant claimed were ratting on him. (48 RT 8685-8686.)

Kara Allen has known appellant since they were in elementary school together. (47 RT 8486.) Through the mail, appellant requested that Ms. Allen send a letter to Victor Challoner. She never sent this letter. (People's Exhibit 87.) However, at appellant's request she did send a letter written by appellant to inmate Robert Imes. (People's Exhibit 89.) This letter stated,

among other things, that inmates John Crecelius and Chris Bowen had been ratting on him. (48 RT 8497-8502.)

Ms. Allen also wrote a letter to appellant giving him Samantha Medina's address (48 RT 8506) knowing that Ms. Medina was supposed to contact Spencer Arnold to tell him that his girlfriend, Kristin Spellins, was a rat. (48 RT 8513.) Appellant asked Ms. Allen to visit him at the jail. She went to see him, along with Samantha Medina. Ms. Allen first testified that she did not hear appellant ask Ms. Medina to contact Spencer Arnold, but heard Ms. Medina say she would contact him. Under further questioning from the prosecutor, Ms. Allen changed her story and said that during a prior trial (presumably that of Sue Merriman), appellant told Ms. Medina to contact Arnold. However, she never did so. (48 RT 8489-8490.)

At time of the trial, Jennifer Wepplo was on parole for a conviction she suffered for conspiracy to intimidate witnesses in the instant case. (48 RT 8698-8699.) In 1999, appellant told Ms. Wepplo that people, including Larry Nicassio, were wearing wires on him. Ms. Wepplo communicated this information to John Reeder, a Skin Head Dog incarcerated in Centenella State Prison. (48 RT 8700-8701.)

After receiving this information, in a letter postmarked February 25, 1999, John Reeder wrote back to Ms. Wepplo that someone had to "get"

Nicassio from inside of the jail. (Vol. 48 RT 8702-8704; People's Exhibit 107.)

During this period of time, Ms. Wepplo was corresponding quite a bit with appellant and his fellow gang members. She said that she was sort of a "middlewoman." (48 RT 8715.) Wepplo would send letters to other gang members in prison that referred to "rats", including one to Ian Morrow stating she was glad "Mumrock"[10] was letting "all the niggas know" about what was going on with informants in his case. (48 RT 8724.) Ms. Wepplo admitted that she was spreading the word about the informants. (48 RT 8725-8726.)

Ms. Wepplo wrote a letter to Skin Head Dog Jed Malmquist on March 7, 1999 (People's Exhibit 112), telling him appellant wanted him to know about the "cheese-eaters, including Larry Nicassio, Robyn Gates, Billie Bryant, Kristin Spellins, John Crecelius, Mike Wozny and Chris Bowen." Ms. Wepplo specifically requested that Malmquist hurt Bowen, who was at Ironwood State Prison. She knew of Bowen's location because appellant told her. (48 RT 8726-8730.)

On March 17, 1999, Ms. Wepplo sent another letter to Malmquist at Ironwood. She asked Malmquist if he got the previous letter about Bowen

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10. Mumrock was one of appellant's nicknames.

and told him that "Big Daddy Mumrock" said Bowen "needs his jaw wired is the only wires that should have been going on." However, at trial Ms. Wepplo testified that appellant never said anything should be done to Bowen, only that Bowen ratted on him. It was her idea that Malmquist should attack Bowen. (48 RT 8731-8733; People's Exhibit 113.)

Ian Morrow was a member of the Skin Head Dogs who was incarcerated in Norco State Prison during 1999-2000. (49 RT 8873-8875.) He received a letter from Ms.Wepplo about the people who were wearing a wire in connection with appellant's case. (49 RT 8877; People's Exhibit 132.) His return letter to Wepplo expressed surprise and anger about these people, especially Mike Wozny. (*Ibid.*) Morrow wrote a long letter, postmarked February 26, 1999, expressing sympathy for appellant's legal problems, but not mentioning doing anything to any of the witnesses. (49 RT 8879-8881; People's Exhibit 133.)

A search warrant was executed at the jail on March 10, 1999, yielded an envelope addressed to "Fawn W." on Anthony Street in Ventura from an inmate named Contreras. It contained letters from appellant to both his sister, Ember, and to Sal Sponza (49 RT 8825.) The letter to Ember requested that she mail the second letter to Sal. (People's Exhibit 126.) (49 RT 8825-8828.). The letter to Sal named the people who wore wires in the

investigation. It made no requests for any action against them. (49 RT 8828-8833.)

In April, 2000, Sue Merriman pled guilty to tampering by trying to dissuade Larry Nicassio and other witnesses from testifying at appellant's trial. (49 RT 8787.)

Jed Malmquist received a letter from appellant postmarked April 4, 1999 (49 RT 8866; People's Exhibit 131), but testified that he never attempted to harm Bowen or even find him. He told the jury that since his release from prison in 2000, he had made no attempts to contact any of the witnesses. (49 RT8868; 8871-72.)

At the time of his testimony, Spencer Arnold was married to Kristin Spellins. Arnold was a felon who had been in and out of prison for the last ten years. He was a white supremacist skinhead, but testified at trial that he had abandoned this lifestyle. While he was in custody in 1999, he was not aware that his then-girlfriend, Spellins, had been assisting the prosecution in appellant's case. (49 RT 8885-8886; 8892-8893)

In March, 1999, Arnold received a phone call from Kenneth Barber saying there was paperwork proving that Kristin was co-operating with the prosecution. Barber may have called her a "rat." Arnold later got a call from appellant, who told him to "get a hold of his people." Appellant also told

Arnold that someone would contact him. (Vol. 49 RT 8887-8888.)

In the spring of 1999, John Hernandez was housed with appellant at the Ventura County Jail. (47 RT 8524.) Appellant gave Hernandez some grand jury transcripts that showed certain people wore wires during the investigation of appellant. Appellant wanted Hernandez to pass the word around as to what these people had done. (47 RT 8525-8526.) Appellant also gave the Hernandez a note with the names of these people written on it, saying that these people should be assaulted. (47 RT 8528-8532; People's Exhibit 82.)

Sometime after his December, 1998, grand jury testimony, Nicassio received a piece of paper with the names of the informants in this case including Spellins, Nicassio, Bowman, Wozny and Crecelius. Nicassio received this paper from Henry Johnson, who told Nicassio that he received it from John Hernandez. Nicassio did not know these other people were cooperating with the prosecutor. (45 RT 8230-8232.) Hernandez testified that he got this list of names from appellant, who wanted other inmates to know who was working with the police. (Vol. 47 RT8523-8525.) Appellant wanted Hernandez to tell his "home boys" that these people were "rats." (47 RT 8530.) Hernandez came forward with this information in exchange for a deal on a sentence that he was serving in Pelican Bay. (4 RT 8545 et seq.)

Nicassio testified before the grand jury that indicted appellant on the witness tampering charges. While he was in the court holding tank, he was approached by Harlan Romines, who is a member of the Nazi Low Riders and a very intimidating individual. Romines told Nicassio that there was "paperwork" out on him throughout the entire prison system and that he would be killed for being a rat. (46 RT 8237.)

APPELLANT'S CASE

During the Thanksgiving season of 1992, Sue Merriman was living in a two story condominium at Miller Court in Ventura with her children, appellant and his sister Ember. Appellant's room was on top of the garage, separated by an open walkway from the rest of the residence. Sue Merriman's room also was on the top floor, on the other side of this walkway. (52 RT 9310-9313.) She remembered nothing particularly eventful about the Friday after Thanksgiving. Early that Saturday morning she was in her bedroom when she heard male voices. She knew her son had been out late that night and was happy he had come home safely, but did not come out of her room. She heard a noise and saw a "bald boy" urinate onto her patio off the connecting bridge between the garage and the house. She was angry but went back to sleep. From her room she could usually hear what was

occurring in appellant's room, but this morning she heard nothing unusual, nor anyone moving about the house. (52 RT 9316-9320)

Mrs. Merriman eventually got out of bed at 7:00 a.m. When she got up she saw blood on the stairwell connecting the upstairs rooms to the rest of the residence. (52 RT 9322-9323.) She wasn't concerned about the blood because it wasn't "something that someone needed to go to the hospital." (52 RT 9325.) She and Ember cleaned the blood off the rug. (52 RT 9326-9327.) Up until this point, she hadn't seen appellant that morning. Mrs. Merriman was in the kitchen to making breakfast when she heard appellant come out of his room. While having breakfast, Mrs. Merriman spilled coffee on the kitchen rug. (52 RT 9327.) She then noticed appellant and asked him who had gotten hurt. Appellant pointed at his own head. Mrs. Merriman told appellant that she thought he needed stitches but appellant simply said, "Don't baby me" and went back into his room. (52 RT 9333-9334.)

The next contact Mrs. Merriman had with appellant was at 1:30 p.m. when she called up to him that she and Ember were going to town and she would fix him a sandwich if he wanted one. Mrs. Merriman never saw anyone else in the house that morning nor did appellant leave the house at any time prior to 1:30 p.m. (52 RT 9338-9339.)

Appellant was home when Mrs. Merriman returned from shopping at

5:30 p.m. He had a hangover and was in his robe and pajamas. After taking a Darvocet, he went to bed between 7:00 p.m and 8:00 pm. Later that night Mrs. Merriman got a call from Trina's father who wanted to speak to appellant. Mrs. Merriman told him that appellant had taken a pill and gone to bed. Almost immediately thereafter, the phone rang again. This time it was Mrs. Montgomery, who was hysterical. She told Mrs. Merriman that her daughter was missing. Mrs. Merriman told appellant to speak with Mrs. Montgomery but she did not listen to their conservation. (52 RT 9347-9350.)

The next morning, Sunday, appellant and his sister went to church. Mrs. Merriman did not go because she was having the carpets cleaned that morning. Mrs. Merriman had been using Judd Mashburn to clean her carpets. She decided her carpets had to be cleaned that weekend, but not because of the blood. Appellant's room "smelled like a brewery" and the other carpets needed cleaning as well. (52 RT 9340-9341.)

Mrs. Merriman believed Mr. Mashburn cleaned the dining room, living room, stairwell and Justin's room. While the carpet was being cleaned, two officers from missing persons came to the Merriman residence and asked to speak to appellant. Mrs. Merriman told them that appellant was not home. She was aware that appellant was on parole so she gave consent to the officers to search anywhere in the house they wanted. The officers went

upstairs to appellant's room, but Mrs. Merriman did not believe they conducted a search. (52 RT 9351-9355.)

Mrs. Merriman testified that the diagram of the jail found in her possession was not an escape map, but for the purpose of Mrs. Merriman driving by appellant's cell window to wave to him. (52 RT 9359-9361.)

She also indicated that to her knowledge, appellant was not in a "gang." He was just with some kids having a good time. She knew about the Skin Head Dogs but denied that appellant was one of them. (52 RT 9378-9380.)

PENALTY PHASE CASE

Prosecution's Case- in-Chief

Victim Impact Evidence

Opal Jean Montgomery had twelve granddaughters, one of whom was Trina. She testified that Trina was " the apple of her grandfather's eye." She said that she could still feel Trina's hug and that Trina was a very loving baby and a very nice child. She told the jury that Trina's first prayer was "Now I Lay Me Down to Sleep." She stated that appellant didn't allow Trina to utter her last prayer and hopes that God can forgive appellant because she cannot. (59 RT 10506-10508.)

Michael Montgomery was Trina's younger brother. He was fifteen

years old when Trina disappeared. He remembered that it was important for him to be respected by his sister. When she first disappeared, no one in the family knew what had happened and it became necessary for them to come up with whatever theory that they could so that they could believe she was alive. Mr. Montgomery found the disappearance of his sister "very hard to swallow." He really didn't understand the loss until he entered college and now will spend the rest of his life doing what he can to keep her memory alive. (59 RT 10509-10511.)

Laurie Montgomery was Trina's sister and the youngest of the three Montgomery children. She described the good relationship she had with her older sister as they were growing up. When Laurie got married it was very sad that Trina was not there. She wanted her sister to know that she had grown up and had changed. The death of her sister still keeps her up at night. (59 RT 10512-10515.)

Michael Montgomery was Trina's father. He stated that she was very bright but turned rebellious around ninth grade. He and his wife decided not to try to control their daughter's conduct and let her see the world. They let her go to Germany to be with her boyfriend, Mitch Sutton. She returned from Germany a changed person, having "turned a corner." (59 RT 10527.)

Mr. Montgomery realized when Trina disappeared that the situation

was very bad. He turned his focus on his other children. However, there is a dark cloud hanging over the entire family. He remembers Trina now through photos, videos and the memories of hundreds of friends and family members. There is a giant void in his life. Due to the circumstances under which she died, there will never be a healing. The loss shattered his wife. His daughter was always kind, energetic and friendly, with a sense of invincibility that perhaps led to her fateful poor choice. (59 RT 10517-10520.)

Katherine Montgomery was Trina's mother. She told the jury that she had a very close and special relationship with her daughter. Mrs. Montgomery stated that when Trina had returned from Germany, she had a new appreciation of her family. Mrs. Montgomery spent a lot of time with Trina and even when Trina was acting out she did not show that side of herself to her very large extended family. Mrs. Montgomery played a video tape for the jury showing Trina at a birthday party for Mrs. Montgomery's sister and Trina dancing at a family wedding. There was also a scene in this tape from Trina's grandparents' 50th anniversary party. (59 RT 10521-10524.)

Mrs. Montgomery said her daughter will never share in these things again. She never had a funeral for her daughter and never had a proper

chance to say goodbye. Further, she said that bad things were brought out about her daughter by people who really didn't know her. (Vol. 54 RT 10524-10526.)

Evidence of Other Crimes Committed by Appellant

In June of 1990, Ronald Jenkins was a teacher at a class in the Pasa Robles Facility of the California Youth Authority. One day, when appellant and six to eight other students were in his class, he heard appellant arguing with a black student about race. Mr. Jenkins then saw appellant pick up a chair and strike this person on the head. (54 RT 10533-10538.)

On June 26, 1994, at the Ventura County Jail, appellant was moving through the jail with fellow inmates Waterloo and Harris. Appellant was walking in front of the other two inmates when he suddenly turned around and hit Waterloo in the face. As Waterloo dropped to the floor, appellant hit him again. When Waterloo asked appellant why he hit him, appellant replied, "Because I felt like it." (59 RT 10568-10575.)

The prosecutor read a stipulation that on July 31, 1989, appellant and his friend, James Ashby, drove to Carla Ellison's house in Ojai. Ms. Ellison had been dating her neighbor, Scott Davis, but Ashby was also interested in Ms. Ellison. Mr. Davis and Mr. Ashby soon got into a confrontation over Ms. Ellison. She went to Mr. Davis's house to get Scott's mother to help. Patricia Davis arrived at the scene a few minutes later. (59 RT 10526-

10527.)

Appellant then approached Scott Davis, pushed a club in his face and threatened to beat the crap out of him." Appellant also told Mr. Davis that he needed bring Ms. Ellison over to Mr. Ashby "or else" and that he better "get his fucking mother out of here." (59 RT 10527-10528.)

Another stipulation stated, in summary, that on July 3, 1990, appellant was an inmate at the California Youth Authority in Pasa Robles. During the early morning, appellant was under the supervision of Officer Paul Jones, who was orchestrating movement to the showers. At that time, appellant struck Officer Jones several times with his closed fists. While being subdued by Officer Jones and other officers, he struck Officer Jones again in the thigh and stomach. On November 9, 1990, appellant pled guilty to resisting or deterring an executive officer in the performance of his duties by force or threat and was sentenced to two years imprisonment in the custody of the California Department of Corrections. (54 RT 10543-10545.)

Another stipulation was entered into which stated, in summary, that on October 31, 1992, at 1:00 am, Deputy Van Davis responded to a "loud party" call. When he arrived, he saw appellant and another man getting up off of Richard Kutback, who was lying on the ground motionless. Appellant ran off, covered with blood. Mr. Kutback was bleeding from a large and deep laceration in his lip and mouth. He also had bruises on his head. (59

RT 10545-10547.) On May 20, 1993, appellant was convicted of misdemeanor battery. (59 RT 10543-10545.)

Another stipulation stated in summary that on April 16, 1996, appellant and Scott Porcho were at the Living Room Nightclub in Santa Barbara. Brett Wittman was dancing in a mosh pit when he was attacked by some skinheads. Mr. Wittman was extricated from the dance floor by security and taken to the lobby where appellant approached him and punched him in the nose, knocking Mr. Wittman to the floor. As Whitman lay on the floor, Porcho kicked him in the head two to three times. Appellant and Porcho fled from the scene. On September 6, 1996, appellant pled guilty to a misdemeanor battery causing serious bodily injury. (59 RT 10548-10550.)

Another stipulation was entered into by counsel, which, in summary, stated that on January 12, 1998, appellant was pulled over for a Vehicle Code violation while driving a car on Ventura Ave. During a search of appellant's person after his arrest, a small concealed knife was found. (59 RT 10550.)

Another stipulation was entered into by counsel which stated that on November 8, 1998, appellant attacked his fellow inmates William Nolan and Paul Folse. (59 RT 10586-10589.)

Appellant's Case

Appellant's penalty phase case consisted of testimony from his grandmother and four expert witnesses: Dr. Patrick Barber, a clinical psychologist, Dr. Jordan Witt, a clinical psychologist with clinical neurological training, Dr. Joseph Wu, a PET scan expert, and Leonard Diamond, a forensic psychologist. Appellant's maternal grandmother, Beverlee Waterhouse, stated that appellant was adopted by Dean Merriman when Beverlee Sue Merriman married him. She said that appellant had always shown her love and respect and that she does not believe that appellant did these crimes. (Vol. 60 RT 10615-10618.)

Dr. Patrick Barker was a forensic and clinical psychologist, who has consulted the courts on various matters since the 1980's. In 1999, counsel requested that Dr. Barker perform a psychological evaluation on appellant. Counsel wanted Dr. Barker to assess appellant without preconceptions. Dr. Barker was informed as to the nature of the charges appellant was facing, but was not given any police reports.

To prevent his opinions from being effected by malingering, Dr. Barker also indicated that he never automatically assumed the subjects of his examinations always told the truth. (60 RT 10730-10731.)

Some of the information used appellant's evaluation came from interviews with appellant, his mother, and his adoptive father, Dean

Merriman. Sue Merriman told Dr. Barker that appellant's birth father was an alcoholic whom appellant rarely saw after his mother and father separated when appellant was two years old. (60 RT 10732.) When appellant was five years old, Sue Merriman married appellant's adoptive father, Dean Merriman. (60 RT 10733.)

Both appellant and Mrs. Merriman described life with Dean Merriman as "badly dysfunctional." Both said that Dean Merriman was "seriously alcoholic" and that he argued and fought all of the time with Sue. He would go into drunken rages, swear at everyone around him, break things and physically abuse his wife. (60 RT 10733.)

Sue and Dean Merriman separated and reunited on a frequent basis. Appellant would live with one of them and then the other, creating a very unstable living environment. Appellant had significant school problems, including learning difficulties, behavioral problems and attendance problems. He did not finish high school. Appellant attended alterative schools, such as Mar Vista, created for students with similar problems. Appellant attended seven or eight schools prior to dropping out. (60 RT 10734.)

Appellant stayed away from home a lot because he hated the turmoil there. He often stayed at a friend's house where drugs were readily accessible. It was there that appellant first started using methamphetamine

when he was 11 years old. (60 RT 10734-10735.) At one point he was staying at a neighbor's house and he was sexually molested by the woman. (60 RT 10735.)

Appellant was a good fighter and by his early teens other kids looked to him for protection. He got a reputation as being the type of person who would take on anyone in a fight, even people seven or eight years older. Appellant got into a lot of fights and it became a point of pride for him that, even in his very early teens, he would not back down. (60 RT 10735.)

During his mid-teens, appellant began to associate with skinheads and white supremacists. Mrs. Merriman believed this was partly due to Dean Merriman's racism, but she also believed that it came from an incident in which appellant was knifed by an Afro-American. (60 RT 10735-10736.) When appellant was fifteen years old, he was arrested for vandalism and other crimes and was sent to Colston Juvenile Facility. Appellant spent most of the next ten years in detention of one sort or another. Most of the detentions were related to drugs. (60 RT 10736.)

Dr. Barker also reviewed certain of appellant's school records which indicated that in seventh grade he disrupted school activities by distributing methamphetamine pills to other students. There were also records of poor school behavior, attendance and performance, including making racially derogatory statements to another student. (60 RT 10738-10739.)

Dr. Barker gave appellant various tests, including the WAIS intelligence test, the MMPI, which measures clinical disorders such as depression and schizophrenia, and the Millon Clinical MultiAxial Inventory, which is a personality test. In addition, Dr. Barker had appellant fill out an extensive life history questionnaire. (60 RT 10739-10740.)

The MMPI results showed that appellant was trying to exaggerate his virtues. As to the other tests, there was no indication that appellant was trying to manipulate the results. If anything, appellant was trying to make himself look better than he was, not more dysfunctional. (60 RT 10742.)

The intelligence test measured appellant's full scale I.Q. at 88, which in the 21st percentile, the low-average range. Appellant's Millon profile was shared by individuals who are unreliable, self-centered in their contempt for social convention, deeply resentful and lacking in empathy and tolerance. People with this profile are ruthlessly indifferent to others with a low tolerance for frustration. They have personal relationships fraught with conflicts. Appellant's responses to the Millon also indicated poor adjustment to society, as well as addictive tendencies. (60 RT 10743.)

The MMPI profile of appellant matched the most difficult of criminal offenders: people who are distrustful, anti-social, cold, unstable, impressionable, hostile and violent. These people have very poor impulse control, having a belief that they are entitled to anything that they want.

They have no long range planning and blame their troubles on other people. Exacerbating this profile was the fact that appellant took disinhibiting drugs. (60 RT 10743-10744.)

Dr. Barker indicated that when under the influence appellant's ability to plan was more severely impaired than when he was not. However, even when not under the influence, appellant's planing is very short term and exhibits a lack of respect for others. He judges something as good if it fits his immediate needs. He cannot take into account the needs of others. (60 RT 10745.)

Appellant's scored in the average range in abstract reasoning. He also understood society's expectations of him, even though he often did not follow them. His processing speed was very slow compared the average person, falling in the 2% range. (60 RT 10746-10747.)

Dr. Jordan Witt, a clinical psychologist with special training in clinical neuropsychology, did a complete neurological examination of appellant. This examination involved three components: interview of the subject, the subject's history, and neuropsychological testing. (Vol. 60 RT 10624-10627.)

Dr. Witt gave appellant fourteen different neuropsychologically based tests to get as much information as possible about the workings of appellant's brain. He testified that there is a possibility that the subject of

these tests could fake them, but these tests were extremely difficult to fake when they are correlated with each other. There are patterns derived from these tests which can show whether a subject was faking. These patterns were not present in the test results received from appellant. (60 RT 10627-10630.)

According to Dr. Witt, appellant presented a developmental history consistent with individuals who are highly hyperactive, impulsive, impatient and restless. Because of these traits, this type of people tend to come into conflict with different expectations early on for performance both in school and in the community. This is the reason why appellant went into a special education program as a child. (60 RT 10631.)

Dr. Witt indicated that such abnormalities in the way people respond, behave, think and process information can be caused genetically, *in utero*, or through substance abuse. From Dr. Witt's many discussions with appellant, he came to believe that appellant's brain may have been damaged by such substance abuse. Appellant also reported blackouts, loss of memory and seizures. Dr. Witt felt that there was a concern that the significant polysubstance abuse may have severely affected appellant's brain function. (60 RT 10632-10634.)

In addition, Dr. Witt cited to appellant's history of multiple head injuries as being a risk factor in brain injury. Appellant had been in many

fights, beginning at the age of 14, in which he lost consciousness, as well as an automobile accident in which he was knocked unconscious. The longest he was unconscious from one of these incidents was 20 -30 minutes, placing the event in the category of mild to moderate head injury. This raised the question as to whether this risk factor contributed to his current state of neuropsychological functioning. (60 RT 10634.)

Dr. Witt's evaluation of appellant was based on two streams of information: the way appellant presented himself to the examiner and the results of the examination. Appellant presented as very restless, mildly agitated, very active with motor hyperactivity, also known as a motor tick. Dr. Witt observed that he had a certain shake to his hands. Dr. Witt stated this was a pattern of behavior often seen in people with extreme hyperactivity. (60 RT 10635.)

Based upon Dr. Witt's evaluation, appellant had several "significant to even severe problems in how he managed, processed and worked with information and reacted to it." Dr. Witt testified that appellant had a very limited span of concentration with difficulty in shifting that concentration. His abilities in this area was severely below average. (60 RT 10635-10636.)

Appellant's second major area of neurological defect was related to learning, both with language information (things that you tell him), and with visual information (things that were presented to him). In addition, he had

marked memory difficulties. He ranked in the lowest 1-2 % of the general population in this memory testing. (60 RT 10636.)

Appellant also executed both motor and thinking tasks at a very low speed. He appeared confused with basic instructions and did basic tasks, such as reciting words and putting pegs in holes, very slowly. Dr. Witt testified this was representative of how appellant's brain works, how it manages a variety of tasks and how it communicates with itself. (60 RT 10637.)

Dr. Witt found that appellant was a person who was living in a kind of ongoing present. He does not have the capacity to retrieve and recall information and does not understand very much of what is presented to him. Therefore, he cannot anticipate and plan for the future because he does not have the ability to take in information adequately. These problems, compounded with his hyperactivity, created a person who lives at the whim of his impulses, emotions and desires, less able to rely on his memory, reasoning, and learning of information that he gets from his environment on which to base his actions and judgments. (60 RT 10638.)

Dr. Witt concluded that appellant was neither insane nor retarded. He could tell right from wrong. However, appellant did have brain damage, having been born with a brain that was not really functional and which only became worse with time. Appellant's brain had a skewed pathway of

development and was in effect a dysfunctional organ, which can not be repaired by surgery. (60 RT10639-10642.)

Dr. Witt diagnosed appellant as having an anti-social personality disorder. Dr. Witt stated appellant had a "textbook" case in that he exhibited virtually all of the DSM-IV factors that identify this disorder. This included failure to conform with social norms with respect to lawful behaviors, deceitfulness as indicated by lying for personal profit or pleasure, irritability and aggressiveness, impulsive failure to plan ahead, reckless disregard for the safety of himself or others, consistent irresponsibility as indicated by failure to sustain consistent work, and lack of remorse. (60 RT 10703-10706.) In addition, Dr. Witt diagnosed appellant has having the Axis I disorders of attention deficit hyperactivity disorder, learning disabilities, polysubstance dependence and cognitive disorder not otherwise specified. (60 RT 10720.)

Psychiatrist Dr. Joseph Wu had published many articles about Positron Emission Topography (PET). He described the procedure and its uses, testifying that it can be used to look at the brain and ascertain which areas of the brain are abnormal. These results can be correlated with possible brain injury, lesions and tumors. (61 RT 10776-10780.) Dr. Wu also gave the jury a description of how the brain works and which parts of the brain control which brain function. (61 RT 10781-10782.)

Dr. Wu did a PET scan on appellant He also did an EEG. The EEG showed appellant had abnormal activity in the frontal and temporal lobes of his brain, evidenced by complex partial seizures, a type of epilepsy that can affect motions and movements. (61 RT 10784-10787.)

Dr. Wu described the PET procedure to the jury. He compared appellant's scan to a composite image of 56 normal scans of a normal control group and then did statistical comparisons to see if there were statistical abnormalities in appellant's scan. (61 RT 10787-10794.)

Dr. Wu stated that the PET scan reveals an image of the brain in color. The color scale runs from dark purple to red: the dark purple indicating areas of the lowest activity and the red indicating areas of the highest activity. In a normal brain, the front lobe tends to be more active that the rear portion of the brain. However, in appellant's brain, there is an abnormal pattern with more activity in the rear portion of the brain. This pattern is known as hypofrontality and is consistent with brain pathologies, including lesions and with certain types of mental illnesses such as schizophrenia. (61 RT 10795-10796.)

Dr. Wu explained in detail to the jury his analysis of appellant's PET scan. (61 RT 10797-10804.) His ultimate conclusion was that it was "more likely than not" that appellant had brain damage in the frontal lobe of the brain, the area of the brain involved with regulation of aggression, long term

planning and judgment. People with such damage also tend to be more violent due to this brain injury. (61 RT 10806-10810.)

Leonard Diamond, a clinical and forensic psychologist, examined the appellant for the juvenile court in 1989. The court asked him to describe appellant's personality and offer some recommendations. Dr. Diamond performed intelligence tests, tests of brain pathology, subjective drawings and ink blot tests. The information obtained from appellant was significant in terms of long term conduct disturbance, long term personality difficulties and characterological disturbance. (61 RT 10895-10897.)

Dr. Diamond's evaluation revealed an individual with a very low level of maturity who had no insight whatsoever into his own actions and no social judgment. Dr. Diamond stated appellant "requires total restructuring of his personality but he doesn't have the intellectual capacity or the motivation to become involved in that sort of treatment." (61 RT 10897.)

Appellant also scored very low on intelligence tests. The testing revealed that he had not incorporated societal values nor developed a superego. He operated on pure impulse; doing what feels good or appropriate even though those actions are totally inappropriate vis-a-vis other people's awareness. Dr. Diamond's testing indicated that appellant was not psychotic but had a characterological disturbance that interfered with his social judgment skills and his ability to function in his environment in an

appropriate manner. According to Dr. Diamond, appellant didn't even know what planning was, as planning requires structure and an individual saying to himself, "I can do this at this time." However, appellant was incapable of this because he does not have an orderly progression of thoughts. (61 RT 10898-10900.)

According to Dr. Diamond, appellant accepted no responsibility for his actions, making constant excuses in such a way as to indicate sociopathy. The evaluation stated that appellant needed a structured environment and society needs protection from him. The evaluation also recommended confinement in the Youth Authority indicating that appellant was a "significant danger to the people of California." (61 RT 10900-10901.)

During the evaluation, appellant told Dr. Diamond that he knew nothing about reading or math and it embarrassed him to the extent that he just gave up. The lack of these basic skills also affected appellant's ability to function in society. (61 RT 10902-10903.)

Prior to the penalty phase of the instant case, defense counsel requested that Dr. Diamond do a re-evaluation of appellant. Dr. Diamond was given no further instructions as to what to look for or what findings defense counsel wanted to receive. (61 RT 10904-10905.)

Dr. Diamond saw appellant for a total of 12-13 hours in December,

2000. Appellant was administered the WAIS intelligence test, the Wechsler Memory Test, the Bender Gestalt Test, as well as projective drawing tests, the Rorschach test, the Thematic Appreciation test, and the MMPI. (Vol. 61 RT 10905.)

The results of these tests and evaluation showed very little change in appellant from the time of Dr. Diamond's original testing. Dr. Diamond felt the testing was accurate because appellant lacked the basic planning skills to malinger. The testing shows no evidence of brain pathology from injury. It showed limited intellectual awareness and that appellant was functioning within dull normal range. The evaluation showed appellant to be hostile, suspicious, negativistic, all of which indicated a borderline personality. Appellant did not have the capacity to effectively deal with his environment; he is too impulsive and "blows up" too easily. Further, he lacked the ability to anticipate, hence, is extremely dependent. He has no insight into his behavior and doesn't respond appropriately to others. (61 RT 10906-10907.)

Dr. Diamond's evaluation revealed no hallucinations, delusions or paranoia. Further, Dr. Diamond stated that the testing eliminated organic causation for appellant's behavior as well as any thought disorder. Instead, Dr. Diamond found sociopathy, a characterological disorder formed very early in life. People suffering from this disorder are very hard to treat and experts can't say for sure where sociopathy originates. It could be chemical,

genetic, psychological or *in utero* effects that cause this disorder. It was possible that he was just born this way. As with all sociopaths he misunderstands his own needs and motives as well as those of others. According to Dr. Diamond, appellant has so many gaps in his awareness, he is not open to treatment. (61 RT 10908-10909.)

Regarding the Thematic Apperception Test (TAT), appellant's stories were "fraught with violence, abandonment, fear, loneliness, and blatant stupidity." (61 RT 10910-10911.) Regarding the projective drawing test, appellant drew a house without a foundation, signifying a lack of personal foundation, great anxiety, interpersonal deficiencies and family deficiencies. Another drawing of a tree is borderline disturbed, "over the edge" and completely inappropriate. Appellant could not stop drawing all over the page until he was told to stop by the examiner. This drawing indicated that appellant had no environmental limits. (61 RT 10913-10915.)

Appellant's third drawing was of a person. Usually, subjects would draw a person of the same age and sex as themselves. Appellant drew a picture of a man named "Fred," who was 44 years old and who liked to scream when he was upset. According to Dr. Diamond, this was appellant's self image: a person out of control. (61 RT 10915-10916.)

Dr. Diamond summed up his findings, stating appellant had not changed much in 12 years. Appellant's judgment, self image, ability to

function in the world and his ability to plan were all extremely deficient. (61 RT 10917.)

Dr. Diamond stated that it was fair to say that appellant can be categorized as having anti-social personality disorder. He tested very high on the MMPI-2 lie scale. In addition, Dr. Diamond characterized appellant as a very violent, dangerous and vengeful individual. (61 RT 10918-10920.)

People's Rebuttal Case

Dr. Ari Kalechstein was a forensic and clinical neuropsychologist retained by the prosecution to review Dr. Witt's analysis. (61 RT10972-10973; 10982.)

Dr. Kalechstein stated that there were many problems with the MMPI that was analyzed by Dr. Witt. In his view, answers to many of the questions appeared to be outright lies. In addition, appellant obviously misreported various items on the personal inventory sheet. Further, Dr. Kalechstein pointed out three tests that Dr. Witt either scored wrong or misinterpreted in such a way that greatly overestimated the degree of appellant's neuropsychological dysfunction. (62 RT 10988 et seq.)

The prosecution also called Dr. Helen Mayberg, a board certified neurologist. (63 RT 11294-11297.) Dr. Mayberg's testimony was confined to a critique of the PET scan administered to appellant by Dr. Wu. Dr. Mayberg testified there were irregularities in compiling the "normal"

controls, stating there was either something wrong with the people used in the control group or something wrong with the PET machine used to test them. (63 RT 11319-11326.) She was concerned about which control group appellant was compared to and that no diagnosis was ever made on appellant. (63 RT11326-11333.) Moreover, the drugs appellant was taking at the time of the scan could also affect the test result. (63 RT 11335-11336.) Dr. Mayberg testified that based upon the particular scan given to appellant, she couldn't derive a diagnosis, at least in part due to the drugs that appellant was taking at the time of the scan. She further indicated that the scan results did not meet the criteria of what is considered a brain abnormality. (63 RT 11342-11345.)

Appellant's Rebuttal Case

Against the advice of counsel, appellant took the stand. He read a statement giving his condolences to the Montgomery family and stated that his counsel did a terrible job defending him. (64 RT 11406-11411.) He also stated that he did not kill Katrina Montgomery. (64 RT 11415.)

ARGUMENT

I. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE PREJUDICIAL MISCONDUCT OF JUROR #1

A. Introduction

Before the first word of testimony was uttered, appellant had been irrevocably prejudiced and denied his right to a fair trial. There was a juror in the box, Juror #1, who was not an unbiased judge, but rather a partisan. The juror misconduct in this case involved two separate acts. The first was that Juror #1 was not forthcoming in her questionnaire and oral voir dire because she withheld important information from counsel and the court. Secondly, separate and apart from the aforementioned misconduct, there was evidence that at least one of the jurors (Juror #1), if not more, decided this case, as to guilt and penalty, prior to deliberations in the guilt phase. This sitting juror had intentional contact with Ventura Deputy Sheriff Kathleen Baker. There was convincing evidence that during the evidence portion of the guilt phase trial, Juror #1 told this deputy that the jury wanted to "fry" appellant. Further, Juror #1 admitted that, prior to guilt phase deliberations, she discussed the case with this deputy, who told Juror #1 that she wanted appellant "put away." The juror assured the deputy that this

would be done.

The evidence was irrefutable that the juror committed serious misconduct. Juror #1 carried into the deliberation room the attitudes and biases of a law enforcement agency hostile to appellant. A "13th juror" was present. By law, prejudice from this misconduct must be presumed unless rebutted by the prosecution. Under the circumstances of the misconduct, rebuttal is not legally possible.

Appellant was not tried by twelve impartial jurors. This error was structural, striking at the very foundation of our system of jurisprudence. There can be no harmless error analysis. These acts of juror misconduct deprived appellant of a fair trial and due process of law under Amendments V, VI, VIII and XIV of the United States Constitution. Reversal is required.

B. Procedural and Factual Summary

On March 5, 2001, during the penalty phase, the court informed counsel that Juror #1 had telephoned from home and informed the court that due to the illness of her daughter she was seeking to be excused from further jury service. In addition, the court told counsel that it had been informed by a deputy sheriff, who was working security on the case, that Deputy Sheriff Kathleen Baker had had lunch with a juror[11] and that there may have been a

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11. As matters developed, it became apparent that the juror who spoke with Deputy Baker was also Juror #1.

discussion of the case. (62 RT 10935-10936.) The court convened the jurors who were present at court, and asked them whether they knew Deputy Baker. All stated that they did not. (62 RT 10937.)

An inquiry was made of Deputy David Kadosono. He informed the court that Deputy Baker recently told him that she had lunch with a person who said that she had been a juror in a murder trial for the last two months. This juror told Deputy Baker that the jury was going to "fry" the defendant. (62 RT 10942.)

The court then telephoned Juror #1 and an unsworn telephonic hearing was held with counsel present. The juror explained that her daughter had just undergone a rather serious operation and that the juror would have to take care of her for the next few weeks. (62 RT 10944-10945.) In response to the court inquiry, she admitted that she knew Deputy Baker and had spoken to her on the phone about possibly meeting with her. She said she never actually had lunch with Deputy Baker nor had she ever told her that the jury was going to "fry" appellant. (62 RT 10947-10949.) She also stated that this call was made after the guilt phase verdict. (62 RT 10951-10953.) She insisted that she never told Deputy Baker how she was going to vote and that she had followed the court's instruction not to discuss the case with anybody. (62 RT 10960.)

After learning this information, the court held a testimonial hearing.

Deputy Baker testified that she knew Juror #1 from past family encounters. Her first contact with the juror regarding this case was when the Juror #1 left a message on the deputy's answering machine stating that she was going to be in Ventura the next week for jury duty and that Juror #1 wanted to get together for lunch. (62 RT 11082.) The deputy returned the call a few days later. During that conversation, Juror #1 had told the deputy that she had been on the Merriman jury for the last two months. Juror #1 also said that "we all want to fry him." (62 RT 11083.) The witness testified that call occurred before the guilt verdict. (62 RT 11087.) Deputy Baker testified that she told her husband, sergeant and captain about this conversation. (62 RT 11092.) Sometime thereafter, the deputy called Juror #1 and told her that it would be improper for them to have lunch together while she was on the jury. (62 RT 11084.)

Sergeant Richard Barber was Deputy Baker's supervisor. (63 RT 11150-11151.) He testified that prior to the guilt verdict Deputy Baker told him that she had lunch plans with a juror on the Merriman case and that he told her that she should not have lunch with a sitting juror. (63 RT 11151-11153.) Deputy Baker told Sergeant Barber that the juror had said that the jury wanted to "fry" appellant. (63 RT 11156)

Captain Gordon Hansen of the Ventura County Sheriff's Office

testified along the same lines as Deputy Baker. However, he stated that Deputy Baker told him that the juror's exact words were that they were "looking to fry this guy." (63 RT 11161.)

Deputy Baker's husband, Michael Baker, was also a deputy sheriff with the Ventura Sheriff's Office. He testified that while he was aware that a conversation occurred between his wife and the juror, she never told him its details. (63 RT 11166-11167.) Deputy Kadosono then testified that Deputy Baker had told him that one of the jurors had called her and informed her that the jurors "were looking forward to frying" appellant. (63 RT 11177-11178.)

Juror #1 testified that Deputy Baker was her daughter's sister-in-law whom she had seen socially five times prior to this incident. (63 RT 11195-11196.) During her service on this jury, she called Deputy Baker to invite her to lunch. (63 RT 11195-11196.) Deputy Baker was not at home but a message was left and contact was made, soon thereafter. (63 RT 11197). Juror #1 estimated that this call was made approximately three weeks before guilt phase deliberations occurred. (63 RT 11198.) This conversation lasted four to five minutes. (63 RT 11199.)

Juror #1 testified that during the phone call, she and Deputy Baker made tentative plans for lunch. (63 RT 11200.) Juror #1 also recalled Deputy

Baker "saying something like 'I hope you put him away'." Juror #1 recalled responding "[h]e will be put away." (*Ibid.*) This was her own opinion and she didn't "believe" she shared it with anyone other than Deputy Baker. (63 RT 11205.)

Juror #1 further testified that while she had no independent recollection of the comment about the jury wanting to "fry" appellant, it is possible that she did say it, as there is no reason why Deputy Baker would say this if it was not so. (63 RT 11211-11213.) Juror #1 further indicated that she had made up her mind that appellant was guilty before any deliberations commenced because of the strength of the evidence in the case. (63 RT 11211; 11218-11219.) While she said that the deliberative process was "open minded" and "conscientious," it was questionable if she could have been persuaded, during deliberations, to change her perception of guilt. (*Ibid.*) She also stated that at no time did she hear any discussion amongst the jurors as to penalty. (63 RT 11219-11220.) However, upon further questioning by the judge, Juror #1 stated that she did recall some comments about the penalty between her and a few of the jurors with whom she most associated. She testified that she could not remember the substance of these conversations. (63 RT 11225.)

The court then proceeded to ask all of the other jurors, individually

and outside the presence of each other, whether they overheard or participated in any conversations as to what the penalty should be in this case. All of the jurors answered in the negative. (63 RT 11249-11262.)

Based upon the above testimony, counsel moved for a mistrial, stating that Juror #1 had prejudged, prior to deliberations, not only appellant's guilt, but also what penalty he should receive. (63 RT 11264.) Counsel further stated that the juror entered into deliberations with her mind made up; therefore, appellant was denied his right to a fair and impartial jury. He further stated that the juror had an agenda going into deliberations and that she could have swayed the other jurors. In addition, counsel argued that it was quite possible that this misconduct would have an effect on the penalty phase. (63 RT 11264-11267.)

Counsel also referred to misstatements the juror made on her questionnaire in which she indicated that she didn't have any close friends or relatives in law enforcement other than Richard Walsh, a prison guard. (Vol. I Augmented CT 9, Q 32; 63 RT 11263-11269.)

The court made the following factual findings. The court found that deliberations began in the guilt phase late on February 8th and continued through the full day of February 9th and that verdicts were reached on all counts but the murder count on the 9th. February 12th was a court holiday

so there was a three day recess. During that recess, Juror #1 was contacted by Ventura Sheriff's Deputy Kate Baker, sister of Juror #1's son- in-law. (63 RT 11376)

The court further found that Deputy Baker said something to the effect that she hoped that the jury would put the defendant away. Juror #1 responded they would do so one way or the other. (63 RT 11377.) The court found that it believed the phrase "we are going to fry him" was uttered in the conversation in question but the court could not ascertain who used the phrase first. (63 RT 11387.) The court also held that there was no improper discussion of penalty and no other indication of other impropriety by Juror #1, and that any remark by her was an "off-the-cuff" comment in response to a provocative statement by Baker. (63 RT 11378.) The court also found that prior to the guilt verdict, the juror remained open minded and able to vote either way on guilt and penalty. The court further speculated that the jurors could have easily discussed Count 1 prior to Juror #1's conversation with Deputy Baker. (63 RT 11377-11378.)

The court opined that the above facts suggested that there were four possible juror misconduct issues. (63 RT 11379.) Firstly, the court stated that there was no misconduct in Juror #1's failure to mention her relationship with Deputy Baker on the questionnaire because their relationship was "very

distant." (63 RT 11379-11380.) The court further stated that Juror #1 did not even know that Deputy Baker worked in close proximity to the courthouse until another relative told her. (*Ibid.*) Secondly, the court held that there was juror misconduct in the occurrence of a conversation between Juror #1 and Deputy Baker. (63 RT 11380-11381.) The third issue involved the content of Juror #1's conversation with Deputy Baker. The court found this to be juror misconduct, as well as Juror #1 had been admonished not to talk to anyone about the case. (63 RT 11381.) The fourth issue was whether Juror #1 prejudged the case in some fashion. (*Ibid.*)

The court denied the Motion for a Mistrial in spite of its finding of misconduct. The court found the question as to whether Juror #1 prejudged the penalty to be moot as she had been dismissed prior to the commencement of the penalty phase. (63 RT 11381-11382.) The court further held that Juror #1 did not prejudge the guilt phase, as by the time of the first conversation with Deputy Baker, the juror had legitimately begun to form opinions and that most of the verdicts had been returned. (63 RT 11382.) Further, the court held that there was no indication that the juror was reacting to bias as opposed to evidence. (63 RT 11382-11384.)

The court then concluded that the presumption of prejudice had been refuted, basing this upon the credibility of Juror #1 and the overwhelming

evidence of guilt. (63 RT 11384-11386.) After the verdict of death, the court denied a Motion for New Trial that included this claim of juror misconduct. (65 RT 11577-11578.)

C. Legal Analysis

1. General Law of Juror Misconduct.

When an action occurs that constitutes a direct violation of the "oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with non-jurors, or shares improper information with other jurors" that action is defined as jury misconduct. (*In re Hamilton* (1999) 20 Cal.4th 273, 294; *People v Nessler* (1997) 16 Cal.4th 561, 578-579; *In re Carpenter* (1995) 9 Cal.4th 634, 647; *In re Hitchings* (1993) 6 Cal.4th 97, 118.) Further, "a sitting juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require similar examination for probable prejudice." (*In re Hamilton, supra,* 20 Cal.4th at pp. 294-295.)

"Misconduct by a juror, or a non-juror's tampering contact or communication with a sitting juror, usually raises a rebuttable 'presumption' of prejudice." (*In re Hamilton, supra,* 20 Cal.4th at p. 295.) This rebuttable presumption rests upon the limitation of impeaching a verdict set forth in

Evidence Code section 1150, the pertinent part reading as follows:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Whether an individual verdict will be set aside due to juror misconduct is "resolved by reference to the substantial likelihood test, an objective standard." (*In re Hitchings*, *supra,* 6 Cal.4th at 121.) The verdict will be set aside if there appears a substantial likelihood of juror bias. Under the substantial likelihood test, such bias can be established in one of two ways. The first way is that the circumstances attending the juror misconduct are inherently and substantially likely to have influenced the juror. (E.g., *People v. Holloway* (1990) 50 Cal.3d 1098, 1110-1112; *People v. Marshall* (1990) 50 Cal.3d 907, 951-952.) Alternatively, bias can be found by looking to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. (E.g. *In re Hitchings, supra,* 6 Cal.4th at 121.) The judgment must be set aside if the court finds prejudice under either test. (*In re Carpenter, supra,* 9 Cal. 4th at p. 654.)

This two part test is different than the harmless error standard commonly used in typical appellate analysis. While the first alternative of the juror misconduct standard of *Carpenter* is somewhat analogous to the general "harmless error" analysis, the second is not. As stated in *Carpenter, supra,* 9 Cal.4th at pp.653-654, "[u]ltimately, the test for determining whether juror misconduct resulted in actual bias is 'different from, and indeed less tolerant than,' normal harmless error analysis, for if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict. A biased adjudicator is one of the few 'structural defects in the constitution of the trial mechanism which defy analysis by harmless error standards.'" (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; see also *Rose v. Clark* (1986) 478 U.S. 570, 577-578.)

2. Juror #1's Concealment of Her Relationship With Deputy Baker at Voir Dire was Misconduct

One accused of a crime has a constitutional right to a trial by impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *In re Hitchings, supra,* 6 Cal.4th at p. 110; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.) "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury

guaranteed by the Constitution." (*Ibid,* quoting *People v. Galloway* (1927) 202 Cal. 81, 92.) Further, a defendant's right to a fair trial is violated even if only one of his jurors is biased. (*People v. Nessler* (1997) 16 Cal.4TH 561, 578.)

The impartiality of prospective jurors is explored at the preliminary proceeding known as voir dire. " Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule ...." (*In re Hitchings*, *supra,* 6 Cal.4th at 110, citing to *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

Therefore, it stands that a juror who conceals relevant facts or gives false answers during voir dire commits misconduct in that the parties are not able to properly evaluate that juror's ability to be impartial in the particular case in question. "[W]here a party has examined the jurors concerning their qualifications, and they do not answer truly, it is manifest that he is deprived of his right of challenge for cause, and is deceived into foregoing his right of

peremptory challenge.[citation.] The prosecution, the defense and the trial court rely on the voir dire responses in making their respective decisions, and if potential jurors do not respond candidly the jury selection process is rendered meaningless. Falsehood, or deliberate concealment or non-disclosure of facts and attitudes deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process. [citation.]" (*In re Hitchings, supra,* 6 Cal. 4th at 112.)

There is no dispute as to the fact that Juror #1 was not forthcoming as to her relationship with a Ventura County deputy sheriff. She mentioned it neither in her questionnaire nor in her oral voir dire. Contrary to the court's holding that the juror's relationship was "very distant", making the concealment irrelevant, Juror #1's concealment was misconduct.

The court mischaracterized the relationship. The deputy was a relative through marriage whom she had seen multiple times socially. Deputy Baker was the sister-in-law of Juror #1's daughter. Therefore, Juror #1 would be the aunt to any children that Deputy Baker may have. The deputy was present enough in the juror's mind that she called Deputy Baker prior to the verdict being rendered in the guilt phase and talked about the case.[12]

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12. The trial court's finding that Juror #1 did not know that Deputy Baker worked in close proximity is not supported by Juror #1's testimony. (63 RT 11196-11203.)

Juror #1's concealment of her relationship with a member of the same police force that not only was involved in the investigation of appellant's case but was actually victimized by appellant was critical. Appellant's counsel had every right to know this. Whether it would have justified a challenge for cause or not, there is no reason to doubt counsel's statement to the court that this juror would have been the subject of a peremptory challenge had counsel known of this relationship. (63 RT 11270.) No further proof is needed of the wisdom of such a challenge than what actually happened because of the concealment. Deputy Baker was not simply a law enforcement officer. She was a law enforcement officer who, because of her position and employer, had an inherent bias against appellant. Had counsel known of this relationship, there is no question that Juror #1 would have been subjected to at least a peremptory challenge.

The concealment bore upon a clearly material fact of the case: that a person, with whom Juror #1 was well acquainted and with whom she felt comfortable discussing the case, had predictable prejudices against appellant.[13] (See *People v. Diaz* (1984) 152 Cal.App.3d 926, 931.) Therefore,

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Even if this was the case, it has no bearing on the existence or nature of the conversation or the issue of concealment.

13. A reasonable prediction that a person in Deputy Baker's position might be expected to be prejudiced against appellant was confirmed by Deputy Baker's actual opinion that she wanted appellant to "fry."

the act of concealment was, in and of itself, an act of misconduct on the part of the juror. Whether this concealment was intentional or inadvertent is irrelevant. (*Id.* at 938.) As stated in *In re Hitchings, supra,* 6 Cal.4th at 111, "Without truthful answers on voir dire, the unquestioned right to challenge a prospective juror for cause is rendered nugatory. Just as a trial court's improper restriction of voir dire can undermine a party's ability to determine whether a prospective juror falls within one of the statutory categories permitting a challenge for cause." *Hitchings* further recognized that this type of concealment "eviscerate[s] a party's statutory right to exercise a peremptory challenge and remove a prospective juror the party believes cannot be fair and impartial. We have recognized that 'the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury.'" (*Ibid.*)

The likelihood of this concealment demonstrating Juror #1's actual bias is multiplied by the additional misconduct of communicating with Deputy Baker. Further, as will be discussed in the next subsection, Juror #1 was also fundamentally dishonest regarding her contact with Deputy Baker, which supports the argument that her concealment was intentional and evidenced a biased state of mind.

3. Communicating with Deputy Baker Was Juror Misconduct. The Content of the Conversation and the Juror's Testimony at the

Hearing Show Separately or Together, that There is a Substantial Likelihood that Juror #1 Was Biased Against Appellant Requiring a Reversal of the Judgment

The court was correct in assessing that the conversation between Juror #1 and Deputy Baker was misconduct. However, the court was wrong in its assessment that the presumption of prejudice had been overcome by the overall circumstances, including Juror #1's honesty. Juror #1 was not at all honest and forthright. In her unsworn telephone interview with the court, Juror #1 stated that she never had any conversations with anyone about the case. However, during her sworn testimony she told a completely different story, swearing that there was indeed a conversation between herself and Deputy Baker in which the deputy said "I hope you put him away" and the juror responded that she would. (62 RT 10960; 63 RT 11200.)

The above are not minor discrepancies, but rather the type of contradictions one would expect from a person who found herself in a very difficult position because she had not been totally honest with the court. During her unsworn phone conversation with the court and counsel, Juror #1 clearly attempted to distance herself from the misconduct that had been uncovered. However, once she was compelled to testify under oath, her story fundamentally changed. This is not the hallmark of an honest witness.

Regarding the circumstance of the timing of the conversation, the

court was factually wrong when it held that the conversation took place after deliberations had commenced. While this is what Juror #1 stated during the phone call, when she was not under oath, she testified at the hearing that the conversation in which she and Deputy Baker discussed the case was "maybe two or three weeks" *before* the jury deliberations. (62 RT 10951-57; 63 RT 11198.)

The trial court essentially ruled that the fact that the presumption of prejudice vis a vis Juror #1's misconduct was overcome by the fact that she testified that her deliberations were "open-minded" and any comments she made were "off the cuff." The court was wrong. Everything that Juror #1 said or did must be viewed through the prism of her attempt to disavow all knowledge of any misconduct in her telephone conversation with the court. It is hard to fathom how the court could reach a determination that Juror # 1 was an honest person, in light of the fact that the court found that the juror did indeed likely use the word "fry," or at least assented to it, in respect to appellant, even though the juror initially denied in the phone conversation that such a discussion even took place. (63 RT 11378.)

Regarding the court's finding as to the "open-minded" attitude of Juror #1 as she approached deliberations, this finding was fundamentally flawed as well. The juror clearly testified that she had already made up her

mind prior to deliberations and that she doubted that anything said at deliberations would have changed her point of view. (63 RT 11219-11221.) The characterization of this as "open-minded" clearly misses the whole point of the deliberative process.

This Court has made it clear that the presumption of prejudice is strengthened by a concealment of information by a juror at voir dire. (*In re Hitchings, supra,* 6 Cal.4th at 119.) As this Court stated, "[I]n most cases, the honesty or dishonesty of a juror's response [to a question on voir dire] is the best initial indicator of whether the juror in fact was impartial." (*Ibid* quoting to *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556.) The dishonesty of Juror #1 has been discussed above and clearly works in favor of the presumption of misconduct.

Further, the court's emphasis on whether the juror was entitled to form some opinions as to the truth or weight of evidence prior to deliberations was misplaced. This was not a situation in which a juror was simply evaluating and judging evidence as it was received at trial. This case represents a situation in which Juror #1 had direct contact concerning the disposition of the case with a third person who was prejudiced against appellant. What is critical to the determination of prejudice in this case is that Juror #1 spoke with Deputy Baker and therefore failed to comply with

the court's repeated fundamental warnings not to discuss the case with anyone prior to formal deliberations. This is the core of the misconduct. This failure cannot be underestimated in the determination of prejudice in that it "casts serious doubts on (the juror's) willingness to follow the court's (other) instructions" or perform her duties. (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1118 citing to *In re Hitchings, supra,* 9 Cal.4th at 120; see also *People v Gray* (2005) 37 Cal.4th 168, 217.) By engaging in any form of conversation with anyone about the case, Juror #1's claims to have been "open-minded" ring hollow. Her protestations are made more hollow still by her concealment in voir dire.

The juror's misconduct cannot be taken in isolation. Juror #1's disregard for the court's admonitions created a substantial likelihood that she gave "short shift" to other vital court instructions. (*People v. Cisna, supra,* 182 Cal. App.4th at 1119.) "Jury adherence to the trial court's instructions-which cover such matters as the burden of proof, the presumption of innocence, the elements of the crime, and the evaluation of witness credibility-is essential to a fair trial." (*Ibid.*)

The long-honored presumption that the law assumes that jurors will follow instructions (e.g. *People v. Gray, supra,* 37 Cal.4th 217) does not hold in this case. By her voluntary actions, Juror #1 introduced into this case

a 13th juror, who walked in the same uniform as those prosecuting appellant. (*People v. Cissna, supra,* 182 Cal.App. 4th at 1120.) The conversation between Juror #1 and Deputy Baker indicated that Juror #1 had already decided the issue. In essence, at the very least, she gave her word to an agent of the State that she would "do her duty" and remove appellant from society.

This was not an "off-the-cuff" or casual comment. This was not a situation in which a juror makes a brief passing comment to a disinterested party about her general feelings of stress about being a juror or some other matter irrelevant to a defendant's guilt. (*People v. Danks* (2004) 32 Cal.4th 269, 307, 310.) The trial court did not take into account that Deputy Baker was not a disinterested person. She was a law enforcement officer, a member of the same department that had a disagreeable history with appellant from before the murder, and clearly wished to see him "put away." The fact that Juror #1 discussed this matter with Deputy Baker, who was also a relation by marriage, indicated that Juror #1 trusted this law enforcement officer, with all her understandable bias, and valued Deputy Baker's opinion. The fact that Juror #1 engaged a law enforcement officer in such a conversation was not a *de minimus* "off-the-cuff" conversation. Even if there was no misconduct vis a vis the concealment, this conversation itself was an act of

serous juror misconduct.

The trial court further misplaced its reliance on the "overwhelming" evidence presented by the prosecution to rebut the presumption of prejudice. It has been held that, "In general, when the evidence of guilt is overwhelming, the risk that exposure to extraneous information will influence a juror is minimalized." (*People v. Tafoya* (2008) 42 Cal.4th 147, 192.) However, the factual situation in the instant case does not fit the general rule for the reasons stated below.

The cases that speak to the effect of "overwhelming" evidence can be readily distinguished from the instant case in that in those cases the nature of the evidence had to be factored into the "substantial likelihood" standard to determine if there was juror bias. In the instant case, the bias was established directly from the juror's own mouth. In *Tafoya*, the juror misconduct entailed a penalty phase juror who briefly spoke to a priest about the Catholic Church's position on the death penalty. As related by the offending juror, this conversation was neutral in that the priest told the juror that the Catholic Church believes in following the law of the land. (*Id.* at 193.) The juror related this to her fellow penalty phase jurors. The court removed the offending juror from the penalty phase juror and instructed the jury to disregard her remarks. This Court held that in light of the neutrality of the

remarks, that the juror was removed and that the juror in question did not advocate for one position or another, and, in light of the nature of the evidence, there was "no inherent or substantial likelihood that the extraneous information influenced the other jurors or resulted in any juror's actual bias in rendering the penalty phase." (*Ibid,* citing to *In re Carpenter, supra,* 9 Cal.4th at 653.)

In *Carpenter,* the misconduct consisted of a juror inadvertently learning, during the guilt phase, of the defendant's prior conviction for a related murder. The juror did not share this information with the other jurors. The jury convicted petitioner. However, there was no evidence that the juror had any actual bias toward the petitioner nor was there evidence to indicate an inherent bias. It was under this set of facts that this Court factored into the equation of prejudice the "overwhelming" nature of the evidence. This Court held that there was no indication that the juror decided the case upon anything other than the "overwhelming evidence" presented at trial, and further indicated that there was no substantial likelihood the juror was biased as a result of the extraneous information. (*Id.* at 656.)

In *In re Hamilton, supra,* 20 Cal.4th 273, it was revealed that one of the jurors who returned guilty and death verdicts against petitioner had some discussion about the case with her neighbors long before she was

chosen as a juror. (*Id.* at 286.) The discussion was brief and fairly neutral. There was no mention in the discussion that the juror in question thought that petitioner was guilty or deserved the death penalty. The juror never revealed this discussion to the court or counsel or fellow jurors. (*Id.* at 287.)

This Court found there to be no prejudice to petitioner in that the discussion that the juror had was "brief, isolated and ambiguous" and that there was no substantial likelihood that it would have created any actual bias in the mind of the juror. (*Id.* at 305.) In doing so, this Court weighed in the fact that the evidence was "very strong" as to petitioner's "brutal crimes." (*Id.* at 301, fn 21.)

The above cases made clear that the fact that the evidence presented against the accused was very strong or even "overwhelming" is only a factor to be considered in determining whether there was a substantial likelihood that the accused suffered prejudice. Nowhere in these cases, or any others, is there even a suggestion that a trial in which one or more jurors is biased against a defendant is constitutional as long as the evidence against him is relatively strong.

Juror #1 did not merely receive outside information from which actual prejudice can be established or inherent prejudice be inferred. No inference is necessary. The juror's feelings of bias toward Mr. Merriman

were plainly stated. During the guilt phase of the trial she expressed her actual bias against appellant. She stated that appellant needed to be "fried" and assured her law enforcement relative that she knew her duty was to find appellant guilty. It is not necessary to weigh whether, in light of the evidence, there was a substantial likelihood of prejudice. Juror #1 was biased against appellant. Apparently, according to her own testimony, other jurors were as well.

It matters little that Juror #1 testified that she judged the case only upon the evidence. Jurors are traditionally very reluctant to admit they were biased and the proof of such bias is usually circumstantial. (*United States v. Gonzalez* (9th Cir 2000) 214 F3d 1109, 1111-1112.) The circumstantial evidence in this case demonstrated not only that Juror #1 made statements that unambiguously indicated this bias, but that when initially asked by the court to explain what had occurred between herself and Deputy Baker, she lied. This sort of dishonesty weighs heavily in favor of a finding of bias.(*Fields v. Brown* (9th Cir 2005) 431 F.3d 1186, 1195-1196.)

The participation of a biased juror in rendering a verdict is never harmless. The bias of this juror is structural error, requiring a new trial without a showing of actual prejudice. (*Dyer v. Calderon* (9th Cir 1998) 151 F3d 970, 973.) The bias or prejudice of even a single juror violates the right

to a fair trial. (*Dyer v. Calderon, supra,* 151 F.3d at 973.) Therefore, it is unnecessary to delve into the bias of the other eleven jurors. Under the United States Constitution, appellant was entitled to the unbiased opinion of 12 jurors, not 11. Under either prong of the above described "substantial likelihood" analysis, Juror #1 was biased. Objectively, the circumstances attending her misconduct were inherently and substantially likely to have influenced her. More subjectively, her failure to reveal her relationship to Deputy Baker at voir dire, her contradictory statements about the event in question, and her utter disregard of the court's admonition all combine to establish actual prejudice and defeat any attempt to rebut the presumption of prejudice so wisely created by this Court. The portrait that is painted by the evidence is one of a juror who carried a bias against appellant through a substantial part of the guilt trial, and through deliberations.

This Court has long held that an accused's entitlement to an unbiased jury is grounded in the United States Constitution. (*In re Hamilton supra,* 20 Cal.4th at 293; United States Const., amends VI and XIV.) This Court has interpreted this to mean that *every* juror must be unbiased or the jury is constitutionally infirm. (*People v. Nessler supra,* 16 Cal.4th at 578.) Appellant was not judged by such a jury and hence was deprived of his right to a fair trial, effective representation of counsel and due process of law

under the California and United States Constitutions. Therefore, the judgment against him must be reversed.

In addition, it must be considered that Juror #1 did sit in the penalty phase and heard a good part of the evidence. While the other jurors indicated there was no discussion of penalty, the presence of a prejudiced juror in the penalty phase is constitutionally unacceptable. Even if Juror #1's misconduct did not require a reversal of the guilt judgment, the need for legitimacy beyond reproach in the penalty phase mandates reversal of the penalty judgment. Further, by the use of the word "fry,"there was indication that at least some of the jurors had discussed the penalty during the guilt phase.

INTRODUCTION TO ARGUMENTS II-VIII

The capital crime in this case that resulted in appellant's sentence of death involved the murder of Katrina Montgomery. If the prosecutor's two chief witnesses (Nicassio and Bush) were to be believed, appellant murdered Katrina Montgomery after she voluntarily went to appellant's house and climbed into bed with him. According to these witnesses, appellant responded to this by raping and then murdering her.

There was no physical evidence connecting appellant to the crime. Ms. Montgomery's body was never recovered. No murder weapons were

found. No DNA of the victim was discovered in appellant's room, where the murder allegedly took place. In addition, every single witness that testified against appellant about the murder either (1) was extremely biased against appellant or (2) received some sort of a beneficial deal from the District Attorney to testify, was himself the possible murderer, or was part of a criminal gang that had absolutely no respect for the truth or the law.

The evidence as to the murder count was weak. Therefore, it was very advantageous for the prosecution to be able to prejudice appellant before the jury to such an extent that they would be predisposed to find appellant guilty of the capital crime.

The trial court allowed the prosecutor to gain this improper advantage by permitting, over the objection of counsel, not only the joinder of three sets of completely unrelated and highly prejudicial crimes to the murder count but also the highly prejudicial admission of several non-charged offenses.

The trial commenced with evidence of the charges that arose out of appellant's arrest on January 30, 1998. (Counts 9-15.) Before the jury heard any evidence pertaining to the murder they heard evidence that branded appellant as a person deserving of their disgust.

This evidence, by itself, made it impossible for appellant to get a fair

trial on the murder counts. However, this was just the beginning of a concerted effort by the prosecution, supported by the court, to paint appellant as a monster, to be found guilty and sentenced to death irrespective of the weakness of the evidence in the capital crime.

The prosecutor was also allowed to join two unrelated sets of sexual assault charges. (Counts 2-4 (Robin Gates) and Counts 5-9 (Billie Bryant.)) The alleged victims of these offenses had been in consensual relationships with Mr. Merriman. Their testimony was intended to, and did, paint a portrait of appellant as a savage brute who did not hesitate to take advantage of women for his own gratification. The evidence pertaining to these sets of counts had no probative value at all as to the murder counts. However, it was all too probative of the prosecutor's theory that appellant was a monster, as he referred to appellant in his summation. (57 RT 10127.)

The final set of counts that the court improperly joined to the murder count were counts 16-20, and the associated Penal Code section 186.22 criminal street gang allegation for count 16. While there might have been some limited probative value to this evidence regarding consciousness of guilt, the probative value was completely outweighed by the prejudicial aspect of this evidence.

As the alleged conspiracy involved members of appellant's gang, the

second half of the trial testimony was a long litany of the violent, racist and misogynistic activities and attitudes of the gang members, including a prison gang expert who described the nature of the gang's brutal actions and anti-social attitudes in detail. The jury was presented with an in depth exposure to the world of "white power" organizations with Nazi sympathies, who treated woman like chattel, despised blacks and Jews, and had no compunction against using deadly violence against their enemies. None of this had the slightest relevance to Katrina Montgomery's murder.

In addition to the constitutionally improper joinder, the trial court also improperly permitted the prosecution to present evidence of uncharged acts of unrelated alleged sexual assault on four separate women, Corrie Gagliano, Billie Bryant, Susan Vance and a prior attack on Katrina Montgomery. It also improperly and prejudicially admitted evidence that appellant was a car thief.

Neither the evidence of the joined counts nor the uncharged acts bore any significant probative value as to the murder of Ms. Montgomery. They did not provide any relevant evidence as to the guilt of appellant on the charge for which the jury imposed the death penalty. What this evidence did was prejudice appellant beyond the point where he could get a fair trial on the capital charge and violate appellants rights under both California state

law and the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

II. UNDER CALIFORNIA LAW, THE COURT COMMITTED REVERSIBLE ERROR BY FAILING TO SEVER COUNT I (THE MURDER COUNT) FROM THE BALANCE OF THE INDICTMENT

A. Procedural History

The 1998-1999 Ventura Grand Jury returned a twenty-five count indictment (CR45651) against appellant. (Supp CT 5 et seq). This indictment included all of the charges on which he was tried with the exception of the conspiracy and dissuading witnesses charges. The same grand jury returned a second five count indictment (CR46564) charging appellant with one count of conspiracy and four counts of Solicitation to Dissuade or Attempting to Dissuade a Witness by Force or Threat. (Supp CT 31 et seq.)

On June 11, 1999, the prosecution moved to consolidate the two indictments. (III CT 843.) On August 8, 2000, appellant filed his Notice and Motion for Separate Trials and Memorandum of Points and Authorities. (V CT 1235 et seq.) In the motion, appellant requested that the murder be severed from the balance of CR45651[14] and that the murder be tried

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14. In the Motion, appellant denominated the murder related counts as counts 1-3, counts 2 and 3 being sexual assault charges vis a vis Ms. Montgomery. However,

separately from all other charges.

Counsel argued that according to the factors stated in *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452-453, the two indictments should not be consolidated. (V CT 1239-1240.) He further maintained that none of the evidence of the crimes charged in the rape counts was cross-admissible with the murder or special circumstances. In addition, it was argued that the two other rapes would so inflame the jury against appellant that he would be unduly prejudiced as to the murder count. Appellant also argued that in a death penalty case "the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a non-capital case." (*Williams v. Superior Court, supra,* 36 Cal.3d at 454; V CT 1240-1241.)

In addition, appellant argued that counts 11-20 (the crimes arising from the arrest of appellant on January 30, 1998 and the dissuading witnesses related counts) were not even statutorily joinable with the murder counts under Penal Code section 954, in that they were neither of the same class nor connected in their commission with the murder. (V CT 1242.)

Appellant also maintained that Evidence Code section 352 mandated a severance of the murder count from the balance of the indictment as did the Due Process and Equal Protection Clauses of the United States

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in the final version of the indictment, the sexual assault charges were dismissed and the murder charge was denominated as Count 1.

Constitution. (V CT 1246.)

On September 20, 2000, the Court granted the motion to consolidate. (21 RT 3470- 3471) and indicated that the consolidated indictment will have the docket number of CR45651. The court severed counts 17-18 and 20-25 of original indictment CR45651 but denied the severance motion as to the balance of the counts. The court ruled that the joined counts were cross-admissible as to each other and the evidence of the non-murder counts would be admissible as to the murder under either Evidence Code 1101(b) or 1108, therefore making the issue of severance moot under the law. (21 RT 3471 et. seq.)

B. Statutory Standards for Joinder Under California Law and General Law

Penal Code section 954[15] provides that "[a]n 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 or divided into two or more groups and each of said groups tried separately." If this preliminary statutory

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15. Appellant recognizes that Penal Code section 954.1 clarified that cross-admissibility is not *required* for joinder of offenses. It did not, however, render cross-admissiblity *irrelevant* to the question of whether joinder comports with Due Process.

requirement is satisfied a defendant can predicate error in denying a motion to sever only upon a clear showing of potential prejudice. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315; *People v. Osband* (1996) 13 Cal.4th 622, 666; *People v. Sandoval* (1992) 4 Cal.4th 155, 172-173.)

As stated by this Court:

> The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citation.] The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial. [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (*People v. Bradford, supra,* 15 Cal.4th at p. 1315 citing to *People v. Sandoval*, *supra*, 4 Cal.4th 155, 172-173; *People v. Mayfield* (1997) 14 Cal.4th 668, 721; *People v. Memro* (1995) 11 Cal.4th 786, 849-850; *People v. Mason* (1991) 52 Cal.3d 909, 933-934; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452-454 .)

In reviewing such a claim, the trial court's ruling may be reversed only if the court has abused its discretion. (*People v. Mayfield*, *supra,* 14 Cal.4th at p. 720; *People v. Davis* (1995) 10 Cal.4th 463, 508.) An abuse of discretion may be found when the trial court's ruling "falls outside the

bounds of reason." (*People v. Osband*, *supra*, 13 Cal.4th 622, 666.)

As a general proposition, "[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled." (*People v. Bradford, supra,* 15 Cal.4th at pp. 1315-1316 quoting *People v. Balderas* (1985) 41 Cal.3d 144, 171-172; see *People v. Mayfield*, *supra*, 14 Cal.4th 668, 721.) This Court has held that while this cross-admissibility suffices to negate prejudice, it is not necessarily essential for that purpose. "Although we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (*Id.* at p. 1314. quoting *People v. Sandoval*, *supra*, 4 Cal.4th 155, 173.)

C. General Law of Cross-Admissibility

Evidence Code Section 1101 states:

> (a) Except as provided in this section and in Sections 1102 and 1103, 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. (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some

> fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

As seen from the wording of the statute, admission of evidence of subsection (b) is essentially an exception to the general law of subsection (a) forbidding evidence of a defendant's general propensity to commit crimes before the jury. In order to fully understand exceptions of subsection (b) the general law against propensity must be fully explored.

1. Subdivision (a)

Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion.

In *People v. Thompson* (1980) 27 Cal.3d 303, 326, this Court explained the reason for the prohibitions of 1101(a);

> The primary reasoning that underlies this basic rule of exclusion is not the unreasonable nature of the forbidden chain of reasoning. (See *People v. Schader, supra,* 71 Cal.2d at p. 772.) Rather, it is the insubstantial nature of the inference as compared to the "grave danger of prejudice" to an accused when evidence of an uncharged offense is given to a jury. (Citations) As Wigmore notes, admission of this

> evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." (Citation) It breeds a "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses ...." (Citation) Moreover, "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." (Citation.) "We have thus reached the conclusion that the risk of convicting the innocent ... is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty." (Citation) (*People v. Thompson*, *supra,*27 Cal.3d at p. 317, fns. omitted.)

Therefore, evidence must be excluded under section 1101 (a) if the inference it directly seeks to establish is solely one of propensity to commit crimes in general, or of a particular class. (*Ibid.*)

2. Subdivision (b)

Subdivision (b) of section 1101creates an exception to the general rule of 1101(a) by stating that the general rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition, such as motive, intent, common plan or scheme or identity. *(People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

However, the following rationale explains why 1101(b) must be carefully and sparingly applied. "Because other-crimes evidence is so inherently prejudicial, its relevancy is to be 'examined with care.' It is to be

received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Sam* (1969) 71 Cal.2d 194, 203; *People v. Peete* (1946) 28 Cal. 2d 306, 316)

Therefore, even though 1101(b) provides for possible joinder of cross-admissible offenses, the relevance of these offenses to one another must be carefully and fully examined before they are deemed "cross-admissible."

D. General Law of Cross-Admissiblity for Issues of Intent, Common Plan or Scheme and Identity

1. Intent

Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.[Citations omitted.]" (*People v Ewoldt* (1994) 7 Cal.4th 380, 394, fn 2.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbored the same intent in each instance.' [Citations.]" (*People v. Robbins* (1988) 45 Cal.3d 867, 879; see *People v. Ewoldt, supra,* 7 Cal.4th at 402.)

The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. "[T]he recurrence of a

similar result ... tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act .... (2 Wigmore, supra, (Chadbourn rev. ed. 1979) §§ 302, p. 241.)

2. Common Plan or Scheme

Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged, unlike evidence used to prove intent, where the act is conceded or assumed. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 394 fn 2.)

"The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done" in the charged crime. (*People v. Ewoldt, supra,* 7 Cal.4th at p.394.)

A greater degree of similarity is required in order to prove the existence of a common design or plan. "Evidence of uncharged misconduct must demonstrate not merely a 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 the individual manifestations." (*Ewoldt, supra,* at p. 399.)

3. Identity

Evidence of identity is admissible to prove that the defendant was the perpetrator where it is conceded or assumed that the charged offense was committed by someone. (*Ewoldt, supra,* at p. 394.)

The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Miller* (1990) 50 Cal.3d 954, 987.)

E. There is No Cross-Admissibility Between the Murder and Counts 9-15

As stated in above in the Introduction, there is absolutely no cross-admissiblity as to the evidence in these counts to any other counts in the indictment. The prosecutor argued that these counts were cross-admissible with the murder count because appellant's flight from the police is evidence of consciousness of guilt of the murder. (21 RT 3474-3478.) Even if this was the case, a single witness stating that appellant fled when approached by the police was sufficient for this purpose. The vast majority of the evidence of Counts 9-15 served no other purpose than to prejudice appellant. This involved violent, anti-social behavior of a completely non- sexual nature that

provided no relevant evidence as to appellant's guilt in any of the other counts, including the murder count.

Further, to claim that appellant's flight proved his consciousness of guilt of a murder that took place over five years prior is rank speculation. Appellant had a long negative history with the police. He had been in and out of confinement during this five year period. There were any number of reasons that he would have fled at the sight of the officers.

F. There is No Cross-Admissiblity Between the Rape Counts and the Murder Counts

1. Application of Evidence Code section 1101(b)

The prosecution's theory of admissiblity as to Counts 2-8 under Evidence Code section 1101(b) is unclear at best. It never stated exactly how the other rapes were relevant. In its Opposition to Motion to Sever, the prosecution stated the rape counts are cross-admissible to the murder because "[f]irst, the victims in [the rape counts] are still alive, compared with the victim in [the murder count] and will be able to personally describe to the jury how it felt to be raped by Mr. Merriman..." (V CT 1292.) While this certainly shows why the prosecutor would want Ms. Gates and Ms. Bryant to testify in a trial on the murder, it has absolutely no connection with 1101 (b) that would make their testimony admissible.

The trial court held that the facts underlying the rape counts would

have been admissible under 1101(b), thereby allowing for joinder under state law. The court cited what it called "some rather distinctive and unusual similarities" between the rape and murder counts. (33 RT 5846.) The court indicated that these similarities were that the women were "skinhead groupies" who came back to appellant no matter how badly they were treated, the use of drugs during the acts, that there were multiple sex acts, that there were acts of false imprisonment, the proximity of other people during the acts, that all of the women were treated in a less than human manner, that the women had a prior sexual relationship with appellant, the use of pornography and the length of the event. (33 RT 5846-5848.)

Regarding the relevant matters for which Evidence Code section 1101(b) evidence can be employed, intent is clearly not at issue in the murder. Regarding common plan or scheme and identity, appellant has no idea what the prosecutor's argument would have been if he had chosen to make one. However, the similarities between the Gates/Bryant alleged assaults and the Montgomery murder are completely insufficient to allow any inference of the type permitted by the statute.

As stated in the Statement of Facts regarding Counts 2-4, Ms. Gates would often voluntarily socialize and take drugs with appellant. She was living on her father's house boat which she turned into a drug party location.

During one of these parties, appellant was present along with certain other people. He and Ms. Gates used heroin and methamphetamine together. At some point, Ms. Gates invited appellant below deck to ingest more drugs.

Ms. Gates willingly began to have sex with appellant. Appellant began to get more aggressive during the sexual conduct. He produced pornographic magazines and "ordered her" to perform oral sex on him. However, Ms. Gates could not even remember if she told appellant she wanted to stop. She also testified that she thought that he had placed a gun in her vagina. The two then had vaginal sex, after Ms. Gates told appellant that she wanted him to leave. The incident lasted for 2-3 hours and eventually appellant left the boat. None of these criminal allegations were reported to the police until years after they occurred. None of this is even remotely similar to what the prosecutor claimed occurred to Trina Montgomery.

Similarly, the Bryant counts (5-8) involved a woman with whom appellant had a long-standing relationship and with whom he had engaged in consensual sex on many occasions over several years. Prior to, in between and after the alleged sexual abuse, she would continue to have a voluntary sexual relationship with appellant. At least one of counts charged (Count 6) was an incident that took place at appellant's house after Ms. Bryant was allegedly raped by appellant months before. As with the Gates counts, the

allegations involved incidents that went on for several hours.

The factual similarities between these two sets of sexual assault charges and the murder are insufficient to prove either common plan or scheme or identity. In fact, the only commonality was that appellant knew all three women. Even if Nicassio and Bush were to be believed, there was no prior sexual relationship between appellant and Ms. Montgomery. Most importantly, there was no evidence of deadly force used against either of these women.

While the trial court may have been correct that the two sets of rape counts were cross-admissible as to each other, it was incorrect in holding that there were sufficient similarities between the rape counts and the murder count. The prosecutor spent a great deal of effort to convince the jury that Ms. Montgomery "just wanted to be friends" with appellant and had rejected him as a sexual partner. (56 RT 9933-9937.) In fact, the evidence was that Ms. Montgomery had twice before resisted appellant's sexual advances. While there was no direct evidence why Ms. Montgomery went to appellant's residence the morning of her disappearance, the circumstantial evidence clearly points to her wanting to spite the Porchos or that she just needed a place to sleep after her fight with them. There certainly was no evidence, as with Ms. Gates and Ms. Bryant, that Ms. Montgomery went to

appellant's residence as part of a long-term consensual relationship with him.

In addition, there was no evidence, as there was in the Gates and Bryant counts, that drugs were used immediately prior to the alleged murder of Ms. Montgomery. There was no evidence that the alleged murder and rape of Ms. Montgomery were protracted, as were the alleged rapes. Further, there was no evidence of appellant's use of pornography in the alleged rape/murder of Ms. Montgomery. Regarding the presence of third persons, given the most favorable interpretation of the evidence for the prosecutor, it was Ms. Montgomery who picked the time and place of her alleged fatal encounter with appellant. The fact that Nicassio and Bush allegedly were there was happenstance and not part of a common *modus operandi.*

Regarding the court's finding of women being "treated in less than a human fashion" as a common factor, this is a commonality in *all* rapes. Any time a woman is forced to have sex against her will, she is dehumanized. Holding that this dehumanization is a common feature of these crimes is akin to holding that the stoppage of the victims' hearts is a common factor in an otherwise unrelated set of murders.

As with the prosecutor, the trial court never specified what the evidence of the rape counts would be admissible to prove in the murder

count: intent, common plan or scheme. However, it does not really matter. The similarities are completely inadequate to sustain the necessary inference for any of these matters under the above law.

The prosecutor's statement to the jury that the testimony of the living victims had the purpose of speaking for Ms. Montgomery should be considered the last and most accurate word on the real purpose and effect of this joinder. It had nothing at all to do with any legally cognizable purpose under Evidence Code section 1101(b). It was simply to inflame the jury, to artificially substitute the testimony of Ms. Gates and Ms. Bryant for that of Trina Montgomery and horrify the jury. "How it felt to be raped" by appellant is neither an element of any crime charged nor does it pertain to any conceivable relevant issue in the guilt phase.

2. Application of Evidence Code section 1108

The trial court also held that, regardless of the application of section 1101(b), the Gates and Bryant rape counts would be cross-admissible to the murder of Ms. Montgomery under Evidence Code section 1108. The pertinent part of Evidence Code section 1108 reads as follows:

> (a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352

(d) As used in this section, the following definitions shall apply:
(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:
(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code.
(B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem.
(C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.
(D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.
(E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.
(F) An attempt or conspiracy to engage in conduct described in this paragraph.

a. Evidence Code 1108 Does Not Apply to Murder or the Special Circumstances

In *People v. Lewis* (2009) 46 Cal.4th 1255, 1288, this Court held that Evidence Code section 1108 evidence may be admissible in a case of murder with a rape special circumstance.

However, to the best of appellant's knowledge, the United States Supreme Court has never ruled on whether the admission of this evidence is in violation of the provisions of the United States Constitution that guarantee a defendant the right to a fair trial, due process of law and effective assistance of counsel. (U.S. Const. Amnds V, VI and XIV.)

It is appellant's argument that Evidence Code section 1108 is unconstitutional under the above stated provisions of the United States Constitution.

b. The Application of Evidence Code section 1108 is Subject to Evidence Code 352 Analysis

In *People v. Falsetta* (1999) 21 Cal.4th 903, 911, this Court stated that the reason why Evidence Code section 1108 was not violative of state or federal Due Process is the inclusion therein of the requirement that a "careful analysis under Evidence Code section 352 must be conducted by the trial court to assure that the defendant has not suffered undue prejudice." (*Id.* at p. 911.)

This Court set forth at least some of the factors that the trial court should consider in making this determination. These include the degree of certainty of the Evidence Code section 1108 offenses, the similarity of these offenses to the charged offense, the relevance of said charges, its prejudicial impact on the jurors, the possibility of less prejudicial alternatives and the likelihood of "misleading or distracting the jurors from their main inquiry." (*People v. Falsetta, supra*, at pp. 917- 919.)

Falsetta also made it clear that the trial judge's obligation to consider exclusion of this type of evidence under Evidence Code section 352 is to be taken seriously. This Court directed that this discretion be

"broad"and went so far as to state that there is "no reason to assume" that the trial courts will find that the "prejudicial effect of a sex prior offense will rarely if ever outweigh its probative effect." (*People v. Falsetta, supra,* at p. 919.)

If this Court's confidence in the protections of the law is to be borne out, it must hold that the trial court was incorrect in holding that the evidence of the Gates and Bryant rapes was admissible under Evidence Code section 1108. Appellant was on trial for his life. This fact alone should be a transcendent consideration. As stated above, all of the prosecution's witnesses regarding the murder count had credibility problems. In spite of their intimate involvement in the alleged murder, Nicassio got what can only be considered a sweetheart deal from the prosecution and Bush walked away with no charges at all. The balance of the witnesses that offered testimony as to the murder were gangsters and gangster "associates," all of whom had ulterior motivations and whose credibility or memory was in question. Therefore, the prejudicial effect of the Bryant and Gates counts is greatly magnified.

As stated above, this Court also considers the existence of a prior conviction for Evidence Code section 1108 incidents as an important factor to be considered by the trial court when considering admission of this

evidence. There were no such prior convictions. In fact, neither woman went to the police and both basically ignored the matter for years. It was only when the police started to press for evidence on the murder did these women "reveal" the alleged rapes.

Regarding the *Faretta* factor of the similarities between the charged offense and the section 1108 "crimes," as discussed above, in spite of the urging of the prosecutor that the living speak for the dead, a thorough review reveals few similarities.

Ultimately, the issue comes down to whether this sort of evidence distracted the jury from its main area of inquiry. (*Falsetta, supra* at p. 919.) As stated in the Introduction to the Arguments of Counts I-V, this entire trial was like the tail that wagged the dog with the evidence of alleged crimes and incidents completely unrelated to the murder of Ms. Montgomery dominating the trial. The prosecution chose to charge appellant with capital murder. The main focus of the jury should have been the evidence of that murder and whether the prosecution proved its case beyond a reasonable doubt. Instead the jury was presented evidence of a plethora of other incidents, appellant's life style, his Nazi leanings, his hatred of blacks and Jews, his past problems with the police and any number of anti-social acts referenced in this brief. This unquestionably had

the effect of distracting the jury from the sober consideration of the capital charge. In essence, the guilt trial was a referendum of whether appellant was a candidate to die based on his general character, opinions, relationships and past offenses. By the time the prosecution finished with its presentation, the jury could not have helped but believe that appellant was someone in need of killing despite the dearth of direct evidence regarding the murder of Ms. Montgomery.

Relying on state law, the two sets of rape counts, if not improperly joined with the murders, would not have been admissible to prove the murder as per Evidence Code section 1108.

G. The Very Limited Cross-Admissibility Between the Murder and Counts 16-20 (Conspiracy and Witness Dissuasion) Was Not Sufficient to Dispel the Inference of Prejudice

While it can be argued that some reference of appellant's alleged attempt to dissuade witnesses from testifying is relevant as consciousness of guilt as to the murder count, the overwhelming prejudice of the voluminous amount of evidence, including evidence of gangs, racism and other violent crimes admitted as to the proof of Counts 16-20, so far outweighed any probative evidence of consciousness of guilt that the inference of prejudice cannot be dispelled. The nature of this prejudice will be discussed below.

H. The Trial Court Committed Reversible Error in Joining the Non-Cross-Admissible Counts in that Appellant Suffered Substantial Prejudice From the Joinder

1. Public Policy Considerations Regarding Judicial Economy

The burden on the party seeking severance arises from certain policy factors that favor joinder. "Joinder of related charges... ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 451 citing to *Coleman v. Superior Court, supra,* 116 Cal.App.3d at p. 138.) This Court has indicated that in deciding a defendant's motion to sever, the trial court must weigh the prejudicial effect on the defendant against any probative value to the prosecution with the consolidation of the counts. Any beneficial policy effects are to be added to the side of the argument favoring the prosecution. (*Id.* at p. 451 citing to *People v. Matson* (l974) 13 Cal.3d 35, 39.)

As it was appellant who sought the severance, the policy consideration of needless harassment to defendant can be eliminated from the determination of whether severance was appropriate in this case. (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 451.) Therefore, the only policy issue to be taken into account is the waste of public funds if the case

were to be tried in two or more trials. The "waste of public finds" occurs when there would be a duplication of evidence presented due to the fact that the crimes were "joined together in their commission." (*Ibid,* see *People v. Brock* (1967) 66 Cal.2d 645,655.)

The joint trial of the murder count with the non-murder counts saved very little time or court resources. If appellant had not been charged with any other crimes, the prosecution's evidence submitted to prove appellant's guilt in count I consisted of the testimony of Nicassio and Bush, the only two "eyewitnesses" to the crime, and appellant's alleged statements to bargain-seeking, inherently unreliable gang members and associates about his "involvement" in the Montgomery crime. Neither of the other alleged victims in the two sets of rapes knew anything about what happened at the Merriman residence in the early morning hours of November 27, 1992, and as such would not have been called as witnesses. Therefore, these witnesses would not have to be subjected to testifying more than once. As the murder count and the other counts were not connected together in their commission, there was no significant savings of time in their joinder. (*People v. Brock, supra,* 66 Cal.2d at p. 655; *Williams v. Superior Court, supra*, at p. 451.)

Regarding the Counts 9-15, none of the witnesses as to these counts would have had to testify both at the murder trial and a trial on these counts,

as Counts 9-15 have no relationship, whatsoever, to the murder count and attendant special circumstances.

A few of the witnesses may have had to testify at both severed trials. However, saving a day or two of testimony is not the *sine qua non* of the law of joinder. As stated by this Court, "[a]lthough there is inevitably some duplication in cases where the same defendant is involved, it would be error to permit this concern to override more important and fundamental issues of justice. Quite simply, the pursuit of judicial economy and efficiency may never be used to deprive a defendant his right to a fair trial." (*Williams v Superior Court, supra,* 36 Cal.3d 451 citing to *In re Anthony T.* (1980) 112 Cal.App.3d 92,102; see *People v. Smallwood* (1986) 42 Cal.3d 415, 426.)

The type of judicial efficiency to be gained by joinder was discussed by this Court in *People v. Mason* (1991) 52 Cal.3d 909, which held that the public policy of judicial efficiency favored joinder when two capital cases were joined together and the severance of cases would require selection of two juries at a cost of several months of court time and a delay of a much longer time to get both cases tried. However, in the instant case, there was only one capital crime and the jury selection for the non-murder case would have taken only a day or two.

In fact, the reality of the matter is that a second jury would not have

been necessary for the trial of the severed cases. A death qualified jury could have been selected for the trial of count I. The murder case could have been then tried to guilt verdict. If the jury found appellant guilty, then the trial could proceeded to the penalty phase. As each and every non-murder felony charged in the indictment would have qualified as a (b) factor aggravation, the penalty phase of count 1 could also have served as a guilt phase for the non-murder counts. There would have been no downside to either party or to the prompt administration of justice in such an arrangement. With the exception of a very few witnesses, this arrangement would have allowed most of the witnesses to testify once, with only one jury to be employed. The jury would not have needed to hear evidence of the highly prejudicial and non-cross-admissible non-murder counts, *unless and until* they had determined that appellant was guilty of Ms. Montgomery's murder. In such a manner, the joined non-murder crimes could not have possibly had any effect on the jury's determination of appellant's guilt in the capital count. It would not be necessary for any of the victims to have come forward during this phase of the trial, yet, the prosecution would have been deprived of neither the opportunity to try appellant for the other crimes he allegedly committed nor the use of those crimes as aggravating factors in the penalty phase. Therefore, any public

policy consideration of judicial efficiency is, upon closer examination, illusory.

However instead of employing such an eminently fair procedure as described above, the trial court embarked upon the unnecessarily dangerous process of allowing the jury deciding appellant's life or death fate to hear the evidence of otherwise inadmissible other crime evidence *before* they determined his guilt of the capital murder.

As discussed earlier in this Argument, the danger of the procedure used by the court has long been a concern of this Court. "Because other-crimes evidence is so inherently prejudicial, its relevancy is to be examined with care. It is to be received with 'extreme caution' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Sam, supra,* 71 Cal.2d at p. 203.) This Court has often stated its concern as to the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him. If the court finds a likelihood that this may occur, severance should be granted. (See *Williams v. Superior Court, supra,* 36 Cal.3d at p. 451.)

It is within the context of these overarching philosophical concerns that

the four "*Bradford*" factors must be considered.

2. Discussion of the Four "*Bradford*" Criteria

While this Court has set forth the four factors cited above in *Bradford*, at the same time it has made clear that these factors are simply "criteria that have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." (*People v. Bradford, supra,* 15 Cal.4th at p. 1315.) This Court has made clear that "prejudice is a highly individualized exercise necessarily dependent upon the particular circumstances of each individual case." (*Williams v. Superior Court, supra,* 36 Cal.3d at 452*; People v. Balderas* (1985) 41 Cal.3d 144, 173.) It is in the context of this individual determination that the prejudice in this case must be analyzed.

a. Cross-Admissibility of Counts

The first of the four criteria outlined in *Bradford* has already been fully discussed in this brief. The evidence in the non-murder counts is not cross-admissible as to any contested issue in the capital murder. Therefore, this criterion most definitely favors appellant.

b. One of Crimes is Punishable by Death

The final of the four criteria is indisputable and similarly favors appellant's motion to sever in that count I charged a crime punishable by death. In formulating such a fact specific criterion, this Court clearly

recognized the unique nature of death penalty cases and the necessity of keeping them as free of prejudice against defendant as possible without violating basic public policy. As stated in *Williams*, "since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance 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 454.)

Therefore, the first and last of the criteria outlined by this Court in *Bradford* clearly favor severance of the murder and non-murder counts.

c. Inflammatory Nature of Crimes

The first of the two remaining criteria is an analysis of whether certain of the charges are unusually likely to inflame the jury against the defendant. The analysis of this issue often revolves around whether a defendant's actions in one set of the charges were substantially more moral egregious than in the other charge or charges. However, such a subjectively based analysis is largely dependent upon what the individual judge believes is a "worse crime" and as such is neither reliable or consistent.

The true meaning of "inflammatory" charges in this context rests less upon whether one set of crimes is "worse" than the other and more upon the foundational issue of predisposition. The overarching concern of joinder of

non-cross-admissible crimes is that evidence of these other crimes "could produce an overstrong tendency to believe the defendant guilty of the charges merely because he is a likely person to do such acts." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453 quoting *People v Thompson, supra,* 27 Cal.3d at 317.) Stated otherwise, "it may be error to consolidate an 'inflammatory offense' with one that is not under circumstances where the jury cannot be expected to try both fairly." (*People v. Mason*, *supra,* 52 Cal.3d at p. 934.) Therefore, the analysis must focus not upon some inevitably arbitrary and subjective assignment of relative heinousness to each set of offenses. Instead the inquiry must rest upon a highly individualized evaluation of whether or not the joint trial of the two sets of charges would have produced in appellant's jury a tendency to convict appellant of the murder because the joint trial of all of the crimes unfairly preyed upon the jury's emotions, convincing them that appellant is the type of evil person that would commit murder.

In the instant case, the number, diversity and inflammatory nature of the evidence of the non-murder counts could have had no other effect than to convince the jury that appellant was a very dangerous criminal capable of virtually any type of violent crime. The sheer volume of evidence as to the non-murder counts that were joined in this case was overwhelming. It

bombarded the jury with inflammatory evidence that appellant was essentially a terribly dangerous, psychopathic predator who would stop at nothing to see that his needs were fulfilled. In no other reported case where joinder was not based upon cross-admissibility was there evidence of so many unrelated alleged crimes and anti-social behavior as in this case. (See, e.g., *People v Mason* (1991) 52 Cal.3d 909; *People v. Sandoval* (1992) 4 Cal.4th 155; *People v. Mendoza* (2000) 24 Cal.4th 130; *People v. Balderas* (1985) 41 Cal.3d 144; *People v. Bean* (1988) 46 Cal.3d 919; *People v. Musselwhite* (1998) 17 Cal.4th 1216.)

This type of assault on the jury's ability to make a logical, dispassionate decision as to appellant's guilt in the capital count far exceeds the prejudice in cases reversed for improper joinder of counts for this very reason. In *Williams,* this Court issued a writ to set aside a trial court order denying defendant's motion to sever two unrelated murder counts which apparently involved gang membership. This Court held that the introduction of evidence of two seemingly "senseless, gang-related shootings" would created the forbidden "overstrong tendency to believe defendant guilty of the charge merely because he is a likely person to do such acts." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453 citing to *People v.Thompson, supra,* 27 Cal.3d at p. 317.) In addition, the *Williams*

Court cited to the fact that gang activity was a "highly publicized phenomena" which also encouraged the jury to convict on something other than the evidence presented. *(Id.)*

Similarly, in *Coleman v. Superior Court* (1981) 116 Cal.App. 3d 129, the court of appeal issued a writ to set aside a trial court order denying defendant's motion to sever two counts of sex crimes against minors from an unrelated murder case. The court of appeal held that defendant was prejudiced by the presentation of evidence of the sex crimes in the same trial as the murder count. The court stated, "...evidence of sex crimes with young children is especially likely to inflame a jury. When confronted by direct evidence from two minor victims concerning petitioner's propensity to commit sex crimes, the jury would be hard pressed to decide the murder case exclusively upon evidence related to that crime. That difficulty would be exacerbated by the fact that the murder case consisted primarily of circumstantial evidence[.]" *(Id.* at p 138.)

The *Coleman* court did not engage in the ultimately fruitless exercise of determining which crime was "worse," the sexual assaults or the murder, as there is no way to ever answer such a question without engaging in moral hairsplitting. The court simply stated that the introduction of other crimes of an emotionally inflammatory nature would invariably cause the jury to

factor into its murder deliberation the "fact" that defendant is a reprehensible person.

(1) Inflammatory Nature of the Evidence of Counts 9-15

Appellant was on trial for his life for the murder of Katrina Montgomery. He was entitled to a trial that determined his guilt based on the evidence of that crime. Instead, he got a trial where before such evidence was even proffered to the jury, they learned from witnesses to Counts 9-15 the following:

1. Appellant customarily carries a gun.
2. He has complete contempt for the law.
3. He drew his gun on several police officers, putting their lives in danger.
4. He is a meth user, if not an outright addict.
5. He caused a disturbance that terrified an entire neighborhood and put it at risk.
6. In order to save himself, he broke into an innocent person's house, terrifying the residents.
7. He used his gun to menace the people in the house.
8. He threatened to shut a little girl up "forever" if she did not stop crying.
9. He created a dangerous hostage situation where tear gas was used.
10. He completely trashed the house for no other reason but to do so, doing another $50,000 worth of damage and destroying a lot of property of sentimental worth, including irreplaceable family heirlooms.
11. He tried to make a bomb out of a can of Drano, insinuating that he had developed knowledge of incendiary

devices.

12. After the police managed to force him out of the premises, he was so crazed that even rubber bullets could not stop him.

13. His arrest created a situation which put several police officers at risk of their lives.

None of this had the slightest relevance to the alleged murder.

(2) Inflammatory Nature of Evidence of Counts 2-9

The joinder of the unrelated Gates and Bryant counts also added to the inflammatory nature of the joinder, because of both the number of incidents and the graphic and prejudicial nature of the evidence. As stated above, neither of these sets of counts had any probative value as to the murder charge. What their inclusion in this indictment did was present the jury with evidence of demeaning and sexually aggressive behavior by appellant against women. It again portrayed him as a person who used illegal drugs, consorted with immoral people, had no respect for others and used his physical size and presence to gratify his sexual needs. He was again portrayed as a person who had no respect for motherhood or children. The testimony elicited to support these two sets of crimes was explicit, revolting and inflammatory by any definition. In short, the evidence of these two sets of sexual assault counts further added to the impression conveyed by the

evidence elicited in Counts 9-15 that appellant was an out-of-control psychopath.

(3) Inflammatory Nature of Evidence of Counts 16-20

Regarding Counts 16-20, the evidence elicited as to these counts, yet again, demonstrated appellant's bad character as opposed to his guilt of the alleged murder. The prosecution was allowed to present to the jury an incredible gamut of testimony that placed appellant in the worst possible light. There were dozens of letters that illustrated appellant's gang contacts, unpopular political and social beliefs, racism, bigotry, use of drugs, violent nature, lack of respect for the system and willingness to use other people to suit his ends.

The joinder of the Penal Code section 186.22 gang enhancement of Count 16 with the murder count allowed for the admission of a plethora of gang related evidence that greatly prejudiced appellant *vis a vis* the capital count of the indictment. None of this evidence was in any way relevant to the murder of Ms. Montgomery, as the murder was not in any way gang related. However, the improper joinder allowed the jury that decided appellant's guilt on the murder count to consider that appellant was a member of a violent, neo-Nazi, white power street and prison gang who

committed any number of serious crimes. It further permitted the introduction of evidence of the connections of appellant's gang to the state prison system and of the violent crimes committed by the members of the gang. It also allowed for the testimony of several young women who eagerly cooperated with the gang in their illegal activities. The slavish devotion of these young women invoked created a Manson-like aura around appellant, which, along with the other above mentioned evidence and the evidence of the other joined counts, stamped appellant as an evil individual and assured his conviction of any charge that the prosecution cared to bring against him. As such, there can be no confidence in the verdict in count I and the attendant special circumstances.

The joinder of this set of counts allowed several witnesses to testify that appellant was a member of the Skin Head Dogs white supremacist street gang. (37 RT 6570; 37 RT 6572; 38 RT 6683; 38 RT 6686.) Scott Porcho testified at length as to the origins and nature of this gang. He stated that when the gang first was formed in the late eighties, the name "skinhead" referred more to the fashion of their clothes and their haircuts than anything else. (39 RT 6999.) However, after a time, the gang turned far more violent and racist. (39 RT 7000.) Porcho then recounted for the jury his own prodigious criminal record. (39 RT 7000-7001.)

Porcho then testified that violence would be used on members or associates of the gangs that cooperated in any way with the police. (39 RT 7004.) He further described the violent "jumping in" rituals by which a new aspirant would have to be beaten up to become a member. (39 RT 7020.) Porcho further testified that appellant was a leader of the gang. (39 RT 7022.)

Porcho also identified a series of photos of gang members, including photos of appellant. Various tattoos were prominent on the bodies of the members, espousing "white power" and a devotion to Nazism, replete with swastikas and the number "88" signifying Adolph Hitler. (48 RT 8584-8587.)

In order to prove this special allegation, the prosecutor was allowed to called Wesley Harris. Mr. Harris was a corrections officer at Wasco State Prison who worked as an institutional gang investigator, gathering information on prison gangs. (Vol. 47 RT 8408-8409.) He defined a "prison gang" as one that didn't form on the streets but has its roots in the prison system. (Vol. 47 RT 8412.)

Mr. Harris testified that all such gangs consider anyone who cooperates with law enforcement in any way as a traitor. (Vol. 47 RT8421.) If someone is thought to be an informant, a gang member will take the

matter to a "shot caller," the "top" criminal from each particular racial or social group for a particular geographical area of the state. If the shot caller orders it, it would be incumbent on individual gang members to carry out retribution on the informant. (Vol. 47 RT8424.)

Pursuant to this special allegation to Count 16, District Attorney's Investigator Mark Volpei was allowed to testify as to the nature of the Skin Head Dogs, the gang of which appellant was a member. Volpei educated himself on the structure of the Skin Head Dogs. He interviewed members of the gang, examined correspondence and obtained information from the Ventura Police Department. (Vol. 48 RT 8574-8576.) He related the criminal convictions of the various members and their violent and racist leanings. (Vol. 48 RT 8577-8588.)

Volpei also learned about the attitude of the Skin Head Dogs toward people who co-operated with the police against one of their members. They were prone to use violent retribution against these people but needed "paperwork," written proof of such cooperation. They would also use the words "rats" and "snitches" to describe these people. (Vol. 48 RT 8589-8591)

California law has long understood the inherent prejudicial effect of admission of a defendant's gang membership or participation in gang

activities.

> It is fair to say that when the word gang is used in Los Angeles County, one does not have visions of the characters in the "Our Little Gang" series.. The word "gang"...connotes opprobrious implications...the word "gang" takes a sinister meaning when it is associated with activities. (*People v. Perez* (1981) 114 Cal.App.3d 470, cited by *People v. Albarran* (2007) 149 Cal.App. 4th 214.)

Due to its highly prejudicial and inflammatory nature, this Court has condemned the use of such evidence unless it is more than tangentially relevant to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 616, 630.) This Court has further held that in cases not involving specific gang enhancements, evidence of gang membership should not be admitted. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Therefore, the illegal joinder permitted the introduction of evidence that would not otherwise be allowed under the law.

Even if such gang evidence can be said to be relevant to prove an issue pertinent to the guilt of a charged crime, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

In the instant case, neither the murder, the rapes nor any of the other substantive offenses charged had anything to do with gang activity.

However, the prosecutor's presentation throughout the entire case emphasized every possible aspect of appellant's relationship with certain racist gangs and the violent and hateful acts performed in their name. The problem here is not so much the inflammatory nature of the joined counts but the inflammatory evidence that was attendant to the joined non-murder counts.

As indicated in the statement of facts, pursuant to the proof of Counts 16-20, dozens of letters and other exhibits were admitted into evidence. However, the effect of these exhibits went far beyond these counts. The exhibits contained irrelevant and highly prejudicial evidence as to appellant's character. This content was vulgar, sexually perverse, obscene, and anti-social and in general presented appellant in such a extraordinarily negative light that his conviction on the murder count was assured. None of this evidence would have been admissible if the murder count was tried alone.

The following are summaries of the information contained in these exhibits.

People's Exhibit 73, is a "kite" (a note from one jail inmate to another) from appellant to an unknown inmate. Appellant not only uses the word "fuck" on many occasions but includes a "poem" that has nothing to do

with any offense. This poem relates to homosexual anal sex and is disgusting and perverse. The first four lines of this "poem" read;

Gloomy farthole of defeat
Between your cheeks I sink my meat
Massive shit hole with crusty hair
Aging sperm goes sour there.

This poem continues for many more lines and only gets more obscene and revolting. It further refers to women by the term "mud-duck." (45 RT 8185.)

People's Exhibit 66 is a letter from appellant to Kristin Spellins. In the letter he mocks sobriety and urges her not to bother with avoiding intoxicating substances.

People's Exhibit 74 is another kite from appellant. It is also full of vulgarities and homosexual references. Exhibit 78, a letter from appellant to Nicassio, is also full of vulgarities and the racially charged term "niggah."

People's Exhibit 83 is a letter from appellant to Brandon Sprout. It is obscene, racist and obscene. It contains a racially charged "joke" about "Buckwheat," a racial caricature of an Afro-American. Appellant signs the letter "Peter-Goes-In-Ya," yet another juvenile sexual reference.

People's Exhibit 84 is a letter from appellant to Harlan Romines. This letter contains the same "joke" as People's Exhibit 83. It also makes homosexual references ("hairy butt cheeks") and is signed "Peter-Goes-in-

Ya." People's Exhibit 85 is a letter from appellant to Mike Gawlick. In this letter there are various ugly references to women such as the use of the words "bitch" and "hos." It also refers to "pussy" and "blow jobs" and employs the word "fuck" liberally.

People's Exhibit 87 is a letter from appellant to Vic Challoner. It is replete with homosexual references, obscenities and vulgarities. In it, appellant makes light of domestic violence and liberally uses profanity. People's 89 is a letter from appellant to Robbie Imes. It is a repulsive note about "sucking dick," "butt holes" and a array of obscenities that would make the proverbial sailor blush.

People's Exhibit 98 is a letter from appellant to Tori Szot, who was a teenage girl at the time that appellant penned the letter. In a postscript to the letter, appellant references a "fucked up Christian ministry," demonstrating a contempt for the good deeds of this society's pre-eminent religious institution. People's Exhibit 99 is a return letter from Ms. Szot in which she professes her love for appellant and attempts to impress him by telling him about a "white power" documentary in which she was featured.

People's Exhibit 100 is a letter from Mitch Joyce to Tori Szot. It features a drawing of a nude, heavily tattooed woman posed in a suggestive manner. While not coming from appellant, this drawing clearly reflects upon

the people he associates with, hence upon appellant, himself. Similarly, People's Exhibit 107 is a letter from one of appellant's confederates to Jennifer, yet another young girl. It contains drawings of swastikas and other Nazi symbols.

People's Exhibit 102 is a letter from appellant to Mitch Joyce. It contains the aforementioned "Buckwheat joke" as well as various obscene references. People's Exhibit 108 is a letter from appellant to Jenny Wepplo which contains the word "nigger" and various other obscenities and homosexual references.

People's Exhibits 109 and 110 are letters from Wepplo to appellant. They are obscene and replete with various unsavory sexual references. Exhibit 110 uses the word "nigger." Exhibit 111 is a letter from appellant to Ian Morrow. It is full of obscenities and vulgar sexual references, including repulsive imagery of anal sex.

People's Exhibit 124 is a letter from appellant to Stacey Warnock. Once again, it contains the "Buckwheat" racial reference, various obscenities as well as being signed "Peter-Goes-in-Ya."

People's Exhibit 125 is a letter from Mike Bridgeford to appellant. It is not only laced with various obscenities, it reveals highly negative attitudes toward women. It also contains references to Hitler and Nazism. While

these are not statements of appellant, it is clear from the letter that appellant shares these attitudes and beliefs. Similarly, People's Exhibit 126 is a letter from appellant to Sal Sponza that contains various homosexual references.

People's Exhibit 131 is a letter from appellant to Jed Malmquist in which appellant makes various racial comments and talks about beating up "Niggs." This racist theme is continued in People's Exhibit 152, a letter from appellant to Gene Ebright in which appellant pens the following "poem" about Afro-Americans.

> Coon, coon, Black Baboon. Brutal, worthless thieving goon. Often high, he thrives in jail. His welfare check is in da mail. Some 40 offspring have been had, not one of them will call him Dad. But he hollers day and night. "I blames da white man fo' my plight! It him who spreads his trash around my shack, it's him who makes me smoke dis crack. But little by little we're takin hold cause when da white bread starts to mold, we'll over run your homes and soon...Dey only be fit fo a Black-assed coon.

People's Exhibit 172 is a letter from appellant to his mother in which appellant denigrated yet another entire group of people. In that letter he makes very positive comments about Adolf Hitler, referring to him as "quite a man" and a "hero." He blames the "lies" told about Hitler to "Jewish traders."[16] Appellant goes on for about a page extolling the virtues of the greatest monster of the twentieth century. In People's Exhibit 173

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16. It is impossible to tell whether appellant meant "Jewish traders" or "Jewish traitors." In this context, it hardly makes a difference. It is a loathsome reference, regardless.

appellant's mother answers his letter, commenting on appellant's "depth of character," presumably for his comments on Hitler.

Further, the testimony of Tori Szot (48 RT 8633), Samantha Medina (48 RT 8617), Jasmine Guinn (48 RT 8672), Kara Allen (47 RT 8486), Stacey Warnock (48 RT 8745) and Jennifer Wepplo (48 RT 8698) was perhaps the most inflammatory and disturbing of any of the evidence that was completely unrelated to the murder. All of these people were allegedly part of the conspiracy to dissuade witnesses. They were all very young women who were into gang activities. They all had "friendships" with appellant. They all would do virtually anything for him. In fact, Samantha Medina testified that she was on probation for the same dissuading offense for which appellant was being tried. (48 RT 8618.) This evidence, combined with the testimony of both Ms. Gates and Ms. Bryant, imparted to the jury that appellant was a Mansonesque figure, who held some sort of psychosexual power over young women, who would do his illegal bidding without question. The prejudice of this very thinly veiled association of appellant with one of the most infamous mass murderers in the history of California is inestimable.

In addition, this evidence also revealed a very unsavory and perverse relationship between appellant and his mother. It also allowed the

prosecutor to bring out the fact that appellant's mother pled guilty to the same conspiracy with which appellant was being charged. (53 RT 9401.) Therefore, the jury heard that both Ms. Medina and Mrs. Merirman had already been convicted for conspiring with appellant, virtually assuring his conviction for Counts 16-20, hence, his conviction for the joined murder count.

Appellant could not have received a fair trial on the capital count from a jury who had been regaled and confronted with such an overpowering array of evidence which had nothing to do with the murder yet served the purpose of condemning appellant as a person not fit to live.

d. Joinder of "Weaker" and "Stronger" Cases

The final factor involves a "weak" case having been joined with a "strong" case, or with another "weak" case, so that the spillover effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges. The rationale behind this factor is that the jury would not be able to decide one case exclusively on the evidence relating to that crime in that "it would be difficult for jurors to maintain doubts about the weaker case when presented with stronger evidence as to the other." *Williams v. Superior Court, supra,* 36 Cal.3d at p. 453, citing to *Coleman v. Superior Court, supra,* 116 Cal.App. 3d at p. 138.)

This Court has addressed this "strong case" vs. "weak case" issue many times. However, no precise standard has ever been formulated for determining whether one case is indeed "weaker" than the other for purposes of the joinder issue. This is because this Court has recognized that such a determination is an individualized process dependent upon the totality of facts and circumstances of each case. (*People v. Bradford, supra,* 15 Cal.4th at 1315.) As indicated above, the instant case presents a highly individualized set of facts and circumstances in that the prosecution sought and was granted joinder of three separate sets of crimes to the murder count. The relative strengths and weaknesses cannot be measured by comparing the evidence in the murder case to each of the other counts separately, as the prosecution urged conviction on the premise that all of the cases were so similar that the same person must have committed all of them. The measuring stick must be the relative weakness of the murder case vis a vis *all* of the remaining joined counts.

In addition, this Court in *Williams* downplayed the necessity of demonstrating a greater disparity in the strengths of the joined counts. "This reasoning should not be limited to situations where the relative strengths of the cases are unequal. Indeed, our principle concerns lies in the danger that the jury here would aggregate all of the evidence, though presented

separately in relation to each charge and convict on both charges." (*Williams v. Superior Court, supra,*36 Cal.3d at 453.) Therefore, much as in the case of the joinder of inflammatory counts, the concern addressed in this factor is that joinder would make it difficult for the jury not to view the evidence cumulatively. "One danger in joining offenses with a disparity of evidence is that the state may be joining a strong evidentiary case with a weaker one in the hope that the overlapping consideration of the evidence will lead to a conviction on both." (*Bean v. Calderon, supra,*163 F.3d at 1085 citing to *Lucvero v. Kirby* (10th Cir) 133 F3d 1299,1315.)

J. Even if the Trial Court Did Not Abuse Its Discretion in Denying the Motion to Sever, Joinder of the Counts Actually Impacted the Trial to the Extent that Appellant Suffered Substantial Prejudice

This Court has long stated that in applying the rules of joinder the trial court must consider the matter on the basis of the evidence before the court at the time of its ruling. (*People v. Brawley* (1969) 1 Cal.3d 277, 292.) However, the reviewing court must also 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." (*People v. Turner* (1984) 37 Cal.3d 302, 313.) That is, whether, in the instant case, it is reasonably probable that the jury was influenced in its verdict of guilt on the murder by its knowledge of his possible involvement

in non-capital counts. (See *United States v. Bagley* (1985) 473 U.S. 667, 682.) This is often described as the "spillover effect."

Appellant continues to maintain that the trial court erred in its denial of the motion to sever. However, even if this Court should find that the trial court ruled properly considering only the information before it at the time of the motion, review of the entire record of the trial establishes that the joinder of the counts did indeed prejudice appellant. As stated above, the prosecutor's entire theory was to urge upon the jury that all of the charged crimes were committed by the same person. The improper joinder of the counts clearly facilitated this theory immeasurably. Therefore the "actual impact" of the joinder on the trial was pervasive and manifest.

K. Appellant Was Substantially Prejudiced by the Improper Joinder

The improper joinder of the murder and non-murder counts substantially prejudiced appellant and violated his right to due process of law and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. (*Bean v. Calderon*, *supra,* 163 F.3d at p. 1084.) A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden.

It is clear that appellant was substantially injured by the errors of which he complained and it can not be said that "it appears that a different verdict would not otherwise have been probable" if not for the error. (*People v. Watson* (1958) 42 Cal.2d 818, 836.) This error was too great and manifest to be called harmless.

This entire judgement must be reversed.

III. THE JOINDER OF THE NON-MURDER COUNTS AND THE MURDER COUNT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Not only did the improper joinder discussed in Argument I violate California law, it also deprived appellant of his right to due process of law under the United States Constitution. Under the United States Constitution, all criminal defendants are entitled to due process of law. (U.S. Const. Amendments V and XIV.)

The United States Supreme Court has recognized due process requirements not specified in the Bill of Rights. The Court has held that any error that fails to ensure fundamental fairness in the determination of guilt at trial violates the Due Process Clause of the United States Constitution as it applies to the states. (*Albright v. Oliver* (1994) 510 U.S. 226, 283; *Estelle v. McGuire* (1991) 502 U.S. 62, 68.) As stated by this Court, trial court

error that made the trial fundamentally unfair violates federal due process rights. (*People v. Partida* (2005) 37 Cal.4th 428,436.)

In order to find a violation of due process, this reviewing court must find that the absence of this fairness "fatally infected" the trial. (*Linseba v. California* (1941) 314 U.S. 219, 237.)

While there may be no single test for "fundamental unfairness" (*People v. Albarran* (2007) 149 Cal. App4th 214, 239), both this Court and the United States Supreme Court have generally defined it as error that "undermines confidence in the outcome of the trial." (See e.g. *People v. Ochoa* (1998) 19 Cal.4th 353,474; *Kyles v. Whitley* (1995) 514 U.S. 419, 434.) As stated in *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637, due process is violated when trial error "had substantial and injurious effect or influence in determining the jury's verdict."

The joint trial of various counts of an indictment can result in the type of fundamental unfairness that violates the due process clause. (*Park v. California* (9th Cir 2000) 202 F.3d 1149.) The reviewing court must "consider each count separately, asking whether 'the trial on a particular count was fundamentally unfair in light of that count's joinder with one or more other charges." (*Ibid* citing to *Featherstone v. Estelle* (9th Cir 1991) 948 F.2d 1497, 1503.)

The federal courts also warn against an overly liberal application of the subsection (b) exception to the general 1101 (a) rule against evidence of predisposition. In *Bean v. Calderon, supra,* 163 F.3d 1073, the Ninth Circuit discussed the dangers of joining counts when the evidence was of questionable relevance *vis a vis* cross-admissibility.

> We have previously acknowledged that 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 otherwise be inadmissible.'" *United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir.1986) (citation omitted). In Lewis, we explained this risk by observing that "[i]t is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against separate defendants joined for trial, 'and by recognizing studies establishing "that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case." (*Id.* at 1084)

The Ninth Circuit framed the issue in terms of whether or not with proper instruction, the jury could "compartmentalize" each count. (*United States v. Douglas* (9th Cir. 1986) 780 F.2d 1472, 1479.) Federal courts have expressed skepticism about the efficacy of any jury instructions designed to ameliorate the damage cause by the introduction of other crime evidence that has no real relevance to the charged count. "To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of

dispassion and exactitude well beyond mortal capacities." *(Lewis, supra,* 787 F.2d at 1323 quoting *United States v. Daniels* (D.C.Cir.1985) 770 F.2d 1111, 1118.)

Further, appellant contends that Evidence Code section 1108 violates the Due Process Clause of the United States Constitution in that, by itself, creates a fundamentally unfair paradigm in which a defendant's uncharged sex offenses serve to unconstitutionally prejudice him in the eyes of the jury.

However, whether this is the case or not, the concerns stated in the above cases resonate with particular force in the instant case. Not only did the trial court join counts for which the evidence was not cross-admissible, but the prosecution encouraged the jury to consider the charges in concert. He stated that there was a pattern established through Gates, Bryant, Gagliano, Spellins, and Montgomery and that it was not just "one evil act but all evil together," (56 RT 9880) as reflecting the modus operandi characteristic of appellant's criminal activities. Thus, 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" (*United States v. Johnson* (9th Cir. 1987) 820 F.2d 1067, 1071), when the prosecution's closing argument urged them to the exact opposite.

In the previous argument, appellant discussed in great detail the fundamental unfairness wrought upon appellant by this improper joinder. The improper joinder of the murder and non-murder counts substantially prejudiced appellant and violated his right to due process of law and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. (*Bean v. Calderon* , *supra,* 163 F.3d at p. 1084.) A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.)

This entire judgement must be reversed.

IV. THE ADMISSION OF EVIDENCE OF UNCHARGED ALLEGED OFFENSES AGAINST OTHER WOMEN VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL UNDER BOTH STATE LAW AND THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Kristen Spellins Arnold

1. Factual and Procedural Summary

Over the objection of counsel, the jury heard testimony regarding the following uncharged offenses. Kristin Spellins Arnold had been an acquaintance of appellant since approximately 1994. She had met him at a party where they consumed drugs together. (Vol. 44 RT7873-7874.) One evening after their first meeting, appellant asked her to go for a ride. They

first went to Jack Garcia's house and then to appellant's house. Ms. Spellins had been using methamphetamine with appellant that night. (Vol. 44 RT 7875-7877.) Ms. Spellins was, in her own words, an "out of control little girl" who used large quantities of drugs such as methamphetamine. (Vol. 44 RT 7934-7935.)

Ms. Spellins memory of that night was hazy, at best. She didn't remember if she arrived at Garcia's house with appellant and stated that she could not remember if she planned on having sex with appellant once they got to his house. However, her grand jury testimony indicated that she knew they were going to have sex. (Vol. 44 RT 7944-7948; 7958-7959.) She couldn't even state with any degree of certainly whether she and appellant were boyfriend and girlfriend on the night this sexual encounter occurred. (44 RT 7965.)

There is no doubt that Ms. Spellins willingly went with appellant to his room. Everything was consensual and the two started kissing. According to Spellins, the sexual acts turned to things that she did not particularly like to do. She said that he had her touch his anus and masturbate him while he was looking at pornographic magazines. He wanted her to orally copulate him and she said she "probably did," although she could not say for sure what happened. (44 RT 7878-7880.)

Ms. Spellins stated that this went on for "a couple of days." However, she never tried to run away, and doesn't remember if appellant tried to restrain her. (44 RT 7881.) She said that she was scared of his behavior but could not articulate what was frightening her. (44 RT 7882.) Eventually, both she and appellant voluntarily left the apartment and both went their own separate ways. She never reported any of this to the police. (44 RT 7884-7885.)

Ms. Spellins next remembered seeing appellant one night at a tattoo shop where she was getting a white power tattoo, designed by appellant, put on her buttocks by "Tattoo Bob." After she received the tattoo, she and appellant went into the bathroom together, where appellant started shooting drugs into his arm. He then used the syringe to squirt his blood at Ms. Spellins. According to Ms. Spellins, she got upset and tried to leave. Appellant told her to shut up or he would "slit her throat" like Trina. (44 RT 7886-7890.) Again, she never called the police. (44 RT 7995.) However, after all of this she continued to see appellant on a regular basis, explaining that she couldn't explain this behavior except for the fact that she was a "junkie." (44 RT 7978-7979.)

Prior to trial appellant attempted to have this evidence excluded. In appellant's December 12, 2000 Response to People's Trial Brief, counsel

argued that this conduct was prejudicial misconduct that was not subject to any exception to the general rule against admissibility of evidence to show propensity to commit crime. At a pre-trial hearing, counsel argued that this evidence was not admissible under either Evidence Code section 1101 or 1108 and that it was highly prejudicial to appellant. (32 RT 5679.) Counsel further indicated that while appellant's statement concerning slitting Trina's throat was relevant, the circumstances surrounding this statement made at the tattoo parlor were irrelevant and highly prejudicial. (32 RT 5680.)

The trial court held that the sexual incident was admissible either under Evidence Code section 1101(b) or Evidence Code section 1108, there being no undue prejudice. (33 RT 5843-48.) It also held that, as with the Gates and Bryant charged counts, the sexual incident was admissible as to the murder count under both Evidence Code sections 1101 and 1108. (33 RT 5844-48.)[17]

It also held that the entire tattoo incident was admissible as the court did not feel that it was proper to take it out of context. (33 RT 5843.)

2. Legal Argument

As appellant's argument is the same as its argument against joinder stated above in Arguments I and II, it will not be repeated in detail in this

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17. The specific reasons for admissibility given by the court were the same as those given for the joinder of Counts 2-9.

section. Once again, the jury who decided appellant's guilt on a capital murder charge was exposed to ugly, prejudicial evidence that could only have had the effect of insuring appellant's conviction of the capital charge.

Further, the recollection of the act by Ms. Spellins is so vague, disjointed and inherently unreliable that it should have been excluded for these reasons alone. She was a self-admitted heavy drug user at the time of the incident and her testimony bears this out. She remembered few details of the incident. In fact, she could not even say whether the event was non-consensual. She was not sure whether appellant actually tried to restrain her or whether he forced her to do anything she didn't want to do. She also stated that all of this went on for "days," during which time she was not sure whether she ever sought to leave.

Even assuming that this incident happened the way the witness said it did, it has no probative value. There is no reliable proof that appellant committed any sort of criminal act or forced Ms. Spellins to do anything against her will. Therefore, it lacks any degree of similarity with the charged offenses and is inadmissable under Evidence Code section 1101 (b). Further, the prosecutor did not show that any non-consensual act occurred. As bizarre as this sexual encounter was, there was no indication that any sort of crime took place. It was not a "sexual offense" under

Evidence Code section 1108, therefore, it was not admissible under that section.

Instead, this was is yet another bizarre and disturbing incident involving appellant and drugs and strange sex which again improperly prejudiced appellant by creating an aura of evil around him. In spite of the fact that it had no probative value at all, it was admitted contrary to Evidence Code 352. It was just another brush stroke in the prosecutor's constitutionally improper, yet successful, attempt to paint the portrait of a "monster." As stated several times in this brief, this portrait would stand in the stead of convincing evidence of the murder count to assure appellant's conviction of the capital count and usher him toward death row.

Regarding the "tattoo" incident, there is no argument as to the admissiblity of appellant's alleged admission that he cut Ms. Montgomery's throat. However, the court refusal to exclude the surrounding incident is both improper and legally inexplicable. It would have been contextually sufficient to have the jury hear that there was an incident where Ms. Spellins got upset with appellant and he responded with the statement in question. The jury would have heard Ms. Spellins contention that appellant admitted to the murder and would have been able to evaluate its reliability in light of the witness's drug use and bias against

appellant and her drug use.

However, the jury was allowed to hear about yet another irrelevant incident that could not have had any other effect than to make them hate appellant even more. This time, the jury heard that a young, drug addled woman was having her buttocks tattooed with a white power tattoo designed by appellant. Once again, appellant is made to appear as a corruptor of young women, a Manson-like figure who can get young women to do whatever he wants them to do.

The testimony as to what happened in the bathroom was even worse. It described appellant, in his underwear, shooting drugs into his arm, then using the syringe to squirt his own blood at Ms. Spellins. In the age of HIV, and considering appellant's drug and sexual habits, the jury likely considered this act as a depraved indifference to the life of Ms. Spellins.

There is no legal reason for the admission of this evidence. It is the most prejudicial type of "propensity" evidence, which is clearly forbidden by Evidence Code section 1101(a). Its prejudice completely outweighs its non-existent probative value under Evidence Code section 352.

This is yet another piece of irrelevant, and highly prejudicial evidence that deprived appellant of a fair trial under both state and federal law.

B. Corrie Gagliano

1. Procedural and Factual Summary

Corie Gagliano met appellant in approximately 1985, when she was about 16 years old and appellant a year younger. They became sexual active and remained so for parts of their relationship over the ensuing years. (Vol. 41 RT 7313-7314.)

On one occasion during their relationship she and appellant drove to Ojai in Clint Williams' truck. She and appellant rode in the back of a covered pickup truck with Williams driving. When they arrived in Ojai, Ms. Gagliano tried to get out of the truck but appellant would not let her. She sensed that he wanted sex but she did not want to oblige him in the truck. He held her arms so she could not move and she knew that it would only be worse if she fought back as he was much bigger than she was and she knew his reputation for violence. She started to scream but no one came to her aid. (41 RT 7319-7324.)

Ms. Gagliano was using a lot of drugs during this period of time. She also frequently associated with the Skin Head Dogs and shared their white supremacist views. (41 RT 7329-7333.) She did not report this incident to the police and only told them about it a long time after it happened. (41 RT 7334-7336.) She also saw appellant after this incident and felt safe with him because he was the toughest guy she knew. (41 RT

7340-7342.) She also continued to hang out with the Skin Head Dogs and continued to take drugs with them. (41 RT 7340-7341.)

As with the above testimony of Ms. Spellins, appellant attempted to exclude this testimony of Ms. Gagliano (VI CT 1581; 32 RT 5672) on the grounds that Evidence Code section 1101 did not apply to the incident in question, that the incident was irrelevant and that its proffer was an attempt to "inflame the jury and establish, by proxy, Mr. Merriman's alleged propensity to have raped and killed Ms. Montgomery." However, the trial court ruled that the Gagliano incident was admissible under Evidence Code section 1108. (33 RT 5843.)

2. Legal Argument

Appellant has discussed the application of Evidence Code section 1108 in Argument I, section F. 2 (B) of this brief and incorporates it by reference into this section. Applying said law, the *Faretta* factors argue against the admission of this incident. There are few similarities between this incident and the murder charge. Further, because Ms. Gagliano chose not to come forward to the police, there was no conviction. In addition, her testimony revealed someone who regularly had sex and used drugs with appellant. Her objection to this particular sex act seemed to have far less to do with the act itself than it did with the location. It is also remote, in that it could have occurred as early as 1985.

This sort of evidence has no probative value as to whether appellant murdered Ms. Montgomery. It is yet another incident which simply adds to the jury's perception of appellant as a completely out of control, psychopathic monster. The federal and state law that assured appellant of a fair trial on the capital count and due process of law was violated by the admission of this evidence.

C. Susan Vance

1. Factual and Procedural History

Susan Vance, 27 years old at the time of the trial, first met appellant when she was 14 years of age. She began a sexual relationship with him She hung out with appellant and other Skin Head Dogs such as James Tibbs, Scott Porcho, Mike Wozny and their female associates, Billie Bryant, Bridget Callahan and Apryl Porcho. Ms. Vance stated that her lifestyle was very different at the time of her testimony than it used to be. (39 RT 6866-6869.)

In 1992, Ms. Vance became aware that Trina Montgomery disappeared after a party (39 RT 6868-6869.) She had a conversation with John Cundiff in 1995 about Trina's disappearance. Shortly after this, Ms. Vance visited appellant at his residence. She arrived in her car, accompanied by her friend, Maria. She was not sure why she went on that particular occasion but she had been seeing appellant off and on for the past

three years. According to Ms. Vance, before she could get into the residence, appellant came downstairs and started to beat her in the face. She retreated into the car to escape. However appellant talked her into leaving the car, whereupon he hit her, once again, multiple times in the face. Maria attempted to come to her aid but appellant told her to stay back. (39 RT 6870-6875.)

Appellant took Ms. Vance by the arm and they proceeded to his room where he asked what she and John Cundiff had talked about regarding the disappearance of Trina Montgomery. Ms. Vance refused to answer any questions that appellant asked about her conversation because she was afraid that appellant might hurt John. She eventually left the room and never went back there again. (39 RT 6875-6877.)

Ms. Vance recalled telling the police about this incident in 1995 but did not recall telling the police that appellant hit her. She did not report the incident to the police the evening that it occurred nor did she seek medical attention. She admitted that she could have left after the first time that he hit her but she did not. (39 RT 6878-6880.) While denying that she had used drugs on that particular day, Ms. Vance admitted that she was a methamphetamine user during that general time period. She also admitted to having a drug-related conversation with appellant that night in his room.

(39 RT 6890-6891.)

Again, appellant attempted to exclude this evidence, arguing that it was inadmissible and highly prejudicial. Counsel argued that it was highly questionable whether appellant's beating of Ms. Vance because she spoke to John Cundiff about the murder had any tendency to prove that he committed it. He also argued that the fact that appellant beat a defenseless woman would inflame the jury to the point that prejudice would hold sway over logic. In addition, counsel suggested that if the court did feel that her conversation with appellant about Cundiff was relevant, the beating was still not relevant and evidence of it could be excluded (32 RT 5683-5688.)

While acknowledging that the evidence of the beating "would have an impact on the jury," the court stated that it would be "an error and injustice to sanitize a situation like this where we have an admission, alleged admission potentially bearing significant probative value that I do believe outweighs its prejudice I've been referring to. Some things we've got to take as they allegedly happened and let the jury sort it out." (33 RT 5692.)

2. Legal Argument

This is yet another tawdry, repulsive, violent and unreliable story told by yet another hanger-on who led the gang life. As stated by trial

counsel, the only conceivable legitimate purpose for this evidence was to demonstrate to the jury that appellant was concerned about Ms. Vance and Mr. Cundiff discussing anything about Trina.

However, as with Ms. Spellins's "tattoo" incident, under the banner of "context," the court allowed the jury to hear evidence that had no other purpose than to further bias the jury against appellant. There is no statute no principle in the law that would allow for this testimony of a completely unrelated act of violence to be heard by a jury considering a capital murder count. Even the court realized that this evidence would have an "impact on the jury," but felt it was best to "let the jury sort it out."

Ruling on the admissibility of evidence is the responsibility of the court, not the jury. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1266.) If that were not the case, and the prosecutor was allowed to introduce any prejudicial and irrelevant evidence it chose for the jury to "sort out," due process of law would have little meaning.

Yet again, still another layer of prejudicial evidence is added; utterly irrelevant to the ultimate issue of appellant's guilt on the murder count, yet just as utterly damning as to appellant's character. In light of this evidence, and all of the other evidence, irrelevant to the murder, it is simply a fiction to hold that this jury decided the murder count on the evidence of the

murder and not on the plethora of evidence that stood for the fact that appellant was simply a bad man. Appellant is on death row for what he was, not what he did. For the reasons stated above, the entire judgment must be reversed.

V. THE ADMISSION OF THE HEARSAY STATEMENTS OF TRINA MONTGOMERY TO SHAWNA TORRES, KATHERINE MONTGOMERY AND LEE JANSEN PREJUDICED APPELLANT AND DENIED HIM A RIGHT TO A FAIR DETERMINATION OF BOTH GUILT AND PENALTY UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE LAW OF THE STATE OF CALIFORNIA

A. Procedural and Factual Summary

1. Shawna Torres

On November 14, 2000, the prosecution filed its Trial Brief. (V CT 1367 et seq.) In the brief, the prosecutor described an attack that appellant allegedly perpetrated upon Trina Montgomery during the summer of 1992, a few months prior to her disappearance. Ms. Montgomery had gone to appellant's house with her friend, Shawna Burgess-Torres. The prosecutor alleged that Trina went to appellant's house to inform him that she was not his girlfriend and that he should stop calling and sending her letters. Ms. Montgomery allegedly went into appellant's house to talk with him while Ms. Torres waited outside in the car. According to the Trial Brief,

Ms.Torres was surprised that Trina had gone inside alone as she had indicated that she was afraid of appellant. (V CT 1399-1400.)

Trina returned to the car after approximately 20 minutes. She was visibly upset and told Ms. Torres that appellant had grabbed her by the neck and had started to choke her. She further allegedly indicated that she began to scream which caused Sue Merriman to come into the room. Mrs. Merriman saw what was going on but did nothing to stop it. The Brief indicated that Trina told Ms. Torres that she had managed to escape from appellant and flee the house. While Trina was telling Ms. Torres this, Ms. Torres noted red marks on Trina's neck. (V CT 1400.)

On December 18, 2000, this matter was raised in court. (32 RT 5561 et seq.) The prosecutor said that Trina Montgomery's statement to Ms. Torres was an excited utterance. (32 RT 5562-5563.) Defense counsel argued that the prosecutor did not meet the legal requirements of Evidence Code section 1240 and made additional objections under Evidence Code section 352. (32 RT 5563.)

The trial court's initial impression was that the probative value of this evidence was very high. (32 RT 5563.)

On December 20, 2000, the prosecution filed a Motion to Admit Victim's Spontaneous Statements of Defendant's Prior Sexual Attack. (VI

CT 1625 et seq.) On the same day an evidentiary hearing was held with Ms. Torres testifying along the general lines set forth in the prosecutor's trial brief. (33 RT 5770.) After hearing testimony and argument, the court held that the testimony of Ms. Torres was admissible under the spontaneous declaration doctrine of Evidence Code section 1240. (33 RT 5787-5788.)

Ms. Torres testified at trial that the incident in question took place in the summer of 1992. (37 RT 6548.) She and Trina Montgomery drove to appellant's house so Trina could "straighten out a couple of things." (37 RT 6549.) Upon arriving at appellant's house, Ms. Montgomery went inside while Ms. Torres remained in the car. After the passage of some time, Ms. Montgomery returned to the car. She was upset and told Ms. Torres that appellant had "gotten mad" and attacked her and she also showed Ms. Torres red marks on her neck. Ms. Montgomery also said that she was angry because appellant's mother, Sue Merriman, witnessed the attack and did nothing to stop it. (37 RT 6549-6551.)

2. Kathryn Montgomery

On December 20, 2000, there was a separate, but legally related, pretrial hearing as to the admissibility of statements allegedly made by Trina Montgomery to her mother, Kathryn. Mrs. Montgomery testified at this hearing and stated that in a conversation in the family home in the late

spring or summer of 1992, Trina related an incident to her mother that allegedly had happened to her fairly recently. Mrs. Montgomery stated that Trina looked agitated, emotional and afraid. (33 RT 5792.)

This conversation took place on a Monday morning. Trina had just returned from spending the weekend in Ventura. (33 RT 5793.) Trina began to relate an alleged incident that occurred either the night before or the night before that. (33 RT 5793-5794.)

Trina told her that she visited Justin at his house to say hello. It was late at night and Justin's mother suggested she spend night. (33 RT 5794-5795.) She went to sleep in an extra bedroom and when she woke up appellant was in bed with her making sexual advances. Trina told him to stop. (33 RT 5795.) Mrs. Montgomery further related that her daughter told her that to escape from the situation she told him she was sick and had to go to bathroom. She then ran off to her car. Trina also told her mother that as she was driving away, appellant ran out of the house yelling at her. (33 RT 5796.)

The court granted the prosecutor's request for a Evidence Code section 1240 hearsay exception and permitted this testimony. (33 RT 5841.) Ultimately, Mrs. Montgomery was allowed to testify about Trina's hearsay statements. (37 RT 6485-6488.)

3. Lee Jansen

The prosecutor also proffered the testimony of Lee Jensen, a friend of Trina's. At a pretrial hearing Ms. Jensen testified that Trina called her and told her that she had visited Justin's house and stayed over. She went to sleep alone but woke up to find appellant on top of her trying to pull her shorts off. (33 RT 5828-5829.) She told him to get off of her, and that she had to go to the bathroom. Trina said that at that point she was able to escape. (33 RT 5829.) The witness stated that the call came within a few days of this alleged incident. (33 RT 5830.)

The court initially ruled that Trina's statement was not a spontaneous declaration. (33 RT 5841.) However, before calling Ms. Jensen to testify on other matters, the prosecutor requested that the court allow questioning of Ms. Jensen as to Trina's statement to corroborate Kathryn Montgomery's testimony. The prosecutor also said that it would be relevant to prove Trina Montgomery's state of mind as to whether she would consent to sexual intercourse with appellant. (37 RT 6561.)

Once again, counsel objected on hearsay grounds. (37 RT 6561-6562.) The court responded by stating that it is "[h]ard to argue it's prejudicial since the jury has already heard it." (37 RT 6562.) Counsel responded by arguing that the testimony was prejudicial in that the more

times a declarant says something the more believable it becomes. (*Ibid.*)

The court then ruled that it would allow Ms. Jensen to testify, without details, that Trina told her about an incident that involved her fleeing appellant's residence after he entered her room. The court said it would give a limiting instruction, unlike with Kathryn Montgomery. (37 RT 6562-6563.) Such an instruction was given. (37 RT 6566-6567.)

Ms. Jensen ultimately testified before the jury that at some point during the summer of 1992, Trina told her that "something happened" at appellant's house. (37 RT 6566.)

B. Discussion of the Law

Evidence Code section 1240's codification of the hearsay exception for spontaneous statements provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

The United States Supreme Court in *White v. Illinois* (1992) 502 U.S. 346, 356 stated that an evidentiary rule creating a spontaneous declaration exception to the hearsay rule does not necessarily violate the confrontation clause but that such exception must be "firmly rooted in

American Jurisprudence." (*Id* at fn 8; *Idaho v Wright* (1990) 497 U.S. 805, 817.)

This Court has taken a similar approach, stressing the reliability of the statement as opposed to a strict formulaic approach. "To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) This Court has also stated that "Evidence Code section 1240 codified the common law exception for spontaneous statements. 'The foundation for this exception [in the common law] is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury.'" (*Showalter v. Western Pac. R. Co.* (1940) 16 Cal.2d 460, 468, quoting Wigmore on Evidence [2d ed.], sec. 1747 et seq.)

In *Showalter*, this Court set forth the logical underpinnings of this exception. "The basis for this circumstantial probability of trustworthiness is 'that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.' " (*Showalter, supra*, 16

Cal.2d at p. 468.)

In *People v. Poggi* (1988) 45 Cal.3d 306, 318, this Court directly quoted *Showalter* in setting forth the requirements for the admission of such a statement. " 'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citation.]" (*People v. Poggi, supra,* (1988) 45 Cal.3d at p. 318.)

Poggi further held that "[w]hether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] The determination of the question is vested in the court, not the jury. [Citation.]" (*Poggi, supra*, 45 Cal.3d at 318.)

According to this Court, "[t]he crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is ... the mental state of the speaker. The

nature of the utterance- -how long it was made after the startling incident and whether the speaker blurted it out, for example- - may be important, but solely as an indicator of the mental state of the declarant." (*People v. Raley* (1992) 2 Cal.4th 870, 892-893, citing to *People v Farmer* (1989) 47 Cal.3d 888, 903.)

Regarding the standard of review upon appeal, this Court has ruled that the trial court's determination of preliminary facts will be upheld if supported by substantial evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 541.) However, this Court will review the trial court's decision to admit the evidence in question for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)

As seen above, the body of case law regarding Evidence Code section 1240 focuses upon reliability. In order to judge reliability, it is not enough simply to perform some temporal calculation as to the passage of time or make a subjective determination on how stressful the incident might have been to the declarant. The critical determination was whether or not, given the totality of the surrounding facts and circumstances, the trial court can be convinced that these statements were sufficiently reliable so as to justify an exception to the Confrontation Clause.

1. Statement to Ms. Torres

Nothing about the facts of this case suggests that Trina Montgomery's statements to Ms. Torres were reliable. The relationship of Trina Montgomery and appellant was at its core unpredictable and hard to fathom. In spite of a good family background, Ms. Montgomery had chosen to consort with a gang with a reputation for both violence and hate. She dated members of this gang and attended their parties, sharing their philosophy. (37 RT 6484-6485, 39 RT 7023, 7028, 7037.) She seemed to enjoy appellant's company and continued her relationship with him while he was in jail. She encouraged his sexual fantasies and led him along.

According to Ms. Torres, Ms. Montgomery voluntarily entered appellant's house, alone. This was in spite of the fact that she was allegedly assaulted for sexual purposes by the very same person at the very same location a few months before. (37 RT 6550-6551.) In addition, according to the prosecutor's own witnesses, Ms. Montgomery lied to her own family in order to go to the gang party on the night of November 27, 1992. (37 RT 6490-6493.)

To say that Trina Montgomery led a dual life is an understatement. In spite of her alleged fear of appellant, she threw herself at him. In spite of having a promising future, she entered into a gang-driven social life that was based on hatred and violence. Nothing about Ms. Montgomery's life-

style was reliable or predictable. As such, her statement to Ms. Torres was innately unreliable.

2. Statement to Kathryn Montgomery

In addition to the innate unreliability of any statement that Trina Montgomery might have made aboutthe appellant, the statement made to her mother also suffers from other specific indicia of unreliability. It was not made until a substantial amount of time had elapsed. As such, Trina was not under the immediate influence of the alleged incident which she related. Further, as stated above, the evidence given throughout this trial indicated that Trina Montgomery was extremely conflicted as to her relationship with appellant and the entire gang milleau in which she voluntarily immersed herself.

According to Mrs. Montgomery's testimony, it may have been 36 hours from the time of the incident to the time Trina made her statement to her mother. She had any number of motivations to deceive her mother, as her entire life at home was a deception.

3. Statement to Lee Jensen

Trina Montgomery's statement to Ms. Jensen was improperly admitted for the reasons stated above. The fact that the court "cleaned it up" so that Ms. Jensen only told the jury that Trina told her that "something happened" between her and appellant in the summer of 1992, does not

ameliorate any error as Mrs. Montgomery and Ms. Torres already informed the jury of the details of Trina's statement.

As stated above, the trial court originally recognized that Ms. Montgomery's statement to Ms. Jensen was unreliable and inadmissible under Evidence Code section 1240. However, it reversed its ruling when the prosecutor stated that it would only go to state of mind and to support the credibility of Kathryn Montgomery. The court's error is twofold. Firstly, if the statement to Ms. Jensen is inadmissible due to a lack of reliability, logically, it should be inadmissible for all purposes. The fact that it is being used for a limited purpose does not make the statement any less unreliable.

Secondly, counsel never questioned that Trina made the statement to her mother or that her mother was telling the truth. No question was ever raised as to Mrs. Montgomery's credibility. Evidence Code section 1240 does not invoke the credibility of the witness. It is the credibility of the declarant that must be determined by the court. Therefore, the court was incorrect to admit the statement for this reason.

C. Prejudice

The pattern of error discussed in the above arguments holds true for this improperly admitted evidence. Once again, the prosecutor proffered, and the court admitted, evidence that made it impossible for appellant to get

a fair trial. Through this evidence whose admission violated both the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution, the prosecutor finally got his wish for Trina to speak for herself. These statements improperly told the jury that appellant had been violent toward Trina in the past. As such they were very prejudicial.

By the admission of this evidence the prosecution's burden of proof was reduced to the point where the trial was fundamentally unfair and violative of the Due Process and Confrontation Clauses of both the California and United States Constitution. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Even using the *Watson* standard, it is clear that appellant was substantially injured by the errors of which he complains and it can not be said that "it appears that a different verdict would not otherwise have been probable" if not for the error. (*People v. Watson, supra,* 42 Cal.2d at p. 836.) This error was too great and manifest to be called harmless.

VI. BY ALLOWING IRRELEVANT AND PREJUDICIAL EVIDENCE THAT APPELLANT POSSESSED A STOLEN CAR, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND OF A FAIR DETERMINATION OF GUILT AND PENALTY UNDER BOTH STATE LAW AND THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

A. Factual and Procedural History

Roy Miller was a witness for the prosecution. He testified as to certain statements that appellant made to him concerning people who were wearing wires, and also was a percipient witness to appellant's January 30-31, 1998 arrest. (39 RT 6923-6926.) During cross-examination, Miller indicated that on that morning, he had observed Merriman driving a car. (39 RT 6939-6940.)

Upon re-direct examination, the prosecutor asked whether appellant told Mr. Miller where he had gotten the car. (39 RT 6941.) Counsel objected on the grounds of relevance. The court initially sustained the objection. (39 RT 6941.) The prosecutor then explained that the reason why he wanted to pursue this line of inquiry was that "there will be some defense on the Avenue with Mr. Merriman driving to the house in Naomi Sponza's car to imply he has this car and he's driving around like this was his car. He had stolen a car that day and he was selling it." (*Ibid.*) Presumably, the prosecutor was trying to foreclose a potential defense

argument that appellant had a car so he would not have been on a bicycle the night of his arrest. (39 RT 6942.)

Defense counsel responded by stating that he was not sure that the defense was going to pursue such a line of defense and that up until this point it had never been raised. (39 RT 6941-6942.) The court then reversed itself and overruled the objection. (39 RT 6943.) Mr. Miller testified that appellant told him that the car was "hot" and that he needed Miller's help to get rid of it. (39 RT 6943-6944.)

B. Legal Argument

Relevant evidence is defined in pertinent part as any evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code section 210.) The fact that appellant stated that the car in question was stolen is completely irrelevant to any disputed matter in this case. Firstly, there was no issue raised by appellant before the jury that related to whether appellant was or was not driving a car the morning that preceded his arrest. The fact that defense counsel may have considered such a defense is irrelevant. In any event, the fact that appellant possessed a car in the morning has no relevance to the fact that he was on a bike that same evening.

Even if there was some possible relevance to the fact that appellant was driving a car on the day in question, the fact that the car was stolen is not only irrelevant but was highly prejudicial to appellant. Once again, evidence was introduced branding appellant as a criminal yet having absolutely nothing to with any counts of the case, let alone the murder count. (Evidence Code section 352.)

The definition of unduly prejudicial evidence is that it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slightly probative value with regard to the issues." (*People v. Robinson* (2005) 37 Cal.4th 592, 632, fn. omitted.) Evidence of defendant's commission of a crime that otherwise has no probative evidentiary value clearly falls into this category of barred evidence. (*People v. Karis* (1986) 46 Cal. 3d 612, 671-672.) Clearly, evidence that the car in question was stolen is exactly the type of evidence that this Court discussed above. The court's admission of this evidence defied both the law and common sense. The fact that appellant had stolen a car was completely gratuitous, with no concomitant probative purpose. This sort of error deprived appellant of a fair determination of guilt and penalty and deprived him of Due Process of Law under the Fifth and Fourteenth Amendments to the United States Constitution.

VII. BY ALLOWING IRRELEVANT AND PREJUDICIAL EVIDENCE THAT APPELLANT ASKED HIS MOTHER TO DO CERTAIN POSSIBLY ILLEGAL ACTIVITIES FOR HIM, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A FAIR DETERMINATION OF GUILT AND PENALTY UNDER BOTH STATE LAW AND THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

A. Procedural and Factual Summary

During the prosecutor's cross-examination of Sue Merriman, he asked her whether appellant asked her to do illegal acts for him. Counsel objected under Evidence Code sections 1101 and 352. (54 RT 9556.) Out of the presence of the jury, the prosecutor informed the court that he had evidence that appellant had asked his mother to retrieve a 45 caliber gun from someone named "Mike." (54 RT 9557.) The prosecutor also informed the court that appellant asked his mother to help him with a scheme to illegally obtain social security disability money. (54 RT 9557.) The prosecutor stated that this evidence was relevant to explain the relationship that appellant had with his mother. (54 RT 9558.) The court indicated that this testimony had some relevance to this issue and that it would allow "some brief inquiry in these areas to illustrate the point that is being made here on cross." (54 RT 9559.)

Pursuant to the court's holding, the prosecutor had Mrs. Merriman read a letter from appellant in which he asked her to pick up the gun for him. (54 RT 9560-9561; Exhibit 181.) In addition, the prosecutor also had Mrs. Merriman read a letter (Exhibit 185) in which appellant requested assistance from his mother regarding the social security disability scheme. (54 RT 9565.)

B. Legal Argument

Appellant relies upon the same legal argument made in Argument V, *supra.* Yet again, the jury heard of more of appellant's alleged criminal activity that had nothing at all to do with the murder charge. Once again, the jury was distracted from their task of determining appellant's guilt as to that charge from the evidence pertaining to that charge. Once again, evidence as to appellant's general character overshadowed the evidence of his guilt or lack thereof.

The situation here is similar to that in *People v. Ortiz* (l979) 95 Cal.App. 3d 926. In *Ortiz,* the court of appeal reversed a murder conviction due to the admission of testimony that defendant practiced a religion that embraced violent animal sacrifices. The court held that whatever limited probative value this evidence may have was overcome by the prejudice of the jury hearing about how he butchered animals. (*Id.* at 933.)

Whatever small probative value that this evidence had as to the appellant's relationship with his mother was overcome by yet more evidence of completely unrelated crimes. These crimes added a new page to appellant's resume; trafficking in guns and social security fraud. These incidents had absolutely nothing to do with Ms. Montgomery's murder. If anything, the admission of this evidence demonstrated just how far afield most of the evidence was to what actually happened to Trina Montgomery.

VIII. THE IMPROPER USE AND ADMISSION OF INFLAMMATORY PHOTOGRAPHS DEPRIVED APPELLANT OF A FAIR DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Procedural and Factual History

At an *in limine* hearing, the prosecutor told the court that during the November 23, 1997, execution of a search warrant in appellant's bedroom, Investigator Volpei found approximately one hundred pornographic magazines. Two of them were seized. (50 RT 8990.) The prosecution argued that these magazines were probative to corroborate the testimony of the witnesses that indicated that appellant looked at pornographic magazines during their sexual encounters. (50 RT 8991.) Defense counsel argued that the magazines were "disgusting," hence, highly prejudicial. (50 RT 8998.) The court admitted these magazines, holding that they were

probative to support the testimony of those witnesses. (*Ibid.*; People's Exhibit 160.)

In addition, the prosecutor informed the court that during the execution of the same warrant two photos were seized. One was a photo of appellant and Mitch Buely holding knives, with a hacksaw in the background. The second photo was a staged photo of appellant and another friend holding knives to each other's throats. The prosecutor stated that these photos were relevant to demonstrate appellant's access to knives and tools. (50 RT 8991.) Counsel objected on the grounds that the photos had no probative value and that they were highly prejudicial. (50 RT 8992.)

The court ruled that photo depicting appellant and Buely was admissible and the other photo was not. (50 RT 8994); People's Exhibit 159.)

At a subsequent *in limine* hearing, the prosecutor proffered another photo that was seized pursuant to a search warrant. This photo portrayed Mitch Buely holding a large knife in appellant's bedroom. (50 RT 9242-9243.) Counsel made the same objection. (*Ibid.*) The court ruled the photo admissible. (50 RT 9246; People's Exhibit 169.)

B. Legal Argument

Appellant restates the legal argument advanced in Argument V and

VI as if more fully stated herein.

Regarding the pornographic magazines, there was absolutely no reason for their admission into evidence. The presence of the magazines in appellant's room was sufficient to corroborate the testimony of witnesses who previously testified as to their use. It was not necessary for the jury to see the *contents* of the magazines. As stated by counsel, these magazines were truly "disgusting." They portrayed violent acts against women, scenes of bondage and degradation, and the general humiliation of women. They were highly prejudicial in that once again they portrayed appellant as a person of low moral character, worthy of a murder conviction regardless of the relevant evidence.

Regarding the photos, once again there was no probative value at all. The fact that appellant had access to knives and a hacksaw proves nothing. Virtually every adult has access to knives. Further, there was no possible relevance to the fact that appellant had a hacksaw in his room. There was no evidence that a hacksaw played any part in the alleged murder. Further, People's Exhibit 169, depicting Mitch Buely holding a large knife, has no probative value whatsoever regarding appellant's alleged use of a knife on Ms. Montgomery.

Once again, this evidence was utterly irrelevant to the alleged murder

of Trina Montgomery. Once again, the real effect of this evidence was to further prejudice appellant by ascribing to him more anti-social behavior.

The prejudice discussed in section 352 is not the type of prejudice that normally flows to the defendant's case from relevant and highly probative evidence. Rather, it is the prejudice that causes a prejudging of a defendant because of factors extraneous to the issues in dispute at trial. *People v. Zapien* (1993) 4 Cal.4th 929, 958.) Nothing could be more extraneous than the evidence details in this and the previous two Arguments.

SUMMARY OF COUNTS II-VIII

Appellant was on trial for murder. He faced the death penalty. He had a right to have his jury consider the evidence that pertained to that murder. The central task of the jury was to decide, rationally and logically, whether Justin Merriman killed Trina Montgomery beyond a reasonable doubt. This task was made impossible by both the improper joinder of offenses, and improper admission of non-charged offenses.

The evidence that had no relevance to the murder charge was overwhelmingly and fatally prejudicial to appellant. The body and tenor of this evidence was so repellant that appellant had no chance with the jury who heard it. From the first witness, they were pre-conditioned to view

appellant as a person who could and would commit any sort of crime, no matter how depraved.

The evidence of appellant's alleged life-style, propensities, prior violent actions, racist and misogynistic attitudes, twisted sexual proclivities, drug use, admiration of Adolf Hitler, willingness to corrupt young girls, bizarre relationship with his mother and leadership of a violent, hateful and depraved gang made it impossible for the jury to compartmentalize the murder count and decide appellant's guilt as to the murder on the evidence of the murder.

The admission of this evidence eased the prosecution's burden of proof to the point where the trial was fundamentally unfair and violative of the Due Process Clauses of both the California and United States Constitution. The United States Constitution requires that a defendant be tried for what he did, not for who he is. This axiomatic principle was violated by the cumulative error described above and as such the entire judgment must be reversed.

IX. APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR DETERMINATION OF GUILT AND PENALTY BY THE ADMISSION OF PREJUDICIAL EVIDENCE AS TO THE RELUCTANCE OF WITNESSES TO TESTIFY

A. Procedural and Factual Summary

On seven separate occasions, before eliciting any relevant testimony from his witness, the prosecutor asked the witness how she "felt." The first of these witnesses was Jennifer Bowkley, who had witnessed the January 30, 1998 vandalism of Jan Rail's house. The prosecutor began the examination by asking Ms. Bowkley how she "felt" about testifying. Ms. Bowkley responded that she felt "nervous and scared." The prosecutor then asked why she was scared and the witness responded that she "wanted to forget that night." The prosecutor then asked the leading question "you don't want to be here today; is that correct?" The witness answered "no" and defense counsel objected as irrelevant and moved to strike. The objection was overruled. (37 RT6448-6449.) The prosecutor then elicited, by leading questions, that the witness was in court because she had been subpoenaed and would prefer not to have anything to do with the case. (37 RT 6449.)

Similarly, the prosecutor asked Billie Bryant, an alleged victim of charged sexual offenses, how she felt about testifying. The witness stated "not good." The prosecutor then asked the leading question, "It's

something that you would rather not talk about in front of people," and the witness answered in the affirmative. (38 RT 6682.)[18]

Susan Vance, an alleged victim of an uncharged offense, responded to the prosecutor's question as to how she was feeling by stating "very nervous." (38 RT 6666.)

Corrie Gagliano was the alleged victim of another uncharged offense. After making an initial inquiry as to whether she recalled an "incident" in Ojai involving the appellant, the prosecutor said "Before I ask that, you're uncomfortable talking about it in public. Is that true?" The witness answered in the affirmative. The prosecutor then asked if testifying before the grand jury was difficult for the witness, again eliciting an affirmative response. The prosecutor then asked "But in comparison is this even harder?" The witness answered, "yes", and the prosecutor asked, "Why is that?" Counsel objected on relevancy grounds, and the court overruled the objection. The witness then answered "He's right there and her [sic] mom is right there. The prosecutor then asked "Are you gonna be able to do this?" The witness nodded her head. The prosecutor then said

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18. After the initial objection to this sort of testimony from Ms. Bowkley, with the exception of Ms. Gagliano, no further objections were made by counsel as to the similar testimony of the other witnesses delineated in this Argument. This does not mean that the issue was waived as to these witnesses, as it is clear that the court would have ruled the same and any further objection would have been futile.

"[T]ake your time. we'll go slow, all right." (41 RT 7317-7319.)

Before questioning Robyn Gates, an alleged victim of charged sexual offenses, the prosecutor elicited that the witness was nervous and that the subject matter of her testimony made her uncomfortable. (42 RT 7484.)

The prosecution commenced the questioning of Elaine Byrd, a friend of Robyn Gates, by eliciting that she felt nervous that morning. (43 RT 7640.)

Kristin Spellins Arnold, an alleged victim of an uncharged offense as well as an alleged victim of the witness intimidation conspiracy, was similarly questioned. The prosecutor asked her, upon being called to the stand, to identify appellant. At that point the prosecutor asked Ms. Spellins whether she was "feeling all right?" The witness answered "no" at which point the prosecutor led the witness into stating that she is not comfortable talking in public about the subject matter of her testimony. (44 RT 7873.)

B. Legal Discussion

In the instant case, the prosecutor's pattern of questioning as to the discomfort and nervousness of the female witnesses was clearly an attempt to improperly represent to the jury that the witnesses, most of whom had allegedly been assaulted by appellant, had been directly threatened by appellant and were afraid of him. This questioning had additional impact as

the jury had already known that appellant was charged with attempting to dissuade witness testimony against him.

This line of questioning served no relevant purpose. There are instances where such evidence of a witness's discomfort may be admissible. In *People v. Naverette* (2003) 30 Cal.4th 458, 506, the witness was fearful due to the presence of the defendant's girlfriend in the courtroom. The prosecutor made an offer of proof outside of the presence of the jury that the witness had reason to fear this person and this Court held that the evidence was relevant to the witness's credibility. Similarly, in *People v. Avalos* (1984) 37 Cal.3d 216, 232, this Court limited this sort of testimony to situations where the jury observed that the witness was hesitant or reluctant to testify.

There was no specific reason offered for such evidence in this case. The questioning about the witnesses' "feelings" occurred in the beginning of their testimony. Seven separate witnesses were encouraged by the prosecution to create this aura of danger, intimidation and menace emanating from appellant. There was nothing in the record to indicate that these witnesses were having any problems testifying truthfully because of their "nervousness." None of the witnesses exhibited any confusion born of trepidation or fear.

Witnesses are typically "nervous." In addition, very few people enjoy talking about personal sexual matters in open court. It must be assumed that the prosecutor understood this. Therefore, the only reason for this repeated irrelevant questioning was to improperly influence the jury.

C. Prejudice

Yet again, we see the admission of evidence that was irrelevant for any other purpose but to prejudice appellant by putting him in a bad light. This time, evidence was admitted that had no other purpose than to insinuate that appellant was still a risk to the safety of the witnesses.

Combined with the other errors, appellant was clearly deprived of his right to Due Process of Law under the Fifth Amendment of the United States Constitution.

X. THE CUMULATIVE EFFECT OF THE DUE PROCESS VIOLATIONS IN THE GUILT PHASE REQUIRES REVERSAL OF THE JUDGMENT

As stated in *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal

trial fundamentally unfair." (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-03.) *Chambers* made it clear that the cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. (*Id.* at 290, n. 3; see also *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 (stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation;" see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 n. 15 ("[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness...."); see also *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179 ("In analyzing prejudice in a case in which it is questionable whether any 'single trial error examined in isolation is sufficiently prejudicial to warrant reversal,' this court has recognized the importance of considering 'the cumulative effect of multiple errors' and not simply conducting 'a balkanized, issue-by-issue harmless error review.' " (citing to *United States v Frederick* (9th Cir 1996) 78 F.3d 1370, 1381.)

The judgment must be reversed when this cumulative error caused "substantial and injurious effect or influence on the jury's verdict." (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 637.)

Appellant has set forth above the errors that allowed his jury to

decide his guilt of murder on evidence that had absolutely nothing to do with the murder. To state that this error had a "substantial and injurious effect on influence on the jury's verdict" is to understate the effect of the cumulative error.

As such, the judgment in this case must be vacated.

PENALTY PHASE ARGUMENTS

XI. THE TRIAL COURT COMMITTED FUNDAMENTAL CONSTITUTIONAL ERROR UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY EXCLUDING QUALIFIED POTENTIAL JURORS

A. Discussion of the Law

Any discussion of this argument must begin with the statutory weighing process which sets forth how a California jury determines the punishment in a death penalty trial. (Penal Code section 190.3.)

This Court has subjected this statute to considerable interpretation. However, the nature of the weighing process is set out in CALJIC 8.88.

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. 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. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

Therefore, it is each *individual* juror who must make this decision. This basic maxim of California law leads to the question that is at the center of appellant's argument. What sort of individuals can the trial court exclude from the jury panel on the basis that their personal beliefs preclude them from following this instruction? The answer has evolved from decisions of the United States Supreme Court and this Court over many years, and clearly demonstrates that the trial court committed reversible error in this case and the judgment below must be vacated.

Over forty years ago, in *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court made clear that the Sixth and Fourteenth Amendments to the United States Constitution prohibited the prosecution from excluding jurors simply because they opposed capital punishment or who had conscientious scruples against inflicting it. (*Id.* at p. 512.) The High Court expressly rejected the notion that such individuals should be

excluded because they will frustrate a state's interest in the legitimate enforcement of its death penalty statute. (*Id.* at pp.518-519.) Recognizing that the Illinois statute in question gave the individual jurors wide discretion as to the determination of the penalty, as does California's current statute (Penal Code section 190.3), *Witherspoon* rejected the exclusion of potential jurors because of personal opposition to or bias against the death penalty.

> [w]hen it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.(*Ibid.;* footnotes omitted.)

In *Wainwright v. Witt* (1985) 469 U.S. 412, the High Court followed *Witherspoon*'s teachings. The Court stated that the fact that a prospective juror would view with as higher degree of concern and gravity their task, or would be more emotionally involved than other prospective jurors did not indicate that such a juror could not follow the law. (*Id.* at 420-421)

Further, the *Witt* Court stated "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 his oath." (*Witt, supra,* at p. 420.)

Regarding the burden of proof for such an excusal, citing to *Witt*, this Court stated in *People v. Stewart* (2004) 33 Cal.4th 425, 445, that the prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors.

The trial court is in the best position to resolve ambiguities in juror responses and to this end can look to the individual juror's demeanor and the totality of his voir dire to make the determination as to whether he or she should be excused under the above law. (*Darden v. Wainwright*) 477 U.S. 1268, 178; *Wainwright v. Witt, supra,* 469 U.S. at p. 421.) In cases where after proper questioning, a particular juror's state of "substantial impairment" is still ambiguous, the trial judge must resolve this ambiguity. As stated by this Court "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. Cunningham* (2001) 25 Cal.4th 926, 975 citing to *People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

However, the ambiguity and conflict must exist within the context of the juror's responses to questioning. This Court in *Stewart* pointed out that "decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under Witt, *supra,* 469 U.S. 412, 105 S.Ct. 844." (*Stewart, supra,* at p. 446.) This Court further cited to *Lockhart v. McCree* (1986) 476 U.S. 162, 176, in which the Supreme Court clearly stated that "[n]ot all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Ibid.*)

The *Stewart* Court recognized,

> [T]hat a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very

> difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt, supra,* 469 U.S. 412, 105 S.Ct. 844. . .A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law. (*Stewart* at 447.)

A trial court's error in excluding jurors who were not "substantially impaired" pursuant to the above law requires reversal of the death penalty, "without inquiry into prejudice." (*People v. Stewart, supra,* 33 Cal.4th at 454, citing to *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667.)

B. The Excusal for Cause of the Following Perspective Jurors Was a Violation of the Above Law

1. Prospective Juror Shannon Billic

a. Questionnaire Responses

In her questionnaire, prospective juror Shannon Billic indicated that if "a person killed someone they should serve a life sentence or receive the

death penalty." (XXI CT 6185, Q 37.) On a scale of "1-10" with "10" being most in favor of a death penalty law, she rated herself a "9." (XXI CT 6186, Q 41.) She also stated that the death penalty served a purpose in that "people that kill other people should not be let go to do it again."(XXI CT 6187, Q 48a.) She also said she felt that a life without parole sentence was worse for a defendant (*Id.* at 49a), but she could be open minded about the imposition of the penalty. (XXI CT 6188, Q 50.)

b. Oral Voir Dire

Pursuant to the court's initial questioning, Ms. Billic gave no sign tht she was not qualified to sit on a capital jury. She informed the court that she would automatically vote for a life sentence, unless the crime involved a serial killing. (28 RT 4768-4769.) This statement precipitated a challenge for cause from the prosecutor. (28 RT 4769.)

Upon more detailed questioning by appellant's counsel, Ms. Billic admitted that she really hadn't given too much thought to her prior answer. (28 RT 4771.) She further stated that in a situation such as a child killing or other type of brutal, remorseless killings, she could impose the death penalty even thought there was only one victim. (28 RT 4770-4772.)

The following exchange then occurred between appellant's counsel and Ms. Billic.

COUNSEL:	Okay. I don't want to change your attitudes and views about it. I just think you didn't have enough information before right now --
JUROR:	Uh-huh.
COUNSEL:	-- is that fair?
JUROR:	Okay.
COUNSEL:	Because I'll tell you what, in the right case with only one victim it sounds to me like your set of values says yeah, maybe, in another case life without parole but in this case death penalty, depending on what you hear. True?
JUROR:	Yes.
COUNSEL:	What we're trying to find out is if you have an opinion that cannot be changed based on your attitudes and life experiences, because if you come in here and tell us, "Look, no matter what happens, one body, forget it, life without parole all the time. More than one body, I'll consider it. I don't think you're saying that.
JUROR:	I'm willing to listen to the case, I think, before I make my decision.
COUNSEL:	And right case, you are gonna give the appropriate verdict no matter how it comes down? (Juror nods head.) (28 RT 472-4774.)

After some preliminary questions, the prosecutor's questioning produced the following exchange.

DA:	Now, in the penalty phase that's a separate trial and I know you would listen, I'm not saying you wouldn't. You're obviously a polite person and you are somebody who would listen, I know you would, no doubt in my mind. But would you seriously consider coming back to a courtroom in a case with only one victim, not a serial murderer, not a mad bomber, just one adult

victim. Could you seriously consider the death penalty?

JUROR: I would listen to everything that's going on and try to, you know.

DA: I know you would listen. There's no doubt in my mind you would listen, but could you consider it? I mean, could you actually see yourself coming to court and saying, "Sir, your sentence is death?"

JUROR: I could consider it but I don't know if I would do it.

DA: Okay.

JUROR: I'd think about it. I'd think about it.

DA: When you say you don't know if you would do it. That's I guess where our language barrier is. I know you would listen, but--

JUROR: I would consider it.

DA: I don't want you to do it arbitrarily, I wouldn't want you to do it that way, but I'm saying if there was evidence that this crime was aggravated and there wasn't much evidence that the crime was mitigated--

JUROR: Uh-huh.

DA: -could you walk into a courtroom and say that the appropriate sentence for this defendant is death?

JUROR: Yes.

DA: You could look over at him and tell him that?

JUROR: No.

DA: Could you live with it?

JUROR: If I really believed that he was guilty, he did it, yeah, I could.

DA: Okay. And so what I'm -- I don't know exactly – I'm a little confused at what I'm hearing but your questionnaire, you know, kind of confuses me

	and some of your answers did to the judge because you came in here and you were pretty affirmative about that you couldn't do it unless it was a serial murderer. Why did you want the judge to know that?
JUROR:	So he could know how I felt.
DA:	Was that to tell the judge potentially you could not be fair?
JUROR:	Potentially.
DA:	Okay. Is there that potential that exists?
JUR0R:	Yeah.
DA:	I just want to make sure -- there's nothing wrong with saying that. If I was sitting in your seat I'd have to tell the judge there's a good chance I'm not gonna be too fair to everybody. So that's a very honest response and we respect that response. Okay. So there is a potential you can't be fair on this issue, the death penalty issue?
JUROR:	Yeah. (28 RT 4777-4780.)

The prosecutor then continued.

DA:	Now, given all your answers here, I'm gonna ask you one last time to make sure. You have said it a couple of times but I'll ask again to make sure. There's a good chance in a case like this that you probably won't be fair in a penalty stage. Fair statement?
JUROR:	Yes.
DA:	Tell me if I'm saying your words wrong or misstating what you said.
JUROR:	That's right. (RT4781-4782.)

Appellant's counsel then recommenced his questioning.

COUNSEL: "Fair" is kind of a hard question. Kind of hard to define what is "fair." I won't use that word, I'm just gonna ask this word. If you are convinced – this is hard for me because Mr. Merriman is my client and he's pled not guilty, but if you are convinced beyond a reasonable doubt he is guilty of the charges, you would vote guilty, wouldn't you?

JUROR: Yes.

COUNSEL: The reason is because that's the rules we have in our country and that's your job and you have to make a hard decision and you have listened to me and in your own mind would have said, "I've listened to you" --

JUROR: Yes.

COUNSEL: -- and the prosecutor has convinced you and that's the way it is. You made the hard decision, you found him guilty, correct?

JUROR: Yes.

COUNSEL: Now we come back in and you take your same seat and we present evidence and the D.A's convince you based on the law and based on how serious this case was that the death penalty was the right verdict... If you were convinced that the appropriate penalty was death based on the evidence, would you return that verdict?

JUROR: Yes.

COUNSEL: Now, you see the words I used were "if it's appropriate based on the evidence." "Fair" can mean different things to different people.

JUROR: Un-huh.

COUNSEL: How I think the prosecutor meant it was will you listen to him the same as you would listen to me.

JUROR: Yes.

COUNSEL: That would be fair; right?

JUROR: (Juror nods head.)

COUNSEL:	Would you weigh the evidence according to the rules the judge gave you?
JUROR:	Yes.
COUNSEL:	Okay. Wouldn't that be fair?
JUROR:	Uh-huh.
COUNSEL:	Okay. Now, if you are convinced that life without parole is the correct punishment, you would return that verdict, wouldn't you?
JUROR:	Yes.
COUNSEL:	And you'll notice how I used the words, that's the correct verdict. You would do what is correct?
JUROR:	Yes.
COUNSEL:	Now, again, I'll just end it this way. No one is asking you to predict this case, okay, no more than they would ask you to predict where you're gonna be five years from now, cause you don't know. Lot of things can happen. True?
JUROR:	True.
COUNSEL:	All right. Early next year we're gonna start with the evidence. You don't know what's gonna happen; true?
JUROR:	True.
COUNSEL:	But if the case convinces you that death is appropriate, even though it's a tough and serious decision, if it's appropriate, what would you do?
JUROR:	(No response.)
COUNSEL:	If death is appropriate, what would you do?
JUROR:	I would say yes if it was appropriate. (RT4782-4784

The final round of questioning of Ms. Billic was done by the prosecutor.

DA:	I'm sorry we're sitting here playing Ping-Pong with you, I feel bad about that, but I'll ask it this

way because I don't want the words used to be my words, I want them yours. I don't want to put words in your mouth at all either. But when you said you potentially could not be fair and thought you would not be fair, tell me what you meant by that.

JUROR: Well, I really want to hear, you know, everything that's going on in the case before I would make my decision and try to be as fair as I could be.

DA: Right. But when you said you couldn't, you didn't think you could, just tell me what you meant by that when you said potentially could not be fair -- and, please, just be open as you can, use your own words, don't use any words we've used at all, don't worry about that-- I know you'll listen and do your best but when you said that, just tell me what you thought.

JUROR: Um, I don' t know. Can you say the question again?

DA: Remember when I was talking to you before and I asked you when you told the judge about that after reading these facts you mentioned about you could only do it in a serial murderer case. You remember that?

JUROR: Yes.

DA: You were telling the judge that you couldn't be fair, you thought you couldn't be fair, and you wanted the judge to know that and you agreed with me.

JUROR: Do you remember that I just wanted you to know my values up front.

DA: I appreciate that. Thank you. Okay. You're probably wishing you never opened your mouth now --

JUROR: (Laughter.)

DA: -- but you did.

JUROR: Yeah.

DA: That's fine. But what I'm getting at here is this: I asked you then later--I followed up and said, "You're telling me" -- I asked you, "Don't let me put words in your mouth" when I asked it but I said, "There's a good chance you couldn't be fair to us in this case?" and you said "Yes." You were honest about that and I appreciate that. Thank you.

JUROR: Uh-huh.

DA: But, you know, Mr. Wiksell said you may not have known what those words meant, I may have confused you. I didn't want to do that. My question to you, so it's clear I'm not putting words in your mouth and I understand you completely, is just: Tell me what you meant when you said that, when you answered that question "yes."

JUROR: Well, it's 'cause the way I feel about the death penalty and life without parole, I wasn't sure how I could -- if I could be fair, but I think I could be.

DA: Okay. Now -- so what has changed your mind? Just to let me know.

JUROR: Just -- I just want to hear what all that's going on before I would decide but I would try to be fair.

DA: I know you would.

JUROR: Yeah.

DA: I know you would. When you answered earlier that you didn't think you could be, that's when my concern comes. It's okay if – like I told you before, there's a lot of cases I couldn't be fair on either --

JUROR: Yeah.

DA -- and as long as we know that, I'm fine with that. Okay. It would be bad and uncomfortable for me if I found out when it was too late because then it would be too late, we couldn't

	talk to you about it, we couldn't change anything. Mr. Wiksell would be the same way; if it turned out you weren't fair to the defendant, that would be pretty rough to find that out at the end of the day.
JUROR:	Yeah.
DA:	And that's why when you stated it -- we appreciate jurors who speak up early. That's why we do it this way. So what I'm getting at is that when you say you can't be fair, potentially won't be fair and you felt strong about it to let the judge know ahead of time, I'm just asking: Why did you let the judge know? Why did you want us to know that?
JUROR:	I wanted you to know my feelings.
DA:	Okay. I know you'll listen but you think it would be very unlikely, put it that way, that you would ever return a verdict of death in a case like this?
JUROR:	Truthfully, yes.
COUNSEL:	Calls for a predisposition.
COURT:	Sustained as to reference to this case.
DA:	Let me put it this way: In a case with only one victim, it would be very unlikely for you to return a verdict of death?
JUROR:	Yes.
DA:	That's what you meant by not being fair?
JUROR:	Yes.
DA:	Okay. So you would listen and everything like that but at the end of the day it would be very unlikely in a case with one victim that you would ever return a verdict of death?
JUROR:	Yes. (28 RT 4785-4788.)

At the end of the questioning, the court stated that it was "leaning

toward excusing" the juror. (28 RT 4789.) Appellant's counsel strongly opposed the prosecutor's challenge, but ultimately the court excused the juror for cause. (28 RT 4789-4795.)

c. Analysis of Improper Granting of Challenge

It is clear from the questionnaire and the oral voir dire that Ms. Billic did not have any generalized moral compunction against administering the death penalty. At no point did she say its imposition so offended her personal code that she could not in good conscience vote for it. In fact, she self-rated a "9" out of "10" regarding her willingness to see the death penalty imposed. Her answers consistently reflected a favorable attitude toward said penalty. She stated that the death penalty serves a purpose in that "people that kill other people should not be let go to do it again." (XV CT 6187.)

As readily acknowledged by counsel, Ms. Billic was not a terribly sophisticated juror when it came to the death penalty. While she initially told the court that she would only impose the death penalty on "serial murderers" (28 RT 4761), she quickly admitted that she hadn't given much thought to her "serial killer" answer and that she could impose the death penalty for other brutal, remorseless killings even though it involved only one victim. (28 RT 4770-4772.)

However, most importantly, Ms. Billic specifically affirmed that she

could "weigh the evidence according to the rules that the judge gave you" and, "if appropriate," return a verdict of death. (28 RT 4784.) She also stated that she could walk into the courtroom and state that the appropriate verdict was death. (28 RT 4779.)

Ms. Billic's above answer made it clear that she could subrogate any personal beliefs that she might have to the rule of law and impose death in this particular case. That was all that was required to qualify her to sit according the law as fully set forth in Section A of this Argument.

The prosecutor attempted to employ Ms. Billic's initial statement about the death penalty being reserved for serial killers to get her to state that she could not be "fair" to the prosecution in a case with only a single victim. However, the most the prosecutor was able to do is get an affirmative answer in response to the leading question that there was a "good chance that you probably could not be fair in any penalty phase." (28 RT 4781-4782.)

In addition to the above question having one too many modifiers to be a useful barometer of Ms. Billic's attitude[19], the prospective juror's affirmative answer is not a disqualifier under the law. As stated above, this Court has made it clear that "a prospective juror's personal conscientious

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19. Essentially, what this question asked is whether the juror probably could not be probably fair. Such a question is impossible to answer.

objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt.*" (*Stewart, supra,* 33 Cal.4th at 446.) Further, this Court has also made it clear that "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." (*People v. Kaurish, supra,* 52 Cal.3d at 699.)

As stated by both parties, it is evident from the voir dire that Ms. Billic was not a student of the complexities of the death penalty. In fact, it was apparent from the voir dire that she hardly thought of the death penalty at all before she was summoned before the court to do her duty as a juror. (28 RT 4771-4772.) The first time that she was called upon to express her beliefs was in the questionnaire where she stated an unconditional support of the death penalty. She did not qualify that support with any comment that it should be limited to serial killers. Her initial comment as to possibly limiting a death verdict to serial killers was immediately modified upon additional questioning, in which she readily admitted that she could impose the death penalty in "brutal, remorseless killings." As the voir dire progressed and Ms. Billic became more familiar with the process, she continued to make it

clear that she could listen to the evidence, apply the law as given by the court and impose the death penalty, if appropriate. (28 RT 4783-4784.)

It cannot be said that this murder was projected as anything but utterly brutal and completely remorseless. It was precisely the type of crime for which Ms. Billic clearly stated she could impose the death penalty. This Court has made it clear that the standard that must be used to determine eligibility to serve under *Witt* is whether the prospective juror would be impaired given the general facts of the specific case before her. (People *v. Butler* (2009) 46 Cal.4th 847, 859-860.) *Butler,* in part, discussed how much a prospective juror should be told about the facts of the case in an effort to ascertain whether the juror's personal beliefs create a substantial impairment under *Witt.* The *Butler* Court reiterated that while questions about the specific facts of the case that invite prejudgment or educated the jury as to the facts of the case should not be asked, the trial court "must probe prospective juror's death penalty views to the general facts of the case." (*Butler* at 859-860 citing to *People v. Earp* (1999) 20 Cal.4th 826, 853.)

The *Butler* Court then held,

> Reconciling these competing principles dictates that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties in the case

> being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation omitted] In deciding where to strike the balance in a particular case, trial courts have considerable discretion. [Citations omitted.]

Unlike *Butler,* this was not a case where the issue was the limitation on defense counsel's voir dire based upon the above principles. However, this Court did make it clear that the decision as to whether a juror can sit as a juror on death cases must be based upon the general facts of the case in question, not upon some unrelated or overly generalized set of facts.

There was no ambiguity, whatsoever, as to whether this juror could impose the death penalty in a case such as this according to the United States Constitution as interpreted by the United States Supreme Court and this Court. The prosecutor's attempt to characterize Ms. Billic as being "unfair" to his cause is legally irrelevant. A prospective juror does not have to be "fair," meaning unbiased, as she would in a guilt phase trial. The above law makes it clear that a death penalty juror can even be unequivocally opposed to the death penalty and have an attitude that will make it "very difficult" for the prosecutor to convince her to find for death and still qualify under the *Witt* standard. (*People v. Stewart, supra,* 33 Cal.4th 446.) Removal of such a juror violates the mandate of the United

States Supreme Court that a penalty jury must not be organized for a finding of death by excusing prospective jurors who personally oppose it.

In excusing this juror, the court said that she "swayed with the wind" and granted the prosecutor's challenge because of her "general reluctance" to impose the death penalty in a single victim case. (28 RT 4793) The court committed clear error. There apparently was no concern on the part of the court as to whether Ms. Billic was capable of setting her personal beliefs aside in a single victim case and follow the law. The concern was that she would have a general reluctance to do so.

Under the above state law and facts, both Ms. Billic and the appellant were entitled to that reluctance under the United States Constitution as interpreted by the United States Supreme Court. The facts as clearly set forth in the record of this case make it clear that this juror unambiguously stated that she could apply the law as set forth by the court as to the imposition of the penalty. As such, there was no "substantial impairment" according to controlling authority.

If the court felt that there was any ambiguity, it was its affirmative duty to clear up any misunderstanding by making appropriate inquiry as the only approved standard: whether this juror could set aside any personal beliefs and could carry out her duty without "substantial impairment." (See

People v. Martinez (2009) 47 Cal. 4th 399, 425-427.)

No such inquiry was made. Ms. Billic was excused not because she was substantially impaired but because she wasn't a devotee of the death penalty in single victim cases. By excluding this juror from the panel, the trial court did exactly what *Witherspoon*, *Witt,* and *Stewart* specifically forbade. As such, appellant was deprived of due process in the penalty phase and the death judgment must be vacated. (*Gray v. Mississippi, supra,* 481 U.S. 661.)

2. **Prospective Juror Bill Tallakson**

a. Answers to Questionnaire

Mr. Tallakson stated in his written questionnaire that "I oppose the death penalty." (XV CT4372.) When asked to rate himself from "1-10" with "10" being strongly in favor of having a death penalty law" and "1" being "strongly against a death penalty law," Mr. Tallakson rated himself a "1." (XV CT 4373, Q 41.)

Mr. Tallakson also stated that the death penalty "promotes a culture of state sanctioned killing. It is irreversible and mistakes are made." (XV CT 4374, Q 46a.) Regarding the death penalty Mr. Tallakson also stated that "I do not think it serves any good purpose." (XV CT 4374, Q 48a.)

The questionnaire also contained the following question (XV CT 4375, Q50.) "The death penalty is not mandatory. If we reach the penalty phase of the case, the jurors will choose between the death penalty and life in prison without parole for a first degree murder during a sexual assault of an adult female. If we reach the penalty phase, can you be open minded as to which penalty should be imposed." Mr. Tallakson answered "no" , explaining again "I oppose the death penalty." (XV CT 4376.) In addition, in response to the question that asked whether the juror was made uncomfortable by filling out the questions the juror said "I dread the thought of having to vote on the death penalty as a juror." (XV CT 4383, Q82.)

b. Oral Voir Dire

The courted commenced the oral questioning.

COURT: I have read some of the key answers here to indicate that you feel that you--you may feel you could never vote for the death penalty. Am I correct or is that a little bit--

JUROR: I couldn't tell you that for sure, sir. I dread the thought of ever having to vote on the death penalty and I think I said it right here

* * *

COURT: Knowing that we have it (the death penalty) and assuming for a minute you are asked to serve, do you feel you are open minded to either penalty.

JUROR: I'm open minded to following the law, that's for sure, but like I said, I dread the thought of ever having to vote on this issue in a jury trial...I always try and do everything I can to follow the law in every way but to try to--to tell you how I would consider voting on the death penalty, I couldn't even tell you. I couldn't even tell you my own mind. (23 RT 4230-4231.)

However, when appellant's counsel more fully explained the process, the following exchange occurred.

COUNSEL: You had indicated to the Court that you could follow the law, is that correct: is that correct?

JUROR: That's correct.

COUNSEL: You know that in this particular case there are really two elements to this trial. One is the guilt phase and if as a juror you and other members determine that Mr. Merriman is guilty, there is a penalty phase. Are you aware of that?

JUROR: Yes.

COUNSEL: Then, once you hear that information, you get to weigh it and make a determination as to what kind of penalty should be assessed, assuming we're there.. And you understand that; is that correct?

JUROR: Yes.

COUNSEL: Now the judge will give you directions and instructions on how you should make that determination or what you should consider. Do you understand that?

JUROR: Yes.

COUNSEL: You understand that you would be taking an oath to follow those instructions under the law? You understand that?

JUROR: Yes.

COUNSEL: Could you do that?

JUROR: Yes. As I just told the judge, I would always follow the law, and could continue to vote for the death penalty? In that case I would always follow the law but, like I said, I also oppose the death penalty. Could I? I don't know. I don't know. (23 RT4233-4234.)

The following then occurred.

COUNSEL: ...Let me ask you this. Is your opinion so strong as to the death penalty that you would not consider it as an option?

JUROR: No, I would not say that. I would say if I voted-- I oppose the death penalty and if I were to vote in an election for somebody who was opposed to the death penalty, I would vote for somebody who was opposed to the death penalty. But I as a juror, I would always do everything I could to follow the law. What can I tell you?

COUNSEL: It's fair to say you would follow the law and you would follow the instructions given to you in regard to your determination as to the penalty phase, is that correct?

JUROR: That's correct.

COUNSEL: Now you indicated in response to the Court's questioning that you would start off being opposed to applying the death penalty in this case; is that correct?

JUROR: I don't know that I said I was opposed to applying the death penalty in this case. I said I'm opposed to the death penalty in general. I don't think I said "in this case." Did I say that?

COUNSEL: Maybe I misunderstood you. I thought one of the responses you said was that if you started off in this particular proceeding, you would have views that you would not favor a death penalty

	decision.
JUROR:	That's true. I agree with that.
COUNSEL:	Okay. Is there any way in which you could set aside that feeling and give the same weight in the sense of fairness as you would give the defendant.
JUROR:	You have to, as a juror, give both sides an equal amount of consideration.
COUNSEL:	Is your mind foreclosed to the possibility of deciding on death as a penalty?
JUROR:	No, it's not. (23 RT4234-4235.)

Having heard this, without conducting any further questioning, the court granted prosecutor's challenge. (23 RT 4236.)

c. Analysis of Improper Challenge

There can be no rational argument that Mr. Tallakson did not personally oppose the death penalty. However, as stated above, prospective jurors who have serious personal misgivings against the imposition of the death penalty may sit on a death penalty jury without improperly prejudicing the prosecution's cause. It well may be that the prosecution would have a difficult time convincing Mr. Tallakson to impose death on appellant but the above law clearly states that such a state of affairs does not act as a disqualifier.

Under the questioning of counsel, Mr. Tallakson made it clear that

he would be willing to set aside his personal beliefs, consider all of the evidence, and most importantly, employ the law in deciding the penalty. As such, he was not substantially impaired in his ability to sit on this jury. Rather, he simply was part of the continuum of public opinion on the death penalty. Not only was he obviously permitted this opinion but both he and appellant were entitled to have him sit on this jury as his opinion would not have substantially impaired his ability to apply the law to the facts to arrive at a penalty verdict.

Once again, it must be reiterated that the sovereign is not entitled to an impartial jury in the penalty phase in the sense that all jurors must have personal attitudes that support the imposition of the death penalty. The government is only entitled to a jury that will be able to apply to law to the facts. The law not only countenances but encourages as diversity of opinions and attitudes.

By excluding this juror from the panel, the trial court did exactly what *Witherspoon*, *Witt,* and *Stewart* specifically forbade. As such, appellant was deprived of due process in the penalty phase and the death judgment must be vacated.

XII. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND REASONABLE DETERMINATION OF PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATION IN THE PENALTY PHASE

INTRODUCTION

As stated in the guilt phase arguments, the improper joinder of the many counts and the admission of other evidence that was irrelevant to the capital crime was reversible error mandating that the entire judgment be vacated.

In addition, much of this evidence had prejudicial implications in the penalty phase as well. The capital murder statutory scheme in California mandates that only certain factors can be taken into consideration by the jury in determining the penalty. Much of the improperly admitted evidence in the guilt phase fell outside of the statutory definition of factors that could be considered by the jury in the penalty phase. As such, the jury was permitted to consider a plethora of highly prejudicial and statutorily barred evidence against appellant in the penalty phase, leading directly to a constitutionally flawed imposition of death. Therefore, even if this Court should find the trial court's error in admitting this evidence to be harmless

in the guilt phase, the error had independent significance in the penalty phase requiring a reversal of the death judgment.

Further, the trial court instructed the jury in the language of CALJIC No. 8.85 that "[i]n 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." (VIII CT 2201.)

A. Discussion of Law of Statutory Factors in Aggravation

Penal Code section 190.3 sets forth the procedure that a jury must use in reaching the penalty determination in a capital trial. Derived from the 1978 initiative, this statute made certain fundamental changes from the 1977 death penalty law, which it superceded. The most critical change was described by this Court in *People v. Boyd* (1985) 38 Cal.3d 762, 773.

> The 1978 initiative. . .provided specifically that the jury "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances. If [it] determines that the mitigating circumstances outweigh the aggravating circumstances [it] shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (section 190.3, see discussion in *People v. Easley, supra,* 34 Cal.3d 858, 881-882.) By thus requiring the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute, the initiative necessarily implied that matters not within the statutory list are not entitled to any weight in the penalty determination.

This Court proceeded to state,

> The change from a statute in which the listed aggravating and mitigating factors merely guide the jury's discretion to one in which they limit its discretion requires us to reconsider the question of what evidence is "relevant to aggravation, mitigation, and sentencing." (Section 190.3.) Relevant evidence "means evidence ... having any tendency in reason to prove or disprove any disputed fact *that is of consequence to the determination of the action.*" [Citation omitted.]Since the jury must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those factors. Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation. (*Boyd, supra*, at 773.)

Therefore, evidence that does not apply to one of the listed aggravating factors is inadmissible before the penalty jury. (*People v. Boyd, supra,* 38 Cal.3d at p.775, citing to *People v. Easley* (1983) 34 Cal.3d 858, 878.) The Boyd Court stated that while a defendant is permitted under 190.3 (k) to introduce any evidence as to defendant's character or record or the circumstances of the crime as a basis for a sentence less than death, the prosecutor does not have a concomitant right to present evidence that defendant was of bad character unless it is specifically within the statutory scheme of 190.3. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.)

B. Application of the Above Law to the Instant Case

As stated in Arguments II-VIII, the jury that would determine whether appellant lived or died improperly heard evidence of appellant's life-style and general attitudes in the guilt phase. None of this would have been admissible as aggravating evidence under the California death penalty scheme in that it neither evidenced felony convictions nor violent conduct. Because of the error committed by the court in the guilt phase, the jury was exposed to damning evidence of appellant's neo-Nazi beliefs, including racism against blacks and Jews. They also learned of his mysogonistic attitudes, twisted sexual proclivities, drug use, his admiration of Adolf Hitler, his willingness to corrupt young girls, his bizarre relationship with his mother and his leadership of a hateful and depraved gang.

The jury was also exposed to multiple photos of appellant and his cohorts, covered in racist and Nazi tattoos, and an exhibit of appellant's disgusting pornographic magazines. In addition, the prison letters, to and from appellant and his fellow gang members, read as an anthology of an anti-social and repulsive ethos. As stated above, these letters were full of obscenities and vulgarities, ranging from revolting poems about homosexual sex and racism to an unremitting rant against the values that society holds dear. They portrayed appellant as an individual utterly

unworthy of any sympathetic consideration from the jury and completely negated counsel's summation pleading for such consideration.

None of the above evidence would have been admissible in a penalty phase proceeding in this case if not for the fact that it was improperly admitted in the guilt phase. The consideration of this inadmissible evidence deprived appellant of his right to due process of law, his right to effective counsel and his right to a fair determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) As this improperly considered evidence was manifestly prejudicial, respondent cannot meet this burden and the penalty judgment should be vacated.

At the very least, the trial court was obligated to reassess the balance of prejudice and probative value of evidence adduced at the guilt phase before placing it wholesale before the jury for its mandatory consideration at the penalty phase. CALJIC 8.85 was far too sweeping in that it permitted the jury to sentence appellant to death by unconstitutionally considering the non-statutory aggravating circumstances or evidence presented at the guilt

trial. (See *Simmons v. South Carolina* (1994) 512 U.S. 154; *Stringer v. Black* (1992) 503 U.S. 222.)

The court gave a vague and inconclusive instruction that the penalty jury should not consider evidence of appellant's "lifestyle and background." (VIII CT 2205.) However, this instruction was completely inadequate considering the circumstances of this case. Firstly, the instruction was so vague as to have no practical guidance for the jury. Secondly, the prosecutor put appellant's "lifestyle and background" front and center on virtually every aspect of its guilt presentation making it impossible for the jury to distinguish between "lifestyle and background" and the circumstances of the offense.

Further, in *Delaware v. Dawson* (1992) 503 U.S. 159, the United States Supreme Court held that pursuant to the First Amendment to the United States Constitution, guaranteeing freedom of association and speech, evidence that defendant was a member of the Aryan Brotherhood was inadmissible in the penalty phase of a capital trial in that it was not, in and of itself, relevant to any aggravating factor because the evidence proved nothing more than Dawson's beliefs and associations. The High Court contrasted a situation like the one in Dawson, where defendant's association with the Aryan brotherhood had no relation to the circumstances of the

offenses to cases such as *Barclay v. Florida* (1983) 463 U.S. 939, 942-944, [103 S.Ct. 3418], where such affiliation was relevant to the motivations behind the capital crime (defendant's membership in Black Liberation Army and his desire to start a "racial war" relevant to motivations to murder of white hitchhiker.) (*Dawson, id.,* 503 U.S. at 164-165.)

The law of *Dawson* applies directly to this case. As in *Dawson,* the prosecution presented constitutionally barred evidence as to appellant's associations, beliefs and choice of free expression in order to encourage the jurors to find for death.

For the reasons stated above, appellant was denied his right to due process under the Fifth and Fourteenth Amendments and his right to a reliable determination of penalty under the Eighth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280.)

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

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution.

Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing: and to the contrary this Court's interpretations of the statute have expanded the statute's reach.

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

burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code §190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. The result is truly a "wanton and freakish" system that randomly chooses, among the thousands of murderers in California, a few victims for the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the state will kill dominates the entire process of applying the penalty of death.

XIII. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE 190.2 IS IMPERMISSIBLY BROAD

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed

> from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.(*Zant v. Stephens* (1983) 462 U.S. 862.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged in this case, the

statute contained 26 special circumstances, some with multiple subparts[20] delineating those murders and murderers deemed most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." (1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are

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

now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance.(See *People v. Hillhouse* (2002) 27 Cal. 4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-58, 575.) These broad categories are joined by so many other categories of special circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[21]

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21. The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra,* 72 N.Y.U. L.Rev. at

It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

Regarding the specific special circumstance of felony murder present in the instant case, the California Penal Code (section 189) defines first degree murder quite broadly, as all murder perpetrated by certain means (e.g., poison, explosives); "any other kind of willful, deliberate, and premeditated killing "; and felony murder-that is, any killing, whether intentional or not, committed in the course of any of the statutorily specified felonies.

As construed by this Court in *People v. Anderson* (1987) 43 Cal.3d

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1325.) This would be a premeditated murder committed by a defendant not convicted of another murder, and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim, or, even more unlikely, advised the victim, in advance of the lethal assault, of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

1104, the felony-murder special circumstance, like the felony murder rule itself, does not contain an intent element for the actual killer. Thus, this special circumstance permits an accidental or unintentional killing to form the basis for a death sentence, despite the United States Supreme Court's repeated emphasis that an evaluation of the accused's mental state is "critical" to a determination of his suitability for the death penalty. (See e.g. *Enmund v. Florida* (1982) 458 U.S. 782, 800 [the appropriateness of the death penalty depends on the accused's culpability and "American criminal law has long considered a defendant's intention-and therefore his moral guilt- to be critical" to the degree of his culpability. It should follow from the High Court's concern that special care would be taken in administering the California death penalty scheme to ensure that genuine narrowing criteria apply to felony-murder offenses, and that death eligibility would be limited to the most reprehensible murders and the most blameworthy felony murders.

But in fact, the death penalty scheme as applied to felony murder sweeps in a broad and arbitrary fashion. While all willful, deliberate and premeditated killings are first degree murder under the California statute, not all such killings are subject to the death penalty. On the other hand, any perpetrator of a felony murder, by virtue of even an unintended killing, may

be sentenced to die. Such a sorting cannot be other than arbitrary and capricious, in violation of the Eighth Amendment.

This Court routinely rejects challenges to the statute's lack of any meaningful narrowing, and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 53, n. 13.; See *People v. Beames* (2007) 40 Cal. 4th 907, 933-934.) The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary

imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and prevailing international law.

XIV. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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

Factor (a), listed in § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion," or because three weeks after the crime

defendant sought to conceal evidence,[22] or threatened witnesses after his arrest,[23] or disposed of the victim's body in a manner that precluded its recovery.[24]

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

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

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22. *People v.* Nicolaus (1991) 54 Cal.3d 558, 581-582 (hatred of religion); People *v. Walker* (1988) 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

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

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

a. Because the defendant struck many blows and inflicted multiple wounds,[25] or because the defendant killed with a single execution-style wound.[26]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[27] or because the defendant killed the victim without any motive at all.[28]

c. Because the defendant killed the victim in cold blood[29] or

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25.See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, 28. (cont.)No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

26. See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

27. See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).28

28. See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

29. .See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

because the defendant killed the victim during a savage frenzy.[30]

d. Because the defendant engaged in a cover-up to conceal his crime,[31] or because the defendant did not engage in a cover-up and so must have been proud of it.[32]

e. Because the defendant made the victim endure the terror of anticipating a violent death[33] or because the defendant killed instantly without any warning.[34]

f. Because the victim had children,[35] or because the victim

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

31. See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

32. See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

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

34. See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

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

had not yet had a chance to have children.[36]

g. Because the victim struggled prior to death,[37] or because the victim did not struggle.[38]

h. Because the defendant had a prior relationship with the victim,[39] or because the victim was a complete stranger to the defendant.[40]

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

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts

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36.See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

37.See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

38.See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

39.See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d at 717, 802 P.2d at 316 (same).

40. e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[41]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[42]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance

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

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

because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[43]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[44]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[45]

The foregoing examples of how the factor (a) aggravating

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43. e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

44. e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

45. e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

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

XV. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING, AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME; IT THEREFORE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). A defendant, like appellant, convicted of felony-murder is automatically eligible for death, and freighted with a potential aggravating circumstance to be weighed on death's side of the scale. Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and

prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral," and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

A. Beyond a Reasonable Doubt Is the Appropriate Burden of Proof for Factors Relied on to Impose a Death Sentence, for Finding that Aggravating Factors Outweigh Mitigating Factors, and for Finding that Death Is the Appropriate Sentence.

Twenty-five states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[46] Only

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46. Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30 (c)(Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A),9 (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071 (c)(West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.(c) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(I) (1992).)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[47] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.) California does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context, the required finding need not be unanimous.

This Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) The moral basis of a decision to impose death,

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Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a (c) (West 1985)

47. Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

however, does not mean that a decision of such magnitude should be made without rationality or conviction. Nor is it true that the penalty phase determinations mandated by section 190.3 do not involve fact finding.

Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences *which is above and beyond the elements of the crime itself.*" (CALJIC 8.88; emphasis added.) Thus, before the process of weighing aggravating factors against mitigating factors can begin, a fact other than those that underlie the guilty verdicts must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors. These determinations are essential elements of the decision that a crime is death-worthy.

The fact, that under the Eighth Amendment, "death is different" cannot be used as a justification for permitting states to relax procedural protections provided by the Sixth and Fourteenth Amendments when

proving an aggravating factor necessary to a capital sentence. (*Ring v. Arizona* (2002) 536 U.S. 584, 609.) No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly found the *Santosky* statement of the rationale for the burden of proof beyond a reasonable doubt requirement[48] applicable to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." (*Bullington v. Missouri* (1981) 451 U.S 435, 441 [quoting *Addington v. Texas* (1979) 441 U.S. 418, 423-424; *Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the U.S. Supreme Court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to

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48. "When the state brings a criminal action to deny a defendant liberty or life, . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [internal citations omitted].)

the jury and proved beyond a reasonable doubt. (*Id.*, at 478.) This decision seemed to confirm that as a matter of due process under the Fourteenth Amendment the proof beyond a reasonable doubt standard must apply to all of the findings the sentencing jury must make as a prerequisite to its consideration of whether death is the appropriate punishment.

Under California's capital sentencing scheme, the "trier of fact" may not impose a death sentence unless it finds (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) In *Ring v. Arizona, supra*, 536 U.S. 584, the high court held that the Sixth and Fourteenth Amendment's guarantees of a jury trial means that such determinations must be made by a jury, and must be made beyond a reasonable doubt.

Before *Ring* was decided, this Court rejected the application of *Apprendi* to the penalty phase of a capital trial. In so doing, the Court relied in large part on *Walton v. Arizona* (1990) 497 U.S. 639, and its conclusion that there is no constitutional right to a jury determination of facts that would subject defendants to a penalty of death. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453 [*Walton* compels rejection of defendant's instant claim that he was entitled to a finding beyond a reasonable doubt of the applicability of a particular section 190.3 sentencing factor.]

In *Ochoa*, this Court stated that a finding of first degree murder in Arizona was the "functional equivalent" of a finding of first degree murder with a section 190.2 special circumstance in California: "both events narrowed the possible range of sentences to death or life imprisonment . . . a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence." *(People v. Ochoa, supra*, at 454; see also, *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14.)

This contention was specifically rejected by the high court in *Ring*, hich (1) overruled *Walton* to the extent *Walton* allowed a sentencing judge, sitting without a jury, to make factual findings necessary for imposition of a death sentence, and (2) held *Apprendi* fully applicable to all such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial. "Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense'. . . .". (*Ring, supra,* 536 U.S. at p. 609, quoting *Apprendi*, 530 U.S. at 494, n. 19 (2000).)

In light of *Ring*, this Court's holdings, made in reliance on *Walton*, that there is no need for any jury determination of the presence of an aggravating factor, or that such factors outweigh mitigating factors, because the jury's role as factfinder is complete upon the finding of a special circumstance, are no longer tenable. California's statute requires that the jury find one or more aggravating factors, and that these factors outweigh mitigating factors, before it can decide whether or not to impose death. These findings exposed appellant to a greater punishment than that authorized by the special circumstances finding alone. Capital defendants, no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. (See *Ring v. Arizona, supra,* 536 U.S. at p. 609.)

In *People v. Snow* (2003) 30 Cal.4th 43,126, fn 32, this Court stated that *Aprendi v. New Jersey* (2000) 530 U.S. 466, which held that a jury must find beyond unanimously and beyond a reasonable doubt any fact that increases the maximum sentence possible for a defendant, does not affect

California's death penalty process, because once a special circumstance has been found beyond a reasonable doubt the defendant is death eligible and jury findings as to aggravating circumstances do not expose a defendant to a higher maximum penalty.

However, a careful look at California's death penalty procedures shows that essential steps in the death-eligibility process take place during the penalty phase of a capital trial and these steps are subject to the mandates of *Ring*.

California utilizes a bifurcated process in which the jury first determines guilt or innocence of first-degree murder and whether or not alleged "special circumstances are true. If a defendant is found guilty and at least one special circumstance is found to be true, a penalty phase proceeding is held, wherein new witnesses may be called and new evidence presented by the prosecution and defense to establish the presence or absence of specified aggravating circumstances, as well as any mitigating circumstances. The jurors are instructed that they are to weigh aggravating versus mitigating circumstances and that they may impose death only if they find that the former substantially outweigh the latter. If aggravating circumstances do not outweigh mitigating circumstances, the jury must impose life without possibility of parole, or LWOP. Even if aggravating

circumstances do outweigh mitigating circumstances, the jury has the discretion to exercise mercy and impose LWOP instead of death. (See sections 190-190.9; CALJIC Nos. 8.84-8.88; *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I),* (1985) 40 Cal.3d 512, 541.)

In California, the penalty for first-degree murder is 25 years to life unless at least one of a statutorily enumerated list of special circumstances is found. This special finding is made during the guilt phase by the jury, unanimously and beyond reasonable doubt. Prior to *Ring*, this Court held that there is no right under the Sixth or Eighth Amendments to the United States Constitution to have a jury determine the existence of all of the elements of a special circumstance. (*People v. Odle* (1988) 45 Cal.3d 286, 311.) However, in *People v. Prieto,* the Court acknowledged the error of that holding. (*People v. Prieto* (2003) 30 Cal.4th 226, 256.)

Only if a special circumstance is found does the trial proceed to the penalty phase where the jury hears additional evidence and argument from the prosecution and defense and determines whether the penalty will be LWOP or death.

California's scheme in the eligibility phase is directly parallel to Arizona as recognized by *Ring.* (Compare Ariz. Rev. Stat. Ann

13-7-3 (E) & (F) to Cal. Pen. Code 190.2 & 190.3.) The Arizona statute, like section 190.3, lists the specific circumstances which can be considered as aggravating or mitigating the offense. (Ariz. Rev. Stat. Ann. 13-703(F).) Some of these are similar to some of the special circumstances found in California's section 190.2 (compare 190.2(3) with Ariz. Rev. Stat. Ann. 13-703(F)(8); and 190.2(2) with Ariz. Rev. Stat. Ann. 13-703(F)(1); and 190.2(7) with Ariz. Rev. Stat. Ann. 13-703(F)(10); others, however, are equivalent to section 190.3's aggravating circumstances. (Compare 190.3, subds.(c)), (a), (I), (h), (g), & (k), with Ariz. Rev. Stat. Ann.13-703(F)(2), (F)(6),(9)&(3), (F)(5)&(9), (G)(1), (2), and 13-703(G), respectively.)

Like a first-degree murder conviction under the Arizona statutory scheme invalidated by this Court in *Ring*, a jury verdict of guilt with a finding of one or more special circumstances in California, authorizes a maximum penalty of death only in a formal sense. (*Ring, supra*, 536 U.S. at pp. 602-605.) In California, death is the maximum penalty for *all* murder convictions. (See 190.1, subds. (a), (b) & (c.) Section 190(a) provides that the punishment for first-degree murder is 25 years to life, life without the possibility of parole, or death. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190. (*Ibid.*)

Section 190.3 requires the jury to impose LWOP unless the jury

finds the existence of at least one additional aggravating factor above and beyond what was found during the guilt phase, and then finds that the factors in aggravation outweigh any factors in mitigation. According to California's principal sentencing instruction. (*People v. Farnam* (2002) 28 Cal.4th 107, 177), an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. (CALJIC No. 8.88.) In the context of a California capital murder conviction, elements of the crime can only be interpreted to mean the elements necessary to prove both the first degree murder and whatever special circumstance or circumstances were found during the guilt phase.

Only then is the defendant truly eligible for death. The jury then engages in the final, purely normative stage of determining whether a particular defendant should be sentenced to death. Even if the jury concludes that aggravation outweighs mitigation, as noted, it may still impose LWOP.

To summarize, then, there are four steps to determining whether the sentence in a California capital case will be death or LWOP: (1) the defendant must be found guilty of first-degree murder and at least one of

the of the "special circumstances enumerated in section 190.2 must be found; (2) at least one of a *different* list of aggravating factors from section 190.3 must be found; (3) aggravating factors must be found to outweigh any mitigating factors present; and (4) if and only if aggravating factors are found to outweigh mitigating factors present, the jury must choose between death and LWOP.

Of these four steps only the first occurs during the guilt phase of the trial, attended by the Sixth Amendment's protections of unanimity and proof beyond reasonable doubt. In contrast, Steps 2, 3, and 4 occur during the penalty phase. Although occurring in the penalty phase, in actuality steps 2 and 3 are part of the *eligibility* determination as described by this Court in *People v. Tuilaepa* (1992) 4 Cal.4th 569, rather than the *selection* determination. Like the Arizona defendant in *Ring* convicted of first-degree murder, a person convicted of first-degree murder with a special circumstance finding in California is eligible for the death penalty in a formal sense only (*Ring, supra,* 536 U.S. at pp. 602-605); death cannot be imposed until Steps 2 and 3 have occurred.

It is here that California's scheme runs afoul of *Ring* because Steps 2 and 3 do not require juror unanimity or findings beyond reasonable doubt. Yet they do involve factual determinations above and beyond those made in

the guilt phase of the trial necessary for the imposition of death. Therefore, under *Ring*, these factual determinations must be made unanimously and beyond a reasonable doubt. A special circumstance findings pursuant to section 190.2 is not the same as an aggravating factor; it can even serve as a mitigating factor. (See e.g., *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance of section 190.2, subd. (a)(1) can be argued as mitigation if murder was committed by an addict to feed addiction].)

In effect, the California legislature has extended steps of the eligibility phase into the penalty phase of the trial. The selection phase does not begin until Step 4, where the jury considers all of the circumstances of the case and defendant, and determines whether to impose death.

The highest courts of Colorado, Missouri, Nevada, Connecticut, Arizona, and Maryland have concluded that steps wholly analogous to Step 2 of California's process involve factual determinations and are therefore subject to the requirements of *Ring*, and all but Maryland have further concluded that steps analogous to Step 3 of California's process the determination of whether aggravation outweighs mitigation is also a factual determination that must be made beyond a reasonable doubt. (See *Woldt v. People* (Colo. 2003) 64 P.3d 256, 263-267; *State v. Whitfield* (Mo. 2003)

107 S.W.3d 259; *Johnson v. State* (Nev. 2002) 59 P.3d 450, 460; *State v. Rizzo* (Conn. 2003) 833 A.2d 363, 406-407; *State v. Ring* (Ariz. 2003) 65 P.3d 915, 942-943; *Oken v. State* (Md. 2003) 835 A.2d 1105, 1122.) California is alone among the states in holding that the determination of whether aggravating factors are present need not be made by the jury unanimously and beyond reasonable doubt. Yet in *Prieto*, this Court stated that the high cour reasoning in *Ring* does not apply to the penalty-phase determination in California. (See also *People v. Snow*, *supra,*. 30 Cal.4th at p.126, fn. 32.) In *Prieto*, this Court recognized that a California sentencing jury is charged with a duty to find facts in the penalty phase: While each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. This is true *even though the jury must make certain factual findings* in order to consider certain circumstances as aggravating factors. (*Prieto*, *supra*, 30 Cal.4th 226 at p. 263, emphasis added.)

Thus, California's statutory law, jury instructions, and this Court's previous decisions leave no doubt that facts must be found, and fact-finding must occur, before the death penalty may be considered. Yet, this Court has attempted to avoid the mandates of *Ring* by characterizing facts found

during the penalty phase as facts which bear upon but do not necessarily determine which of these two alternative penalties is appropriate. (See *People v. Snow, supra*; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.) This is a meaningless distinction. There are no facts either in Arizona's scheme or in California's scheme that are necessarily determinative of a sentence; in both states the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. The jury s role in the penalty phase of a California capital trial requires that it make factual findings regarding aggravating factors that are a prerequisite to a sentence of death. *Ring* clearly applies. California's statute, as written, applied, and interpreted by this Court, is unconstitutional and must fall.

B. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden For Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose sentence without the firm belief that whatever considerations underlie their sentencing decisions have been at least proved to be more

likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to base "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Cal. R. Ct. 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments, and the Sixth Amendment's

guarantee to a trial by jury. (See e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra,* 122 S.Ct at 1443.)

Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S.343, 346.)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and does not apply at all to the finding of the existence of aggravating factors. There is a long judicial history of requiring that decisions affecting life or liberty be based

on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the state had the burden of proof beyond a reasonable doubt regarding the existence of any factor in aggravation, and the burden of persuasion regarding the propriety of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra,* 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth and Fourteenth Amendments, and is reversible *per se*. (*Sullivan v. Louisiana, supra.*) That should be the result here, too.

C. The Trial Court's Failure To Instruct The Jury on Any Penalty Phase Burden of Proof Violated Appellant's Constitutional Rights To Due Process And Equal Protection Of The Laws, And To Not Be Subjected to Cruel And Unusual Punishment

Appellant's death sentence violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances exist beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on any burden of proof at

all when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358.)

Appellant has argued above that the appropriate burden of proof for the requisite findings that one or more aggravating factors are present, and that such factors outweigh the mitigating factors, is beyond a reasonable doubt, and that the prosecution has the burden of persuasion in all sentencing proceedings. (See, Section A, *ante*.) In any event, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; emphasis added.) The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove

mitigation in penalty phase would continue to believe that. Such jurors do exist.[49] This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes, supra,* 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v.*

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49. See, e.g., *People v. Dunkle*, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at p. 725.

Florida, *supra*, 428 U.S. at p. 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either. Such chaos is not allowed for factual findings in non-capital cases, or even in sentencing proceedings before a judge after all essential foundational factors have been found by a jury.

The error in failing to instruct the jury on what the proper burden of proof is or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.) In cases in which the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the burden of persuasion to the state, and another assigns it to the defendant.

D. California Law Violates The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Unanimous Jury Agreement On Aggravating Factors.

Jury Agreement

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord, People v. Bolin* (1998) 18 Cal.4th 297, 335-336; *People v. Miranda* (1988) 44 Cal.3d 57, 99.) Consistent with this construction of California's capital sentencing scheme, no instruction was given requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warrants the sentence of death. Indeed, on the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty which would have lost by a 1-11 vote, had it been put to the jury as a reason for the death penalty.

It is inconceivable that a death verdict would satisfy the Eighth and

Fourteenth Amendments if it were based on (I) each juror finding a different set of aggravating circumstances, (ii) the jury voting separately on whether each juror's individual set of aggravating circumstances warrants death, and (iii) each such vote coming out 1-11 against that being an appropriate basis for death (for example, because other jurors were not convinced that all of those circumstances actually existed, and were not convinced that the subset of those circumstances which they found to exist actually warranted death). Nothing in this record precludes such a possibility. The result here is thus akin to the chaotic and unconstitutional result suggested by the plurality opinion in *Schad v. Arizona* (1991) 501 U.S. 624, 633 [plur. opn. of Souter, J.].

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefore, including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See, *Murray's Lessee, supra*; *Griffin v. United States, supra.*) And it violates the Fifth, Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death

penalty. A death sentence under those circumstances would be so arbitrary and capricious as to fail Fifth, Eighth and Fourteenth Amendment scrutiny. (See, e.g., *Gregg v. Georgia, supra,* 428 U.S. at pp. 188-189.)

Under *Ring v. Arizona, supra,* it would also violate the Sixth Amendment's guarantee of a trial by jury. The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical elements of California's sentencing scheme, and a prerequisite to the weighing process in which normative determinations are made. The U.S. Supreme Court has held that such determinations must be made by a jury, and cannot be somehow attended with fewer procedural protections than decisions of much fewer consequences. See Section A, ante.

For all of these reasons, the sentence of death violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

Jury Unanimity

Of the twenty-two states like California that vest the responsibility for death penalty sentencing on the jury, fourteen require that the jury unanimously agree on the aggravating factors proven.[50] California does not

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50. See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(I)

have such a requirement.

Thus, appellant's jurors were never told that they were required to agree as to which factors in aggravation had been proven. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from the factors relied on by the other jurors, i.e., with no actual agreement on why appellant should be condemned.

The United States Supreme Court decision in *Apprendi v. New Jersey*, *supra*, confirms that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantees of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (*Id.*, 530 U.S. at 478.) In *Apprendi* the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved to the jury's satisfaction beyond a reasonable doubt. Under California's capital sentencing scheme, a death sentence may not be imposed absent findings

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(1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

(1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) Accordingly, these findings had to be found beyond a reasonable doubt by a unanimous jury.

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*, *supra*, 52 Cal.3d at 749.) This holding was overruled by *Ring v. Arizona, supra*, which held that any factual findings prerequisite to a death sentence must be found beyond a reasonable doubt by a unanimous jury. (See Section A, *ante*.)

The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[51] *accord*

51.The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. `It is of vital importance' that the decisions made in that context `be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique `in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of

Johnson v. Mississippi, *supra*, 486 U.S. at p. 584), the Fifth, Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

The finding of an aggravating circumstance is such a finding. An enhancing allegation in a non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) Since capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. at 957, 994), and certainly no less (*Ring*, *supra,* 536 U.S. 617-618) and since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, (9th Cir 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.[52]

Burger, C.J.) (stating that the `qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) (`[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." *(Monge v. California, supra,* 524 U.S. at 731-732.)

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

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[53] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or

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53.The first sentence of Article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." (*People v. Miranda*, *supra*, 44 Cal.3d at p. 99.) But unanimity is not limited to final verdicts. For example, it is not enough that jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281-282.) It is only fair and rational that, where jurors are charged with the most serious task with which any jury is ever confronted – determining whether the aggravating circumstances are so substantial in comparison to the mitigating as to warrant death – unanimity as to the existence of particular aggravating factor supporting that decision, and as to the fact that

such factors outweigh the mitigating factors, likewise be required. These "foundational factors" of the sentencing decision are precisely the types of determinations for which appellant is entitled to unanimous jury verdicts beyond a reasonable doubt. (See *Ring v. Arizona, supra.*)

This claim must be considered in light of *Cunningham v. California* (2007) 549 U.S. 270. *Cunningham* supports appellant's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by the jury beyond a reasonable doubt and by unanimous decision of the jury. Because of *Cunningham*, this Court's effort to distinguish *Ring v. Arizona, supra,* and *Blakely v. Washington* (2004) 542 U.S. 296 should be re-examined. (See *People v. Prieto* (2003) 30 Cal.4th 226, 275-276 [rejecting the argument that *Blakely* requires findings beyond a reasonable doubt] and *People v. Morrison* (2004) 34 Cal.4th 698, 731 [same].)

The *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi v. New Jersey, supra,* 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. The Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term

only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington*, *supra,* 542 U.S. at pp. 303-304.)

In *Cunningham v. California*, *supra*, the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law. The question was whether the Sixth Amendment right to a jury trial require that the aggravating facts used to sentence a noncapital defendant to the upper term (rather than to the presumptive middle term) be proved beyond a reasonable doubt The High Court held that it did, reiterating its holding that the federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of fact finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.* at p.288) citing *People v. Black* (2005) 35 Cal.4th

1238, 1254) so that the upper term (rather than the middle term) is the statutory maximum. The majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth Amendment: "We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." (*Id.* at p.290)

Justice Ginsburg's majority opinion held that there was a bright line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Ibid.* citing to *Blakely*, *supra,* 542 U.S., at 305, and n. 8.)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (*People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; see also CALJIC

No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely*, *Ring*, and *Apprendi*.

In *People v. Prieto, supra,* 30 Cal.4th at p. 275, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 462, this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty sentencing is "analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the constitutional question whether the fact finding was something "traditionally" done by the sentencer. The only question relevant to the Sixth Amendment analysis is whether a fact is essential for increased punishment. (*Cunningham v. California, supra*, 549 U.S. at p. 290.)

This Court has also held that California's death penalty statute is not within the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275), or because a death penalty decision involves the "moral

assessment" of facts "as reflects whether defendant should be sentenced to death." (*People v. Moon* (2005) 37 Cal.4th 1, 41, citing *People v. Brown* (1985) 40 Cal.3d 512, 540.) This Court has also held that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow, supra,* 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14.) None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts – it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point.

Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish

to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly, a capital juror does not have to consider aggravation if in the juror's moral judgement the aggravation does not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact of aggravation has to found beyond a reasonable doubt.

The United States Supreme Court in *Blakely* as much as said that its ruling applied to "normative" decisions, without using that phrase. As Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. at p.328.) Merely to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring v. Arizona*, *supra*, 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of *Ring* and *Apprendi*: "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of

punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt."

Because California does not require that aggravation be proved beyond a reasonable doubt, it violates the Sixth Amendment.

A second recent United States Supreme Court case also supports appellant's argument that a sentence must be based on the findings beyond a reasonable doubt by a unanimous jury. In *Brown v. Sanders* (2006) 546 U.S. 212, the High Court clarified the role of aggravating circumstances in California's death penalty scheme: "Our cases have frequently employed the terms 'aggravating circumstance' or 'aggravating factor' to refer to those statutory factors which determine death eligibility in satisfaction of *Furman's* narrowing requirement.(See, e.g., *Tuilaepa v. California,* 512 U.S., at 972.) This terminology becomes confusing when, as in this case, a State employs the term 'aggravating circumstance' to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty." (*Brown v. Sanders*, *supra*, 546 U.S. at p. 216, fn. 2, italics in original.) There can now be no question that

one or more aggravating circumstances above and beyond any findings that make the defendant eligible for death must be found by a California jury before it can consider whether or not to impose a death sentence. (See CALJIC No. 8.88.) As Justice Scalia, the author of *Sanders,* concluded in *Ring:* "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 612.)

In light of *Brown* and *Cunningham,* this Court should re-examine its decisions regarding the applicability of *Ring v. Arizona* to California's death penalty scheme.

The error is reversible *per se*, because it permitted the jury to return a death judgment without making the findings required by law. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-281; *United States v. Gaudin*, *supra,* 515 U.S. at pp. 522-523 [aff'g 28 F.3d at pp. 951-952.]) In any event, given the difficulty of the penalty determination, the State cannot show there is no reasonable possibility (*Chapman v. California*, *supra,* 386 U.S. at p. 24; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259) that the

failure to instruct on the need for unanimity regarding aggravating circumstances contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) As a result, the penalty verdict must be set aside.

E. California Law Violates The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of such a provision does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are elsewhere

considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus, and is required to allege with particularity the circumstances constituting the state's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 267.)[54] The same reasoning applies to the far graver decision to put someone to death. (See also, *People v. Martin* (1986) 42 Cal.3d 437, 449-450 (statement of reasons essential to meaningful appellate review).)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth and Fourteenth Amendments,

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

capital defendants are entitled to more rigorous protections than those afforded non-capital defendants (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994). Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at 383, n. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes, supra*, 52 Cal.3d at 643) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43,79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the

aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[55]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances), and finding that these aggravators outweigh any and all

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55. See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

mitigating circumstances. In some cases, the jury may rely upon aspects of a special circumstance found at the guilt phase trial as a penalty phase aggravating circumstance and conclude that it outweighs the mitigating circumstances, but there is no requirement that the jury treat a special circumstance finding as a penalty phase aggravating factor or that the jury accord such a factor any particular aggravating weight. Thus, absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

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

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has

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

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-

comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. 52, n. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other

cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304; *Thompson v. Oklahoma* (1988) 487 U.S. at 821, 830-31; *Enmund v. Florida* (1982) 458 U.S. 782, 796 n. 22 [102 S.Ct. 3368]; *Coker v. Georgia* (1977) 433 U.S.584, 596 [97 S.Ct. 2861].)

Thirty-one of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238 . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[56]

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56. See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code

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

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute

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Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment. Categories of crimes that warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes".[57] Categories of criminals that warrant such a comparison include persons suffering from insanity (*Ford v. Wainwright* (1986) 477 U.S. 399) or mental retardation; see *Atkins v. Virginia*, *supra*.)

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his

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57. Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more that we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev.1, 30 (1995).)

or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

G. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As Factor In Aggravation Unless Found to Be True Beyond a Reasonable Doubt By A Unanimous Jury

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in § 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 ; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United State's Supreme Court's recent decisions in *Ring v. Arizona, supra,* and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial

guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (See Section A, ante.) The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. See Section A, ante. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

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

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

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

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.)

It is thus likely that appellant's jury aggravated his sentence upon the

basis of what were, as a matter of state law, non-aggravating factors and did so believing that the state – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, as well, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the

evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "arbitrary and capricious action,'" *Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, quoting *Gregg v. Georgia*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

J. California Law that Grants Unbridled Discretion to the Prosecutor Compounds the Effects of Vagueness and Arbitrariness Inherent on the Face of the California Statutory Scheme

Under California law, the individual county prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, this creates a substantial risk of county-by-county arbitrariness. There can be no doubt that under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of any standards to guide the

prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible conditions, including race and economic status. Further, under *People v. Morales* (1989) 48 Cal.3d 527, the prosecutor is free to seek the death penalty in almost every murder case.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme-in charging, prosecuting and submitting a case to the jury as a capital crime- merely compounds, in application, the disastrous effects of vagueness and arbitrariness inherent on the face of the California st6atutory scheme. Just like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina*, *supra,* 428 U.S. 280, such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia, supra,* 408 U.S. 238.

XVI. CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINE THE CONSTITUTIONAL REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

In accordance with CALJIC No. 2.90, the trial court instructed the jury at appellant's trial that appellant was presumed to be innocent until the contrary was proved and that this presumption placed upon the state the burden of proving him guilty beyond a reasonable doubt. (VII CT 1933.) In addition, the jury was also instructed on the meaning of reasonable doubt in

interrelated instructions which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence and which addressed proof of specific intent and/or mental state. (VII CT 1905, 1943-1944.) Except for the fact that they were directed at different evidentiary points, each of these three instructions informed the jury, in essentially identical terms, 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." [58]

This repealed directive was contrary to the requirement that appellant may be convicted only if guilt is proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781.) As a result, appellant's federal and state rights to due process of law, to a jury trial, and to a reliable determination of guilt and penalty were violated. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The problem lies in the fact that the instructions required the jury to accept an interpretation of the evidence that was incriminatory, but only "appear[ed]" to be reasonable. These instructions are constitutionally

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58. The issue of the erroneous circumstantial evidence instructions has not been waived. Penal Code section 1259 provides that "The appellate court may also review any instruction given, refused, or modified even though no objection was made in the lower court, if the substantial rights of the defendant were effected, thereby." (See *People v. Hannon* (1977) 19 Cal.3d 588,600.)

defective in that telling jurors that they "must" accept a guilty interpretation of the evidence as long as it "appears to be reasonable" is blatantly inconsistent with proof beyond a reasonable doubt and allows for a finding of guilt based on a degree of proof less than that required by the Due Process Clause. (See, *Cage v. Louisiana* (1990) 498 U.S. 39 (per curiam) .)

These instructions given in appellant's case were also unconstitutional because they required the jury to draw an incriminatory inference when such an inference merely appeared to be reasonable. The jurors were told that they "Must" accept such an interpretation. Thus, the instructions operated as an impermissible mandatory, conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable." (*Carella v. California* (1989) 491 U.S. 263.)

The erroneous reasonable doubt/circumstantial evidence instructions require reversal of appellant's conviction. The error is reversible without any inquiry into trial evidence, both because it involved the basic standard to be applied at trial, and ths undermined the verdicts in this case, and because the error operated as an improper mandatory, conclusive presumption. (See *Carella v. California, supra,* 491 U.S. at pp. 267-273 (conc. opn of Scalia, J).)

Even if this Court does not find that this error is reversible per se, it is of constitutional magnitude, hence, the state must prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The errors in the instructions' explanation of reasonable doubt/circumstantial evidence require reversal of the entire judgment.

XVII. EVEN IN THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (*Monge v. California, supra,* 524 U.S. at 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural perfections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional

guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights...It encompasses in a sense, 'the right to have rights.'" (*Trop v. Dulles* (1958) 356 U.S. 86, 102.)

If the interest identified is "fundamental", then the courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra, Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The state cannot meet this burden. In this case, the equal protection guarantees of the state and federal constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any

purported justification by the People of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution therefore requires that capital defendant receive at very least the same procedural protections of proof beyond a reasonable doubt as do non-capital felons. By not so requiring, the California death penalty scheme is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

XVIII. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United

States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa has abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website (www. amnesty. org)[59]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied

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59.These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895)159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 ; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 100; *Atkins v. Virginia, supra,* 536 U.S. at pp. 315-316.) It prohibits the use of

forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. (Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina,* O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, at p. 227; see also *Jecker,*

Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311.]

Recently, the United States Supreme Court in *Roper v. Simmons* (2005) 543 U.S. 551, 567, struck down the death penalty for defendants who committed the capital crime as juveniles. In doing so, the Court made reference to the international community's disfavor of the death penalty for juveniles, signaling the High Court's inclination to bring this country more into line with international standards vis a vis capital punishment. (*Ibid.*)

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

XIX. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

There were numerous penalty trial errors in this case. There were also significant guilt phase errors. This Court has recognized that guilt phase errors that may not otherwise be prejudicial as to the guilt phase may nevertheless improperly and adversely impact the jury's penalty determination. (See, for example, *In re Marquez* (1992) 1 Cal.4th 584,605, 607-609.) This Court is also obliged to consider the cumulative effect of multiple errors on the sentencing outcome. (*Taylor v. Kentucky* (1978) 436

U.S. 478, 487-488 ; *People v. Holt* (1984) 37 Cal.3d 436,459.)

The cumulative weight of the guilt and penalty phase errors was prejudicial to appellant. As demonstrated elsewhere in this opening brief with respect to various guilt phase errors, appellant's rights were violated under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the penalty trial, appellant was deprived of a fair and reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Together, the cumulative effect of the errors was prejudicial.

It is both reasonably probable and likely that both the jury's guilt and penalty determination were adversely affected by the cumulative errors. (*Chapman v. California, supra,* 386 U.S. at p. 24.) In the absence of the errors, the outcome would have been more favorable to appellant. It certainly cannot be said that the errors had "no effect" on the jury's penalty verdicts.

CONCLUSION

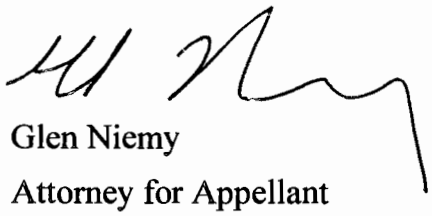
By reason of the foregoing, appellant Justin James Merriman respectfully requests that the judgment of conviction on all counts, the special circumstance findings, and the judgment of death be reversed and the matter remanded to the trial court for a new trial.

Appellant was denied his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The grievous errors deprived appellant of his right to a meaningful determination of guilt and a reliable determination of penalty.

The citizens of the State of California can have no confidence in the reliability of any of the verdicts rendered in this case.

September 13, 2010

Respectfully submitted,



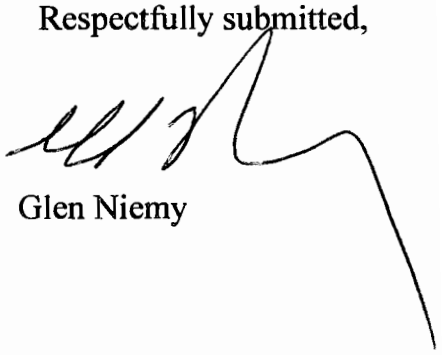
Glen Niemy
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief uses a 13 point New Times Roman type and is 75,641 word in length.

September 13, 2010

Respectfully submitted,



Glen Niemy

DECLARATION OF SERVICE

re: People v. Justin Merriman
S097363

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Opening Brief,** on each of the following by placing the same in an envelop addressed (respectively)

Jaime L. Fuster
Office of the Attorney General
300 South Spring St
Los Angeles, CA 90013

Mordecai Garelick, Esq
California Appellate Project
101 2nd St
Ste 600
San Francisco, CA 94105

Justin James Merriman
T 15293
San Quentin State Prison
San Quentin, CA 94974

District Attorney of Ventura County
800 South Victoria Ave
Ventura, CA 93009

Superior Court of Ventura County (Appeals Division)
800 South Victoria Ave
Ventura, CA 93009

Susan Garvey, Esq
Habeas Corpus Resource Center
303 Second St
Ste 400
San Francisco, CA 94107

Each envelop was then on September 15, 2010, sealed and placed in the United States Mail, at Bridgton, ME, County of Cumberland, the county in which I have my law office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws of California and Maine that the foregoing is true and correct this September 15, 2010, at Bridgton, Maine.

Glen Niemy