S 114671

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH SCHULTZ,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA CASE NO. CR 49517
HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

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TABLE OF CONTENTS

THE DEFENSE CASE

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CALIFORNIA STATUTES

OTHER STATUTES

CONSTITUTIONAL PROVISIONS

RULES

OTHER AUTHORITIES

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH SCHULTZ,

Defendant and Appellant.

STATEMENT OF JURISDICTION

This is an automatic appeal from a conviction and judgment of death entered against appellant, Michael Joseph Schultz, in the Superior Court of the State of California in and for the County of Ventura on March 26, 2003.

The appeal is authorized by Penal Code section 1239, subdivision (b)[1] and California Rules of Court, rule 8.600(a). (22RT 4082-4096[2])

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[1] All statutory references are to the California Penal Code unless specifically stated otherwise.

[2] Appellant's Opening Brief adopts the following conventions to refer to the record on appeal certified to this Court on May 25, 2011:
"CT" will refer to the Clerk's Transcript on Appeal.
"AUG-CT" will refer to the Augmented Clerk's Transcript on Appeal.
"SUPP-CT" will refer to the Supplemental Clerk's Transcript on Appeal.
"2SUPP-CT" will refer to the Second Supplemental Clerk's Transcript on Appeal.
"JQ" will refer to the Juror Questionnaires.
"RT" will refer to Reporter's Transcript on Appeal.
"SUPP-RT" will refer to the Supplemental Reporter's Transcript on Appeal.
The record also contains a volume of sealed documents that were unsealed by the superior court on April 9, 2001. No reference is made to any of these documents in this opening brief.

INTRODUCTION

Michael Schultz grew up under the thumb of a father who abused alcohol and prescription and non-prescription drugs. Anthony Schultz, II[3] introduced his son to a host of licit and illicit drugs; and, by the time Schultz was in the third grade, he was routinely using mind-altering drugs. Not surprisingly, by the time he was a teenager, Schultz was hopelessly addicted to methamphetamine.

In August 1993, Schultz — cripplingly dependent on methamphetamine and essentially estranged from his family because of his drug use — had no permanent home and was forced to live a nomadic existence bouncing from one residence to another in the Oxnard-Port Hueneme area.

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[3] Schultz's brother, Anthony Schultz, III, testified at trial. Although Schultz's father, Anthony Schultz, II, did not testify at trial, many witnesses made reference to him. In order to avoid confusion between Schultz's father and brother, appellant's opening brief will refer to Anthony Schultz II as Schultz, Sr. and to Anthony Schultz III as Anthony III. Schultz intends no disrespect to either Anthony Schultz II or to Anthony Schultz III.

In the early morning hours of August 5, 1993, Schultz wandered the empty streets of Port Hueneme in a methamphetamine haze until he happened upon Cynthia Burger's open garage door. He wandered into the garage and then into the living area of Burger's condominium. He found Burger asleep in the upstairs bedroom. He raped and strangled her and left after setting the bedroom on fire.

Three years later, Schultz — again in the grips of a methamphetamine binge — was arrested while attempting to break into a coin machine in the student lounge on the Ventura campus of Cal State Northridge.

While imprisoned for the Cal State break-in and awaiting trial on this action, Schultz — free from the clutches of methamphetamine — was a model prisoner and a trusted leader of a racially-diverse, inmate, fire-fighting unit.

When Schultz's body and mind were controlled by methamphetamine, he committed the only other violent crime. When his

body and mind were controlled by methamphetamine or other ethical or unethical drugs, he became embroiled in squabbles with friends and family. But, weaned from methamphetamine while incarcerated, Schultz re-established his relationship with his mother and maintained good relations with prison personnel and fellow inmates.

STATEMENT OF PROCEDURAL HISTORY

In October, 2000, the Ventura County Grand Jury returned an indictment charging Michael Joseph Schultz with the willful, deliberate, and premeditated murder of Cynthia Burger in violation of section 187, subdivision (a)(1). (1CT 1, 1RT 182-185) The indictment specially alleged Schultz murdered Burger while engaged in the commission, or attempted commission, of the crimes of rape and burglary. Each special allegation is a special circumstance described in section 190.2, subdivision (a)(17).[4] (1CT 1-2)

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[4] Section 190.2 was amended between 1993 when Burger died and 2003 when Schultz was tried. In 1993, a murder committed during the commission or attempted commission of rape was a special circumstance under section 190.2, subdivision (a)(17)(iii); in 2003 when Schultz was tried, rape was a special circumstance under section 190.2, subdivision (a)(17)(C). In 1993, a murder committed during the commission or attempted commission of a burglary was a special circumstance under section 190.2, subdivision (a)(17)(vii); and, in 2003, burglary was a special circumstance under section 190.2, subdivision (1)(17)(G). Although the numbering changed, the definition of both special circumstances remained the same.

The indictment was filed with the Ventura County Superior Court and assigned case number CR49517. (1CT 3)

Schultz pled not guilty to the charge and denied the special allegations. (1CT 39, 2RT 195)

On November 16, 2001, Schultz filed a motion to dismiss the grand jury indictment on the ground the selection process systematically excluded a fair and proportional percentage of women and young people from the panel. (3CT 602-833, 834-858, 4CT 1120-1129, 1130-1137, 1145-1182, 1183-1211, 1215-1218, 1219-1227)

The judicial council assigned the motion to the Honorable Frank Ochoa in neighboring Santa Barbara County. (4CT 1069-1070)

Judge Ochoa granted Schultz's motion and set aside the indictment pursuant to section 997 on February 1, 2002. The ruling was filed in the Ventura County Superior Court on Monday, February 4, 2002 — the last day to commence trial. (5CT 1404-1434, 6RT 856)

To avoid dismissal, the prosecutor hastily filed an information that mimicked the indictment. (6CT 1446-1448, 6RT 878, 880)

Schultz objected to the filing of the information, but he pled not guilty and denied the special allegations. (6CT 1446-1449, 6RT 880)

Schultz later successfully moved for an order dismissing the newly-filed information under section 995. (6CT 1478-1486, 1487-1493, 1494-1502, 1524-1533, 1534-1548, 1555-1560, 1565-1572,1573-1574, 6RT 929-931)

The People immediately filed a felony complaint with a new case number — case number 2002-004949. (6CT 1561-1564) Schultz again pled not guilty and denied the special allegations. (6CT 1577-1578, 6RT 936-936A)

The People filed an Alternative Writ of Mandate seeking an order setting aside the ruling dismissing the action under section 995. (6CT 1579-1580)

On July 15, 2002, in a published opinion, the Second Appellate District, Division Six reversed the order granting Schultz's motion to set aside the information under section 995. (6CT 1592-1602)

Schultz filed a petition for review with this Court. This Court denied review and remanded the matter to the Court of Appeal with an order that the opinion be decertified for publication. (5AUG-CT 1061, 1098)

Once jurisdiction was again vested in the superior court, the court reinstated the information originally filed in case number CR49517, consolidated case number 2002-004949 into case number CR49517, and granted leave to file a first amended felony information deleting count 2 and the special circumstances appended to count two.[5] (7CT 1828-1831, 6RT 952, 957-959)

Schultz again pled not guilty and denied all of the special allegations. (6RT 957-959)

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[5] Count two was entirely duplicative of count one; so the amendment did not change the nature of the charges against Schultz.

After a preliminary hearing, the court held Schultz to answer. (7CT 1842, 6RT 1228-1229)

The case was called for trial on January 13, 2003. (10CT 2535-2539, 9RT 1427) Jury selection began on that date and continued until January 23, 2003. (10CT 2535-2539, 9RT 1427, 12RT 2192)

The prosecution began its guilt-phase case on January 27, 2003 and rested its guilt-phase case on January 30, 2003. (10CT 2574, 2620, 13RT 2279, 16RT 2753)

Schultz rested his guilt-phase case on the state of the evidence on the same date. (10CT 2620-2622, 16RT 2753)

Jury deliberations began on January 30, 2003. Later that day, the jury found Schultz guilty of the first-degree murder of Burger and found both special circumstances true. (10CT 2705-2708, 16RT 2904-2908)

The prosecution began its penalty-phase case on February 10, 2003 and concluded its case on February 13, 2003. (11CT 2843-2847, 2863-2866, 2892-2896, 17RT 2977, 19RT 3334)

Schultz began presentation of his penalty-phase case on February 13, 2003 and concluded his case on February 20, 2003. (11CT 2892-2896, 2915-2918, 2918-2920, 2921-2925, 19RT 3334, 21RT 3781)

The prosecution completed its rebuttal the same day. (11CT 2921-2925, 21RT 3820)

Jury deliberations on penalty began on February 24, 2003; and, on February 26, 2003, the jury returned a verdict setting the penalty at death. (11CT 2932, 3040-3042, 22RT 4057, 4073-4076)

On March 26, 2003, the court denied Schultz's Motion to Reduce Penalty to Life in Prison Without Parole, found the special allegations true as required by section 190.4, subdivision (a), and imposed a sentence of death. (12CT 3101-3103, 3104-3107, 3109-3112, 22RT 4086-4089, 4095-4096)

This appeal is automatic. (Cal. Rules of Ct., rule 8.600(a).)

STATEMENT OF THE FACTS

GUILT PHASE

August 5, 1993 — A fire is discovered at Burger's condominium.

Cynthia Burger[6] lived alone in one of the many semi-detached condominiums that made up the Marlborough Complex, a condominium community in Port Hueneme, California. (13RT 2287, 14RT 2463)

Aaron Casper lived in a condominium that was catty-corner to Burger's. (13RT 2284, 2285) Because no one in the complex ever left their garage door open overnight, Casper was startled to see Burger's garage door open as he backed out of his garage and headed to work, as he usually did, between 3:30 a.m. and 3:40 a.m. on August 5, 1993. (13RT 2285-2286)

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[6] Ms. Burger's parents, Had and Virgie Burger, testified at the penalty phase of the trial. In order to avoid confusion among the victim and either of her parents, appellant's opening brief refers to Cynthia Burger as Burger, to her mother, Virgie Burger, as Virgie and to her father, Had Burger, as Had. Appellant intends no disrespect to Had or Virgie Burger or to the Burger family.

Feeling slightly unsettled by the open garage door, Casper sat quietly in his car for a minute or two and then — hearing nothing untoward — went on his way to work. (13RT 2285-2286)

Two hours later, Burger's contiguous neighbor discovered that her condominium was on fire. The neighbor and the first two police officers on the scene tried to enter Burger's condominium; but, without protective clothing, the smoke and heat quickly thwarted their efforts. (13RT 2293, 2294-2295, 2296, 2301)

In accordance with their custom, firefighters from the Oxnard Fire Department, the Ventura County Fire Department, and the Naval Construction Battalion Fire Department based at the Port Hueneme Naval Station responded jointly, and the fire — which had started in, and was largely limited to, Burger's bedroom — was extinguished in short order. (12RT 2309, 13RT 2327)

When the fire was under control, two firefighters searched the condominium and found Burger's lifeless body floating face down in the bathtub on the first floor. Her matted hair — an unnatural

yellow-orange color seemingly coated with a foamy soap-like substance — was spread out on the top of the water. (13RT 2369-2370, 14RT 2446-2447) The bathtub was half-filled with water and household chemicals. (13RT 2347, 2348, 14RT 2511)

Firefighters immediately instituted resuscitation efforts but quickly abandoned their efforts because it was apparent Burger was dead. (16RT 2349, 2369-2370, 2376-2377)

August 1993 — the investigation by the police and coroner.

About 45 minutes after the original call had been received, the Port Hueneme Police Department arrived to inspect the scene and collect evidence. (14RT 2445, 2446)

Police found the wires for the first-floor smoke detector dangling from the ceiling and the smoke detector in the staircase dismantled. (14RT 2453, 2466) Investigators found smoke-detector components on the floor in the downstairs hallway, on the staircase, and in the bedroom. (14RT 2419, 2421-2421)

Police found no signs of forced entry. (14RT 2459)

Authorities asked Sandra Woodward, Burger's older sister, to come to the scene to assist the detectives in determining if any items were missing. (14RT 2468) Woodward told police she could not locate Burger's purse and the wallet and credit cards Burger usually kept in her purse or two rings Burger usually kept on a glass ring holder in the bathroom. (14RT 2468-2469, 2469-2470, 2473)

The coroner, Dr. Ronald Louis O'Halloran, performed an autopsy on Burger on the day she died and concluded she died as a result of asphyxiation by strangulation. (15RT 2648, 2649, 2657-2658)

O'Halloran testified he believed Burger was dead at the time of the fire because he found no evidence Burger had inhaled any smoke and no evidence of carbon monoxide in her blood. (15RT 2654)

O'Halloran opined Burger had been forcibly penetrated because he found three lacerations in the pubic area and bruising of the lower portion of the vagina. (15RT 2666-2667)

O'Halloran swabbed and aspirated Burger's vaginal canal to remove any possible seminal fluid and released the swabs to the Port Hueneme Police Department. (14RT 2454-2455, 15RT 2641, 2669)

The department delivered the swabs to Michael Parigian, the assistant laboratory manager of the Ventura County Sheriff's Department Crime Laboratory. Parigian determined that the sample contained semen and preserved the material for future testing. (15RT 2685)

O'Halloran also collected and preserved a single, dark, long, human hair that he found on Burger's nightgown. (15RT 2673)

Two weeks after the fire, James R. Allen, an expert in fire reconstruction visited Burger's condominium to determine the fire's point of origin, characteristics, and duration. (14RT 2386-2387, 2390)

Based upon his reconstruction of the second-floor bedroom, Allen opined the fire started when an open flame was applied to the

synthetic bedclothes at the foot of the bed, erupted quickly, and was extinguished quickly. (14RT 2394-2396, 2396-2397, 2404, 2418, 2419)

Investigation between 1993 and 1996.

In March, 1996, Parigian sent some of the preserved swabs to Orchid Cellmark Laboratories in Germantown, Maryland for deoxyribonucleic ("DNA") extraction and profiling. (15RT 2686)

Paula Yates,[7] an Orchid Cellmark employee, extracted sperm and non-sperm cells from the samples, acquired DNA from both types of cells, and compiled a DNA profile on each of the two DNAs she had acquired. (15RT 2707, 2709)

Once Yates completed her examination, she returned the material to the Ventura County Sheriff's Department Crime Laboratory. (15RT 2687, 2709)

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[7] Although Paula Yates is now Paula Clifton, she is consistently referred to as Paula Yates in the record, and appellant's opening brief adopts that convention simply to avoid confusion. Appellant intends no disrespect to Ms. Clifton. (15RT 2709)

Mooney's visit to Mt. Gleason in August 1999.

In late July or early August 1993, Schultz met Therresa Mooney. They began dating and became an instant couple. (14RT 2484, 2485-2486, 2526, 18RT 3228)

Mooney and Schultz were still a couple when Schultz was sentenced to prison in 1996.[8] (14RT 2486)

Mooney and Schultz continued their relationship while he was incarcerated, and Mooney regularly visited him. (13RT 2486) While he was incarcerated, Schultz re-established a relationship with his mother, Brunhilde Loprieato,[9] and Bruni and Mooney often visited him together. (13RT 2487, 14RT 2529, 15RT 2587)

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[8] Although the reason for this incarceration was not explained during the guilt phase, testimony during the penalty phase established that Schultz had been sentenced to prison after pleading guilty to a number of charges stemming from a coin machine break-in in the student lounge on the Ventura Campus of Cal State Northridge. (17RT 3042-3042)

[9] Brunhilde Loprieato is always referred to in the transcript as Bruni Loprieato. Bruni Loprieato and her third husband Nickolas Loprieato testified at trial. In order to avoid confusion, appellant's opening brief refers to Bruni Loprieato as Bruni and

By August 1999, Schultz was housed at the Mt. Gleason Fire Camp, a low-security incarceration facility. He and Mooney were engaged to be married. The couple expected he would be released in six months or less,[10] and they were eagerly anticipating his release. (14RT 2486-2487, 2490, 2491-2492, 2527, 15RT 2589)

Because his release was imminent, Mooney was flabbergasted when Schultz sought her help in implementing a plan he had developed to escape from Mt. Gleason. (14RT 2487, 2489, 2491) Schultz explained that he wanted to escape because prison authorities would soon take a DNA sample, and he feared that sample might link him to a murder a companion had committed many years earlier during a scuffle with a homeowner who had discovered Schultz and his companion burgling his house. (14RT 2488-2489)

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to Nickolas Loprieato as Loprieato. Appellant intends no disrespect to either Bruni or Nickolas Loprieato.

[10] The couple's belief that Schultz would be released in six months was erroneous. The Department of Corrections had miscalculated the time for his release, and it was later determined that Schultz had to serve more time than he and Mooney had anticipated. (20RT 3726)

Mooney refused to help him with his escape plan. (14RT 2491, 2532)

Mooney's and Bruni's visit with Schultz a week later.

A week later, Mooney shared Schultz's escape plan with Bruni as the two women drove to Mt. Gleason for a visit. (14RT 2493, 2533, 15RT 2587) Bruni was as dumbfounded as Mooney had been; and, as soon as they reached the camp, Bruni berated Schultz for planning an escape and adamantly insisted neither she nor Mooney would assist him in any way. (14RT 2496, 15RT 2611)

Mooney harbored serious doubts that the burglary story was true; so, when she and Schultz were alone, Mooney shared her doubts with Schultz. (14RT 2497) Faced with Mooney's skepticism and buoyed by her assurance nothing would change her feelings for him, Schultz changed his story and told Mooney he — not a companion — had killed someone. (13RT 2497-2498)

After listening to Schultz's story, Mooney told him she had "a weird feeling" Schultz had raped and killed a woman. (14RT 2498)

In response to Mooney's hunches, Schultz suggested that she search for a story about the death of Cindy Burger and a fire in the Ventura-area newspapers printed on August 4, 1993, or August 5, 1993. (14RT 2499)

Mooney and Schultz decided to keep the information about Burger to themselves. (14RT 2500)

Schultz tells Mooney he was involved in Burger's murder.

Sometime in the next few weeks, Mooney and her friend, Terry Kephart, found a newspaper article in the local library about the Burger murder. (14RT 2502-2503, 2538-2539)

Mooney took the newspaper article with her when she visited Schultz the following weekend. Schultz read the article and took exception to some of the statements contained in the article. (14RT 2504-2506, 2539)

Mooney attached significance to the fact she had been having nightmares about Schultz choking her; so, she asked Schultz if he

had strangled Burger. Schultz said he had smothered her with a pillow. (14RT 2506)

Mooney then peppered Schultz with questions. (14RT 2544) In response to Mooney's questions, Schultz said he had taken a lot of methamphetamine earlier in the day; and, while wandering around alone between 2:30 and 3:00 a.m., he had stumbled across Burger's open garage door. (14RT 2508, 2528, 2542, 2543, 2549)

As the questioning progressed, Schultz told Mooney he entered the garage planning to steal something. Once inside the garage, he found a key that unlocked the door that separated the garage from the residence, opened the door, and went into the condominium. (14RT 2507-2508) He poked around on the first floor for a while and then went upstairs where he found Burger in her bedroom. He raped and killed her. (14RT 2509)

Mooney asked why he had killed Burger, and Schultz replied he feared his distinctive appearance would make it easy for Burger to identify him. (14RT 2510, 2547)

When Mooney asked why Burger was found in the bathtub, Schultz explained that he feared residual semen might identify him; so he carried Burger's body downstairs to the bathroom, placed it in the bathtub, and filled the tub with water, bleach, and household chemicals. (14RT 2511)

Finally, he said that, fearing hair or sperm on the bedclothes might also identify him, he used a candle to ignite the bedclothes. (14RT 2511-2512, 2547)

He told Mooney he pilfered some things from the condominium to make it appear that Burger had been burglarized. (14RT 2518, 2443-2554)

When Schultz had completed his narrative, Mooney told him that Kephart had a friend in the police department who — for a $200 fee — would check the files to determine whether any DNA had been recovered at the Burger crime scene. Mooney urged Schultz to put his escape plan on hold until she found out if DNA existed. (14RT 2513)

Sometime later, Mooney gave Kephart $100 to pay for the insider information regarding any DNA the police had found in the Burger case. Kephart reported back that the DNA from the Burger crime scene was "not legible." (14RT 2514-2516)

Mooney relayed Kephart's report to Schultz by telephone. (14RT 2518)

Mooney's and Bruni's last visit to Mt. Gleason

Mooney shared everything Schultz had told her about the Burger murder with Bruni during the women's next ride to Mt. Gleason. (14RT 2519, 2614, 15RT 2595)

The instant the women reached the prison, Bruni confronted Schultz and demanded to know whether what Mooney had told her was true. Schultz hung his head and walked away. (14RT 2521, 15RT 2595-2596)

Mooney contacts the police, and the investigation into Burger's murder is reopened.

One year later, on August 29, 2000, Mooney made an anonymous call to the Ventura Police Department and reported she had information linking Schultz to the Burger case. (14RT 2480-2481, 2522-2523, 2524,)

The officer who took the call found that Burger had been murdered in 1993 in Port Hueneme, and he provided the Port Hueneme Police Department and the district attorney's office with Mooney's telephone number. (14RT 2481, 2482)

Investigation by authorities after Mooney's report.

One month after Mooney contacted the Ventura Police Department — on September 26, 2000 — Dennis Fitzgerald, an investigator in the district attorney's office, obtained a blood and hair sample from Schultz, who was incarcerated at Jamestown Prison. (14RT 2556-2558)

The Ventura County Sheriff's Department Crime Laboratory bundled a blood sample taken from Schultz with the vaginal swabs taken at autopsy and released them for delivery to Orchid Cellmark. (15RT 2688)

In November 2000, Wendy Magee, a DNA analyst employed by Orchid Cellmark, extracted DNA from the blood sample known to have been obtained from Schultz and developed a profile of that DNA. (15RT 2712-2713)

Magee testified she compared the profile she obtained with the male profile Yates had developed in 1996 and concluded that the likelihood the sperm found at autopsy were the sperm of a Caucasian other than Schultz was 1 in 24×10^{48}. (15RT 2713-2714)

PENALTY PHASE

THE PROSECUTION'S CASE

Prior convictions

In 1992, Schultz was convicted of residential burglary. He was initially granted probation; but, probation was later revoked, and he served a short prison sentence. He was paroled on June 21, 1993. (17RT 3044-3045, 3048)

In August 1996, Schultz was apprehended trying to break into the coin box on a vending machine in the student lounge on the Ventura campus of Cal State Northridge. He pled guilty to second-degree burglary, felony battery resulting in serious bodily injury to a police officer, felony battery causing injury to another police officer, two counts of misdemeanor resisting or obstructing of a police officer in the performance of his duty, and misdemeanor being under the influence of a controlled substance. (17RT 3042-3043)

Unadjudicated conduct

Domestic squabbles involving family members

a. Michael Hecht.

In June 1989, Anthony Schultz II ("Schultz, Sr.") was living with Michael Hecht's mother and operating a refrigeration repair business with Hecht and his two sons, Schultz and Anthony Schultz III ("Schultz III"). (18RT 3286, 3287-3289, 3297 3303)

Schultz, Sr. abruptly demanded that Hecht leave the household and the business. (18RT 3289, 3297)

A free-for-all broke out as Hecht was gathering his belongings. Schultz, Sr. enlisted Schultz to help him wrestle Hecht to the ground and pummel him. (18RT 3295-3296) Hecht retaliated by slashing at Schultz, Sr. and Schultz with a pocketknife. (18RT 3297-3298, 3318)

Hecht summoned the police. (18RT 3299) When the police arrived, they arrested Hecht. He was incarcerated for three weeks and released when the charges were dropped. (18RT 3300)

Hecht suffered a swollen and dislocated jaw, a bloody nose, a concussion, and injuries to his ribs. (18RT 3300) Schultz suffered knife wounds. (18RT 32998-3299)

b. Nickolas Loprieato

Schultz was particularly respectful of his mother, so Nickolas Loprieato ("Loprieato"), his stepfather, was surprised when, on April 14, 1991, he found Schultz and his mother squabbling about Schultz's use of the washing machine in the Loprieato residence. (18RT 3190-3192, 3200)

As Loprieato chastised Schultz for not respecting his mother, Schultz grabbed him and restrained him with a chokehold. (18RT 3192-3194)

Schultz released Loprieato unharmed when Bruni demanded that he do so. (18RT 3198-3199)

A police report was filed. (18RT 3197)

c. Therresa Mooney

1. Beach incident.

Three or four weeks after Schultz and Mooney became a couple in early August 1993, they attended a beach party with friends. (18RT 3208-3209) When Mooney spent time with a male companion, who was not part of their party, Schultz became jealous. (18RT 3210)

Mooney testified Schultz became angry when she would not leave her companion and turn her attention to him. Mooney testified Schultz drove his car at her male companion in a pique of jealousy whereupon her male companion picked up a metal pipe to protect himself. (18RT 3210-3212, 3214-3215)

Mooney's daughter, Missy Rodriguez, remembered the incident differently. Missy testified Mooney taunted Schultz, and when Mooney's male companion tried to assault Schultz with a metal pipe, Schultz drove his car at his attacker. (19RT 3271-3272)

2. Incidents involving only Mooney and Schultz at home.

In 1994, during an argument over Schultz's continued drug use, Schultz kicked Mooney in the buttocks. (18RT 3219-3220)

In January 1995, Mooney was again angry with Schultz because of his drug use. Mooney repeatedly poked Schultz in the chest as she lectured him about the need to stop using drugs. Schultz pushed his knee into her buttocks. (18RT 3220)

On another occasion when Mooney had broken off her relationship with Schultz because of his continued drug use, he was forced to live in his truck. (18RT 3220) On a rainy day, Mooney allowed him into her garage. After smoking methamphetamine, Schultz took possession of Mooney's house and car keys and refused to give them to her. An argument ensued. (18RT 3220) When police arrived Mooney and Schultz were still quarrelling, and Schultz was twisting Mooney's hand. The police separated Mooney and Schultz and told both of them to calm down. (18RT 3221)

In April 1994, when Mooney announced her decision to break up with Schultz, he threatened to throw her television on the floor and pushed the door off its hinges. (18RT 3221-3222)

3. Incident involving Darryl Allen.

In February 1995, Mooney and Schultz were not dating. (18RT 3215)

Mooney testified that one evening as she returned from a date with Darryl Allen, Schultz rushed at the car in rage shouting that Mooney was his girlfriend. Once he reached the car, he assaulted Allen. Allen retrieved a sledgehammer handle he kept in the car and attempted to defend himself, but Schultz wrested the handle from him and broke the windshield of Allen's car as Allen sped off. (18RT 3216-3217)

Allen described the same incident quite differently. Allen stated he came upon Mooney and Schultz loudly arguing about their future in the street as he arrived to spend some time with

Mooney. (18RT 3253) Schultz rushed at Allen, grabbed his shirt, ripped it from his body, and punched him in the head. (18RT 3253) Allen grabbed the sledge-hammer handle from his car to defend himself and Schultz grabbed him. Schultz released him at Mooney's request. (18RT 3254)

Squabble with a neighbor over a $5.00 debt.

In April 1995, Schultz became angry when Richard Bowens's girlfriend, Lois, could not repay a $5.00 loan. (18RT 3176, 3177, 3185) Bowens intervened when Schultz shook Lois and she called for help. (18RT 3179)

After Bowens seemingly brokered a peaceful solution, Schultz started to walk away. But, Schultz unexpectedly turned and aimed a punch at Bowens. Bowens moved quickly, and the punch merely grazed his left cheek. (18RT 3180-3181)

As soon as Bowens told Lois to call the police, Schultz fled. (18RT 3181)

The police eventually arrived and took a report. (18RT 3182)

Testimony from Burger's family about the effect her death has had on the family

Had Burger, Burger's father, learned his daughter had died when a sheriff notified him there had been a fire at her home and she had apparently drowned while taking refuge in the bathtub. (18RT 3164-3165) When Had contacted the coroner's office, he learned Burger had been strangled. (18RT 3165)

The first year after Burger's death was the most difficult one for her family. Had visited the cemetery every week to talk to her. (18RT 3165, 3166)

Over time, Had had reconciled himself to the idea that he would never know the perpetrator's identity. (18RT 3166) Had often said he hoped the perpetrator would never be caught because he didn't want to go through the whole grieving process again. (18RT 3166)

Virgie Burger was heartbroken by her daughter's death and testified she has never fully recovered. (18RT 3170)

For years after the incident, Virgie would look at every man she saw — strangers and relatives alike — and wonder what would motivate a man to harm a woman as Burger had been harmed. (18RT 3171)

When Virgie learned the culprit had been found, she knew she would have to talk out loud about her daughter, and she dreaded doing so. (18RT 3171)

Woodward is six years older than her sister and always expected her sister would outlive her. She had a very difficult time accepting the fact Burger had predeceased her. (19RT 3322-3325, 3325, 3332)

During the seven years that Burger's murder remained unsolved, Woodward knew that the police believed that Burger was the victim of someone she knew. (19RT 3325) Woodward had provided police with the names of many of Burger's friends and acquaintances, and she found she was suspicious of people who remained a part of her life. (19RT 3326)

DEFENSE CASE

Testimony about Schultz's family life, the physical and mental abuse inflicted by his father, and his early introduction to drugs

Schultz — the third and last child of Bruni and Schultz, Sr. — was born in Inglewood in 1969. (20RT 3525)

Schultz's father was seldom employed; so, when Schultz was about two years old, his mother, Bruni, who had been born in Germany and had trained as a hairdresser there, became more or less the sole breadwinner in the family. (19RT 3403, 20RT 3520, 3526-3527, 3528, 3529, 3531)

The need to make a living kept Bruni away from home from very early in the morning until late at night. (19RT 3348, 3349-3350, 3352, 3394, 3415-3416, 20RT 3528, 3530-3531, 3536-3537, 3547-3548) As a result, Schultz and his older brother, Anthony III, were usually left in the care of their step-sister, Britta Anderson. Anderson was only two years older than Anthony III and five years older than Schultz, and she was completely unequipped to take on the respon-

sibilities of caring for her rambunctious brothers. (19RT 3342, 3344, 3363, 20RT 3528, 3529, 3531)

As Bruni became more successful, the family took on most of the trappings of a working-class family. To outsiders, the Schultz family likely appeared to be an average family, but, inside the house — hidden away from prying eyes — things were far from normal. (19RT 3349-3350, 3351, 20RT 3536)

Inside the home, family members lived under the thumb of Schultz, Sr. — an alcoholic, drug-addicted, under-employed martinet — who maintained his position of authority in the family by inflicting fearsome physical abuse on his wife and children, sexually abusing his step-daughter, and fiendishly torturing his children with mind games they could not win. (19RT 3320, 3364-3369, 20RT 3536-3537, 3538) Anderson described living with Schultz, Sr. as "like a hostage situation" and like living with a "sort of a terrorist" or a "monster." (19RT 3354, 20RT 3345, 3538)

Schultz, Sr.'s moods were mercurial, and — although the children did not know when or how their father would punish them — they knew that the beatings and the cuffings would inevitably come whether they had done anything wrong or not. (19RT 3345, 3353-3354, 3413-3414, 20RT 3533, 3537)

Schultz, Sr. regularly inflicted fearsome beatings on his wife and on his children. He made a point of striking his wife and his children in areas of the body that would not be visible to individuals with whom they came into contact outside the home. (19RT 3346, 3353-3354)

Schultz, Sr. reveled in forcing his children to bear witness as he viciously abused his wife. (19RT 3354-3356, 3416, 20RT 3529, 3533-3534) At times Schultz, Sr. inflicted such horrific abuse on Bruni, the children feared Schultz, Sr. would kill her. (19RT 3361-3362) On occasion, Schultz, Sr. would hand Bruni a knife and demand that she kill herself so he would be free of her. (19RT 3356)

Whenever it was possible for her to escape from a thrashing, Bruni would grab her car keys and flee. Whenever Bruni managed such an escape, Schultz, Sr. would load all three children into the car and drive around searching for Bruni. As the children kept a lookout for their mother, Schultz, Sr. would rant and rave about the brutality he would inflict upon Bruni when he found her. The children were fearful they would find their mother and just as fearful they would not find her — they feared their mother would be beaten if she was found, and they feared they would be left alone with their father if she was not found. (19RT 3362-3363, 3414-3415)

Schultz, Sr. regularly beat all three of his children with a belt and forced them to kneel for hours on the hard kitchen floor — a punishment he called "de rodillas." [11] But, his favorite and most insidious punishment was an intensive, all-night, hours-long, interro-

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[11] The record does not contain a translation of the term de rodillas. Schultz, Sr., spoke fluent Spanish. (19RT 3346) Appellate counsel believes Schultz, Sr.'s phrase refers to the Spanish phrase, de rodillas, which translates as kneeling.

gation session during which all three children would be forced to stay awake, sit ram-rod straight on the couch, and answer endless convoluted and detailed questions about some presumed malfeasance until Schultz, Sr. was finally able to catch one of the children in some minor inconsistency which would justify further corporal punishment. (19RT 3345-3346, 3347, 3348, 3355-3356, 3358, 3414-3415, 20RT 3533)

Schultz, Sr. was an alcoholic and addicted to prescription and non-prescription drugs. (19RT 3359, 3361, 20RT 3531) He made no effort to hide his abuse of alcohol or drugs from the family and made no effort to stash his paper sacks chock full of drugs or his alcohol stores in places where they would not be found by his children. In fact, he often asked his children to bring him his drugs and to join him in using cocaine. (20RT 3531, 3369-3370, 3420, 3422)

Schultz, Sr. introduced his sons to Black Beauties[12] when they were still in grade school. He had turned Schultz into a regular drug user by the time he was in the third grade and into a regular user of cocaine, LSD, and marijuana by the time he was 11 years old. (19RT 3364, 3370, 3371, 3393-3394, 3420-3421)

After Schultz, Sr. and Bruni divorced, Schultz, Sr. used a portion of the settlement he obtained in the divorce to purchase a large quantity of cocaine. He enlisted Schultz and his brother to help him re-package his purchase into smaller bindles. (19RT 3427, 3428)

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12 Although not defined at trial, the Urban Dictionary defines Black Beauties as follows: Black Beauties (also known as Black Birds or Black Bombers) are a combination of Amphetamine (Speed) and Dextroamphetamine (Active salt in Adderall). Pills are typically 20 milligrams. Effects include a mild to moderate euphoria, increased hyperactivity, increased awareness of surroundings, increased interest in repetitive or normally boring activities, decreased appetite, and decreased ability to sleep. The added dextroamphetamine reduces comedown effects compared to amphetamine alone, but not to the extent of methamphetamine. (Urban Dictionary available online at http://www.urbandictionary.com/define.php?term=black+beauties [accessed 4-26-12].)

When Schultz was about 10 or 11 years old, his step-sister, Anderson, ran away from home after Schultz, Sr. attempted to sexually assault her in a particularly wrenching and brazen manner in front of the entire family. (19RT 3396-3399, 20RT 3557)

Schultz, Sr. desperately wanted Anderson to return home. Bruni, who had been unaware that Schultz, Sr. had been sexually abusing Anderson until she witnessed Schultz, Sr.'s brazen attempted sexual assault, urged Anderson to stay away. Finally, Schultz Sr. delivered an ultimatum — Bruni had to coax Anderson back into the house or commit suicide by slitting her own wrists with a shard of broken glass to atone for her failure to do so. Rather than bring Anderson back, Bruni left the house and the marriage. (20RT 3537-3540)

After the divorce, Schultz's existence — which had always been peripatetic taking him from Inglewood to Farland to West Hol-

lywood to Northridge to Panorama City to Granada Hills to Woodland Hills in a 10 year period — became dizzyingly peripatetic. (19RT 3338, 3340, 20RT 3525, 3528, 3530, 3535)

After the divorce, Schultz and Anthony III lived briefly with their mother. (20RT 3541) When their father refused to pay child support, Bruni sent them back to live with their father. Schultz, Sr. had no home; so his sister, Victoria Strauss, took the boys and their father in for a few weeks. They then moved to Sierra Madre. (20RT 3542, 21RT 3657-3658)

When the house in Sierra Madre was lost, Schultz and his brother lived in the garage of their grandparents' house in Redlands. (19RT 3435, 3436, 21RT 3657)

When Schultz, Sr. began a relationship with Jackie White, Schultz, Sr. and his sons shared a condominium in Arcadia with White and her son. (19RT 3419, 3424, 3426, 21RT 3661-3662)

When Bruni moved in with a man who operated a marijuana farm in his house in Woodland Hills, Schultz and Anthony III came

to live with them to help with the harvesting and cleaning of the marijuana plants. (20RT 3543)

When Bruni married her second husband, a mechanic for American Airlines, Schultz moved in with them in Topanga for a short period of time. (20RT 3545)

At times during his teens, Schultz had no home at all and simply shuffled from one friend's house to another's. (20RT 3546)

The Schultz family history of abuse

Schultz's paternal aunt, Victoria Strauss, testified that she and Schultz, Sr. grew up in a home in which their father was abusive, controlling, and unpredictable. (21RT 3654) Strauss testified their father would often force his children to kneel or submit to an unrelenting interrogation for hours on end for some imagined fault much as Schultz, Sr. had forced his own children to do. (21RT 3654-3655)

Schultz's drug use as an adult

Kenneth Ross met Schultz in 1990. In addition to sharing an addiction to methamphetamine, they shared a love of dogs. They both had dogs, and Schultz's dog was one of the few who got along with Ross's Rottweiler. Ross and Schultz often spent time playing with their dogs. (20RT 3473, 3474)

Ross, who was no longer dependent upon drugs at the time of trial, testified that he became a totally different person when he was under the influence of methamphetamine. He described himself as a sort of Dr. Jekyll and Mr. Hyde meaning he did things while under the influence of methamphetamine that he would never dream of doing when not under the drug's influence. (20RT 3474)

Ross not only used methamphetamine with Schultz, he sold small quantities to Schultz on a weekly or bi-weekly basis. (20RT 3476-3477)

Ross sold Schultz the methamphetamine that Schultz had snorted just before attempting to break into the coin machine in the student lounge on the Ventura campus of Cal State Northridge. (20RT 3481)

Ross often saw Schultz under the influence of methamphetamine. He found Schultz cold and self-absorbed at such times. (20RT 3478) When the methamphetamine was fading, Ross found that Schultz became somewhat intimidating and aggressive. Ross tried to avoid him during those times. (20RT 3479)

Chad Hoffman and Schultz were friends from 1993 to 1996. (20RT 3458) They were both methamphetamine addicts, and Hoffman saw Schultz use drugs on numerous occasions. Schultz would binge for days on methamphetamine and stop only when he became too exhausted to go on. (20RT 3460, 3462)

When Schultz was under the influence of methamphetamine, he was talkative and happy; when the methamphetamine would

begin to leave his system, he would become quiet, grumpy, and aggressive. (20RT 3463)

Anderson saw Schultz under the influence of some drug in 1993 and 1994. (19RT 3404-3405)

In 1993, Schultz lived with Bruni and her third husband, Loprieato, on an occasional basis. His drug use became so intolerable, Bruni asked him to leave the house. (20RT 3546)

Schultz was under the influence of methamphetamine when he wandered into Burger's garage in August 1993. (14RT 2528)

Mooney testified to Schultz's repeated drug use from 1993 to 1996 including instances in which he would continue to smoke or snort methamphetamine for days and days. (18RT 3219, 3220, 3222-3223, 3224, 3225-3226, 3227, 3230, 3238-3239, 3240, 3241, 3242, 3244-3245, 3247-3248, 3248-3249, 3250)

In August 1996, when Schultz was arrested for the break-in at the Ventura campus of Cal State Northridge, a blood sample

demonstrated that he was heavily intoxicated with methamphetamine. (18RT 3263)

In 1996, Michelle Larson, a probation officer, interviewed Schultz to prepare a sentencing report and recommendation. Her report indicates that Schultz summarized his drug use during his late teens and early adulthood as follows:

- From age 15 to age 20 he smoked marijuana three times a day.
- When he was 17 or 18 he smoked cocaine along with marijuana about once a month.
- At age 15 he snorted cocaine two to four times a month.
- Between 22 and 24, he snorted and smoked approximately one gram of cocaine per day until he was arrested and sent to prison.
- From 1990 to 1992, he snorted and smoked a quarter gram of methamphetamine per day which decreased to once every other month from 1994 to 1996.
- From age 14 to 20, he used mushrooms about every three months.
- At age 16 he used peyote.
- He smoked heroin one time in 1994.

- From 1990 to 1996 he used Xanax, Valium, or Klonopin off and on to help him sleep after his methamphetamine use.

(20RT 3511-3512)

Testimony from expert witnesses regarding physical and substance abuse

Dr. Bruce Gladstone testified as an expert in the effect of abuse on children. (21RT 3760) He opined that, because Schultz grew up in an atmosphere of abuse, one would expect he would suffer from low esteem and exhibit poor impulse control, a proclivity for anti-social behaviors, a tendency to substance abuse, and social awk-wardness. (21RT 3769-3770)

Dr. Alex Stalcup, an expert in addictive medicine and clinical toxicology, testified as an expert on drugs of abuse. (20RT 3567)

Stalcup described "drugs of abuse" as chemical compounds that overstimulate neuroreceptors in the brain so that those neuro-receptors trigger the brain to release excessive amounts of dopamine and endorphins, the two chemicals that produce a feeling of pleas-ure in human beings. Repeatedly over stimulating these receptors

permanently damages them, blunts the pleasure centers in the brain, and changes the physiology of the brain, so that the brain of an addicted person is not the same as the brain of a non-addicted person. (20RT 3574-3576, 3579, 3582)

Stalcup stated that addiction is a disease. (20RT 3590)

Statistically, most people will try a drug of abuse at some time in their lives; but 80% of those who try a drug of abuse will not become addicted to that drug. (20RT 3583)

Individuals with specific risk factors are more likely to become addicted to a drug of abuse. Schultz demonstrated several of those risk factors: (1) he had a family history of addiction, (2) he grew up in a household where violence, verbal abuse, and shocking physical abuse were regular occurrences, and (3) drugs were available to him and used by him when he was very young. (20RT 3602, 3618-3619)

Certain drugs, including heroin, methamphetamine, cocaine, and nicotine, are so highly addictive than even individuals with no risk factors can become addicted to them. (20RT 3584)

Stalcup testified that the events that occurred during Schultz's arrest on the Cal-State Northridge campus in 1996 are textbook examples of the effect methamphetamine has on and individual's perception of reality and physical abilities. Stalcup opined Schultz responded with exceptional violence because he perceived himself to be in danger and displayed near super-human strength in fighting off the officers because his system was over-stimulated. (20RT 3622)

Schultz's behavior while incarcerated and his prospects for a successful adjustment to a life term.

Anthony Casas testified as an expert on penology. (21RT 3674-3677)

Casas reviewed Schultz's prison records and found that, when Schultz was incarcerated in 1996, he was initially housed in a high-security facility. (21RT 3683-3684) By dint of hard work, academic

achievement, and good behavior Schultz worked himself up to a position of trust on the inmate fire crews based in one of the lowest-security facilities operated by the Department of Corrections. (21RT 3683-3684, 3687)

Casas explained that inmates — like Schultz — chosen for fire-fighting training are the crème de la crème of the inmate population. (21RT 3690)

Casas opined Schultz's record of good behavior and sociability was an indication he could serve out a life sentence as an obedient and peaceful inmate. (21RT 3693, 3696-3698)

Charles Lovers, a firefighter with the Los Angeles County Fire Department, testified Schultz was the first sawyer[13] on the inmate fire crew he commanded. The first sawyer is the number-two crew member. The first-sawyer position is a leadership position that an inmate must earn. The appointment to the position is based upon the inmate's attitude, his ability to get along with other crewmen

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[13] A sawyer is a workman who works with a saw.

and supervisors, and his successful completion of academic training in the use and safety regulations relating to the power saws used in firefighting. (21RT 3746-3748)

John Bailey, a fire captain with the Los Angeles County Fire Department, testified Schultz was the first sawyer on an inmate fire crew he commanded during a fire on Catalina Island. The crew fought the fire for ten days without any backup or assistance. Bailey recalled that Schultz worked long arduous days during that fire. He recalled that — when Schultz was not using the saw — he provided assistance to other crewmen. Bailey felt Schultz did an outstanding job and demonstrated leadership qualities. (21RT 3746-3747)

Michael Bernal testified that Schultz was a toolsman, a coveted position which is awarded to an inmate only if the entire supervisory staff agrees that the inmate is an exceptional worker. (21RT 757-3758)

Schultz did not testify on his own behalf during either the guilt phase or the penalty phase of the trial.

ARGUMENT

I. The trial court erred in excluding prospective jurors, Antonio A. and Mary M., for cause.

A. Introduction.

Unable to reconcile his duty to his king and his duty to his conscience, Thomas More chose to be "the King's good servant, but God's first;" and, as a consequence, he soon lost his head on Tower Hill. Although the obdurate More perished, thousands of his countrymen reconciled their allegiance to their king with their personal belief his divorce from Catherine of Aragon was morally wrong and thereby kept their heads. In balancing king and conscience, these sixteenth century Englishmen demonstrated that individuals who disagree with a law of the state can nevertheless put aside those private beliefs and competently embrace the duties of citizenship — a principle recollected four centuries later in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] and applied to jurors called upon to decide capital cases:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror.
> (*Id.* 391 U.S. at p. 519.)

Two decades later, *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.3d 622] held that prospective jurors who harbor strong personal opinions for or against capital punishment are as eligible to serve as those who are indecisive or neutral so long as they are able to leave their personal beliefs about capital punishment at the courthouse door and walk into the courtroom ready to abide by their oath and prepared to make all of their decisions in reliance on the court's instructions.

The trial court applied *Witt* incorrectly in excluding prospective jurors, Antonio A. and Mary M.

Prospective juror, Antonio A., explained that, because of his religious scruples, he had misgivings about the death penalty. But he stated again and again that "inside this court, ... [he] would follow the [court's] instructions." (11RT 1903, 1904, 1917-1918) Jurors

like Antonio A., who are willing to follow the court's instructions and obey their oaths in spite of their personal feelings about the death penalty, are not excludable. The trial court erred in excluding Antonio A. (*Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.CT. 2521, 65 L.Ed.2d 581]; *Gray v. Mississippi* (1987) 481 U.S. 648, 658 [107 S.Ct. 2045, 95 L.Ed.2d 622].)

Prospective juror, Mary M.'s questionnaire responses indicated that she had no opinion on the death penalty; but, when her responses to a two-question *voir dire* indicated she now believed the death penalty was wrong, the trial court excluded her without conducting any further *voir dire* itself and without affording either counsel an opportunity for *voir dire.* (9JQ2290, 11RT 1875-1876) Trial courts are under obligation to engage in a conscientious attempt to determine a prospective juror's views regarding capital punishment and to determine whether that juror can put those views aside and act in accordance with the court's instructions. (*People v. Wilson* (2008) 44 Cal.4th 758, 779; *People v. Heard* (2003) 31 Cal.4th 946, 963–

968.) The trial court erred in removing Mary M. without conducting a sufficient *voir dire* to determine Mary A.'s true views on capital punishment and sufficient *voir dire* to determine whether those views would impair her ability to perform her duties as a juror.

Schultz contends the court committed *Witt* error in excluding each of these prospective jurors from service; and, in doing so, the court violated Schultz's right to be tried by a fair and impartial jury drawn from a representative cross-section of the community, denied him his right to due process of law under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California clones, article I, sections 7, 15, 16, and 17 of the California Constitution, and undermined the reliability required for a capital conviction by the Eighth and Fourteenth Amendments and their opposite numbers under the California Constitution, article I, sections 7, 15, and 17.

Reversal of Schultz's sentence is, therefore, required. (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014]; *Gray v. Mississippi, supra,* 481 U.S. 648, 658; *Wainwright v. Witt, supra,* 469 U.S. 412, 424; *People v. Mickey* (1991) 54 Cal.3d 612, 679-680; *People v. Holloway* (1978) 50 Cal.3d 1098, 1112; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266.)

B. Standard of review.

In reviewing the propriety of the trial court's decision to exclude a juror from service in a capital case, this Court must separate those jurors who express a consistent opinion about capital punishment from those who express confusing or inconsistent opinions.

The body language, speech patterns, and intonations of capricious jurors are often indications of their true thinking, and the trial court's perception and interpretation of these physical signs will ordinarily be upheld on appeal. But, since the mannerisms of a juror who expresses a consistent opinion regarding the death penalty is of

no importance, the trial court's exclusion of such a juror will be upheld only if supported by substantial evidence:

> "If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence."
> (*People v. Ledesma* (2006) 39 Cal.4th 641, 671 quoting *People v. Horning* (2004) 34 Cal.4th 871, 896–897.)

C. A juror may be excused for cause only if the juror's personal opposition to the death penalty is so fixed and inflexible it will impair his or her ability to act as a juror.

Forty years ago *Witherspoon v. Illinois, supra,* 391 U.S. at p. 518 inaugurated the notion that a capital jury, selected in a manner which excludes those prospective jurors who oppose capital punishment, falls "woefully short of that impartially to which the petitioner [is] entitled under the Sixth and Fourteenth Amendments." After *Witherspoon,* constitutional fairness, impartiality, and diversity demand that qualified jurors who are morally opposed to the death penalty as well as qualified jurors who favor the death penalty serve

side by side because "a jury that must choose between life imprisonment and capital punishment can do little more — and must do nothing less — than express the conscience of the community on the ultimate question of life or death." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 519.)

Witherspoon cautioned against assuming "that a juror who describes himself as having ... 'religious scruples' against the infliction of the death penalty ... thereby affirm[s] that he could never vote in favor of it or that he would not consider doing so in the case before him." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 515 at fn. 9.) Under *Witherspoon,* a juror with a moral compass that points away from accepting capital punishment could be excused *only* if that prospective juror made it "unmistakably clear that [the juror] would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case ...." (*Witherspoon v. Illinois, supra,* 391 U.S. p. 522 at fn. 21. [Italics in original].)

Revisiting *Witherspoon* 18 years later, *Wainwright v. Witt, supra,* 469 U.S. 412 adopted the less rigid standard first announced in *Adams v. Texas, supra,* 448 U.S. at p. 45 which limits disqualification to those jurors whose views about capital punishment "*would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with the instructions and ... oath.*" (*Wainwright v. Witt, supra,* 469 U.S. at. p. 424 citing *Adams v. Texas, supra,* 448 U.S. at p. 44 [Italics in original.].)

California adopted the *Witt* standard in *People v. Ghent* (1987) 43 Cal.3d 739, 767:

> Because we think *Witt*'s review standard and underlying rationale make good sense, and because California courts have generally followed the teachings of the high court in determining when a prospective juror properly may be excused for cause because of his views regarding capital punishment, we adopt the *Witt* standard.

The trial court failed to apply the *Witt–Ghent* standard correctly and erroneously excluded Antonio A. and Mary M.

D. Antonio A. repeatedly declared he would set aside his misgivings about the death penalty and follow the court's instructions. The record is devoid of substantial evidence that would support exclusion of Antonio A.

Antonio A.'s questionnaire revealed that he was a middle-aged married man, who had lived in Ventura County for more than half of his life. (2JQ 516, 517) He had graduated from college with a bachelor's degree in civil engineering and had been employed as a design engineer in the aerospace industry for more than 20 years. (2JQ 516, 518, 520)

He had previously served on a criminal jury that had reached a verdict. (2JQ 522) He staunchly believed the legal system "work[ed]" and was "fair." (2JQ 520, 528)

When asked to describe his position on the death penalty, Antonio A. wrote on the questionnaire that he was "kind of against" capital punishment. (2JQ 535)

In completing the questionnaire, Antonio A. indicated he was not a member of a religious organization that took an inflexible posi-

tion on the death penalty. (2JQ 535, 536, 538) And, during oral *voir dire,* he reiterated that position: he stated Catholicism — his chosen religion — did not have a policy on capital punishment so far as he knew. (11RT 1903)

Antonio A. — like many others[14] — entertained some reservations about the death penalty. However, such reticence does not disqualify an individual who expresses a sincere ability to set his or her personal concerns aside from service on a capital case. Indeed, the defendant's right to a jury that reflects the community demands that such individuals serve:

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[14] From 1935 to 1999, Gallup conducted periodic polls to determine views on the appropriateness of the death penalty as a punishment for murder. From 2000 to 2011, Gallup conducted annual or biannual polls on the same subject. Schultz was tried in 2003. The Gallup poll conducted from May 19, 2003 to May 21, 2003 revealed 70% of those polled supported the death penalty, 28% opposed the penalty, and 2% had no opinion. The same poll conducted from October 6, 2003 to October 8, 2003 revealed 64% favored the death penalty, 32% opposed the penalty, and 4% had no opinion.
(Gallup available online at http://www.gallup.com/poll/1606/death-penalty.aspx [accessed 5-25-12].)

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty.... [H]owever, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled — indeed, duty bound — to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.
> (*People v. Stewart* (2004) 33 Cal.4th 425, 446)

Even if Antonio A.'s opposition to the death penalty had been more resolute, the mere fact he was adverse to capital punishment was not enough to support his exclusion; he could be excluded for cause only if his aversion would impair his ability to serve:

> 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* (1990) 52 Cal.3d 697, 699.) (Italics added.)

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

The issue for the trial court — and for this Court — is whether Antonio A.'s oral and written responses indicated that his opposi-

tion was so steely that it would substantially impair his ability to act as an effective juror.

From first to last, Antonio A. plainly stated and plainly wrote that it would not.

On the questionnaire, Antonio A. wrote he was "kind of" opposed to the death penalty, but stressed that his position was not inflexible and he was "no[t] sure what [he was] gonna do:"

> 78. Please read this question carefully. The question does not ask whether you would vote for the death penalty in this case, without having heard any of the evidence, but rather whether you think we should have a death penalty law.
>
> On a scale of 1-10 with 10 being strongly in favor of having a death penalty law, 5 having no opinion and 1 being strongly against having a death penalty law, how would you rate yourself?
>
> 1 2 (3) 4 5 6 7 8 9 10
>
> Why did you select the above number?
> [Ans.] *Kind of against but no sure what I gonna do.*
> (2JQ 535) (Italics added.)

Antonio A. also answered, "yes" in response to the question that asked whether he was "open-minded about what the penalty in

this case should be" (2JQ 537) and responded "yes" to the question that asked if he was "willing to weigh and consider all the evidence of the aggravating and mitigating factors that will be presented to [him] before deciding what the appropriate punishment should be" (2JQ 537).

When questioned orally, Antonio A. reiterated what he had written in his questionnaire: He stated he was "kind of" opposed to the death penalty but did not feel he could state what punishment he would eventually find appropriate in a given case without knowing the facts. (11RT 1900, 1903, 1904)

Antonio A. had served as a juror before; and, based on his knowledge of a juror's obligation to follow instructions, he stoutly declared a willingness to set aside his private opposition to capital punishment so long as he was acting as a juror, and he categorically stated he would follow the court's instructions:

> I — I'm against the death penalty. And — but, *you know, inside this court, you know, I will follow the instruction, you know.*
> (11RT 1917-1918) (Italics added.)

When asked to explain a response to a question on the questionnaire, Antonio A. again stated his intention to follow the court's instructions:

> Q [By prosecutor]: You were asked [in the questionnaire] — this is a longer question, but I'm going to read the whole thing, okay?
> This is the question:
> "It is up to each individual juror to decide the significance, if any, of evidence concerning the defendant's background or behavior. A juror is required to listen and consider the evidence with an open mind before deciding what weight to give to any particular evidence.
> "If you find the defendant guilty of first-degree murder with a special circumstance, could you consider further information concerning the defendant's background or behavior as a factor in your decision about the appropriate penalty?"
> And then you're given a choice to answer yes or no. And you answered no, which is essentially telling us that you don't want to consider further — further evidence.
> *Now, when I read that at the same time I'm reading you're against the death penalty and you'd always vote against it,*

I'm wondering if that means that your mind is closed to considering the death penalty as an option and that you would simply always vote for life in prison without the possibility of parole.
Is that true? Would you just always vote for life in prison without the possibility of parole?

A [By Antonio A.]: I could — you know, I could — as I said, *I could follow the instruction, you know. I would* — I will try, you know, to be fair, you know and follow the judge (sic) instructions. That's all I can do, you know.

(11RT 1919) (Italics added)

Lest there be any doubt that Antonio A. was qualified to serve as a juror in Schultz's case, Antonio A. unequivocally declared his willingness to make an individual decision in favor of imposing a death sentence and a willingness to sign a verdict taking individual responsibility for that decision:

Q [By prosecutor]: Could you actually sign a verdict form — at the end of the case you're going to be given verdict forms, and it will have written on the form your decision. And then the foreperson will be asked to sign that form saying what the jury's decision is. And

if the jury — if the jury decides that death is the appropriate penalty, there will be a form for you to sign. Could you sign that verdict form saying that this man should be put to death as his punishment?

A [By Antonio A.]: Well, after considering probably all — what the other jurors — jurors, you know, find, you know probably I could — I could do that, you know.

Q: Well, it would have to be your individual decision though. It's—

A: Deciding—

Q: You can't just go along with everyone else.

A: Yeah, but—

Q: You have to decide for yourself

A: *Yeah, I could sign.*

(11RT 1919-1920) (Italics added.)

The trial court leaped to the conclusion that Antonio A. should be excused for cause and ruled on its own "objection" without any input from the prosecutor and before Schultz's counsel had any opportunity to speak. (11RT 1923)

When defense counsel was finally given an opportunity to speak, he reminded the court Antonio A. had "repeatedly [stated] he

was able to follow the court's instructions and he could consider both penalties." (11RT 1965)

The trial court countered that it had excused Antonio A. because he "was not able to consider imposition of the death penalty as a reasonable possibility or, quite frankly, as any possibility" and because he had indicated in response to a question by the prosecutor that, "if ... given the choice he would choose life without possibility of parole." (11RT 1966)

The court's first reason is not supported by the record; the court's second reason is not supported by the law.

The court's statement that Antonio A. would never impose the death penalty was plainly a misstatement or a misrecollection of Antonio A.'s *voir dire* responses. In fact, Antonio A. never once said that he would not consider imposition of the death penalty. To the contrary, he unequivocally stated that he could follow instructions which might lead to a decision to impose the death penalty, he could

impose the death penalty, and he could sign a verdict imposing death.

Throughout his *voir dire,* Antonio A. freely stated that, based on his religious scruples, his personal preference would be to impose a sentence of life without parole; but, he repeatedly acknowledged his willingness to set aside that personal preference and make his decisions in the courtroom in accordance with the instructions he was given. When asked if he would always vote against the death penalty, he responded that he was "against the death penalty," but, "inside this court" he would "follow the instruction." (11RT 1917-1918) When asked if he would "always vote for life in prison without the possibility of parole," he responded, he would "follow the judge (sic) instructions." (11RT 1919)

The court's statement that Antonio A. — given his druthers — preferred life without parole is factually correct; but it is not a legally disqualifying state of mind. Although Antonio A. never equivocated about his position on capital punishment, he never once said that

he would not follow the court's instructions. To the contrary, he *always* said he recognized that — in the courtroom — he was obliged to, and would, follow the court's instructions.

In his dissent in *Uttecht v. Brown, supra,* 551 U.S. at p. 37, Justice Stevens stated that the goal of the *voir dire* process in a death case is not to draw a distinction "between jurors who are in favor of the death penalty and those who oppose it, but rather between two subclasses within the latter class — those who will conscientiously apply the law and those whose conscientious scruples necessarily prevent them from doing so."

Antonio A.'s responses painted a portrait of a thoughtful, intelligent, conscientious, scrupled man who recognized the solemnity of his task, believed in the criminal justice system, was determined to try to do the best job he could, and was prepared to set aside his personal beliefs and follow the court's instructions. He was a well-qualified juror, not one properly excluded for cause under *Witt* and *Ghent*.

The erroneous exclusion of Antonio A. alone is sufficient to require a reversal. (*People v. Pearson* (2012) 53 Cal.4th 306, ___ [135 Cal.Rptr.3d 262, 282].)

E. The court's extraordinarily abbreviated *voir dire* of Mary M. failed to establish Mary M.'s true views on capital punishment and whether she could put her feelings — whatever they might be — aside and follow the court's instructions. The court's inquiry was insufficient to support exclusion.

Prospective juror, Mary M., was a recent college graduate who had just embarked on a career as a claims adjuster for a major automobile insurance company. (9JQ 2290, 2292)

When asked to rate her position on the death penalty on a 1-10 scale, Mary M. gave herself a five — a score the questionnaire specifically defined to mean "having no opinion" on the issue.[15] (9JQ 2309, 2310)

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[15] The questionnaire defined the scale in the following language:

Mary M.'s questionnaire answers indicated she did not have strong feelings on the subject of capital punishment, believed she could be open minded in choosing an appropriate penalty, and was willing to weigh and consider all the aggravating and mitigating factors before deciding what punishment should be imposed. (9JQ 2311)

When called upon to replace the fourth juror excused by peremptory challenge, Mary M. unexpectedly announced that she could not impose a death sentence under any circumstances — a position totally at odds with all of her questionnaire responses relating to capital punishment. (11RT 1875-1876)

Without making any attempt to explore the dramatic and puzzling difference between Mary M.'s written questionnaire responses and her oral response, and without ascertaining whether Mary M's newfound opposition was so inflexible she could not fol-

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On a scale of 1-10, with 10 being strongly in favor of having a death penalty law, 5 having no opinion and 1 being strongly against.

low the court's instructions, and without soliciting the opinions of trial counsels, the trial court summarily excluded Mary M. for cause. (11RT 1876)

1. Defense counsels' failure to object does not forfeit Schultz's right to raise this issue on appeal.

Schultz is mindful that defense counsel failed to raise an objection to the trial court's precipitous exclusion of Mary M. and failed to request that the court engage Mary M. in additional *voir dire*. Had this case been tried after August 2011, this Court's decision in *People v. McKinnon* (2011) 52 Cal.4th 610, 643, which held that a timely objection or its functional equivalent is required to preserve the issue of improper excusal on appeal, might have acted as a forfeit to the right to raise the exclusion of Mary M. on appeal.

However, this case was tried years before August 2011, and *McKinnon* announced that — in cases tried before August 2011 — the no-forfeiture rule first announced in *People v. Velasquez* (1980) 26 Cal.3d 425 applies:

> [W]e abandon our no-forfeiture rule with respect to *Witherspoon/Witt* excusal error. In addition, we require, *prospectively*, counsel (or defendant, if proceeding pro se) to make either a timely objection, or the functional equivalent of an objection (i.e., statement of opposition or disagreement) to the excusal on specific grounds under *Witherspoon/Witt* in order to preserve the issue for appeal.
> (*People v. McKinnon, supra,* 52 Cal.4th at p. 636) (Italics added.)
>
> Accordingly, for the reasons stated, we overrule *People v. Velasquez, supra,* 26 Cal.3d 425 to the extent it articulates a no-forfeiture rule with respect to *Witherspoon/Witt* excusal error. *In any capital case tried after the finality of this decision* [8-22-11], counsel (or defendant, if proceeding pro se) must make either a timely objection, or the functional equivalent of an objection, such as a statement of opposition or disagreement, to the excusal stating specific grounds under *Witherspoon/Witt* in order to preserve the issue for appeal.
> (*People v. McKinnon, supra,* 52 Cal.4th at p. 643.) (Italics added.) (Internal parallel citations omitted.)

Accordingly, Schultz has not forfeited the right to raise the issue of Mary M.'s exclusion on appeal, and this Court should review the issue.

2. Neither the trial court nor the prosecutor undertook an effective inquiry of Mary M. In the absence of an effective inquiry, there is no substantial evidence that Mary M.'s views would have interfered with her ability to perform her duties as a juror.

The pivotal question in qualifying jurors to sit on a capital case is whether the particular juror is willing and able to set aside his or her personal feelings about capital punishment and follow the court's instructions. Mary M. wrote on her questionnaire that she had no opinion about the death penalty. When called for oral inquiry, Mary M.'s responses to two quick-fire questions from the court voiced a new-found opposition to capital punishment, and the court summarily excluded her without even consulting counsels.

It appears the court simply assumed Mary M's new-found opposition would impair her ability to act as a juror. Schultz acknowledges Mary M.'s apparent about face provided a *preliminary* indication that she *might* prove, upon further examination, to be subject to exclusion for cause. However, absent clarifying follow-up examination by the court or counsel, — during which the court would

be able to further explain the role of jurors in the judicial system, examine Mary M.'s demeanor, and make an assessment of her ability to weigh a death-penalty decision — the apparent about face was not by itself sufficient to establish a basis for exclusion for cause. (*People v. Stewart* (2004) 33 Cal.4th 425, 448.)

The scant evidence before the court simply was not sufficient to support the assessment required by *Witt* that Mary M. would be unable faithfully to perform the duties required of a juror by the law

The questionnaire *never* asked Mary M. whether she could set aside her personal feelings with respect to the death penalty and follow the court's instructions. And, the trial court *never* asked Mary M. whether her new-found opposition to the death penalty also meant that she was not willing to follow the court's instructions.

To the contrary, Mary M. simply told the court that she could not impose the death penalty regardless of the "weighing in aggravation and mitigation:"

> Q [By the court]: All right. So you're saying that regardless of the evidence and regard-

less of the weighing in aggravation and mitigation in the penalty phase, because of certain principles you hold, you could never impose the death penalty. Is that what you're saying?

A [By Mary M.]: That's what I'm saying.
(11RT 1875-1876)

Had Mary M. understood the concept of aggravating and mitigating circumstances, her answer might well have been evidence — albeit merely preliminary evidence —that her ability to serve as a juror in Schultz's case might be impaired.

But, Mary M. had already demonstrated that she did not understand the meaning of aggravating and mitigating factors. Her responses to questionnaire question numbers 76 and 77 demonstrate that what the court considered an aggravating or mitigation factor, Mary M. considered a special circumstance:

76 What are your feelings regarding the death penalty as a punishment for murder with a special circumstance?

[Ans.] Depends on the special circumstance. If someone can be treated or helped w/ their "special circum-

stance" then I would not vote for the death penalty.

77. What are your feelings regarding life in prison without the possibility of parole as a punishment for murder with a special circumstance?

[Ans.] Depends on the special circumstance. But life in prison as a punishment for murder seems fair to me.
(9JQ 2308)

People v. Heard, supra, 31 Cal.4th 946 took special note of the toll a cursory *voir dire* in a capital case takes on the increasingly scarce resources of trial and appellate courts and the judiciary's loss of public respect and stature that arises when reversals are occasioned by hasty and incomplete *voir dire*:

> When a trial court commits such readily avoidable error under the circumstances before us, the public perception of justice suffers and the public fisc is squandered. Now, several years after the original trial commenced, the prosecution and the defense will be asked to prepare and present their respective cases, not only strictly concerning the appropriate penalty but also largely concerning the facts underlying the determination as to guilt in order to sufficiently inform the new jury, thereby consuming scant governmental resources and causing witnesses to relive the details of this horrible crime. That such inefficiencies and renewed an-

> guish were so readily avoidable, and yet were set in motion here by an experienced jurist, thereby compelling this court to reverse a penalty phase judgment in a case so exceptionally aggravated, underscores the need for our trial courts to redouble their efforts to proceed with great care, clarity, and patience in the examination of potential jurors, especially in capital cases.
> (*People v. Heard, supra,* 31 Cal.4th at p. 968.)

Even before *Heard,* this Court held that a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the prospective juror's performance as a juror. (*People v. Stewart* (2004) 33 Cal.4th 425, 445, *People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

Mary M. was a young woman with no prior experience as a juror. Her responses on the questionnaire indicated that she did not understand the legal concepts involved in a capital case. Five or ten minutes of additional inquiries would have provided Mary M. with a proper understanding of the concept of special circumstances and the very different concept of aggravating and mitigating factors and the role each might play in the trial. Likewise, five or ten minutes of

inquiry would have allowed the court to understand whether Mary M.'s position on capital punishment was so inflexible, she would not be able to follow the court's instructions.

In sum, five or ten minutes of inquiry would have allowed the court to make a reasoned — rather than a precipitous — decision on Mary M.'s ability to perform as a juror in this case.

F. This Court must reverse Schultz's sentence.

A violation under *Witt* is reversible error not subject to harmless error analysis. (*Gray v. Mississippi, supra,* 481 U.S. at p. 668, *Davis v. Georgia* (1976) 429 U.S. 122, 123 [97 S.Ct. 399, 50 L.Ed.2d 339], *People v. Ashmus* (1991) 54 Cal.3d 932, 962)

Although a *Witt* error does not require reversal of the judgment of guilt or the special circumstance findings, the error does compel the *automatic reversal* of defendant's death sentence. (*People v. McKinnon* (2011) 52 Cal.4th 610, 643; *People v. Heard, supra,* 31 Cal.4th at p. 965.) (See *Gray v. Mississippi, supra,* 481 U.S. at pp. 666–668.)

This Court must reverse Schultz's death sentence.

II. The trial court erred in admitting the taped message Burger left on the answering machine of her dance partner. The statements were irrelevant and prejudicial inadmissible hearsay.

For days and days, jurors had been asking themselves, "Will I be on this jury or will I be sent home?" and "Who else will be on this jury?" Now, the selection process was finally over. As jurors wriggled about settling themselves into their seats and shifted their focus to the case itself, the prosecutor dramatically brought Burger to life by playing a tape on which Burger herself spoke the very last words she spoke to anyone other than her attacker:

> Hi, Larry. This is Cindy. And it's about 9:15 on Wednesday night. Give me a call back if you can, uh, or at work tomorrow. I'd like to meet a little early before class and go over the step from last week. Um, I just hope I don't get too lost tomorrow. But anyway, I had a real good, uh, trip. Look forward to seein' ya, and give me a call when you get a chance. Bye-bye.
> (7CT 1939, 13RT 2233)

Introducing Burger's lilting voice poking fun at herself as she chattered happily about dance class the next day just at the moment when trial began created an aura of sympathy and pathos that defense counsel was never able to diffuse; an aura of sympathy and pathos that irreparably harmed Schultz's defense.

A. Statement of proceedings in the trial court.

Among the People's pre-trial motions[16] was one asking the court to allow the prosecutor to introduce the voicemail message Burger had left on her dance partner's answering machine five to eight hours before she died. The People repeatedly urged the court to find the statements on the voicemail tape admissible under Evidence Code section 1250, subdivision (a)(2) as statements of Burger's then-existing plan or intent to stay home that night or, alternatively,

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16 The People filed a Trial Brief which contains almost all of the prosecution's pre-trial requests for rulings on matters related to trial evidence. (7CT 1892-1942) Schultz responded to these pre-trial requests for rulings on trial evidence in his Response to Trial Brief. (9CT 2207-2339)

admissible as non-hearsay circumstantial evidence of the same intent. (7CT 1927-1929, 1930-1931)

The prosecutor argued evidence Burger planned to stay home that evening was relevant for two reasons: (1) it was essential to the burglary special circumstance because it showed Schultz was an uninvited guest and "this [wasn't] some pickup or date that went awry" and (2) it corroborated Mooney's testimony that Schultz entered Burger's residence with the intent to steal. (7CT 1928, 8RT 1321, 1322)

Defense counsel vigorously opposed the motion on the grounds the statements were not relevant to any disputed issue, were hearsay, were the equivalent of improper victim impact evidence during the guilt phase, and were more prejudicial than probative. (9CT 2213, 8RT 1319-1320)

Schulz also alleged the admission of these statements would violate his right to due process of law, his right to confront and cross-examine the witnesses against him, his right to affirmatively

present evidence in his own defense, and his right to effective representation as guaranteed to him under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California clones, article I, sections 7, 15, 16, and 17 of the California Constitution and would undermine the reliability required for the conviction of a capital offense by the Eighth and Fourteenth Amendments and their apposite numbers under the California Constitution, article I, sections 7, 15, and 17. (9CT 2207, 2213, 2216)

Without making any effort to distinguish among the statements contained on the voicemail audiotape and without any thought of redaction, the trial court admitted the entire audiotape on hearsay and non-hearsay grounds and found that the probative value of the statements outweighed their prejudicial impact. (8RT 1322)

Schultz contends the fact Burger intended to stay home the night she was killed thereby proving Shultz's entry was uninvited (1) was not a fact that was in dispute, (2) was not relevant to the burglary special circumstance because proof the perpetrator was un-

invited is not an element of burglary and, therefore, not an element of the burglary special circumstance, and (3) was not a fact from which one could reasonably infer that Schultz entered Burger's condominium with the intent to steal.

Schultz also contends that — even if relevant — the statements on the taped voicemail message were not admissible because: (1) not one of the statements on the tape is a statement of Burger's intent or plan to stay home that night as required for admission under Evidence Code section 1250, subdivision (a)(2) as an exception to the hearsay rule, (2) the statements cannot be admitted as non-hearsay circumstantial evidence of Burger's intent to stay home because the statements are not evidence that she intended to do so unless certain pivotal statements are true, and (3) the statements on the tape had *de minimus* probative value, were highly prejudicial to the defendant's case, and a ready and non-prejudicial evidentiary alternative was available to the prosecution.

B. Standard of review.

Schultz acknowledges that the abuse-of-discretion standard applies to his relevancy argument and to his argument Burger's statements were not admissible as an exception to the hearsay rule under Evidence Code section 1250 or as non-hearsay circumstantial evidence. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331)

Schultz grants that the trial court has broad discretion in determining the relevance of proposed evidence. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167; *People v. Memory* (2010) 182 Cal.App.4th 835, 858)

But, the trial court's discretion is not boundless. The court lacks discretion to admit irrelevant evidence, and the court's discretion is further bounded by the court's obligation to ensure that all evidence placed before the jury is admitted in accordance with the rules set forth in the Evidence Code. (*People v. Memory, supra,* 182 Cal.App.4th at p. 858.) In particular, Evidence Code section 350 prohibits the admission of irrelevant evidence and Evidence Code sec-

tion 352 prohibits the admission of evidence — even if relevant — that is significantly more prejudicial than probative.

Schultz contends the abuse-of-discretion standard does not apply to his argument that evidence Burger intended to stay home did not corroborate Mooney's testimony. Corroboration of Mooney's testimony was dependent upon drawing the inference Schultz entered Burger's condominium with the intent to steal from the fact Burger planned to stay home. The admissibility of such an inference is a pure question of law and must be reviewed on appeal under the de novo standard of review. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1023-1024.)

In admitting irrelevant and incendiary evidence on an undisputed fact — especially when a nonprejudicial alternative was readily available — Schultz contends the trial court overstepped the bounds of its discretion. In stepping outside those bounds, the court violated Schultz's right to due process of law, denied him his right

to confront and cross-examine the witnesses against him as guaranteed to him under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California equivalents, article I, sections 7, 15, 16, and 17 of the California Constitution, and undermined the reliability required for the conviction of a capital offense by the Eighth and Fourteenth Amendments and their opposite numbers under the California Constitution, article I, sections 7, 15, and 17.

Schultz contends that court violated the same state and federal rights in admitting evidence from which no one could logically infer that Schultz entered Burger's condominium with the intent to steal.

The admission of this evidence cast such a pall over Schultz's defense that this Court must reverse his conviction and his sentence.

C. Evidence relating to undisputed facts is not relevant. The fact Burger was home the evening she was killed and did not go out and meet Schultz at a bar was not a disputed fact.

The parties agreed there was no evidence Burger "went out that night and met [Schultz] and invited him in" (8RT 1322) and there was "no solid dispute as to whether or not [Burger] was home, intended to stay home, or left or went out and met Mr. Schultz at a bar and then returned." (8RT 1321)

Defense counsel argued that — if there is no dispute about a fact — evidence on that fact is not relevant. The prosecutor countered by claiming that "whether or not this is in dispute does not further the analysis." (8RT 1321)

Defense counsel was correct — the Evidence Code limits relevancy to *disputed* facts:

> "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.
> (Evidence Code, section 210) (Italics added.)

Therefore, whether a fact is disputed or not is essential to determining relevance.

In drafting the first Evidence Code in 1965, the Law Revision Commission used the Uniform Rules of Evidence, which had been published in 1953, as a starting point. (California Law Revision Commission, Recommendation Proposing an Evidence Code (January 1965) pp. 3, 29 [out of print, but available online at clrc.ca.gov/pub/Printed-Reports/Pub060.pdf.][accessed 4-16-2012] ("Law Revision Commission"); Witkin, California Evidence, § 12.)

The Commission adopted some — but not all — of the provisions of the Uniform Rules as the new Evidence Code. (Law Revision Commission at p. 29.)

What the Commission accepted from the Uniform Rules and what it rejected are important in understanding California evidence law.

Uniform Rule 1(2) did not limit relevant evidence to evidence that proves a disputed fact. Evidence that proved any fact — dis-

puted or not — was admissible under Rule 1(2).[17] In fact, if a fact was undisputed, Uniform Rule 3 allowed the admission of all evidence — even evidence that normally would have been excluded as hearsay or privilege — relating to that fact.[18]

The fact that section 210 did not incorporate the language of the Uniform Rules upon which it is based makes it clear that the limitation of relevant evidence to evidence offered to prove a *disputed* fact was not accidental and is language that cannot be ignored. (*Rojas v. Superior Court (Coffin)* (2004) 33 Cal.4th 407, 418 at fn. 6 citing *People v. Williams* (1976) 16 Cal.3d 663, 667-668.)

And, indeed, California courts have consistently found that the section 210 means what it says — evidence is only relevant if it relates to a *disputed* fact.

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[17] Uniform Rule of Evidence 1(2) defines relevant evidence as "evidence having any tendency to prove any material fact."

[18] Uniform Rule of Evidence 3 provides in pertinent part:
If ... there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply.

In *People v. Lucero* (1998) 64 Cal.App.4th 1107, a robbery victim advised the investigating officer at the scene that the perpetrator had left a shoeprint on the counter. At trial, the officer was permitted to repeat the victim's statement — not for its truth — but as evidence the officer had probable cause for defendant's subsequent arrest. On appeal, the court stated that "the jury was not asked to determine whether the police had probable cause to arrest" and, therefore, the statements in support of such probable cause "had no tendency in reason to prove any disputed issue of fact in the action." (*Id.* at p. 1110.)

In *People v. Price* (1991) 1 Cal.4th 324, the People argued the victim had given her guns to the defendant to sell and the defendant had murdered her to avoid paying for the weapons and to prevent her from testifying that he had possession of her guns. (*Id.* at p. 417) As part of an effort to shift responsibility for this murder to a third party — the victim's live-in boyfriend — the defense sought to introduce evidence the victim feared her boyfriend and wanted to sell

her guns so that she would have the money to relocate herself and her children. (*Ibid.*) This Court ruled the evidence was not relevant because the "sale of [the victim's] guns was not a disputed fact" by either party. Since the evidence related to a fact that was not in dispute, the evidence was properly excluded as irrelevant. (*Ibid.*)

Here — as in *Price* — the defense did not dispute that Burger was at home on the night she was killed. Testimony on that issue was, therefore, irrelevant.

D. Whether a burglar gains entry by invitation or without an invitation is irrelevant to the jury's decision on the burglary special circumstance, and the trial court erred in admitting evidence to prove that issue.

The information alleged Schultz murdered Burger while committing a burglary, a special circumstance under section 190.3. In its written motion seeking admission of Burger's voicemail tape, the prosecution argued it had to "preclude[] any inference that defendant met Ms. Burger out that night, and was an invited guest in

her home, rather than one who entered with the intent to commit a felony, the basis of Special Circumstance number two, the crime of burglary." (7CT 1928)

At argument, the prosecution reiterated its position:

> The People have the burden of proof. And one of the two main themes of this case, aside from the rape — the other one is this is a burglary [in order to prove the burglary special circumstance]. *That he was not an invited guest. And we have to show this isn't a pickup or date that went awry. He was an uninvited guest.*
> (8RT 1321) (Italics added.)

The prosecutor was mistaken; the voicemail tape was irrelevant to the burglary special circumstance.

The burglary special circumstance simply requires that the People prove "[t]he murder was committed while the defendant was engaged in the commission of a burglary." (CALJIC No. 8.81.17 (March 2012 update).)

The elements of burglary are the same whether burglary is alleged as a crime or as the basis for a special circumstance.

People v. Abilez (2007) 41 Cal.4th 472 illustrates the congruity between the crime of burglary and the burglary special circumstance. In *Abilez,* the defendant was temporarily staying in his mother's house. He killed his mother and stole things from her bedroom and from a bedroom occupied by one of his sisters. The court found that entry into his mother's and his sister's bedrooms "was sufficient to support both counts of burglary" and "that being so, [the court] also reject[ed] defendant's claim there was insufficient evidence to sustain the burglary-murder special circumstance." (*Id* at p. 509.)

1. Uninvited entry is not an element of burglary.

If the elements of burglary are the same whether burglary is alleged as a charged offense or as the basis for a special circumstance, the only question is: Does burglary require that the perpetrator be an uninvited entrant?

The answer is: No, *every* individual who enters an inhabited dwelling with the intent to commit a felony is guilty of burglary whether he or she is invited in or not.

More than 125 years ago, this Court rejected the notion that "in order to constitute a burglarious entry, the act of entering must be itself a trespass, — an intrusion against or without the consent of the owner." (*People v. Barry* (1892) 94 Cal. 481, 482.) In *Barry*, this Court held section 459 "is clear and concise, and its meaning obvious. By its express terms the offense is perfect and complete when the entry is made with the intent to commit grand or petit larceny, or any felony." (*Ibid.*)

Though this Court has changed, the state has changed, and times have changed, section 459 has not changed. Today — as in 1892 — *every person who enters* an inhabited dwelling with intent to commit larceny or any felony is guilty of burglary.[19]

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[19] Section 459 provides as follows:

Whether the entry was by invitation or not is of no consequence.

Schultz's jury was so instructed:

> *Every person who enters* any inhabited dwelling house with the specific intent to steal, take, and carry away the personal property of another of any value and with the further specific intent to deprive the owner permanently of that property or with the specific intent to commit rape, a felony, is guilty of the crime of burglary in violation of Penal Code section 459.
> .....
> In order to prove this crime, each of the following elements must be proved:

> *Every person who enters* any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, *with intent to commit grand or petit larceny or any felony is guilty of burglary is guilty of burglary.*
> (Italics added.)

> One, a person entered an inhabited dwelling house; and two, at the time of the entry, that person had the specific intent to steal and take away someone else's property, and intended to deprive the owner permanently of that property or at that time of the entry that person had the specific intent to commit the crime of rape.
> (16RT 2816)

In *People v. Abilez, supra,* 41 Cal.4th at pp. 557-558, this Court made it clear that even if the defendant actually lives in the house, he or she is guilty of burglary for entering a portion of the house inhabited by another member of the family with the intent to commit larceny.

The prosecutor was a Janus with regard to this issue. In arguing the pretrial motion, the prosecutor put on one face and insisted the People had to prove Schultz was an uninvited guest to establish a burglary. In final argument, the prosecutor showed a different face and argued Schultz "could have been an invited guest" and still be guilty of burglary. (16RT 2835)

The prosecutor's final argument was correct — whether an individual is invited in or not is not relevant to burglary and, therefore, not relevant to the burglary special circumstance.

Evidence tending to show that Burger did not invite Schultz into her home was irrelevant, and the trial court erred in admitting it on that basis.

E. The taped message was not relevant to corroborate Mooney's testimony Schultz entered Burger's condominium to steal something.

The prosecutor represented to the court that Mooney would testify that Schultz told her he went into Burger's garage intent upon stealing something. The prosecutor argued the fact Burger intended to stay home that evening "corroborated Ms. Mooney's testimony ... that defendant told her that he entered the residence with the intent to steal." (7CT 1928) In other words, the prosecutor asked the court to infer that Schultz entered Burger's house or garage with the intent to steal from the fact Burger intended to stay home that evening.

Whether an inference can be drawn from a particular piece of evidence is a question of law for the court. (*Blank v. Coffin* (1942) 20 Cal.2d 457, 461; *Marshall v. Parkes* (1960) 181 Cal.App.2d 650, 660)

Schultz contends — as a matter of law — it is impossible to infer that Schultz entered Burger's condominium harboring the intent to steal from evidence Burger intended to stay home that night.

As defined in Evidence Code section 600, an inference is a deduction the fact-finder is reasonably justified in drawing from proven or absent facts. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1149.)

Not every inference can reasonably be drawn from a given set of facts or from a particular item of evidence. An example of inferences one can reasonably draw based on a given sets of facts are:

Fact:	The teacher said that all the students in Jane's class passed the examination.
Fact:	Jane is a student in Jane's class.
Inference:	Jane passed the examination.

Or:

Fact: Harry said Jane told him she passed the examination.

Fact: All the students in Jane's class passed the examination.

Inference: What Jane told Harry was true; Jane passed the examination.

The prosecutor argued one could reasonably infer that Schultz went into Burger's house harboring an intent to steal from the fact Burger planned to stay home the night she was killed. In a Logics class, the prosecutor's argument would be graphed as follows:

Fact: Burger planned to stay home on the night of August 5, 1993.

Fact: Schultz entered Burger's house on the night of August 5, 1993.

Inference: Schultz entered Burger's house on August 5, 1993 harboring an intent to steal.

Or as:

Fact: Burger planned to stay home on the night of August 5, 1993.

Fact: Mooney said Schultz told her he entered Burger's house on August 5, 1993 harboring an intent to steal.

Inference: What Schultz told Mooney was true.

No matter how the inference is graphed, when one scans it, one is startled by the final line because there is no connection between the facts and the inference.

It is simply not reasonable to infer that Mooney was telling the truth or that Schultz entered Burger's condominium harboring an intent to steal from the fact Burger planned to stay home. Inferring Schultz harbored an intent to steal or that Mooney was telling the truth from the fact Burger planned to stay home is akin to the following:

Fact:	The teacher said that all the students in Jane's class passed the examination.
Inference:	Tomatoes are on sale at the supermarket today.

When there is no rational connection between the fact and the inference, the inference simply cannot be made. When the inference cannot be made, the evidence is not relevant, and — as a matter of law — the trial court errs in admitting it.

F. The statements on the tape were not admissible under Evidence Code section 1250 as a statement of Burger's then-existing intent to stay home the night of August 4, 1993.

The prosecutor argued the fact Burger planned to stay home the night she died was relevant because: (1) the burglary special circumstance required proof Schultz's entry was uninvited, (2) that fact corroborated Mooney's testimony that Schultz entered Burger's condominium with the intent to steal, and (3) that fact was disputed. As Schultz has already argued, each of these claims is specious, and the fact Burger planned to stay home was not relevant to any issue.

Without abandoning that position, Schultz contends the voicemail was not admissible even if it was relevant as claimed by the prosecution because it was inadmissible hearsay.

The trial court treated the voicemail message as all of a piece. The trial court erred in doing so.

All of the statements on the voicemail tape cannot be lumped together as a single evidentiary offer. The voicemail is not a single piece of evidence, but a series of ten separate statements:

- Hi, Larry.
- This is Cindy.
- And it's about 9:15 on Wednesday night.
- Give me a call back if you can, uh, or at work tomorrow.
- I'd like to meet a little early before class and go over the step from last week.
- Um, I just hope I don't get too lost tomorrow.
- But, anyway, I had a real good, uh, trip.
- Look forward to seein' ya.
- And, give me a call when you get a chance.
- Bye-bye.

(7CT 1939, 13RT 2233)

Each of the statements was hearsay, and each was excluded as such under Evidence Code section 1200.

The trial court could not properly allow admission of any single statement unless that individual statement qualified for admission under one of the provisions of the Code.

The People argued only one provision of the Code, and the trial court considered only one provision — Evidence Code section 1250, subdivision (a)(2) — which allows admission of a hearsay declarant's expression of a present intent or plan to do an act in the future:

> [E]vidence of a statement of the declarant's then existing ... intent [or] plan ... is not made inadmissible by the hearsay rule when:
> The evidence is offered to prove or explain acts or conduct of the declarant.

In order for this Court to find that the trial court's decision was not an abuse of discretion, this Court must find that *all* of the statements on the voicemail were statements of Burger's then-exiting intent or plan to stay home that night, and, therefore, admissible under section 1250.

This Court cannot reach that conclusion.

Section 1250 codified the holding in *People v. Alcalde* (1944) 24 Cal.2d 177, a case decided before the Evidence Code was enacted. In *Alcalde,* the victim told her roommate and her brother-in-law that she was "going to dinner that night with Frank." The Court admitted the statements as a declaration of the victim's intent to go out with a man named Frank on the night she was killed:

> [The victim's] utterance was hearsay. It was made extrajudicially and offered as proof of the truth of its content. It was a declaration of intent to do an act in the future, offered as evidence that the deceased had the in-

> tent she declared and that the intent was probably carried out, namely; that she intended to and did go out that night with a man named "Frank."
> (*Id* at p. 185.)

Section 1250 rests on the *Alcalde* belief that one can reasonably infer that an individual actually performed an act he or she has declared an intent to perform. As stated in *Alcalde*:

> From the declared intent to do a particular thing an inference that the thing was done may fairly be drawn.
> (*People v. Alcalde, supra,* 24 Cal.2d at p. 185.)

Before the court can allow the jury to conclude that an individual went forward with an expressed intent, that intent must be expressed in a reasonably straightforward manner.

In *People v. Jones* (1996) 13 Cal.4th 535, 548, the victim's statement to her daughter that she was going to "Oakland with [defendant]" was admitted under section 1250 to prove "conduct of the declarant in conformity" with the statement — that the defendant went to Oakland.

In *United States v. Persico* (2nd Cir. 2011) 645 F.3d 85, Persico, a high ranking member of Colombo crime family was charged with

ordering the murder of Cutolo, another member of the family, who had disappeared. Relying on Federal Rules of Evidence, Rule 803,[20] the court admitted testimony from Mrs. Cutolo that, on the day her husband disappeared, he told her he had to "run back to Brooklyn" to meet "The Kid" — a nickname commonly associated with Persico — "to show Cutolo's intent to meet Persico [in Brooklyn] and to support an inference that Cutolo acted in accordance with that intent." (*Id.* at 99, 101.)

In *United States v. Badalamenti* (2nd Cir. 1986) 794 F.2d 821, 825-826, the court relied on rule 803 to admit the statement of a government informant that he "going to meet [one of the defendants] at the Cafe Borgia to obtain a sample of heroin" as evidence of the informant's intent to do so.

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[20] Federal Rules of Evidence Rule 802(3), 28 U.S.C.A. is nearly identical to section 1250 and provides as follows:
A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

In *Staelens ex rel. Estate of Staelens v. Staelens* (D. Mass. 2010) 677 F.Supp.2d 499, 503, the court relied on Rule 803 to permit Ms. Staelens to testify that her ex-husband told her he continued to name her as beneficiary on his 401(k) account even though they were divorced because he wanted to be sure she would be okay and because there was no one else to whom he wished to leave the money as proof that her ex-husband had actually intended to leave her as the designated beneficiary; and, as proof the continued designation was not an oversight on his part.

Even the most cursory review of the statements recorded on Rodriguez's answering machine reveals no statement that can reasonably be interpreted as: "I plan to stay home tonight."

Accordingly, all of the statements on the tape were hearsay, and none qualified for admission under section 1250, subdivision (a)(2).

G. Burger's voicemail statements were not admissible as circumstantial evidence she planned to stay home the night she was killed.

As an alternative, the prosecutor argued that statements on the voicemail were admissible — not to prove their truth — but as circumstantial evidence that Burger planned to stay home. The court accepted this argument and ruled that all of the statements were admissible under this theory as well as under Evidence Code section 1250. (8RT 1322)

In ruling that all of the statements on the tape were admissible as non-hearsay evidence, the trial court again failed to parse the statements and recognize that each statement on the tape was a separate piece of evidence.

Schultz contends the trial court's failure to distinguish among the statements led it to commit error because: (1) most of the statements are not circumstantial evidence of an intent to stay home and (2) those few that *might* evidence such an intent do not do so unless

they are true — and, therefore, they are hearsay and inadmissible as non-hearsay.

Circumstantial evidence is evidence that does not directly prove the fact to be decided; it is evidence from which one may logically and reasonably draw a particular conclusion. (CALCRIM No. 223 (Database updated April 2012).)

In the seminal case, *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152-153, the court defined circumstantial evidence as follows:

> Circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth.

Plainly, the following statements cannot lead to an inference that Burger planned to stay home on the night she died:

- Hi, Larry.
- This is Cindy.
- I'd like to meet a little early before class and go over the step from last week.

- Um, I just hope I don't get too lost tomorrow.
- But, anyway, I had a real good, uh, trip.
- Look forward to seein' ya.
- And, give me a call when you get a chance.
- Bye-bye.

(CT 1107, 13RT 2233)

The court erred in admitting these statements.

The following statements might be circumstantial evidence that Burger planned to stay home — if and only if — the statement, "And, it's about 9:15 on Wednesday night" which links the statements to the day Burger died is true:

- Hi, Larry.
- This is Cindy.
- And it's about 9:15 on Wednesday night.
- Give me a call back if you can, uh, or at work tomorrow.
- Bye-bye.

(CT 1107, 13RT 2233)

However, the statement, "And it's about 9:15 on Wednesday night" was not admissible under any exception to the hearsay rule and must be eliminated leaving only:

- Hi, Larry.
- This is Cindy.
- Give me a call back if you can, uh, or at work tomorrow.
- Bye-bye.

(CT 1107, 13RT 2233)

This collection of statements is no longer circumstantial evidence Burger planned to stay home on the night she died because there is nothing to link these statements to the day she died.

The court erred in admitting the statements on the voicemail as non-hearsay circumstantial evidence that Burger planned to stay home the night she was killed.

H. The court erred in ruling the entire taped message was more probative than prejudicial, and the trial court failed to consider viable alternatives to diminish the prejudice.

In religion, the Lord giveth, and the Lord taketh away. In law, Evidence Code section 210 giveth, and section 352 taketh away.

Evidence Code section 210, which expansively defines "relevant evidence," and article I, section 28(d) of the California Constitu-

tion, which commands the admission of all relevant evidence, combine to create a climate favorable to admissibility.

On the other hand, Evidence Code section 352 gives the court the power to regulate the climate of admissibility by excluding otherwise admissible evidence when, among other things, the probative value of that evidence is outweighed by the danger of unfair prejudice.

A trial court's grant of discretion imposes on the court a duty to conduct a serious search for prejudice and to make a sincere attempt at balancing the interests of the opposing parties. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1069-1070; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

In this case, the trial court abused that discretion because it failed to conduct any truly meaningful search for prejudice and made little attempt to balance the interests of the parties by searching for an alternative solution to allowing an emotionally-charged voicemail message into evidence.

1. The introduction of Burger's last words was extremely prejudicial.

As a society, we are fascinated with an individual's last words. Amazon sells books that collect the last words of the famous — William Brahms's, Last Words of Notable People — the infamous— Robert K. Elder's Last Words of the Executed — and the good and the bad — Herbert Lockyer's Last Words of Saints and Sinners.[21]

We are fascinated with last words because they often create an indelible image of the deceased. P. T. Barnum's last words: "How were the receipts today at Madison Square Garden?" conjure up an image of a carny huckster. Similarly, Todd Beamer's last words before leading an attack on the terrorists who had taken control of Flight 93 on September 11, 2001: "Are you guys ready? Let's roll!"

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[21] Brahm, William, Last Words of Notable People: Final Words of More Than 2500 Noteworthy People Throughout History (2010) Reference Desk Press; Elder, Robert K., Last Words of the Executed (2010) University of Chicago Press; Lockyer, Herbert, Last Words of Saints and Sinners (2000) Kregel Classics.

conjure up an image of a patriot and hero whose life was cut short by terrorism.

The statements on the voicemail tape were Burger's last words. Because they were her last words, jurors necessarily looked to them to sum her up as an individual — an image of a young woman with a career and friends who danced just for the joy of it and was able to laugh at herself.

As the jurors listened to Burger babble on about dancing, they knew that she would soon be dead and that the excited plans she was making would never come to fruition. The tape created an indelible picture of a tragically doomed young woman. It was — as defense counsel argued — "a voice from the grave." (8RT 1320)

2. The trial court failed to consider alternatives that would have minimized prejudicial nature of the voicemail.

One of the most prejudicial aspects of the voicemail message is that it brought the fact Burger had friends, hobbies, a job, vacations, and plans all of which had been tragically cut short by her unexpected death. Although Schultz does not abandon his contention that the entire message was irrelevant, he argues that — if the trial court believed that evidence Burger planned to stay home was relevant — those statements relating to Burger's dance class and her vacation should have been redacted. All of those statements were emotionally evocative, and none reasonably led to an inference that Burger planned to stay home the night she died. Redacting those emotionally-charged statements would have left a significantly less-prejudicial collection of statements, and the reduced collection would still have conveyed the notion the People wanted to present:

- Hi, Larry.
- This is Cindy.
- And it's about 9:15 on Wednesday night.

- Give me a call back if you can, uh, or at work tomorrow.
- Bye-bye.

The voicemail was also extremely prejudicial because it allowed Burger to speak about her life directly to the jury. The trial court never explored the possibility that Larry Rodriguez could testify in a manner that would afford the prosecutor the opportunity to show that Burger planned to stay home and, at the same time, avoid exposing the jury to the prejudice inherent in hearing Burger's voice.

Plainly, that option was available. The People's moving papers state that "Mr. Rodriguez will testify that he was at home, lying down when Ms. Burger left him the message and he got up and called her back a few minutes later, thus establishing the foundation for when the message was left." (7CT 1928)

The voicemail message was played during the prosecutor's opening statement and again when Larry Rodriguez testified. When the contents of the tape itself are removed from Rodriguez's actual trial testimony, it is apparent that his testimony conveyed the notion

that Burger planned to stay home the night she died. Thus, the playing of the tape was unnecessary:

Q: [Prosecutor]	Okay. Did you have a conversation with Miss Burger shortly before she died?
A: [Rodriguez]	Yes, sir.
.....	
Q:	Did Miss Burger leave a message on your answering machine on the evening of August 4th, 1993?
A:	Yes, she did.
Q:	And about what time was that?
A:	It was about 9:15.
Q:	Were you actually at home at the time that message was left on your answering machine?
A:	Yes, I was.
.....	
Q:	Mr. Rodriguez, did you call her back shortly after she left that message?
A:	Yes, I did.
Q:	And about what time did you call her back?
A:	Around 9:27, 9:28, somewhere around there just before 9:30
Q:	And did she make any statements to you about having plans to go out that evening?
A:	No, she did not.

(13RT 2281-2282)

At least two reasonable and viable alternatives — redaction and reliance on Rodriguez's testimony without the tape — were readily available. The trial court failed to exercise its muscle to ensure that evidence of a highly prejudicial nature was not admitted.

I. The admission of the voicemail shifted the focus of the guilt phase from the crime to the victim and created an aura of pathos that defense counsel could not dispel.

Ordinarily, the standard of prejudice for state law evidentiary error is whether there is a reasonable possibility that the error affected the verdict. (*People v. Watson* (1956) 46 Cal.2d 818; *People v. Carter* (2003) 30 Ca1.4th 1166, 1221-1222; *People v. Brown* (1988) 46 Ca1.3d 432, 446-448.)

However, Schultz contends the court's failure to follow established rules of evidence violated his right to due process of law in violation of the Fourteenth Amendment. The standard of prejudice for federal constitutional error is whether it appears beyond a reasonable doubt that the assumed error did not contribute to the ver-

dict. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People* v. *Carter, supra,* 30 Cal.4th at pp. 1221-1222.)

Schultz contends respondent cannot carry its burden under either standard.

As this Court acknowledged in *People v. Salcido* (2008) 44 Cal.4th 93, 151, a purely emotional presentation regarding the victim such as this voicemail tape has no place in the guilt phase of a capital trial and amounts to victim-impact testimony.

Salcido is simply an echo of earlier decisions in other jurisdictions each of which acknowledges that the boundary drawn by the Supreme Court in *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] is crossed when irrelevant victim-impact testimony seeps into the guilt phase of a capital trial. (*Odle v. Calderon* (N.D. Ca. 1995) 884 F.Supp. 1404, 1429-1430; *Calhoun v. State* (Ala. 2005) 932 So.2d 923, 968-969.)

Salcido and its predecessors bar victim-impact testimony in the guilt phase of a capital trial because victim impact evidence injects

emotional elements into the crime and criminal law — during the guilt phase — concentrates on the objective elements of the crime which remain the same no matter who the victim is and without regard to whether the victim's injury had a ripple effect and touched others. This ensures that guilt decisions are consistent.

Whether the victim is a prostitute or a nun, a rape is a rape if the sexual intercourse is without the victim's consent. Whether the victim is homeless or the wealthy patriarch of a large and loving family, a murder is a murder if the victim is killed unlawfully and with malice.

In those few instances, when the focus is on the victim in the guilt phase, the focus is on some particular, discrete, and non-emotional aspect of the victim — for example, the victim is a child (section 288, subdivision (a); section 273ab, subdivision (a)), the victim is elderly (section 237, subdivision (b)), or the victim is a police officer (section 664, subdivision (e)(1).)

Defense counsel stated in his opening statement, the crime "was not premeditated" and was "a random act committed by a man high on methamphetamine." (12RT 2261) The admission of Burger's own voice talking about her vacation, her friend, and her dance class — words the jury knew were the very last words she would say to anyone other than her murderer — in the guilt phase of Schultz's trial — not once, but three times — coupled with an idealized photograph of the doomed speaker raised an aura of sympathy and pathos and led the jury to feel that they knew Burger. The fact the jury felt they knew Burger made it difficult for them to focus dispassionately on the elements of murder and accept the defense that Schultz's perceptions were so altered by methamphetamine that it was impossible for him to premeditate this crime or that the crime was not premeditated but simply a random, albeit terrible, act.

A measure of the prejudice of an error is the importance the prosecutor placed on the evidence. Here, the prosecutor played the voicemail tape during his opening statement. (13RT 2233) He

played it again when the first witness took the stand. (13RT 2281) And, he played it again in final argument. (22RT 3905)

When the prosecutor played the tape during Rodriguez's testimony, he added an additional emotional firecracker to the pyre by connecting the voice to a face; he introduced a photograph of Burger so photo-shopped and idealized that her good friend, Rodriguez, had a difficult time even recognizing it as a photograph of Burger. (13RT 2279)

In sum, whether Burger was interested in dancing or not had nothing to do with whether Schultz had premeditated the murder. Whether she danced as well as Fred Astaire or had two left feet likewise had nothing to do with that issue. And, whether she was going to meet Rodriquez before class the next day or not had nothing to do with that issue. The admission of the voicemail so distracted the jury from the issues that were to be decided that it denied Schultz a fair trial.

This Court must reverse Schultz's conviction and sentence.

III. Schultz was denied his state and federal right of confrontation when Magee, an uninvolved surrogate, testified to the DNA profile independently developed by Yates.

Strings of material called deoxyribonucleic acid ("DNA") found in virtually every cell of the human body contain all the information necessary to produce another complete and identical human being. Techniques for studying this individually-unique genetic blueprint have been applied with increasing frequency to forensic identification. The People's case against Schultz rested heavily on the contention Schultz's genetic blueprint — and *only* Schultz's genetic blueprint — matched the male genetic blueprint extracted from semen recovered at Burger's autopsy.

A. Factual and procedural summary.

In 1993, the coroner collected a vaginal washing at Burger's autopsy and delivered it to the Ventura County Crime Laboratory ("Crime Lab"). (15RT 2649, 2669) The Crime Lab determined the

washing contained sperm cells and took immediate steps to protect the washing for future DNA testing. (15RT 2685)

Three years later — in 1996 — knowing the washing contained sperm cells, the Crime Lab sent the washing to Orchid Cellmark ("Cellmark") to develop a DNA profile of the sperm donor. (15RT 2686)

Paula Yates, a Cellmark employee, separated the female vaginal epithelial cells from the male sperm cells, performed a complicated series of procedures to extract and replicate particular DNA segments from both male and female samples, developed a DNA profile for the sperm donor, and returned the samples and the DNA profile to the Crime Lab. (8RT 1377-1378, 15RT 2707-2708)

Four years later — in 2000 — an investigator for the Ventura County District Attorney's Office hand-delivered a blood sample known to have been obtained from Schultz to Cellmark for comparison with Yates's 1996 sperm DNA profile. (12RT 2556)

Soon after the sample was delivered, Wendy Magee, an employee of Cellmark, developed a DNA profile from Schultz's blood sample and compared it with the male profile Yates had developed four years earlier. Magee concluded that, in the Caucasian population,[22] the likelihood the profile Yates had developed matched someone other than Schulz was 1 in 24×10^{18}. (15RT 2692, 2712, 2713-2714)

Before trial, the People filed a motion seeking an order allowing Cellmark's 1996 and 2000 records of DNA extraction, replication, and profiling in evidence as business records under Evidence Code section 1271. (8CT 2163)

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[22] Schultz is a Caucasian individual. Magee stated that the likelihood the profile Yates had developed matched someone other than Schultz among the African-American population was 1 in 48×10^{18} and someone other than Schultz among the Hispanic population was 1 in 80×10^{18}. (15RT 2714)

Schultz opposed the motion on several grounds[23] including an argument that admission of a DNA profile as a business record in the absence of the testimony of the analyst who had developed the profile would deny Schultz his right to cross-examine and confront an adverse witness thereby depriving him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the equivalent provisions in the California Constitution, article I, sections 7, 15, 17, and 24. (9CT 2422-2423)

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[23] Schultz also opposed the motion on the following grounds: (1) *People v. Kelly* (1976) 17 Cal.3d 24 requires a hearing to demonstrate case-specific proof that the DNA procedures were conducted in accordance with recognized protocol by knowledgeable technicians, and this requirement necessarily prohibits admission as a business record, and (2) a record of a DNA extraction, replication, and profiling is not a qualifying record under section 1271. (9CT 2422-2423) Schultz argues the court erred in granting the motion on each of these grounds infra in sections IV and V of this opening brief.

Schultz further contended the court had discretion under Evidence Code section 352 to exclude evidence the probative value of which was substantially outweighed by the danger of undue prejudice and asked the court to exercise that discretion in this case. Schultz also questioned the prosecution's ability to present a proper foundation and an unbroken chain of custody. (9CT 2422-2423) Schultz does not argue either of these grounds on appeal.

The trial court initially denied the motion and ordered the individuals who had performed the two extractions and had developed the two profiles to appear and testify to their methods and results. (8CT 1288, 8RT 1289)

However, on reconsideration and after further urging by the prosecutor, the court modified its ruling to allow the prosecutors to rely on Evidence Code section 1271 or a surrogate to introduce the 1996 DNA profile and the records related to that profile.[24] (9CT 2481, 8RT 1387)

At trial, defense counsel unsuccessfully renewed all of the objections raised in the pretrial motion and also unsuccessfully objected on the ground that Magee was not qualified to testify as an expert in the field of population frequency. (15RT 2698, 2717-2718)

Over objection, Magee testified to the contents of the Cellmark records created by Yates in 1996 and the DNA profile Yates had

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[24] The court's ruling actually referred to the "1993" records. Patently, the court intended the ruling to apply to the 1996 Cellmark procedures and conclusions. There were no 1993 DNA tests or results.

produced in 1996 and relied on Yates's profile to conclude it was a statistical match to the profile she had developed from a source known to have been acquired from Schultz. (15RT 2698, 2707-2708)

B. Summary of argument.

A DNA profile is a statement by the analyst that says: "This is the DNA makeup for this person." In this case, Yates's said: "This is the DNA makeup of the person whose sperm was found in Burger at autopsy."

The People introduced this statement at trial to prove that Schultz had been in Burger's condominium on the night she died and to prove that he had sexually forced himself on her. Since the jury was instructed it could find Schultz guilty of first-degree felony murder based upon a finding Schultz had killed Burger during the course of a rape and also instructed on rape as a special circumstance, Yates's statement was an essential cog in the People's case.

The prosecutor also relied on this statement to bolster its claim Schultz's plan to escape from custody to avoid DNA testing was evidence of consciousness of guilt.

It is inescapable that Yates's statement — "This is the DNA makeup of the person whose sperm was found in Burger at autopsy" — is testimonial because: (1) Yates knew that the Crime Lab had sent the vaginal washing containing sperm to her to establish the perpetrator's identity through DNA evidence and she knew the DNA profile would be used as evidence at a later trial, (2) Yates's DNA profile is the functional equivalent of in-court testimony offered to establish that the sperm found at autopsy was Schultz's, and (3) Yates's profile was not raw data, but the result of human interpretation of data extracted and replicated from a biological source and then interpreted through the application of reason and mathematics.

It is also inescapable that Magee — who did not participate either directly or in a supervisory capacity in Yates's work and had no personal knowledge of Cellmark's or Yates's procedures or practices in 1996 at the time the profile was developed because she did not work there in 1996 — was not an appropriate surrogate for Yates.

Finally, it is inescapable that Magee's conclusion the semen found at autopsy was Schultz's depended upon an assumption that DNA profile Yates had developed was true and, therefore, Yates's DNA profile was admitted for its truth.

The clusters of rights bundled together in the Sixth Amendment and its state counterparts are the powerhouses of criminal procedure. These constitutional powerhouses are the engines on which criminal defendants rely to drive their defenses. In denying Schultz the opportunity to cross-examine Yates — a pivotal witness in the prosecution's claim the sperm found at autopsy was Schultz's — the court denied Schultz one of the most potent engines he needed to drive his defense and violated the state and federal Confrontation

Clauses embodied in the Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, and the Sixth Amendment's state opposite number, article I, section 15 of the California Constitution. (*Pointer v. Texas* (1965) 380 U.S. 400, 401 [85 S.Ct. 1065, 13 L.Ed.2d 293].)

Because California criminal defendants find further succor in section 686,[25] which echoes the language of the state and federal con-

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[25] Penal Code section 686 provides as follows:
In a criminal action the defendant is entitled:
1. To a speedy and public trial.
2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel, except that in a capital case he shall be represented in court by counsel at all stages of the preliminary and trial proceedings.
3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that:
   (a) Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this state.
   (b) The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this state.

stitutional provisions, the trial court's error also deprived Schultz of this statutory right.

The trial court's first decision — ordering Yates to appear — was correct. The trial court's second decision — excusing Yates's appearance and allowing Magee to act as her surrogate — was incorrect.

The error effectively stalled Schultz's defense; and, as a result, Schultz's conviction and sentence must be reversed. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

C. Standard of review.

The admission of Magee's testimony impacted Schultz's state and federal constitutional rights. This Court must independently review the settled facts of the case. (*People v. Cromer* (2001) 24 Cal.4th 889, 905.)

D. *Crawford* requires that testimonial forensic evidence be presented through a forensic analyst actively involved in the forensic procedure unless that analyst is unavailable and the defendant has previously been given an opportunity for cross-examination.

For almost 25 years, the reliability test set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [124 S.Ct. 1354, 158 L.Ed.2d 177] determined whether out-of-court statements could be admitted without producing the author or speaker for cross-examination.

In 2004, *Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177] lit the fuse that blasted huge and fatal holes in *Roberts's* confidence in reliability measured by state evidentiary rules and ignited the 21st century revolution in Confrontation jurisprudence. After *Crawford,* trial counsel's hard-hitting partisan cross-examination — not state evidentiary rules — determines reliability:

> [The Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination ... [and] thus [the Clause] reflects a judgment, not only

> about the desirability of reliable evidence (a point on which there could be little dissent) but about how reliability can best be determined"
> (*Id.* 541 U.S. at p 61.)

In order to assure that reliability is tested by cross-examination, *Crawford* requires that — when an out-of-court statement is testimonial — it may not be admitted against the defendant unless the original author or writer is unavailable and the defendant has had a prior opportunity to cross-examine the original creator. (*Crawford v. Washington, supra,* 541 U.S. at pp. 53-54.)

The questions necessarily raised by *Crawford* are: Was Yates's DNA profile a testimonial statement? If so, was Yates's absence from trial excused because she was unavailable and Schultz had already been given a chance to cross-examine her? The answer to the first question is yes; the answer to the second is no.

Yates's DNA profile was a testimonial statement, and Schultz had the right to sic his counsel on that statement to test its reliability and accuracy.

1. Yates's DNA profile report was prepared to serve as an investigative tool and to provide evidentiary assistance to the prosecution at the time of trial. It was, therefore, a testimonial statement.

Crawford provided parameters for, but did not precisely define, a testimonial statement. The *Crawford* parameters prohibit the admission of ex parte in-court testimony and its functional equivalents. Functional equivalents are described as: (1) "pretrial statements that declarants would reasonably expect to be used prosecutorially" and (2) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial":

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or ***its functional equivalent*** — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar ***pretrial statements that declarants would reasonably expect to be used prosecutorially;***" "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" ***statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.*** These formulations all share a

> common nucleus and then define the Clause's coverage at various levels of abstraction around it.
> (*Crawford v. Washington, supra,* 541 U.S. at pp. 51-52.) (Internal citations and quotations omitted.) (Italics in original; Bold italics added.)

In companion cases, *Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 1665 L.Ed.2d 224] fleshed out the definition of "functionally equivalent" by differentiating between various types of statements made to police officers. The *Davis* Court held that statements to officers about what *is* happening are not testimonial; whereas, statements to officers about what *did* happen are testimonial:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *They are testimonial when the circumstances objectively indicate that there is no such emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*
> (*Id.* at 547 U.S. at p. 822) Italics added.)

Three years later, in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314], the Court tackled its first case involving forensic evidence. In *Melendez-Diaz*, a police officer found 19 baggies containing a suspicious substance hidden in a car in which Luis Melendez-Diaz was a passenger. The police submitted the baggies to a forensic laboratory for analysis, and the laboratory issued certificates that set forth the composition, quality, and net weight of the suspicious substances: all of which were determined to be cocaine. The certificates themselves were admitted to prove Melendez-Diaz possessed cocaine for sale. (*Id.* 557 U.S. at p. ___ [129 S.Ct. at pp. 2530-2531].)

The Court found the forensic certificates — which essentially said: "The substance found in this baggie is x ounces of cocaine" — were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' " (*Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at p. ___ [129 S.Ct. at p. 2532].) The Court stated:

> [N]ot only were the affidavits "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," but under Massachusetts law the *sole purpose* of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance...
> (*Melendez-Diaz v. Massachusetts, supra* at 557 U.S. at p. ___ [129 S.Ct. at p. 2532].) (Italics in original)

In sum, *Melendez-Diaz* concluded that that "the analysts' affidavits were testimonial statements," *and*, therefore, the analysts' certificates were inadmissible absent the analysts' testimony or a showing that they were unavailable and the defendant had had a prior opportunity to cross-examine them. (*Melendez-Diaz v. Massachusetts, supra*, 557 U.S. at p. ___ [129 S.CT. at p. 2532.) (Italics added.)

Two years after *Melendez-Diaz*, in *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610], the evidence against Donald Bullcoming included a forensic laboratory report certifying that Mr. Bullcoming's blood showed an elevated alcohol concentration. (*Id.* __ U.S. at p. __ [131 S. Ct. at p. 2709].)

Bullcoming continued the Confrontation Clause analysis regarding forensic testing that began in *Melendez-Diaz*. *Bullcoming* explained that forensic reports that are "created solely for an 'evidentiary purpose,' " i.e., "in aid of a police investigation" are testimonial and, therefore, cannot be introduced without "offering a live witness competent to testify to the truth of the statements made in the report." (*Bullcoming v. New Mexico, supra,* ___ U.S. at p. ___ [131 S.Ct. at pp. 2709, 2717].)

The facts show that — but for the differences in the forensic sciences — Yates's DNA profile was just like the forensic materials before the Court in *Melendez-Diaz* and in *Bullcoming* because it too *was* "created solely for an 'evidentiary purpose,'" i.e., "in aid of a police investigation." (*Bullcoming v. New Mexico, supra,* ___ U.S. at p. ___ [131 S.Ct. at p. 2717].)

Parigian, the assistant laboratory manager of the Crime Lab, testified that as soon as the Crime Lab received the vaginal washing from the coroner, he inspected the swabs to find out if the sample

contained any sperm cells. The moment he determined that sperm cells were present, he "preserve[] its integrity for the purpose of DNA testing." (15RT 2685) Parigian sent the sample to Cellmark in 1996 "for the purpose of extracting DNA so that it could be compared to a known suspect." (15RT 2686, 2707) When Cellmark had completed its job and developed a DNA profile of the sperm donor, Cellmark returned the profile and the sample to the Crime Lab. As soon as the Crime Lab received the material, it took steps to safeguard the DNA profile it had requested for later use as evidence at trial:

> Q [By prosecutor]: Okay. Now, did your laboratory receive back the *evidence* from Cellmark after they completed their examination [in 1996]?
>
> A [By Parigian]: Yes.
>
> Q: And did your laboratory also receive a report indicating that DNA had in fact been extracted from the samples that you sent?
>
> A: Yes.
>
> (15RT 2686-2687) (Italics added.)

The Crime Lab procedures themselves demonstrate that the laboratory's goal is to test and preserve evidence for later use at trial. Parigian testified that the Crime Lab divides all samples into four parts "so [the Crime Lab] has plenty for the defense to use if they need it, plenty for sending it outside, or plenty for [the Crime Lab] to use." (15RT 2687-2688)

Logic dictates that Yates — who worked for a company that describes itself as "one of the most experienced providers of forensic DNA identity testing services" and announces it "has performed DNA forensic analyses in tens of thousands of cases and for hundreds of thousands of offender samples" for "federal, state, and local crime laboratories, [and] law enforcement agencies"—knew that the vaginal washing was to be analyzed for DNA to assist in identifying and prosecuting the alleged perpetrator. (Orchid Cellmark website available online at http://www.orchidcellmark.com/forensicdna.htm. [accessed 4-2-12].)

But, even if one were to assume Yates was too dense to know the purpose of the DNA analysis on the sperm cells found in the vaginal washing, a reasonable analyst who received a sample from a Crime Lab requesting a DNA profile from a sample taken at autopsy and accompanied by a "cover letter ... telling ... a little bit about the case" (15RT 2686) would have believed that the profile was being prepared for use at a later trial — and that is enough under both *Melendez-Diaz* and *Crawford* to make a statement testimonial because both cases define a testimonial statement to include one " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at p. ___ [129 S. Ct. at p. 2532 citing *Crawford v. Washington, supra,* 541 U.S. at p. 52.)

There can be no dispute that under *Melendez-Diaz* and *Bullcoming,* Yates's DNA profile was a testimonial statement that could only be presented through the testimony of a forensic analyst.

This analysis is not changed by the Court's recent ruling in *Williams v. Illinois* (June 18, 2012, No. 10-8505) ___ U.S. ___ [2012 WL 2202981, 12 Cal. Daily Op. Serv. 6620].

In *Williams,* a DNA analyst testified she had compared two DNA profiles, each of which had been produced by other analysts, and concluded the profiles were a statistical match. The analyst did not identify the sample or its origin, describe how the forensic laboratories that developed the profiles had handled or tested the samples, comment on the reliability of the forensic laboratories' testing procedures or the capabilities of their employees, or vouch for the scientific validity of the profile either laboratory had developed.

In sum, her testimony was limited to a single response to what the Court called a modern-day version of a hypothetical question: She "answered "yes" to a question about whether there was a match between the DNA profile "found in semen from the vaginal swabs of [the victim] and the one identified as [the defendant's]." (*Williams*

v. Illinois, supra, ___ U.S. at p. ___ [2012 WL 2202981, 12 Cal. Daily Op. Serv. 6620].)

In Schultz's case, Magee's testimony ranged far beyond a comparison of two established DNA profiles. During her testimony, Magee:

- *Identified the sample that Yates tested* as a "vaginal wash pellet" obtained at Burger's autopsy "for the purposes of extracting DNA" to be compared to a "known suspect" (15RT 2708);
- *Described the tests Yates had performed* by detailing the process used to extract and separate the sample into sperm and non-sperm components, the process used to replicate those components, and the method utilized to develop a DNA profile for each (15RT 2708-2709);
- *Verified Yates's skill and technique* (15RT 2709); and

- *Vouched for the accuracy of Yates's results* stating that Yates was "trained and qualified to extract DNA," Yates's methods were "generally accepted in the scientific community" in 1996 and in 2000. (15RT 2709-2710)

In sum, the forensic witness in *Williams* made a limited appearance to testify as an expert on the comparison of one established DNA profile with another established DNA profile. Magee, on the other hand, appeared to identify the biologic source material from which Yates developed a DNA profile, to validate Yates's testing procedures and qualifications, and to vouch for Yates's conclusions.

Like the forensic witnesses in *Bullcoming* and in *Melendez-Diaz*, Magee did far more than answer "yes" or "no" to a hypothetical question. The qualitative and quantitative difference between Magee's testimony and the testimony of the witness in *Williams*, takes the *Williams* decision out of the equation in Schultz's case.

E. Magee was a surrogate who played no role in supervising or assisting Yates in developing the DNA profile that allegedly matched Schultz's profile, and she could not constitutionally appear as a surrogate for Yates.

In *Melendez-Diaz*, the state did not call any analyst as a witness; the state relied entirely upon the drug analysis certificate itself to prove Melendez-Diaz was peddling cocaine. *Melendez-Diaz* held that the certificate could be admitted only through the testimony of a forensic analyst, but left open the question of which forensic analyst must appear at trial: Must it be the forensic analyst who actually performed the forensic test or could a surrogate forensic analyst appear?

Two years later, *Bullcoming v. New Mexico, supra,* __ U.S. at __ [131 S.Ct. at p. 2709] would answer that question.

In Donald Bullcoming's trial, the state of New Mexico called an analyst to testify that the state's forensic laboratory had conducted a blood-alcohol concentration test on Bullcoming's blood and found the levels were extremely elevated.

The State did not call the analyst who performed the test; the State called "another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test" to introduce the test results into evidence. (*Bullcoming v. New Mexico, supra,* __ U.S. at __ [131 S. Ct. at p. 2709].)

Bullcoming answered the which-forensic-analyst-must-appear question left open in *Melendez-Diaz* by holding that generally the forensic analyst who actually performed the test must appear and testify; a surrogate will not suffice:

> As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.
> (*Bullcoming v. New Mexico, supra,* __U.S. at p.___ [131 S.Ct. at p. 2713].)

A surrogate will not suffice because a defendant on trial for his or her life is entitled to question the scientific know-how and veracity of all testimonial evidence. Recollecting its language from *Melendez-Diaz, Bullcoming* once again stressed that no one who

makes a testimonial statement — no matter how scientifically knowledgeable and no matter how dedicated to truth — is exempt from cross-examination at a criminal trial:

> [A]analysts who write reports introduced as evidence must be made available for confrontation even if they have "the scientific acumen of Mme. Curie and the veracity of Mother Teresa."
> (*Bullcoming v. New Mexico, supra,* ___ U.S. at p. ___ [131 S.Ct. at p. 2708] citing *Melendez-Diaz, supra,* 557 U.S. at p. ___ at fn. 6 [129 S.Ct. at p. 2537 at fn. 6].)

Schultz recognizes that Justice Sotomayor's concurring opinion arguably limits *Bullcoming* to a situation in which the surrogate plays no personal role of any kind in the testing, analysis, preparation, or review of the forensic report at issue:

> [T]his is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. [The surrogate] conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. The court below also recognized [the surrogate's] total lack of connection to the test at issue. It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is suffi-

> cient because here [the surrogate] had no involvement whatsoever in the relevant test and report.
> *(Bullcoming v. New Mexico, supra,* ___ U.S. at p. ___ [131 S.Ct. at p. 2722],)

Although academics might debate the significance of Justice Sotomayor's statements, and some might argue that Sotomayor's concurring opinion suggests that a supervisor who was involved in the testing or in the preparation of the report in some substantial way might be an acceptable surrogate and others might argue to the contrary, the debate is no more relevant in Schultz's case than the medieval debate about how many angels could dance on the head of a pin.

Magee was not Yates's supervisor in 1996. Magee did not contribute personally in any way to Yates's tests, Yates's decisions, Yates's DNA profile, or Yates's report. Magee had nothing at all to do with Yates's 1996 tests or profile.

In fact, Magee was not even an employee of Cellmark in 1996, and, therefore, she had no knowledge whatsoever of Yate's capabilities or performance in 1996 or of Cellmark's capabilities or performance in 1996. (15RT 2692)

Magee was simply an uninvolved surrogate. And, after *Bullcoming,* an uninvolved surrogate simply will not do! The Confrontation Clause required that Yates appear unless she was unavailable and had been cross-examined by Schultz's counsel some time before trial.

F. The record fails to establish that Yates was unavailable or that Schultz had had a prior opportunity to cross-examine her.

The prosecution did not — and cannot — make a showing that Yates was unavailable for trial or that Schultz had been given an opportunity to cross-examine her before trial.

1. Yates was available.

Yates was a Cellmark employee at the time of trial, and plainly could have been called to testify along with Magee. (15RT 2709)

The prosecutor wanted to avoid calling Yates and to rely on a surrogate only to avoid "time and expense." (8RT 1286)

Giles v. California (2008) 554 U.S. 353 [128 S.Ct. 2678; 171 L.Ed.2d 488] recognized the plain fact that constitutional protections sometimes are expensive and sometimes hamstring the prosecution more than they hamstring the defense and acknowledged the "asymmetrical" nature of constitutional protections stating:

> The dissent ... implies that we should not adhere to *Crawford* because the confrontation guarantee limits the evidence a State may introduce without limiting the evidence a defendant may introduce. That is true. Just as it is true that the State cannot decline to provide testimony harmful to its case or complain of the lack of a speedy trial. The asymmetrical nature of the Constitution's criminal-trial guarantees is not an anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent. The State is at no risk of that.
> (*Id.* 554 U.S. at p. ___ at fn. 7 [128 S.Ct. at p. 2693 at fn. 7 [Internal references to text omitted.].)

On the same day, the *Melendez-Diaz* Court also acknowledged that the constitutional powerhouses of the Sixth Amendment including the Confrontation Clause may sometimes make criminal prosecutions more difficult or more expensive for the state, but found that those expenses and difficulties are a price that must be paid:

> The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause — like those other constitutional provisions — is binding, and we may not disregard it at our convenience.
> *(Melendez-Diaz v. Massachusetts, supra, at* 557 U.S. at p. ___305 [129 S.Ct. at p. 2540].)

A desire to shave time and expense does not make a witness unavailable.

2. Schultz had no opportunity to cross-examine Yates before trial.

Yates was called as a witness before the Grand Jury and briefly discussed the fact she had received a vaginal washing and had developed a male DNA profile from that sample. (1RT 123-125)

In accordance with Grand Jury procedure, Yates testified before only 17 grand jurors and 2 prosecutors. (1RT 1-2) In accordance with Grand Jury procedure, defense counsel did not participate and no cross-examination of Yates took place. (1RT 122-126.) (*Berardi v. Superior Court (People)* (2007) 149 Cal.App.4th 476, 483; *People v. Pipes* (1960) 179 Cal.App.2d 547, 553.)

Yates was not called as a witness at the preliminary hearing. (7RT 1005-1229)

Plainly, Yates was available; plainly Schultz had no opportunity to cross-examine her before trial. In the absence of such a showing, the Confrontation Clause erected an unbreachable barrier barring admission of Yates's 1996 DNA profile unless Yates appeared and submitted herself to cross-examination.

G. The Confrontation Clause does not permit a forensic surrogate who qualifies as an expert witness to bring the forensic testimonial statements of others before the jury.

Bullcoming left open the question of whether all surrogates are equal or whether some surrogates are more equal than others.

Legal scholars and pundits anticipated the Court would answer this question in *Williams v. Illinois, supra* ___U.S. ___ [2012 WL 2202981, 12 Cal. Daily Op. Serv. 6620]. But, in *Williams,* the Supreme Court — as is its wont — ruled on the narrowest issue before it. As a result of this telescoping, *Williams* provides the answer for only a limited class of cases — those tried before a judge rather than a jury and those governed by evidentiary rules which "bar an expert from disclosing the inadmissible evidence in jury trials but not in bench trials." (*Williams v. Illinois, supra,* ___ U.S. at p. ___ [2012 WL 2202981, 12 Cal. Daily Op. Serv. 6620].)

Schultz's case is not such a case.

Williams limited its holding to cases tried before the court because the Court recognized that trial judges — well-versed in the rules of evidence and experienced in limiting the consideration of particular items of evidence — are equipped with the skills needed to sift through an expert witness's testimony, parse testimony admissible for its truth from testimony admissible only to explain the witness's opinion, and ignore testimony admitted only to explain an opinion in reaching a conclusion:

> Under Illinois law, this putatively offending phrase ["found in the semen from the vaginal swabs of the victim"] was not admissible for the purpose of proving the truth of the matter asserted—*i.e.,* that the matching DNA profile was "found in semen from the vaginal swabs." Rather, that fact was a mere premise of the prosecutor's question, and [the witness] simply assumed it to be true in giving her answer. *Because this was a bench trial,* the Court assumes that the trial judge understood that the testimony was not admissible to prove the truth of the matter asserted. It is also unlikely that the judge took the testimony as providing chain-of-custody evidence. The record does not support such an understanding; no trial judge is likely to be so confused;....
> (*Williams v. Illinois, supra,* ___ U.S. at p. ___ [2012 WL 2202981, 12 Cal. Daily Op. Serv. 6620].)

Schultz's case was tried to a jury. None of these jurors described any legal training, expertise, or experience during *voir dire,* and this Court may not assume Schultz's jurors were able to parse testimony admissible for all purposes from testimony admissible for only limited purposes and adhere to that distinction during deliberations.

Williams also rests on the wording of the Federal Rules of Evidence and the Illinois Rules of Evidence both of which "bar an expert from disclosing the inadmissible evidence in jury trials but not in bench trials" thereby ensuring that testimony a layman might mistake as admissible for all purposes is not presented to a jury composed of laymen. (*Williams v. Illinois, supra,* ___ U.S. at p. ___ [2012 WL 2202981, 12 Cal. Daily Op. Serv. 6620].)

The California Evidence Code does *not contain such a provision.* Under Evidence Code section 802 — unlike the Federal Rules and the Illinois Evidence Code — the admission of otherwise inadmissible hearsay through an expert witness is not dependent upon

whether the trial is a jury trial or a bench trial — the expert may disclose that information whether the trier of fact is a sophisticated legally-trained listener as required in *Williams* or a jury composed of legally-unsophisticated laymen. The Code gives the expert witness full latitude to "state on *direct* examination the reasons for his opinion and the matter ... upon which it is based" no matter who the trier of fact is. (Evid. Code § 802 [Italics added.].)

Finally, Schultz's case differs factually and procedurally from *Williams* in that Magee appeared to testify to the truth of underlying facts and not solely to compare one established DNA profile with another established DNA profile.

Accordingly, the long-anticipated *Williams* decision fails to answer the questions presented to this Court in Schultz's case, and this Court must rely on *Melendez-Diaz* and *Bullcoming*.

1. A surrogate — even a well-qualified surrogate — cannot serve as a conduit to bring testimonial hearsay before the jury.

Schultz contends a surrogate's expertise does not distinguish him or her from any other surrogate under contemporary Confrontation Clause jurisprudence, and Magee's admitted expertise in DNA testing and profiling did not confer on her a special license to introduce Yates's 1996 testimonial DNA profile. Nor does Magee's status as an expert magically transform her into a conduit for testimonial hearsay.

Presumably, the trial court relied on Evidence Code sections 801 and 802 to allow Magee to introduce Yate's 1996 DNA profile and to testify she had compared the DNA profile she herself developed from Schultz's blood with the DNA profile Yates had developed from the sperm recovered at autopsy so that she could ultimately conclude that everyone in the world except Schultz was statistically eliminated as the sperm donor. (15RT 2712-2713) Evidence Code section 801 allows an expert to form his or her opinion in reli-

ance on "matter ... perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible" and section 802 allows an expert witness to "state on direct examination the reasons for his opinion and the matter ... upon which it is based." (Evid. Code § 801; Evid. Code § 802; *People v. Gardeley* (1997) 14 Cal.4th 605, 618-619; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223.)

When — as here — the hearsay statement on which the expert is relying is a testimonial statement of another person, the provisions of section 802 necessarily engage in a tug of war with the federal and state confrontation clauses. When a state evidentiary rule engages in a tug of war with the United States Constitution, the Constitution *always* wins.

The supremacy clauses of the state and federal constitutions describe the legal pecking order. Article III, section 1 of the California Constitution[26] and Article IV of the United States Constitution[27] establish that — in matters of constitutional law — state law is subservient to the United States Constitution. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297] "where constitutional rights directly affecting the ascertainment of guilt are implicated, the [state] hearsay rule may not be applied mechanistically to defeat the ends of justice.")

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[26] Article III, section 1 of the California Constitution provides as follows:
The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.

[27] Article IV of the Constitution of the United States provides as follows:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In California, Evidence Code section 1204 specifically codifies the rule that the Constitution is *always* the trump card:

> A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

Section 802 so often employed mechanically and arbitrarily in expert testimony to classify the materials on which an expert relies as non-hearsay must give way whenever it conflicts with a state and federal constitutional guarantee. (*Davis v. Alaska* (1974) 415 U.S. 308, 319 [94 S.Ct. 1105, 1112, 39 L.Ed.2d 347]; *Delancey v. Superior Court (Kopetman)* (1990) 50 Cal.3d 785, 805-806.)

2. The decision of the court in *People v. Thomas* and progeny do not withstand scrutiny.

Schultz acknowledges several California cases have considered the role of experts in the presentation of testimonial hearsay.

In the first, *People v. Thomas* (2005) 130 Cal.App.4th 1202, a police officer testified as an expert on gang culture and mores and was permitted to state that he had "learned through casual, undocumented conversation with other gang members" that the defendant was a member of a street gang and was commonly known to his fellows as either Little Casper or Villain.

Although defendant contended these casual out-of-court conversations were testimonial statements and inadmissible under *Crawford* in the absence of a showing the conversationalists were unavailable and had previously been subject to cross-examination, the court found *Crawford* did not undermine the state evidentiary rule which allowed the officer-expert to rely on otherwise inadmissible hearsay to explain his opinion because such hearsay was not admit-

ted for its truth and, was, therefore, beyond *Crawford's* purview. (*People v. Thomas, supra,* 130 Cal.App.4th at p. 1210.)

The *Thomas* court concluded that Thomas's right to confront witnesses was not violated by the admission of hearsay evidence in the form of the gang expert's conversation with other gang members during which Thomas was identified as a member of the E.Y.C. gang and his gang moniker was disclosed because the evidence was admitted for a non-hearsay purpose — to wit, to explain the gang expert's opinion:

> *Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."
> (*People v. Thomas, supra,* 130 Ca1.App.4th at p. 1210.)

Thomas has been cited and followed without significant discussion in *People v. Cooper* (2007) 148 Cal.App.4th 731, 747; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426, *People v. Sisneros* (2009) 174 Cal.App.4th 142, 154, *People v. Hill* (2011) 191 Cal.App.4th 1104, 1117, and, most recently, in *McGuire v. Martel* (E.D. Cal. 2012) ___ F. Supp. ___ [2012 WL 652609 2-28-12].).

Neither *Thomas* nor any of its disciples withstands scrutiny legally or logically.

Thomas — and by reference its disciples — placed principal reliance on *People v. Goldstein* (N.Y.S. 2004) 786 N.Y.S.2d 428, a New York case which initially held that *Crawford v. Washington, supra,* 541 U.S. 36 was inapplicable to hearsay documents that serve as the basis for an expert's opinion. (*People v. Thomas, supra,* 130 Cal.App.4th at p. 1209.)

However, at the very moment the *Thomas* Court was relying on the lower court's decision in *Goldstein,* New York's high court was reviewing that reasoning. After reviewing the lower court's

reasoning, New York's high court came to realize that the hearsay had been offered for its truth rather than merely to help the jury evaluate the expert opinion, and reversed *Goldstein*. (*People v. Goldstein* (N.Y. 2005) 6 N.Y.3d 119 [843 N.W.2d 727].)

Continued lockstep reliance on *Thomas* by the courts in *Cooper, Ramirez, Sisneros, Hill,* and *McGuire* is inexplicable when one recollects that the reasoning on which *Thomas* relied has been rejected by a higher court.

The *Goldstein* reversal was a well-reasoned decision. In *Goldstein,* the prosecution's psychiatric expert witness testified about statements from third-party interviewees that provided the basis for his opinion on how the defendant's schizophrenia affected his behavior. On appeal, the defendant claimed the introduction of the third-party statements violated his Confrontation Clause rights under *Crawford*. The prosecution argued *Crawford* was inapplicable because the interviewees' statements were not offered for a hearsay purpose. (*People v. Goldstein, supra,* 843 N.W. at p. 732.)

The court disagreed and explicitly rejected the not-for-the-truth-of-its-contents fiction:

> The claim that the [statements made to the expert] were not hearsay is based on the theory that they were not offered to prove the truth of what the interviewees said. ... Here, according to the People, the interviewees' statements were not evidence in themselves, but were admitted only to help the jury in evaluating [the expert's] opinion, and thus were not offered to establish their truth.
>
> We find the distinction the People make unconvincing. We do not see how the jury could use the statements of the interviewees to evaluate [the expert's] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress [the expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true. [The expert] herself said her purpose in obtaining the statements was "to get to the truth." The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context. (See Kaye et al., The New Wigmore: Expert Evidence § 3.7, at 19 [Supp. 2005] ["(T)he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition."].) We conclude that the statements of the interviewees at issue here were offered for their truth, and are hearsay.
> (*People v. Goldstein supra,* 843 N.E.2d at pp. 732-733.)

Based upon the finding the statements were admitted for their truth, the court went on to find the interviewees' statements were testimonial under *Crawford,* and their admission violated the defendant's confrontation rights. (*People v. Goldstein, supra,* 843 N.E.2d at p. 733.)

Since *Goldstein,* a growing chorus of legal commentators has acknowledged that the not-for-truth rationale is logically insupportable:

> To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence that presumably increases skepticism about the expert's conclusions.
> (Kaye, David H., et al., *The New Wigmore: Expert Evidence* § 3.10.1 (Supp 2010)

And:

> [I]f the [expert's] opinion is only as good as the facts on which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the de-

> fendant is expected to "demonstrate[d] the underlying information [is] incorrect or unreliable."
> (Seaman, Julie A., *Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony,* (2008) 96 Geo. L.J. 827, 847, fn. no. 16 (quoting *People v. Valerio,* No. HO26460, 2005 WL 351788, at p. 14 (Cal.App. Feb 15, 2005 [not certified for publication].)

And, perhaps most damming:

> Cross-examining the expert cannot ... satisfy *Crawford's* requirements with respect to the testimonial basis evidence, any more than cross-examining the detective who took an affidavit can substitute for cross-examining the declarant.
> Mmookin, Jennifer L., *Expert Evidence and the Confrontation Clause after Crawford v. Washington* (2007) 15 J. L. & Pol'y 791 at p. 834 at fn. 5.)

In *Williams v. Illinois, supra,* ___ U.S. ___ [2012 WL 2202981, 12 Cal. Daily Op. Serv. 6620], the voices of five of the nine Justices on the Supreme Court — Justices Ginsburg, Kagan, Scalia, Sotomayor, and Thomas — were added to this growing chorus. Justice Thomas explained that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that a factfinder may evaluate the expert's opinion and disclosing that statement for its truth."

This legal fiction — like the other fictions on which *Ohio v. Roberts* was built — has been turned into a legal relic by *Crawford v. Washington, supra* 541 U.S. 36.

3. Cross-examination of Magee was not an effective substitute for cross-examination of Yates.

Magee's testimony began — as all expert witness testimony does — with a litany of her education, professional achievements, and training in the field of DNA testing. Magee testified she had an undergraduate degree in microbiology and two master's degrees — one in microbiology and biotechnology and another in forensic science. (14RT 2692) Her course work included classes in genetics, molecular biology, microbiology, DNA profiling, cell biology, population genetics, and statistics. (14RT 2692-2693) She was a member or professional associations in Canada and in the United States. (14RT 2693) She was the co-author of a scientific article on the isolation and initial characteristics of a bacterial gene. (14RT 2693)

Magee gave the jury many good reasons why the jury should place its faith in her opinions. But, Magee's testimony on the 1996 DNA profile was not an expression of her opinion. It was an expression of Yates's opinion based on Yates's expertise and experience — not Magee's. Was Yates as qualified as Magee? Schultz had no opportunity to cross-examine Yates to find out.

At many points during the DNA typing procedure, Yates made subjective decisions. Only she could explain the factors that went into those subjective decisions.

The futility of cross-examining Magee on Yates's DNA profile is underscored by the fact it was prepared in 1996 — four years before Magee became a Cellmark employee. (15RT 2692) Magee could not possibly have any personal knowledge about how a DNA profile was obtained four years before she began to work at Cellmark.

Allowing Magee to adopt Yates's opinion necessarily cloaked Yates and her opinion with the mantle of special training, qualifications, and expertise that Magee — her mouthpiece — had draped

about her own shoulders and built an impregnable wall around the 1996 DNA profile that protected it from attack.

4. An expert must express his or her own opinion. An expert witness cannot rely upon the expert opinion of another witness.

Magee developed one of the two critical DNA profiles. The other — the 1996 DNA profile was entirely Yates's work. When she testified, Magee simply adopted Yate's profile in full.

Long before the revolution in Confrontation jurisprudence arose, the well-established rule was — and remains — that a testifying expert cannot rely on or reveal the " 'content of reports prepared or opinions expressed by non-testifying experts.' " (*People v. Campos* (1995) 32 Cal.App.4th 304, 308 quoting *Whitfied v. Roth* (1974) 10 Cal.3d 874, 894 and citing *Lynch Meats of Oakland Inc. v. City of Oakland* (1961) 196 Cal.App.2d 104, 112 and *People v. Reyes* (1974) 12 Cal.3d 486, 503.)

Similarly, in *United States v. Lawson* (7th Cir. 1981) 653 F.2d 299, the Seventh Circuit recognized a testifying expert cannot simply parrot the report of a non-testifying expert:

> An expert's testimony that was based entirely on hearsay reports, ..., would nevertheless violate a defendant's constitutional right to confront adverse witnesses. *The Government could not, for example, simply produce a witness who did nothing but summarize out-of-court statements made by others.*
> (*Id.* at p. 302.)

Courts generally exclude a nontestifying expert's opinion even when it is not the sole basis for the testifying expert's opinion. In *People v. Vanegas* (2004) 115 Cal.App.4th 592, defendant's testifying expert relied, in small part, on the more favorable opinion of a defense expert who had died before trial. The trial court correctly excluded the absent expert's opinion. (*Id.* at pp. 597-598.)

The reason for the rule prohibiting a testifying expert from simply regurgitating the opinion of a nontestifying expert is obvious. The opposing party has no opportunity to cross-examine the nontestifying expert and cross-examination of the testifying expert

cannot serve as a reasonable substitute. (*People v. Campos, supra,* 32 Cal.App.4th at p. 308.)

In *State v. Towne* (1982) 142 Vt. 241 [452 A.2d 1133], the Vermont Supreme Court considered the issue at length. In *Towne,* the state's testifying expert opined the defendant was disturbed, but not mentally ill. The witness bolstered his testimony by stating that he had contacted another expert in the field who concurred in his opinion of the case. The Vermont Supreme Court — foreshadowing *Crawford v. Washington, supra,* 541 U.S. 36 — concluded that allowing the testifying expert to acquaint the jury with the opinion of the non-testifying expert violated the confrontation clause.

Although the court did not rely on the CALCRIM series of instructions in this case, CALCRIM No. 332 (Summer 2011 ed.) is the instruction now commonly given to guide the jury in considering expert testimony. CALCRIM No. 332 specifically instructs the jury to consider the truth of the materials on which the expert witness relied:

> You must decide whether information on which the expert relied was *true* and accurate.
> (Italics added.)

The blue-ribbon panel that drafted the instructions included in CALCRIM recognized that the expert's opinion has no value if it is not based on true facts.

In Schultz's case, the prosecutor argued Yate's DNA profile was true and it was a match to the DNA profile known to reflect Schultz's genetic make-up. He had to. If Yate's DNA profile were not true, there was no evidence that Schultz's semen had been found in Burger.

Here, Magee simply adopted Yates's opinion of what the DNA profile of the sperm recovered at autopsy was, and in doing so, Magee relied entirely on the nontestifying experts' opinion during her testimony.

H. Schultz's defense was irreparably prejudiced by the introduction of hearsay material.

Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California, supra,* 386 U.S. at p. 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674].) "Since *Chapman,* we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Id.* 475 U.S. at p. 681.) The harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35].) Also, *Chapman* puts the burden on the respondent to prove the error harmless. On this record, respondent will not be able to do so.

In Schultz's case it is not clear beyond a reasonable doubt that a jury would have found Schultz guilty if he had been afforded the opportunity to cross-examine Yates because the court's decision

forced defense counsel to abandon an entire line of defense and to make concessions during the guilt phase that would not have been made had he had the opportunity to attack Yates's DNA profile.

1. Defense counsels lost the ability to bring the suspect elements of Mooney's testimony to the jury's attention.

Defense counsels had three arrows in their defense quiver: (1) Schultz was under the influence of methamphetamine the night Burger was killed and unable to premeditate his actions, (2) Mooney's claim that Schultz had confessed to raping and smothering Burger was suspect and Schultz was not the perpetrator, and (3) Yates's DNA profile was wrong. Defense counsels were able to launch their first arrow, but not their second or third.

When defense counsels lost the ability to attack Yates's DNA profile by cross-examining Yates either during a pretrial *Kelly* hearing or during trial, counsels also lost the ability to demonstrate that Mooney's claim Schultz had confessed was suspect. They lost the

ability to attack Mooney's damaging testimony because it strained credibility to argue that Mooney's claim that Schultz had admitted raping and killing Burger was not true if Yates's DNA profile demonstrating that Schultz's sperm had been found in Burger at autopsy was true. Defense counsels simply could not risk losing all credibility with the jury by adopting such an obviously untenable position, and they were forced to concede all aspects of guilt save and except premeditation. [28]

Had counsels been afforded the opportunity to attack the reliability and accuracy of Yates's DNA profile, counsel could have brought the serious deficiencies in Mooney's testimony to the jury's attention. Had the serious deficiencies in Mooney's testimony been coupled with a suspect DNA profile, it is unlikely Schultz would have been convicted.

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[28] The court's denial of a pre-trial *Kelly* hearing is argued at length infra in section V. In that argument, counsel argues the errors that would have been exposed had the *Kelly* hearing been held or had Yates appeared as a witness.

Mooney testified at trial that she had been completely taken aback by Schultz's claim that he had been involved in a killing and that when he told her he had been an accomplice to a killing, she "just couldn't believe that — what was happening." (14RT 2489) She "was scared," "hurt," and "afraid." She "didn't know what was going to happen to [her], [her] future, or anything." (14RT 2501) She felt, "[i]t just kind of threw everything up in the air" because she had never experienced anything like" it before. (14RT 2498) She said she "had nightmares all the time" and "was afraid to sleep" and that "her life was just going downhill." (14RT 2502, 2502) After all, she said she planned to marry Schultz as soon as he was released from prison....and now this! (14RT 2486-2487)

In fact, the foregoing testimony was easily impeached. This was not the first time Mooney found herself close to a killing and not even the first time Mooney had found herself close to a killing in which she believed Schultz had played a role. Mooney had unsuccessfully tried to implicate Schultz in the death of a different woman

just weeks before, and her accusations had been reported in the local newspaper. (7RT 1092-1093)

Had the jury learned that Mooney continued to visit Schultz and continued to plan on marrying him as soon as he was released from jail at the same time she was publicly trying to implicate him in the death of another woman, her credibility would have been seriously tarnished.

Had the jury learned that Mooney made a practice of accusing Schultz of murdering women, it is likely the jury would have considered her testimony unreliable and might even have concluded Mooney was seeking publicity for herself.

Mooney could have been impeached in other ways as well. Mooney testified that she questioned Schultz because she had a dream that Schultz had raped and killed and woman:

> I asked him, uuh, if [he had killed] a woman, and he said yes. And I asked him if he had raped her, and she said — he said yes. I don't know why. It's just I was having bad dreams, and some of them were about that. And, umh, I just had this weird feeling.
> (14RT 2498)

Mooney's testimony suggested that her long relationship with Schultz had so emotionally connected her to him that like an old married couple they finished each other's sentences. Her testimony suggested that it was this closeness that led her to grasp that Schultz's statement a confederate had stabbed a homeowner during a robbery was not true and this closeness led her to grasp that he had been involved in Burger's rape and murder.

In fact, she had no such clairvoyance. "Weird feelings" had led her to try to implicate Schultz in another crime. Those weird feelings had been untrue — Schultz was never arrested. (7RT 1096)

Had the jury been alerted to the fact that this was not the first time Mooney had "believed" Schultz had been involved in a woman's murder or had "weird feelings" about how the crime had occurred, it likely would have put less credence in her bad dreams and weird feelings in this case.

Mooney claimed she did not alert law enforcement because she "didn't want to be the one to have to call and give the information." (14RT 2502) Had the jury learned that Mooney had vainly tried to implicate Schultz in another crime at the same moment she claimed Schultz was confessing to raping and killing Burger, Mooney's claimed reluctance would likely have rung hollow.

Most of what Mooney claimed Schultz had admitted to her came as a result of her questioning him about statements she had read in a newspaper article describing the Burger murder. (14RT 2506-2510) In reality, Schultz merely made ambiguous responses to Mooney's questions; the details of the crime came from Mooney herself, not from Schultz. And, if Mooney was successfully impeached, so was her account of the crime.

The prosecutor argued the DNA match provided support for Mooney's claim that Schultz had confessed. (16RT 2835-2836) Had defense counsel been able to question the reliability of Yates's DNA profile, he could have made the counter argument: the questionable

DNA profile provided support for the claim Mooney's testimony Schultz had confessed was also questionable.

IV. Neither a DNA profile nor the process involved to secure a DNA profile are business records, and the trial court erred in admitting Yates's 1996 DNA profile and the process she relied upon under Evidence Code section 1271.

A. Summary of significant facts, argument, and standard of review.

Before trial, the People filed a motion seeking an order allowing Cellmark's 1996 and 2000 records of DNA extraction, replication, and profiling in evidence as business records under Evidence Code section 1271. (8CT 2163)

In opposition to the motion, Schultz argued neither a DNA profile nor the process by which it is achieved is a qualifying record under section 1271.[29] (9CT 2422-2423)

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[29] Schultz also opposed the motion on the following grounds: (1) the admission of testimonial hearsay through an uninvolved sur-

The trial court initially denied the People's motion and ordered the individuals who had performed the two extractions and had developed the two profiles to appear and testify to their methods and results. (8CT 1288, 8RT 1289)

On reconsideration, at the prosecutor's urging, the court modified its ruling to allow the prosecutor to rely on section 1271 to introduce Cellmark's 1996 records subject to an appropriate foundation. (9CT 2481, 8RT 1387)

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rogate witness deprived him of his right to cross-examine and confront the witnesses against him, and (2) *People v. Kelly* (1976) 17 Cal.3d 24 requires a hearing to demonstrate case-specific proof that the DNA procedures were conducted in accordance with recognized protocol by knowledgeable technicians, and this requirement necessarily prohibits admission as a business record. (9CT 2422-2423) Schultz argues the court erred in granting the prosecution's motion on each of these grounds in sections III and V of this opening brief.

Schultz further contended the court had discretion under Evidence Code section 352 to exclude evidence the probative value of which was substantially outweighed by the danger of undue prejudice and asked the court to exercise that discretion in this case. Schultz also questioned the prosecution's ability to present a proper foundation and an unbroken chain of custody. (9CT 2422-2423) Schultz does not argue either of these grounds on appeal.

Schultz contends Yates's identification of male DNA in the vaginal sample, her selection of portions of the helix for replication, replication of those selected segments, and her determination of what specific alleles were present in what quantities or frequencies and in what arrangement at particular genetic loci she chose to investigate in that sample could not qualify as a business record because these were not acts, conditions, or events, but conclusions reached by applying reasoning to a variety of parameters. Conclusions are not admissible under section 1271. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1012; *People v. Jones* (1998) 17 Cal.4th 279, 308) (See Sections B and C which follow)

Further, Schultz contends the admission of a testimonial statement under the auspices of section 1271 is at odds with the requirements of the state and federal confrontation clauses. As Schultz has already argued supra in section III(G)(1) of this brief, state and federal constitutional provisions *always* emerge victorious in such skirmishes. (See Sections D & E which follow) Here, even if

this Court determines that the DNA profile and the testing behind it were qualifying records under section 1271, the state evidentiary rule would have to cede to the confrontation guarantees of the Sixth Amendment and its state cousins.

Schultz — mindful the trial court's decision to admit a record under section 1271 is reviewed on appeal for an abuse of discretion — contends the trial court's admission of material that does not fall within the ambit of the statute fell well outside the bounds of that discretion. (*People v. Khaled* (2010) 186 Cal.App.4th Supp. 1, 5)

Likewise, Schultz — mindful that the admission of the 1996 DNA profile and process impacted state and federal constitutional rights which must be independently reviewed — contends the Court erred in placing the state evidentiary rule above the state and federal constitutions. (*People v. Cromer, supra,* 24 Cal.4th at p. 905.)

The trial court's decision to admit the 1996 DNA extraction, replication, and profiling as a business record was a prejudicial abuse of discretion under state law that denied Schultz due process

of law and rendered his trial constitutionally unfair in violation of the Fifth and Fourteenth Amendments to the United States Constitution, stripped away Schultz's constitutional right to cross-examine the witnesses against him in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense and their analogs under the California Constitution, Article I, sections 7, 15, and 17.

His conviction and sentence must be reversed.

B. Admissibility under section 1271 is limited to records of acts, conditions, or events. Records that reflect conclusions or opinions are not admissible.

Yates's report did not qualify as a business record because it was based on opinions and conclusions. In *People v. Beeler* (1995) 9 Cal.4th 953, this Court acknowledged that section 1271's statutory language plainly requires that "the evidence must be a record of an act, condition or event" and "a conclusion is neither an act, [nor a]

condition nor an event." (*Id.* at p. 980 quoting *People v. Terrell* (1955) 138 Cal.App.2d 35, 57.)

Beeler is merely a reaffirmation of a long-standing position. Twenty years earlier in *People v. Reyes, supra,* 12 Cal.3d at pp. 502-503, this Court upheld the exclusion of a diagnosis of "alcoholism with sexual psychopathy" in a psychiatric report, because the diagnosis was "based upon the thought process of the psychiatrist expressing a *conclusion*" and not upon a readily observable act, event, or condition. (Italics added)

In 2003 the California Law Revision Commission instituted a project to consider conforming the California Evidence Code to the Federal Rules of Evidence.

The Commission specifically considered the difference between Federal Rule of Evidence, Rule 803, which allows the admission of opinions and conclusions as a business record, and section

1271 which does not.[30] Professor Miguel Méndez of Stanford Law School, who acted as the consultant to the Commission and as the reporter, recommended that section 1271 continue the exclusion of conclusions and opinions because he believed the exclusion "offered a limiting principle that appears sound, especially if [his] hunch [was] right: parties do not approach opinions in records with the same skepticism they show when the expert is called to testify by the

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[30] Federal Rule of Evidence, rule 803 28 U.S.C.A. provides, in part, as follows:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, *opinion*, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(Italics added.)

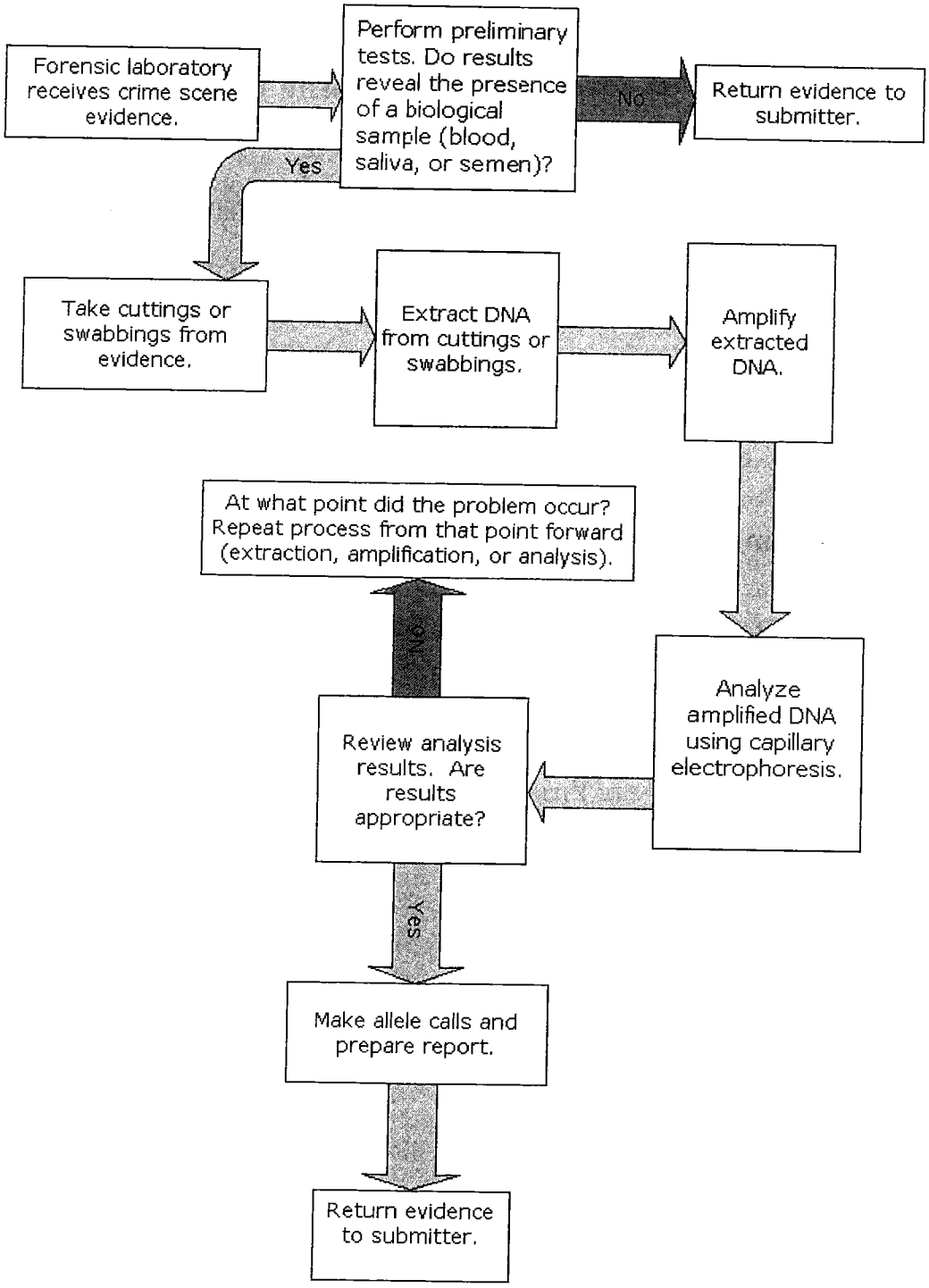
opposing party." (Memorandum from Barbara Gaal, Staff Counsel to Cal. Law Revision Comm'n, on *Conforming the Evidence Code to the Federal Rules of Evidence: Additional Hearsay Issues* (Oct 30, 2003) at p. 10, available online at www.clrc.ca.gov/pub/2003/Mno3-39.pdf [accessed 1-9-12].) Professor Méndez cautioned the Commission that the "magic of business and official records should not mislead parties about the admissibility of opinion found in those records." (*Ibid.*)

Persuaded by Professor Méndez, the Commission did not expand the reach of section 1271. Accordingly, *People v. Young* (1987) 189 Cal.App.3d 891, 912, which excluded psychiatric records explaining psychiatric records "tend to be opinions rather than the record 'of an act condition or event' which is admissible under Evidence Code section 1271" and *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 184, which excluded a statement regarding the cause of a patient's headaches are still good law.

C. Yates's DNA profile and the individual decisions she made in developing that profile were conclusions.

The process for developing a DNA profile is complicated. It requires the application of human intelligence, judgment, and human action on a biologic material.

Yates conducted polymerase chain reaction process (PCR) short tandem repeat testing (STR Testing). (15RT 2720-2721, 2725) The steps involved in conducting PCR/STR testing are demonstrated by the flow chart of the process which is contained in The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities:


Forensic laboratory receives crime scene evidence.
Perform preliminary tests. Do results reveal the presence of a biological sample (blood, saliva, or semen)?
No
Return evidence to submitter.
Yes
Take cuttings or swabbings from evidence.
Extract DNA from cuttings or swabbings.
Amplify extracted DNA.
Analyze amplified DNA using capillary electrophoresis.
Review analysis results. Are results appropriate?
No
At what point did the problem occur? Repeat process from that point forward (extraction, amplification, or analysis).
Yes
Make allele calls and prepare report.
Return evidence to submitter.

(Office of the Inspector General, The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities (May 2004) at p. 8 (available online at http://justice.gov/oig/special/0405/final.pdf) [accessed 3-17-12].) ("FBI Protocol")

Each block in the flow chart is actually only a shorthand description of a complicated process. For example, the flow chart contains a box that states "Extract DNA from cutting or swabbings." Magee described the process that she believed Yates followed to complete this single step as follows:

> This particular sample is what we refer to as a mixed stain. That is one that contains sperm cells [and vaginal cells]. And when we have a sample that contains sperm cells, we do a differential extraction which allows us to separate out the sperm heads from all other cells.
>
> And the way this is done is we put the sample into a tube and add our extraction chemicals. This causes all non-sperm cells to break open and release their DNA. The reason sperm cells do not rise is because they're rather resilient. So under normal extraction conditions, they will not break open.
>
> Once we have broken open all of the non-sperm cells, we will spin down the sperm cells, pull off all of the DNA that's been released, wash the DNA pellet several times, the sperm cell pellet several times, and

> then we add the extraction chemicals, plus one additional chemical that allows the sperm heads to break open. That is how we get two fractions from one sample.
> (15RT 2708)

The next block on the flow chart states the analyst must "Amplify extracted DNA." Although Magee provided an abbreviated description of the process at trial,[31] the more fulsome description of this step is set forth in *People v. Jackson* (2008) 163 Cal.App.4th 313, 322-323:

> Once extraction of the DNA is done, the next step is quantitation. Quantitation is a method for estimating approximately how much DNA is in the extract prepared from the sample. It is necessary to be successful in the amplification process.
>
> For amplification, a specific amount of extracted DNA is placed in a thermocyler instrument. Chemicals, including primers and nucleotides, are added. Through

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[31] Magee briefly described the step as follows:
Step two is where the PCR actually occurs and what happens is specific locations [of] DNA are copied over and over again to give a relatively large quantity of DNA from a relatively small starting quantity.
(15RT 2629)

> a process known as polymerase chain reaction (PCR), copies of the DNA are produced when the thermocyler instrument goes through a temperature program, heating up and cooling down. By the time the instrument goes through 28 cycles, millions of copies of the DNA are made.
>
> A portion of the amplified DNA is then genetically typed through a process of capillary electrophoresis. Basically, a charge is applied to the capillary in which the amplified DNA has been placed, causing the charged DNA to flow through the capillary. The smaller fragments traveling faster go through first, while the larger fragments go through last. A camera takes photographs of the separated DNA fragments utilizing fluorescent tags that have been placed on the DNA. The final results are displayed on what is called an electropherogram that can be analyzed by an expert.

The most cursory review of the steps Yates undertook demonstrates that every step required intellectual reasoning leading to a conclusion:

- Because DNA is contained within the nucleus of cells, Yates selected chemicals to the sample to break open the cells. Then she identified material she concluded was DNA and extracted and isolated that material from other cell components.

- Yates then quantitated the material she had isolated, estimated how much DNA had been extracted, and decided whether the quantity was sufficient for the amplification process.
- In order to secure a larger sample of the isolated male DNA, Yates selected sections of the DNA helix, called Short Tandem Repeats or STRs, and copied and tagged these segments with fluorescent material. She accomplished this replication process, called polymerase chain reaction or PCR, by careful raising and lowering of the temperature of the STR as she added selected enzymes to the genetic soup.
- Yates then identified each newly-created STR and connected the newly-created STR to the original DNA strand which she was copying. She repeated this process over and over until she felt she had achieved a sample of an appropriate size.

- Yates then assessed the size of the STRs, the particular alleles present at particular locations on the STR and their number and configuration.
- Then, using genetic analysis, Yates developed a DNA profile for the strand. (15RT 2707-2710)

Plainly, Yates was not simply recording an observed event. Each step she took required microscopic analysis of minute portions of genetic material and the application of reasoning to determine the significance, if any, of the extant and newly-created genetic material.

The court erred in admitting this material as a business record.

D. Records that are prepared by a business dedicated to the production of evidence for use at trial are not admissible as business records.

Yates's report also does not qualify as a business record because it was prepared by a company whose sole purpose is forensic testing. In *Melendez-Diaz v. Massachusetts, supra,* 557 U.S. 305 [129 S.Ct. 2527], respondent argued that the drug analysis certificates on which the state relied were admissible without confrontation because they were business records " 'akin to the types of official and business records admissible at common law.' " (*Melendez-Diaz, supra,* 557 U.S. at p. ___ [129 S.Ct. at p. 2538].)

After acknowledging that federal and state evidence rules usually permit the admission of documents kept in the regular course of business despite their hearsay status, the Court distinguished documents created and maintained by entities whose regular business was the production of evidence for use at trial. Referencing *Palmer v. Hoffman* (1943) 318 U.S. 109 [63 S.Ct. 477, 87 L.Ed. 645] — a decision which predated *Crawford* by more than 60 years —

the Court described the old and venerable distinction between records created by those entities engaged in the production of evidence from records created by entities not engaged in such a pursuit in the following language:

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business." The analysts' certificates [in Melendez-Diaz] — like police reports generated by law enforcement officials — do not qualify as business or public records for precisely the same reason.
> *Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at p. ___ [129 S.Ct. at p. 2538].) (Internal citations and internal footnote deleted.)

Cellmark is a company dedicated to the DNA evidence for trial. Its website lists its corporate motto as "DNA testing trusted worldwide." The corporate telephone number is 1-800-DNA-TEST. Cellmark describes itself as "a recognized world leader in forensic

genetic testing providing a variety of services to law enforcement agencies, [and] government crime laboratories." The company touts its ability to "provide convenient, professional and painless collection of specimens for legal test clients regardless of where they live" and promises samples from non-traditional sources including "hats." (Orchid Cellmark website available online at http://www.orchidcellmark.com/forensicdna.htm. [accessed 4-2-12].)

Cellmark has become so known for the creation of DNA evidence that it has earned an entry in Wikipedia where it is described as "a DNA testing company." (Wikipedia, available online at http://www.wikpedia.org/wiki/Cellmark [accessed 4-3-12].)

In an effort to argue that evidence produced exclusively for trial should be admissible, the dissent in *Melendez-Diaz* analogized the activities of a clerk who prepares a certification of an official record for use at trial to the activities of a company like Cellmark. The dissent argued that clerk is effectively producing a document for use at trial — as do companies dedicated to the creation of forensic ma-

terials. The dissent argued the clerk's certificate of authentication is both produced for use at trial and traditionally admissible. The Court readily dismissed this analogy by pointing out that the clerk could, by affidavit, authenticate a copy of an otherwise admissible record, but the clerk "could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." (*Melendez-Diaz, supra,* 557 U.S. at p. ___ [129 S.Ct. at p. 2539, fn. omitted.) (Italics in original.)

The DNA profile and the methodology on which Yates relied were prepared at Cellmark, an entity dedicated to the creation of forensic evidence.

E. The analysts who prepare records at entities dedicated to the production of forensic trial evidence are testimonial witnesses and must appear at trial.

Melendez–Diaz held that when a testimonial statement is created at an entity that is engaged in the production of evidence for trial, "the *analysts* who swore the affidavits provided testimony against

Melendez-Diaz, and they are therefore subject to confrontation." (*Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at p. ___ fn. 6 [129 S.Ct. at p. 2537 fn. 6] [Italics added].)

In sum, *Melendez-Diaz* concluded that that "the analysts' affidavits were testimonial statements, *and* the analysts were 'witnesses' for purposes of the Sixth Amendment." As a result, the analysts' certificates were inadmissible absent the analysts' testimony or a showing that they were unavailable and the defendant had had a prior opportunity to cross-examine. (*Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at p. ___ [129 S.Ct. at p. 2532.) (Italics added.)

Yates created that profile for the sole purpose of providing evidence against Schultz. As such, these records do not qualify as business records, and the trial court erred in admitting them as such.

Accordingly, the court erred in excusing Yates's appearance.

F. The trial court's error struck a mortal blow to Schultz's defense.

People v. Ayers (2005) 125 Cal.App.4th 988, 996 declared that the yardstick to be used in measuring the effect of the court's erroneous admission of a record under section 1271 is the standard announced in the seminal case entitled *People v. Watson, supra,* 46 Cal.2d 818. Under the *Watson* standard, reversal is required if "the court, after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson, supra,* 46 Cal.2d. at p. 836.)

The People's case rested in large part on Magee's testimony that the DNA Yates had extracted and profiled in 1996 from the semen sample obtained at autopsy matched the DNA she extracted and profiled in 2000 from the sample known to come from Schultz matched to a significant certainty. The reliability of Magee's conclusion rested not only on the accuracy of profile she herself developed in 2000, but also on the accuracy of the profile Yates had developed

in 1996. Because Yates spoke through a mouthpiece — Magee — rather than through her own mouth, Schultz lost the ability to effectively bring out any inaccuracies in her testing or conclusions before the jury.

Allowing Yates's procedures to come before the jury as a business record through Magee shielded the investigative process and the DNA profile Yates had developed from cross-examination and forced Schultz's counsel to shift the focus of the defense to the penalty phase of the trial.

Schultz has already argued in section III(H) of this brief that his inability to attack Yates's testimony forced him to abandon the attack on Mooney's testimony, and he incorporates that argument as though fully set forth.

V. The third prong of *Kelly* requires the trial court to assure itself that the DNA extraction, replication, and profiling actually presented to the jury was conducted in accordance with the generally-accepted scientific methods. The trial court's de facto denial of Schultz's motion for a third-prong *Kelly* hearing was error.

A. Introduction and summary of argument.

DNA analysis is forensic testing like no other forensic testing. The biologic procedures performed in DNA analysis involve samples so microscopically infinitesimal, they cannot be transported into court, inspected by the naked eye, or even photographed.[32]

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[32] In order to assist the Court in grasping how truly infinitesimal a DNA sample generally is, counsel repeats one commentator's explanation. The commentator compared a DNA sample to a standard packet of artificial sweetener. The commentator began with the mass of material in a standard packet of artificial sweetener — one gram of material. To reduce the sweetener from one gram to one milligram, 1/1000th of the material must be set aside and the rest discarded.

To then reduce the one milligram to one microgram, 1/1000th must again be set aside and the rest discarded. This amount of material is microscopic. But, it is still too much.

To limit the sample to one nanogram, 1/1000th of the one microgram must be set aside and the rest discarded.

The statistical calculations involved in DNA analysis are so mathematically challenging that even an individual with advanced statistical or mathematical training cannot make the calculations using a pencil and paper or a calculator; only a computer has the memory and speed needed to perform these calculations. (15RT 2724)

The results of DNA analysis are expressed in fractions the denominators of which are so large they cannot be expressed in words, but can only be expressed in mathematical shorthand.

These extraordinary characteristics drape an aura of mystery around DNA analysis.

At the same time DNA evidence currently enjoys a reputation for reliability bordering on infallibility among members of the gen-

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(Spence, Michael J. Dr., DNA Technology and Our Criminal Justice System (entry dtd. 1-7-2012) available online at www.spenceforensics.com/dna-criminal-justice.blogspot.com trialprepartion.html [accessed 1-9-12].)

eral public — a reputation not shared by any other type of forensic evidence.

Because DNA evidence may be so compelling and so mystifying to jurors and because the complexities of DNA analysis made it impossible for jurors to dissect the testimony in the same way jurors could dissect other expert testimony, *People v. Venegas* (1998) 18 Cal.4th 47 recognized the need to ensure that only DNA profiles obtained as a result of properly-conducted procedures are presented to the jury. *Venegas* implemented this heightened vigilance by imposing the obligation on the proponent of DNA evidence to demonstrate that the particular procedures utilized in the case before the court conformed to recognized procedures during what is commonly referred to as a prong three *Kelly* hearing.

Schultz opposed the People's pre-trial motion seeking admission of Cellmark's 1996 and 2000 DNA records as business records on the ground that *People v. Venegas, supra,* 18 Cal.4th 47 and *People v. Kelly* (1976) 17 Cal.3d 24 require a hearing to demonstrate case-

specific proof that the DNA procedures were conducted in accordance with recognized protocol by knowledgeable technicians.[33] (9CT 2422-2423)

The trial court initially denied the People's motion, but on reconsideration at the prosecutor's urging, the court modified its ruling to allow the prosecutor to rely on section 1271 to introduce Cellmark's 1996 records. (8CT 1288, 9CT 2481, 8RT 1289, 1387) The granting of the prosecutor's motion effectively denied Schultz's re-

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[33] Schultz also opposed the motion on the following grounds: (1) the 1996 DNA records were testimonial and subject to the Confrontation Clause, and (2) DNA extraction, replication, and profiling is not a qualifying record under section 1271. (9CT 2422-2423) Schultz argues the court erred in granting the motion on each of these grounds in sections III and IV of this opening brief.

Schultz further contended the court had discretion under Evidence Code section 352 to exclude evidence the probative value of which was substantially outweighed by the danger of undue prejudice and asked the court to exercise that discretion in this case. Schultz also questioned the prosecution's ability to present a proper foundation and an unbroken chain of custody. (9CT 2422-2423) Schultz does not argue either of these grounds on appeal.

quest for a *Kelly* hearing because Yates's report was now being admitted without the necessity of Yates's appearance in California.

The trial court erred in denying Schultz's request for such a hearing. The denial of such a hearing denied Schultz due process of law and rendered his trial constitutionally unfair in violation of the Fifth and Fourteenth Amendments to the United States Constitution, stripped away Schultz's constitutional right to cross-examine the witnesses against him in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense and their opposite numbers under the California Constitution, Article I, sections 7, 15, and 17.

B. The standard of review.

Ordinarily, a trial court's ruling on the sufficiency of the foundational evidence is reviewed under an abuse of discretion standard. (*People v. Tafoya* (2007) 42 Cal.4th 147) That standard can-

not apply in this case because the court's denial of Schultz's motion for a limited *Kelly* hearing meant that the trial court neither reviewed the foundational evidence nor exercised its discretion at all. (*In re Adoption of Driscoll* (1969) 269 Cal.App.2d 735, 737; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 296.) The trial court short-circuited the process by excusing the prosecution from its obligation to present any foundational evidence that the 1996 DNA procedures had been performed in accordance with generally-accepted techniques. In such a case, the abuse-of-discretion standard does not apply.

The facts surrounding the trial court's de facto denial of Schultz's motion for a *Kelly* hearing are not in dispute. The issue on review is the application of *Kelly* and its progeny to these undisputed facts — an issue that requires this Court to exercise independent review. (*Crocker National Bank v. City & County of San Francisco* (1989) 49 Cal.3d 881, 888; *Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.)

C. DNA evidence is not infallible, and a *Kelly* hearing was required to test the accuracy and reliability of Yates's 1996 DNA profile and the procedures and methods she utilized to develop that profile.

The test for the admissibility of expert testimony based upon a new or novel scientific testimony is the three-prong test described in *People v. Kelly, supra,* 17 Cal.3d 24. *Kelly* rests on a 90-year old approach to scientific evidence first announced in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 that seeks to ensure that juries are not overwhelmed by scientific evidence. *Kelly* creates an aura of certainty by requiring a judicial answer to three questions:

1. Is the method generally accepted in the relevant scientific community?
2. Does the proponent witness have the training and background to testify about the method?
3. Did the proponent follow the accepted technical procedures in developing the evidence?

Kelly describes this test as follows:

> [A]dmissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) *the reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the

> subject. Additionally, the proponent of the evidence must demonstrate that correct scientific procedures. (*People v. Kelly, supra,* 17 Cal.3d at p. 30.) (Internal citations omitted.) (Italics in original.) (Underlining added.)

The first *Kelly* prong can be satisfied by reference to existing case law holding the method as one generally accepted in the scientific community, and Schultz acknowledges that California courts have already determined that many aspects of DNA analysis have been generally accepted. (*People v. Kelly, supra,* 17 Cal.3d at p. 32.) Specifically, he acknowledges that:

- The scientific principle that human DNA can be profiled to produce a genetic blueprint that is unique to a specific individual is a scientific principle which is generally accepted in the field of genetics. (*People v. Venegas* (1998) 18 Cal.4th 47, 57–58; *People v. Brown* (2001) 91 Cal.App.4th 623, 627–630; *People v. Barney* (1992) 8 Cal.App.4th 798, 805)

- The STR subtype of PCR methodology, on which Yates relied, is a generally accepted protocol within the field of genetics. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1258; *People v. Henderson* (2003) 107 Cal.App.4th 769, 777; *People v. Allen* (1999) 73 Cal.App.4th 1093, 1097; *People v. Morganti* (1996) 43 Cal.App.4th 643, 662-669)
- The statistical methods on which DNA profilers rely to determine probability have been recognized as having gained general acceptance by the scientific community. (*People v. Nelson, supra,* 43 Cal.4th at p. 1259; *People v. Venegas, supra,* 19 Cal.4th at p. 84-85; *People v. Soto* (1999) 21 Cal.4th 512, 541)

1. A third-prong hearing is always required in a DNA case.

Although published appellate decisions can discharge the prosecution's burden under *Kelly's* first prong, the second and third *Kelly* prongs cannot be answered by reference to case law. The second prong is witness specific[34] and the third prong is case specific:

> Since the third prong of the *Kelly* test requires case specific proof that correct procedures were employed, it cannot be satisfied by relying on a published appellate decision.
> (*People v. Morganti* (1996) 43 Cal.App.4th 643, 661.)

Although some thought this Court had nullified *Kelly's* third prong in *People v. Farmer* (1989) 47 Cal.3d 888, 913, *Venegas* made it clear that the reports of its death had been — like the reports of Mark Twain's — greatly exaggerated:

> [The third prong is viable] a fact plainly demonstrated by our recognition of the continued vitality of the test's third prong in the following three cases, all decided within a year before or after *Cooper: People v. Morris, supra,* 53 Cal.3d 152, at pages 206–208; *People v. Ashmus*

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[34] Schultz did not contest Magee's or Yates's knowledge and training in DNA testing in the trial court, and he does not contest the second prong on appeal.

(1991) 54 Cal.3d 932, 970–972,; and *People v. Fierro* (1991) 1 Cal.4th 173, at pages 214–215. In each of those cases, we analyzed the evidence and data under all three prongs of the *Kelly* test, determining that their requirements had been complied with.
People v. Venegas, supra, 18 Cal.4th at p. 80.) (Internal parallel citations omitted.)

Kelly's third prong can be satisfied *only* by testimony from a witness who is familiar with the method actually used in the DNA test that will be presented to the jury. *Venegas* described such a witness in the following language:

> The issue of the inquiry is whether the procedures utilized in the case at hand complied with that technique. Proof of that compliance does not necessitate expert testimony anew from a member of the relevant scientific community directed at evaluating the technique's validity or acceptance in that community. It does, however, *require that the testifying expert* understand the technique and its underlying theory, and *be thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique.*
> (*People v. Venegas, supra,* 18 Cal.4th at p. 81 citing *People v. Smith* (1989) 215 Cal.App.3d 19, 27, and *People v. Reilly* (1987) 196 Cal.App.3d 1127, 1153–1155.) (Italics added.)

Magee was *not* such a witness. She played no role of any kind in the 1996 DNA test — she did not assist Yates, she did not super-

vise Yates, and she did not review Yates's work or conclusions. She was not even a Cellmark employee in 1996 when the tests were performed. She was not *"thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique"* as required by this Court. Because Magee played no role in Yates's tests and was not employed at Cellmark in 1996, she could only presume the reliability of Yates's results, surmise that the protocols in place in 1996 were the same as the protocols in place in 2000, and suppose that Yates followed those protocols when she developed the 196 DNA profile.

In his article, *Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing,* Professor William Thompson states that "DNA testing errors have been popping up all over the country."

Professor Thompson describes a case in Virginia:

> In Virginia, post-conviction DNA testing in the high-profile case of Earl Washington, Jr. (who was falsely convicted of capital murder and came within hours of execution) contradicted DNA tests on the same samples

> performed earlier by the State Division of Forensic Sciences. An outside investigation concluded that the state lab had botched the analysis of the case, *failing to follow proper procedures and misinterpreting its own test results.* The outside investigators called for, and the governor ordered, a broader investigation of the lab to determine whether these problems are endemic. *Problematic test procedures* and misleading testimony have also come to light in two additional capital cases handled by the state lab.
> (Thompson, William, *Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing* (2006) 30 Champion 10, 1) ("Gold Standard")

In April 2002, a colleague accidentally discovered that for at least two years, another DNA analyst employed by the FBI Laboratory performing PCR testing later used as evidence in criminal trials was failing to follow that part of the protocol designed to determine whether contamination had been introduced into the testing process:

> An important step in the DNA testing procedures that [the analyst] was obligated to follow is the processing of control samples that identify whether contamination has been introduced during the testing process, called negative control tests. Starting in the late stages of her training to become a PCR Biologist and for more than two years thereafter, Blake consistently failed to complete these control tests. Her omissions rendered her work scientifically invalid and unusable in court. Without proper processing of the negative controls, a

> Laboratory Examiner is not able to rule out the possibility that contamination, rather than the evidence under examination, is the source of the testing results.
> (United States Department of Justice, Office of the Inspector General, *The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities*, May 2004, available online at http://wwwusdoj.gov/oig/special/0405/index.htm (accessed 2-25-12).)

Most significantly, just one year before Yates developed the DNA profile from the vaginal washing, one of her Cellmark colleagues was "fired ... for allegedly falsifying test data." The falsification occurred in at least 20 cases and allegedly involved the substitution of data in control samples. (Cadiz, Laura, *Md.-based DNA lab fires analyst over falsified tests,* Baltimore Sun Nov. 18, 2004, available online at http://articles.baltimoresun.com/2004-11-18/news/0411180133_1_dna-angeles-police-department-cases (accessed 4-1-12.)) The malfeasance of the analyst was described more fully in Gold Standard:

> [The analyst] manipulated the computer files produced by the genetic analyzer, replacing the computerized results for problematic control samples with the results of "clean controls" from other cases. This manipulation

> was uncovered when another Orchid-Cellmark analyst who reviewed Blair's work noticed that the same control file (which happened to contain an unusual anomaly) appeared in two different cases. According to Robin Cotton, a Technical Director for the lab, a subsequent review of computer files in Blair's cases found approximately 25 instances in which Blair had substituted controls.
> (*Gold Standard, supra,* at p. 10.)

Professor Thompson's article documents that Cellmark's contamination logs and corrective action files reveal scores of errors:

> Files from Orchid-Cellmark's Germantown, Maryland facility, for example, show *dozens of instances* in which samples were contaminated with foreign DNA or DNA was somehow transferred from one sample to another during testing.
> (*Gold Standard, supra,* at p. 6.) (Italics added.)

Clearly, the need to question Yates about whether she followed proper protocol was acute.

In his seminal text, Fundamentals of Forensic DNA Typing, John Butler states that "DNA results are still sometimes challenged in court — not usually because of the technology, which is sound — but rather the ability of practitioners to perform the tests carefully and correctly." (Butler, John, Fundamentals of Forensic DNA Typ-

ing, (2010) Academic Press, p. xii, available online at http://www.scribd.com/doc/56380920/fundamentals-of-Forensic-DNA-Typing [accessed 3-17-12].) ("Forensic Fundamentals") As Professor Butler demonstrates throughout Forensic Fundamentals, these legal questions arise because individual DNA analysts can — and likely do — deviate from an established protocol while developing a DNA profile.

The jury can look at a latent fingerprint and compare it with a fingerprint on file in a database. The jury cannot look at DNA evidence, it cannot spot the presence or absence of the critical alleles on which a match depends, it cannot see the autorads, it cannot compare the sizes of the allelic peaks on the autorad, it cannot perform the calculations which determine how often a series of alleles will appear in the populations, and it cannot check the calculations made by the computer. A growing body of legal and scientific evidence points to an alarming increase in laxness among DNA analysts and

an alarming number of instances in which a DNA analyst has circumvented the approved protocols.

Only *Kelly's* third prong assures that the DNA results in an individual case will be the result of generally accepted technique and not chicanery. Only *Kelly's* third prong assures that the witness is not pulling the wool over the jury's eyes. The need for a *Kelly* hearing has never been more pressing.

D. The trial court's error struck a mortal blow to Schultz's defense.

An error in admission of evidence is measured by the standard described in *People v. Watson, supra,* 46 Cal.2d 818.

The *Venegas* Court recognized that — absent an assurance the DNA procedures were compliant with good practice — there was no way to insure the integrity of a verdict that was based in significant part on DNA evidence.

Schultz has already argued in section III(H) of this brief that his inability to attack Yates's testimony forced him to abandon the

attack on Mooney's testimony, and he incorporates that argument as though fully set forth.

VI. The court erred in admitting evidence relating to Schultz's correspondence with Merriman. The evidence was irrelevant, prejudicial, and infringed on Schultz's constitutional right to freedom of association.

A. Introduction.

To foment the notion she was a sinner, Puritan leaders forced Hester Prynne to embroider a scarlet "A" on her bosom. To foment the notion Schultz was a danger to non-Caucasian prison personnel and inmates, the prosecutor hung a sign around his neck that said, "Skinhead."

Relying on a birds-of-a-feather-flock-together theory of relevancy, the People argued the fact Schultz had written to, and received correspondence from, Justin Merriman — once one of the leaders of the Skinhead Dogs, a Ventura County gang that espoused the belief the Caucasian race was superior to all other races — meant

that Schultz was himself a skinhead, would "join the Aryan Brotherhood, [or] some other white gang, as soon as he [got] to prison," "commit some violent act," and thus pose a danger to prison personnel and non-Caucasian, non-skinhead inmates. (21RT 3810, 3811)

It was vital the People plant this notion in the minds of the penalty-phase jury because Schultz had presented testimony that — during his seven years of incarceration — he had respected and obeyed prison officials and been cordial to his fellow inmates, and his penology expert, Anthony Casas, had opined that this history of compliance and socialization portended that Schultz could live out his life in prison in an obedient and cooperative manner if sentenced to a life term. (21RT 3696-3698)

The admission of irrelevant, highly prejudicial, constitutionally-protected evidence linking Schultz to an individual who held beliefs that likely were repellant to most members of the jury delivered a sucker punch to Schultz's penalty-phase presentation from which it could not recover, and, Schultz's sentence must be reversed.

B. Proceedings in the trial court and summary of argument.

1. The court's ruling admitting the fact of the correspondence and some aspects of Merriman's and Schultz's letters.

Anticipating that the prosecutor intended to introduce Merriman's and Schultz's letters during the testimony of Dennis Fitzgerald, an investigator with the district attorney's office, defense counsel asked for an offer of proof before Fitzgerald testified. (21RT 3808)

The prosecutor argued the letters rebutted Schultz's penology expert's testimony by proving Schultz was acquainted with a skinhead and, therefore, "can be expected to join the Aryan Brotherhood, [or] some other white gang, as soon as he gets to prison." (21RT 3696-3697, 3810)

Defense counsel pointed out that Schultz's and Merriman's letters "speak of conditions of confinement," disrespect the courts by referring to them as "kangaroo courts," describe juries as "unfair," and spew out "all kinds of bias one might suspect someone charged

with a capital crime would say, but make "[n]o mention of gangs at all."[35] (21RT 3809, 3810)

Defense counsel objected to the admission of Merriman's two letters on the grounds his letters were hearsay, not relevant, minimally probative, but highly prejudicial, infringements on Schultz's Sixth Amendment right to a fair trial, and an invitation to the jury to speculate that Schulz would join a prison gang and then commit some kind of violent act. (21RT 3810-3811)

Defense counsel asserted the same objections to the admission of Schultz's single letter to Merriman except defense counsel did not contend Schultz's letter was hearsay. (21RT 3810-3811)

The court ruled: (1) the contents of Merriman's letters were inadmissible hearsay, but (2) the fact Schultz associated with Merriman, the leader of a skinhead gang, was admissible, and (3) the salutations and valedictions in Merriman's letters and the reference

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[35] Schultz and Merriman were defendants in separate capital cases in Ventura County. (21RT 3810)

words "homie"[36] and "Big Mike" were also admissible. (21RT 3811, 3812)

The court did not rule on Schultz's claim the evidence was significantly more prejudicial than probative. (21RT 3808-3811) However, the colloquy during which the parties and the court acknowledged that further briefing would not change the court's decision on the issues was effectively a recognition that the court had ruled on all of Schultz's motions and further argument would be futile.[37] (21RT 3812-3813) The issue was, accordingly, preserved for appeal.

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[36] The word homie is spelled "homie" and "homey" in the transcript. Although the spelling, "homey," appears more often, Schultz adopts the spelling "homie" in this opening brief because it is listed as the preferred spelling in the Oxford English Dictionary. (Oxford English Dictionary, Third edition, June 2001, online version March 2012, available online at www.oed.com/view/entry [accessed 7-1-12].)

[37] The court indicated a willingness to allow defense counsel an opportunity to submit written opposition on the following court day. Rather than delay the case to allow for written briefing, the

2. Fitzgerald's testimony.

Fitzgerald once worked on a police investigation involving Justin Merriman. During that investigation, Fitzgerald learned Merriman had once been one of the leaders of a Ventura County gang called the Skinhead Dogs, a group that embraced a white-supremacist philosophy. (21RT 3814, 3815)

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prosecutor withdrew his request to offer Merriman's letters and Schultz's letter into evidence. (21RT 3808-3811)

Aware that further objection would not change the court's rulings on the admissibility of the fact of the correspondence or the introduction of the salutations, valedictions, and miscellaneous words allegedly demonstrating mutual respect, defense counsel declined the opportunity to provide written opposition. Defense counsel, however, stated that his decision was not a signal he had withdrawn his objections:

> We object to it, but we don't need a night to look it over. If the ruling of the Court is that [the prosecutor] can ask Dennis Fitzgerald if Justin Merriman sent [Schultz] two letters, Michael Schultz sent one, and the salutations, that's fine. I mean, we object to it, but we understand the Court's ruling. We're not asking for any more time. (21RT 3812-3813)

Merriman wrote to Schultz on December 24, 2000. Merriman referred to Schultz as "brother" in the body of the letter and ended the letter with the valediction, "With respect." (21RT 3817-3818)

Two months later, on February 15, 2001, Merriman again wrote to Schultz. Merriman began the letter with the salutation, "Big Mike," and called Schultz "brother" in the body of the letter. (21RT 3818-3819)

Eight months later, on or about October 5, 2001, Schultz wrote to Merriman. Schultz's letter referred to Merriman as "homie" and closed with the valediction, "Long respects." (21RT 3817)

3. Summary of argument.

Schultz contends the court erred in allowing the People to introduce evidence of Schultz's association with Merriman and selected portions of the letters because (1) the People's argument amounts to a claim of guilt by association, a method of proof prohibited in criminal trials because it violates the state and federal due process

clauses and chills an individual's state and federal constitutional right to freedom of belief and freedom of association, (2) even if Schultz espoused a belief in the supremacy of the Caucasian race, the First Amendment protected his right to that belief and to associate with another who shared that belief, (3) the First Amendment barred admission of Schultz's beliefs and associations when — as here — those beliefs and associations were not relevant to any issue, (4) the salutations, valedictions, and other contents of the letters were inadmissible hearsay, and (5) evidence of Schultz's association with an individual whose beliefs were probably anathema to a majority of the jury was substantially more prejudicial than probative. (21RT 3812-3813)

Schultz contends the trial court's errors as a whole denied him his right to heightened due process as guaranteed by the Eighth Amendment and its California opposite number, article I, sections 1, 7, and 17 of the California Constitution. (*Eddings v. Oklahoma* (1982) 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1]; *Beck v. Alabama* (1980) 447

U.S. 625, 638 at fn. 13 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *Woodson v. North Carolina* (1976) 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944].)

He contends admission of evidence based upon a theory of guilt by association violated his federal and state right to due process of law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution and their California equivalent, article I, section 7 of the California Constitution.

He also contends the court's failure to follow state evidentiary rules resulting in the admission of irrelevant and inflammatory evidence violated his right to due process of law, his right to affirmatively present evidence in his own defense, and his right to effective representation as guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California clones, article I, sections 1, 6, 7, 15, and 16 of the California

Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385]; *United States v. Agurs* (1976) 427 U.S. 97, 108 [96 S.Ct. 2392, 49 L.Ed.2d 342].)

Finally Schultz contends the admission of this evidence was barred by the First Amendment protection of the right to freedom of association and the parallel state provisions, article I, sections 1, 2, and 3 of the California Constitution.

Schultz did not raise the right to freedom of association in the trial court and his remaining federal constitutional objections might have been more artfully stated, but he raises these issues on appeal. Nevertheless, Schultz can raise these constitutional issues on appeal because the arguments he is presenting on appeal do not invoke facts or legal standards different from those the trial court was asked to apply. His arguments on appeal merely assert that the trial court's ruling, wrong for the reasons actually presented to the trial court, also violated the United States and California constitutions.

(*People v. Boyer* (2006) 38 Cal.4th 412, 441; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

Schultz contends these errors markedly harmed his penalty-phase presentation, and respondent cannot demonstrate the error did not affect the jury decision to impose a death sentence. As a result, this Court must reverse his sentence.

C. Standard of Review

Ordinarily, the abuse-of-discretion standard of review would apply to trial court rulings on hearsay, relevance, admissibility, and the balance required by Evidence Code section 352. Under that standard, the trial court's grant of discretion would be a major factor this Court would have to consider in making its own ruling. (*People v. Carter, supra,* 36 Cal.4th at pp. 1166-1167; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *People v. Memory* (2010) 182 Cal.App.4th 835, 858)

However, when — as here — the facts in the case touch on the First Amendment, independent review is a "rule of federal constitutional law." (*Bose Corporation v. Consumers Union of United States, Inc.* (1983) 466 U.S. 485, 510 [104 S.Ct. 1949, 80 L.Ed.2d 502].)

Schultz contends this Court must apply the independent-review standard usually applied in core First Amendment cases and scrutinize the trial court's exercise of discretion in accordance with that standard. (*Brandenburg v. Ohio* (1969) 395 U.S. 444, 447 [89 S.Ct. 1827, 23 L.Ed.2d 430]; *In re George T.* (2004) 33 Cal.4th 620, 632-633.)

Schultz contends the trial court's rulings cannot withstand scrutiny under this standard or any other.

D. The prosecutor's claim Schultz believed in white supremacy and would join a racist gang in prison was based solely upon the theory of guilt by association. The Due Process Clauses of the Fifth and Fourteenth Amendments and their state equivalents prohibit reliance on a theory of guilt by association in a criminal trial

When the court allowed the People to claim Schultz was a skinhead who would join a racist gang in prison and terrorize non-Caucasians based solely upon his association with Merriman, the court allowed the People to rely upon guilt by association — the legal version of birds of a feather flock together.

But, in law, one cannot prove the conduct of one bird by looking at the conduct of his avian fellows. In law, a relationship — without more — does not show that the individuals in the relationship are kindred souls, share the same beliefs, or engage in like conduct. As stated in *United States v. Forrest* (5th Cir. 1980) 620 F.2d 446, 451 "[t]hat one is married to, associated with, or in the company of a criminal does not support the inference that that person is a criminal or shares the criminal's guilty knowledge."

1. Due process prohibits proving the defendant has, or will, engage in specific conduct based solely upon the defendant's association with another who has engaged in that conduct .

It is a basic principle of due process that punishment is meted out only to those who are individually culpable; "[i]n our jurisprudence guilt is personal." (*Scales v. United States* (1961) 367 U.S. 203, 225 [81 S.Ct. 1469, 6 L.Ed.2d 782].)

Guilt by association and its close cousin, profiling, violate the due process clauses of the state and federal constitutions because these forms of evidence sidestep the requirement of individual culpability and impose liability or allow a finding of fact based solely on the defendant's connection with others. (*Scales v. United States, supra,* 367 U.S. 203; *People v. Castenada* (1997) 55 Cal.App.4th 1067, 1071-1072; *People v. Galloway* (1979) 100 Cal.App.3d 551, 563.)

Just over 50 years ago, *Scales v. United States, supra,* 367 U.S. at p. 220 established a baseline rule prohibiting proof based upon guilt by association when it declared a statute unconstitutional because "the statute offends the Fifth Amendment in that it impermissibly imputes

guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct." (Internal footnote deleted.)

The principles set forth in *Scales* are still valid.

In *United States v. Polasek* (5th Cir. 1998) 162 F.3d 878, the defendant was charged with rolling back the mileage on car odometers to increase the value of the vehicles in the used-car market. To rebut the defendant's testimony that she did not know how to further odometer fraud and had never intended to do so, the court permitted the government to introduce testimony that many of the defendant's former business associates had been convicted of odometer fraud.

In reversing the conviction on due process grounds, the Fifth Circuit found the evidence invited the jury to conclude without any proof that defendant had likewise engaged in odometer fraud.

In *People v. Leonard* (1983) 34 Cal.3d 183, two men held two victims at gunpoint and robbed them. Defendant and a companion were captured about an hour after the alleged robberies, and both were arrested and charged with both robberies. At trial, the court allowed the prosecution to introduce evidence that defendant's co-arrestee had pled guilty to the robbery of one of the victims.

This Court held that it was reversible error to admit this evidence because — although the evidence proved that defendant's companion had committed a robbery — it proved nothing about defendant's conduct and "invites an inference of guilt by association." (*People v. Leonard, supra,* 34 Cal.3d at p. 188.)

In *People v. Robbie* (2001) 92 Cal.App.4th 1075 and in *People v. Castenada, supra,* 55 Cal.App.4th 1067, a member of law enforcement described or profiled the conduct of a particular type of criminal — a rapist in *Robbie* and a Northern San Diego County heroin dealer in *Castenada.* In both cases, the court held profile evidence is constitutionally unfair because it allows the defendant to be convicted — not

because of his or her own conduct — but because he or she is closely associated with an archetype or avatar. (*People v. Robbie, supra,* 92 Cal.App.4th at pp. 1086-1087; *People v. Castenada, supra,* 55 Cal.App.4th at p. 1072.)

The facts in Schultz's case are strikingly akin to those presented in *United States v. Lemon* (D.C. Cir. 1983) 723 F.2d 922, a non-capital case, in which the court found reliance on guilt by association in a sentencing hearing not only offended due process, it also infringed on the defendant's constitutional right to freedom of association.

In *Lemon,* Edward Lemon was indicted for, and pled guilty to, the theft of two checks which he had deposited into his own bank account. Although first-time offenders like Lemon were routinely sentenced to probation and restitution, the government asked the court to sentence Lemon to a significant prison term because he was associated with members of the Black Hebrews, a religious community that believed its members were descendants of one of the original tribes of Israel. The government claimed Black Hebrews regular-

ly committed crimes like Lemon's crime to finance repatriation of sect members to Israel. (*United States v. Lemon, supra,* 723 F.2d at p. 925.)

Lemon strenuously denied he was a member of the sect, but admitted he knew, socialized with, and was closely affiliated with individuals who were members. (*United States v. Lemon, supra* 723 F.2d at p. 927.)

In reversing the prison sentence imposed on Lemon, the D.C. Circuit found the government's claim amounted to no more than "an attempt to establish guilt by association through an accumulation of uncorroborated suspicions" and that the claim infringed upon Lemon's right to freedom of association, a right the court said was "no less implicated when informal affiliation as opposed to formal membership" is involved. (*United States v. Lemon, supra,* 723 F.2d at pp. 940, 941.)

These cases demonstrate the fact that a defendant associates with another is simply not evidence the defendant engages in the same conduct as a comrade or shares a comrade's beliefs or philosophy. To make such a claim is to claim guilt by association in violation of state and federal due process guarantees.

Just as proof Schultz had written to Pope Benedict XVI complaining about the conditions of his confinement, would not be admissible to prove he was a Catholic or planned to join the priesthood, proof Schultz and Merriman corresponded about their pending capital cases was not admissible to prove Schultz was a skinhead or wanted to join a racist gang and would maim or kill non-Caucasians if given a life term.

The court erred in admitting evidence of Schultz's association with Merriman.

2. The court allowed the prosecution to encourage the jury to sentence Schultz to death based on an inference the court knew was not true. This was an egregious violation of Schultz's right to a fair trial.

The dangers of guilt-by-association evidence is brought into bas relief in Schultz's case because the available evidence quite clearly demonstrates that the inference the jury was invited to draw from the fact of the correspondence was not, in fact, an accurate reflection of what was in the actual correspondence.

At the time the court made its ruling, the court *saw and read* the letters (21RT 3809) and *knew* there was no evidence Schultz and Merriman had ever corresponded about Merriman's racist beliefs or his gang.

The court *knew* Merriman's and Schultz's letters contained no reference to racist beliefs or to racist gangs. The court *knew* the letters merely discussed their dissatisfaction with conditions in the Ventura County Jail and railed against the perceived unfairness of

the judicial system. Defense counsel summarized the letters as follows:

> They speak of conditions of confinement....
> Degrade[] the attorneys, degrade[] the system, degrade[] Ventura County.
> .....
> There's also ... references to kangaroo courts, or references to unfair juries. References to all kinds of bias one might suspect someone charged with a capital crime would say. ... No mention about anything about gangs at all.
> (21RT 3809-3810)

The court also *knew* no one would testify Schultz knew of Merriman's beliefs or associations. Fitzgerald could only testify *he himself* knew Merriman believed in the supremacy of the Caucasian race and *he himself* knew Merriman had once been the leader of a racist gang because *he himself* had worked on a case involving Merriman, but he could not — and did not — testify that Schultz held such beliefs. (21RT 3809, 3815)

In sum, the court *knew* the prosecutor's entire argument was a house of cards based entirely upon guilt by association.

Nevertheless, the court allowed the very last witness the jury would hear from before deciding on an appropriate punishment to inject the poisonous — and patently untrue — inference that Schultz was a skinhead racist bent on joining a racist gang as soon as he got to prison into the penalty phase of the trial.

And, the next morning when final argument began, this error allowed the prosecutor to argue that — because Schultz knew Merriman — he would join a racist gang and terrorize non-Caucasians if the jury gave him a life sentence:

> [H]e's been in contact with a guy who's a member of a white supremacist gang. And so that refutes the contention that he's not so bad when he's in prison.
> (22RT 3903)

> [A]s I brought out during the questioning, if Michael Schultz did join a white supremacist prison gang and he started writing letters to somebody else and they wrote back to him,.... [i]t doesn't mean the person writing back to him endorses the crime of rape and murder and is saying, "Hey Mike, that's great that you committed a rape-murder. I admire you."
> But, if they use terms like "brother" or "homie," it's an indication that there might be a possibility that that person might be interested in joining the same gang.
> (22RT 3903)

Evidence of this guilt-by-association connection violated Schultz's right to due process of law under the Fifth and Fourteenth Amendment and under article I, section 7 and chilled his right to freedom of association.

E. Evidence of guilt by association also violates the First Amendment when it infringes on an individual's right to freedom of association or freedom of belief.

Schultz contends the mere fact he corresponded with Merriman does not prove he knew Merriman's beliefs, shared Merriman's beliefs, knew Merriman was a member of a racist gang, or wanted to join Merriman's or any other gang.

But, even if the fact of the correspondence is sufficient to establish that Schultz did share Merriman's beliefs, or was interested in Merriman's beliefs, or wanted to associate with Merriman and his gang, those beliefs and that association were protected by the First and Fourteenth Amendments' guarantees to freedom of association

and freedom of belief and their state equivalent, article I, sections 1, 2, and 3.

1. The right to freedom of association is a core constitutional right.

The right to freedom of association — although a core constitutional right — is not specifically enumerated anywhere in either the California or federal constitution. The right grew out of a series of cases involving challenges the National Association for Advancement of Colored People ("N.A.A.C.P.") raised to fend off state government demands that local chapters turn over their membership lists.

In the first and most significant of these cases, *National Association for Advancement of Colored People v. Alabama ex rel. Patterson* (1958) 357 U.S. 449, 460 [78 S.Ct. 1163, 2 L.Ed.2d 1488], the N.A.A.C.P. successfully argued disclosure of the names of the organization's rank and file members exposed those members to economic reprisal, loss of employment, threat of physical harm, and general public hostility be-

cause their views were at odds with the views of a large segment of the population in Alabama.

In finding for the N.A.A.C.P., the Court carved out the constitutional right to associate with others based upon the liberty grant of the Fourteenth Amendment and the close connection between association and the effective exercise of the First Amendment right to free speech and belief:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters ....
> (*Id.* at 357 U.S. at pp. 460-461.) (Internal citation deleted.)

The next major step in freedom-of-association jurisprudence occurred as a result of the Cold War tension between the Soviet Union and the United States. Fear and distrust of the Communist Party in

America led law enforcement officers and politicians to make accusations of disloyalty, subversion, or treason based solely upon the accused's associations with supporters or members of the Communist Party.

One of the weapons the government relied upon to root out alleged communists and other radicals was the Alien Registration Act of 1940, commonly known as the Smith Act. The Smith Act imposed criminal penalties for advocating the overthrow of the United States government and for membership in an organization that advocated the overthrow of the government.

In *Scales v. United States, supra,* 367 U.S. 203, the defendant, a former member of the Communist Party, challenged the Smith Act on two grounds: (1) the Act impermissibly interfered with the right to freedom of association because it imputed guilt to an individual merely on the basis of his or her associations and sympathies rather than because of some concrete personal involvement in conduct and (2) the Act violated the First Amendment in that it infringed on free expres-

sion and free association. (*Scales v. United States, supra,* 367 U.S. at p. 220.)

Scales held individuals and groups can be punished for illegal activities without offending the Constitution, but, the Due Process Clause and the First Amendment forbid punishing individuals who support only a group's lawful ends.

To avoid a finding the Smith Act violated due process and the First Amendment, the Court interpreted the Smith Act to require proof that the Communist Party entertained illegal goals, the defendant knew of those illegal goals, and the defendant specifically intended to further those unlawful goals:

> [The Smith Act] requires a showing both of illegal Party purposes and of a member's knowledge of such purposes, ... requiring not only knowing membership, but active and purposive membership, purposive that is as to the organization's criminal ends.
> (*Scales v. United States, supra,* 367 U.S. at p. 209.)

Noto v. United States (1961) 367 U.S. 290 [81 S.Ct. 1517, 6 L.Ed.2d 836] — decided on the same day as *Scales* — cautioned that any inference an individual shares the extreme views espoused by others with

whom he or she is associated must be judged *stictissimi juris* to ensure he or she is not punished for an associate's unprotected speech or actions.[38]

Assuming Schultz shared Merriman's and the Skinhead Dogs' belief in the superiority of the Caucasian race, the right to hold that belief and to associate with others who shared that belief was protected by the First Amendment. Unless there had been proof that the Skinhead Dogs were engaged in criminal acts and that Schultz would join the Skinhead Dogs or some other racist gang with the purpose of furthering criminal activities rather than for companionship, his conduct came under the First Amendment's protective umbrella. There was

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[38] After *Scales* and *Noto*, the Court barred imposition of an ever-enlarging group of penalties absent proof of knowledge of a group's unlawful activity and proof of specific intent to further that unlawful activity. (*National Association for Advancement of Colored People v. Claiborne Hardware Co.* (1982) 458 U.S. 886 [102 S.Ct. 3409, 73 L.Ed.2d 1215]; *Elfbrandt v. Russell* (1966) 384 U.S. 11 [86 S.Ct. 1238, 16 L.Ed.2d 321]; *United States v. Robel* (1967) 389 U.S. 258 [88 S.Ct. 419, 19 L.Ed.2d 508]; *Aptheker v. Secretary of State* (1964) 378 U.S. 500 [84 S.Ct. 1659, 12 L.Ed.2d 992]; *Healy v. James* (1972) 408 U.S. 169 [92 S.Ct. 2338, 33 L.Ed.2d 266].)

no proof of either. Indeed Fitzgerald described only one Skinhead Dogs activity; he testified the group "advances a white supremacy doctrine." (21RT 3815) This is plainly a protected First Amendment activity.

2. Evidence of a defendant's constitutionally-protected associations and beliefs are not admissible in the penalty phase of a capital case unless relevant to prove some aspect of the crime, to prove an aggravating factor or to rebut a mitigating factor.

United States v. Lemon, supra, 723 F.2d 922, a non-capital case, held a defendant's First Amendment right to freedom of association was violated when the trial court considered his association with the Black Hebrews in setting his sentence.

Nine years later, *Dawson v. Delaware* (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309] took up a related question and considered the admissibility of a defendant's constitutionally-protected associations and beliefs during the penalty phase of a capital trial.

The *Dawson* Court held the Constitution does not erect a *per se* barrier to the admission of evidence of protected activities at sentencing; the Constitution will step aside and allow admission of constitutionally-protected beliefs and associations if relevant to the issues being decided in a capital sentencing hearing, (*Dawson v. Delaware, supra,* 503 U.S. at pp. 160, 165.)

Applying this principle to Dawson's case, the Court found the evidence consisted of a stipulation[39] informing the jury the Aryan Brotherhood was a white racist prison gang that began in the 1960's in California and a separate group, also called the Aryan Brotherhood, existed in state prisons in Delaware. (*Dawson v. Delaware, supra,* 503 U.S. at p. 162.) The Court concluded "the narrowness of the stipulation left the Aryan Brotherhood evidence totally without rel-

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[39] The stipulation was worded as follows:
The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.
(*Dawson v. Delaware, supra,* 503 U.S. at p. 162.)

evance" in Dawson's case. (*Dawson v. Delaware, supra,* 503 U.S. at p. 165.)

Having disposed of Dawson's individual case, the Court explored the parameters of First-Amendment relevancy by assuming "the Delaware group to which Dawson allegedly belongs is racist," and contrasting that fact with the facts in *Barclay v. Florida* (1983) 463 U.S. 939 [103 S.Ct. 3418, 77 L.Ed.2d 1134] and *United Stated v. Abel* (1984) 469 U.S. 45 [105 S.Ct. 465, 83 L.Ed.2d 450].

In *Barclay,* defendant, Elwood Barclay, a member of the Black Liberation Army, chose a random Caucasian victim, tortured and brutally murdered that victim, and sent audiotapes to radio stations advertising the racial underpinnings of the murder because he intended to foment a racial uprising pitting Black people against Caucasian people. *Dawson* found — as had *Barclay* — that the defendant's racial beliefs were directly tied to the murder — because Barclay's beliefs provided the motive. (*Dawson v. Delaware, supra,* 503 U.S. at p. 166.)

In *Abel*, a non-capital case, the defendant and a witness who appeared on his behalf were both allegedly members of the Aryan Brotherhood and, as members of the Brotherhood, each had taken an oath to lie to protect other members. *Dawson* found — as had *Abel* — that evidence of this pact to commit perjury to help a fellow related directly to bias. (*Dawson v. Delaware, supra,* 503 U.S. at pp. 164-165.)

By contrast, the Court stated that, even if Dawson's group espoused a racist philosophy, those abstract racist ideas were not tied to any issue in his case and "one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible." (*Dawson v. Delaware, supra,* 503 U.S. at p. 167.)

Finally, the Court scotched Delaware's claim Dawson's membership in the Aryan Brotherhood was valid rebuttal evidence because it was evidence of "bad character." Citing the landmark freedom of association cases, *National Association for Advancement of Colored People v. Alabama el rel. Patterson, supra,* 357 U.S. 499 and *Aptheker*

v. Secretary of State (1964) 378 U.S. 500, 507 [84 S.Ct. 1659, 12 L.Ed.2d 992], the *Dawson* Court reaffirmed that beliefs and associations — no matter how unpopular or benighted those beliefs and associations may seem to the majority — are protected unless the evidence establishes the group advocates illegal goals, the defendant is a member of the group, and the defendant actively advocates or pursues the group's illegal activities and goals:

> Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance. In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future.
> (*Dawson v. Delaware, supra,* 503 U.S. at p. 166.)

In Schultz's case, the evidence established the Skinhead Dogs espoused a racist philosophy. There was no evidence Schultz espoused that belief; but, assuming he espoused that belief, evidence

Schultz believed in white supremacy was not tied to the crime, as in *Barclay*, not tied to bias or impeachment as in *Abel*, and, in the absence of a showing the Skinhead Dogs were a prison gang that advocated lawless activity to advance its beliefs and evidence Schultz actively furthered and supported that lawlessness, the evidence was not admissible to rebut his penology expert's opinion he could be an obedient and social inmate if sentenced to a life term.

Although xenophobic views may be offensive to most, the First Amendment — like Lady Justice — operates blindfolded. It protects orthodox and unorthodox expressions, beliefs, and associations with equal vigor and shelters all persons — prophets and kooks and nuns and Crips alike — engaged in protected activities. Assuming that Schultz shared those views and associated with Merriman because they shared those views, there is no link between those views and any issue in the penalty phase. The court erred in admitting this patently prejudicial evidence.

F. The salutations and valedictions and the words "homie" and "brother" in Merriman's letters were inadmissible hearsay.

The trial court ruled that the contents of Merriman's letters were inadmissible hearsay, but inexplicably ruled that the salutations, benedictions, and the word "homie" which appeared in Merriman's letters, were admissible. The prosecutor never articulated a nonhearsay reason to support the admission of these words, and the court gave no explanation for finding these elements admissible as an exception to the hearsay rule.

During questioning, the prosecutor unilaterally extended the trial court's ruling to include the word "brother" in Merriman's letters. (21RT 3817, 3819) Although counsel did not object to the questions regarding the word "brother," counsel's failure was plainly based on the court's prior decision to admit the words "homie" and "Big Mike" as indications of "how they address each other." (21RT 3812) Based on the court's prior ruling, objection would have been futile, and Schultz has not waived the right to raise the claim that the

word "brother" was inadmissible hearsay on appeal. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1189 at fn. 27.)

1. The words "homie" and "brother" and the phrase "with respect" were admitted to prove their truth — that Schultz was Merriman's respected comrade or fellow racist and were, therefore, inadmissible hearsay.

Schultz contends the words "homie" and "brother" were introduced to prove their truth and were improperly admitted because neither word qualifies as an exception to the rule prohibiting the admission of hearsay evidence.

The word "brother" can mean either a biological relative, "a fellow member" of an organization, or a "comrade." The word was not introduced to prove that Merriman and Schultz were biological relatives, but it was introduced to prove that they were fellow members of a gang and comrades — that they were, in truth, brothers. (Oxford English Dictionary, Third edition, June 2001, online version

March 2012, available online at www.oed.com/view/entry [accessed 5-8-12].)

The same is true of the word "homie." A "homie" is "a member of one's peer group or gang," and it was introduced to prove that Merriman and Schultz were members of the same gang — that they were, in truth, homies. (Oxford English Dictionary, Third edition, June 2001, online version March 2012, available online at www.oed.com/view/entry [accessed 5-8-12].)

The prosecutor argued the truth of the words "homie" and "brother" in his final summation where he stated the use of these words was an indication Schultz wanted to join a gang like Merriman's:

> For example, as I brought out during questioning. If Michael Schultz did join a white supremacist prison gang and he started writing letters to somebody else and they wrote back to him, ... [i]t doesn't mean the person writing back to him endorses the crime of rape-murder and is saying, "Hey, Mike, that's great that you committed a rape-murder. I admire you."

> But, if they use terms like "brother" or "homie," it's an indication that there might be a possibility that that person might be interested in joining the same gang.
> (22RT 3903)

The phrase, "with respect" was introduced to prove the truth of just what it says — that Merriman and Schultz respected each other.

It is a basic paradigm of evidence law that an out-of-court statement offered to prove the truth of the matter asserted is inadmissible hearsay unless it falls within a recognized exception to the hearsay rule. Neither the trial court nor the prosecutor ever articulated a recognized exception to the hearsay rule that would have allowed the admission of these words.

There is none. The words were admitted in error.

G. Evidence of Schultz's association with Merriman was not in the least probative or, alternatively, its probative value was minimal and the prejudicial effect of Schultz's association with a skinhead far outweighed this minimal probity.

Evidence Code section 352 invests the trial court with the power to exclude evidence when the probative value of that evidence is substantially outweighed by its prejudicial effect. Although the section does not state its *raison d'etre,* it is plain that the court is granted this power to ensure that the admission of a particular piece of evidence does not undermine the jury's ability to accurately determine the facts.

The admission of Schultz's correspondence with Merriman for the purpose of tarring him with the label of racist skinhead gangster was evidence that had no probative value because, as Schultz has already argued: (1) it was based on the faulty and unconstitutional assumption that *association with* a racist skinhead gangster was the same as *being* a racist skinhead gangster and (2) it was based on the

faulty assumption that — since Fitzgerald knew Merriman was a racist and a member of a racist gang — Schultz knew it too.

It was also extremely prejudicial because it painted a picture of Schultz that was likely offensive to the majority of the jurors.

1. The evidence of Schultz's association was not probative.

Section 352 contemplates three steps. In step one, the court must determine whether the evidence a party is seeking to exclude is probative. If the evidence is not probative, there is no reason to move to step two which requires the court to determine the prejudicial effect of the evidence or to step three which requires the court to weigh that prejudicial effect against the probative value.

In this case, the admission of evidence Schultz had communicated with Merriman was not probative in the least.

As Schultz has already argued, evidence which relies on guilt by association to prove a fact violates the Fifth and Fourteenth Amendment guarantees of due process of law.

Further, Schultz has also already demonstrated that — although he contends he did not harbor racist beliefs — even if he had harbored such beliefs — those beliefs and his associations with Merriman were constitutionally protected.

Although *Dawson* held that such evidence can be admitted if tied to the underlying crime or to an aggravating factor or if it rebuts evidence presented in mitigation, there is no link in this case.

Evidence that simply demonstrates the exercise of a constitutionally-protected right can *never* be probative.

2. The evidence of Schultz's association with Merriman was highly prejudicial.

Although not specifically defined in section 352, "prejudicial effect" means evidence that is likely to evoke an unreasoned dislike, hostility, or antagonism towards the party seeking exclusion.

If — as Justice Thomas posited in his *Dawson* dissent — jurors do not leave "their knowledge of the world behind when they enter a courtroom," but enter with a preconceived notion that prison gang

members are lawless brigands, evidence linking the defendant to such a group is highly prejudicial:

> In stating that Dawson belonged to a prison gang, the stipulation implied much more than that he shared the gang's abstract racist creed; it indicated that Dawson had engaged in prison gang activities, and that he had the character of a person who engages in these activities.
>
> "One of the distinguishing characteristics of the prison gang is the virtual absence of any non-criminal, non-deviant activities. Gang members engage in some institutional pastimes, weight lifting being one of the more notable, but in general their activities are criminal or deviant in nature. The gang member is completely immersed in being a career prison gangster, leaving little time and less inclination for other than asocial behavior."
>
> (*Dawson v. Delaware, supra,* 503 U.S. at p. 172 citing United States Dept. of Justice, Prison Gangs: Their Extent, Nature and Impact on Prisons 10 (1985) at pp. x-xi.)

Although there was no evidence whatsoever that the Skinhead Dogs was a criminal enterprise, Justice Thomas's belief that the average juror associates Caucasian racist prison gangs with lawlessness and violence is underscored by the references to the Aryan Brotherhood — the most notorious and most well-known of the

gangs that believes in the superiority of the Caucasian race — in online information sources and in the popular press.

Wikipedia,[40] a popular online reference source, describes the Aryan Brotherhood as a prison gang "focused on the economic activities typical of organized crime entities, particularly drug trafficking, extortion, inmate prostitution, and murder-for-hire." (Aryan Brotherhood, Wikipedia, available online at

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[40] Schultz acknowledges the dispute regarding citing Wikipedia in appellate or trial briefs. He acknowledges some unpublished cases have considered Wikipedia an inappropriate source because it is a community-based resource tool that can be edited by readers whereas other cases have cited Wikipedia with approval. Schultz also acknowledges that, as citations to Wikipedia increase in number, the topic has become increasing popular among legal scholars and that legal scholars have taken positions in favor of and in opposition to Wikipedia as a valid source.
Schultz makes reference to Wikipedia to demonstrate materials that jurors are likely familiar with, have commonly consulted, and likely bring to the jury room as part of their existing knowledge, a use he believes is accepted by most courts and most commentators because Wikipedia "is one of the top-ten most visited websites worldwide, and the reader base includes more than one-third of the American public annually." (Miller, Jason, et al, Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites is Appropriate, (2010) 84 St. John's L. Rev. 633, 638 [internal footnotes deleted].)

http://en.wikipedia.org/wiki/Aryan_Brotherhood [accessed 5-15-2012].)

Huffpost TV, an internet newspaper, described a National Geographic documentary called *Explorer: Aryan Brotherhood* as a "first-hand look" at a group that "consists of men who are trained to kill efficiently and mercilessly and control the drug trade." (Finley, Adam, National Geographic goes inside the Aryan Brotherhood, posted online to the internet newspaper, Huffpost TV on 1-30-2007, available online at http://www.aoltv.com/2007/01/30/national-geographic-goes-inside-the-aryan-brotherhood/2 [accessed 5-10-2012].)

Police, a law enforcement magazine, ran a two-part article entitled "The Aryan Brotherhood — the Dogs of War which compared the group to Presa Carnario dogs:

> Like the dangerous Presa Carnario dogs that are loved by the Aryan Brotherhood, and which have for centuries been bred as fighting dogs, some men don't do well caged with others. Some require their handlers to cage them individually, as they are dangerous even when

> confined with their own breed. Mad dogs and mad men must be isolated from others, or put down.
> (Aryan Brotherhood—The Dogs of War, Part 1 of 2, Sept. 19, 2007 available online at http://www.policemag.com/List/Tag/aryan-brotherhood.aspx [accessed 5-10-2012].)

Finally, an article in the New Yorker magazine described the gang as follows:

> Authorities had once dismissed the Aryan Brotherhood as a fringe white-supremacist gang; now, however, they concluded that what prisoners had claimed for decades was true — namely that the gang's hundred or so members, all convicted felons, had gradually taken control of large parts of the nation's maximum-security prisons, ruling over thousands of inmates and transforming themselves into a powerful criminal organization.
>
> The Brand, authorities say, established drug-trafficking, prostitution, and extortion rackets in prisons across the country. Its leaders often working out of barren cells in solitary confinement, allegedly ordered scores of stabbings and murders. They killed rival gang members; they killed blacks and homosexuals and child molesters; they killed snitches; they killed people who stole their drugs, or owed them a few hundred dollars; they killed prison guards; they killed for hire and for free; they killed, most of all, in order to impose a culture of terror that would solidify their power.
> (Grann, David, The Brand, How the Aryan Brotherhood became the most murderous prison gang in America, The New Yorker, Feb. 16 & 23, 2004, at p. 158 available

online at http://archives.newyorker.com/?i=2004-02-16#folio=156 [accessed 5-18-2012].)

The prosecutor equated the Skinhead Dogs with the Aryan Brotherhood when arguing for admission of Merriman's and Schultz's correspondence in spite of the fact there was no evidence the Skinhead Dogs were actually allied with the Aryan Brotherhood. (21RT 3810) Patently, the prominence of the Aryan Brotherhood led the prosecutor to assume that all gangs that espoused a belief in white supremacy were allied with the Aryan Brotherhood. Logic compels the conclusion the jurors made the same connection in their minds.

Even if the jury did not link the Skinhead Dogs directly to the Aryan Brotherhood, this Court has recognized that all gang evidence has a "highly inflammatory impact on the jury" because "evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is, therefore, guilty of the offense charged." (*People v. Williams, su-*

pra, 16 Cal.4th at p. 193, citing *People v. Champion* (1995) 9 Cal.4th 879, 922, and *People v. Pinholster* (1992) 1 Cal.4th 865, 945.)

People v. Maestas (1993) 20 Cal.App.4th 1482 acknowledged that even the word "gang" has a sinister meaning in today's society:

> It is fair to say that when the word "gang" is used in Los Angeles County, one does not have visions of the characters from the 'Our Little Gang' series. The word "gang" ... connotes opprobrious implications.... [T]he word "gang" takes on a sinister meaning when it is associated with activities.
> (*Id.* at p. 1497 quoting *People v. Perez* (1981) 114 Cal.App.3d 470, 479.)

When the reference is to a gang like the Aryan Brotherhood or to skinheads or to the philosophy of white supremacy, these negative images are magnified and predispose a jury to believe those associated with such organizations or ideas are lawless and violent.

As evidenced by the portrayal of the Aryan Brotherhood in the popular press, the prejudice associated with a racist gang which shares the same philosophy as the Aryan Brotherhood, was significant.

3. The prejudicial effect of Schultz's association with a racist gang member far outweighed its probative value.

Evidence of Schultz's connection with Merriman had no, or almost no, probative value and intruded into areas protected by the state and federal constitutions. At the same time, it conjured up the image of a lawless brigand.

On balance, it is apparent that the prejudice far outweighed the probative effect of this evidence.

H. The introduction of this inflammatory and non-probative evidence based on the renegade theory of guilt by association which related to conduct protected by the First Amendment irreparably prejudiced Schultz's penalty-phase presentation.

Skinhead!.....Racist!.....Gangbanger!.....White Supremacist! The prosecution effectively called Schultz all of these names. Even a child knows the ubiquitous adage: "Sticks and stone may break my bones, but names will never hurt me" is not true. Name-calling or labeling does hurt. And, here labeling Schultz a skinhead, a racist,

and a gang member irreparably damaged Schultz penalty phase quest for a life, rather than a death, sentence.

1. Standard of review.

When the *Dawson* Court remanded the case to the Delaware Supreme Court for further proceedings, the Court did not decide whether the harmless-error standard set forth in *Chapman v. California, supra,* 386 U.S. 18, was the appropriate standard. The Court pointedly stated "[t]he question whether the wrongful admission of the Aryan Brotherhood evidence was harmless error is not before us at this time." (*Dawson v. Delaware, supra,* 503 U.S. at pp. 168-169.)

Justice Blackmun's opinion in *Dawson* left open the possibility that the harmless-error analysis might not be appropriate stating that because of the "potential chilling effect that consideration of First Amendment activity at sentencing might have, there is a substantial argument that harmless-error analysis is not appropriate for the type of error before us today" and a higher standard of review might apply. (*Dawson v. Delaware, supra,* at 503 U.S. at p. 169.)

On remand, the Delaware Supreme Court applied the *Chapman* standard, found the error was not harmless, and vacated Dawson's death sentence. (*Dawson v. State* (Del. 1992) 608 A.2d 1201, 1204.)

Schultz contends the state cannot carry its burden under either the *Chapman* standard or the higher standard generally accorded to First Amendment issues.

2. Respondent cannot demonstrate the unfairly linking Schultz to a racist gang did not adversely affect his penalty-trial presentation.

Schultz's quest for a sentence of life rather than death rested heavily on two prongs: (1) he had been exposed to and become a slave to illegal substances in early childhood and his addiction to these substances had been the driving force in his life, but once incarcerated, he was able to shrug off his dependency become a social person, restore his relationship with his mother, and make a contribution to society as a firefighter on an inmate fire-fighting squad,

and (2) he had grown up living "like a hostage" under the thumb of a terrorist — his father who dominated the household, subjected his children to appalling emotional and physical abuse, and introduced them to, and made them dependent upon, mind-altering drugs.

a. The admission of this testimony irreparably harmed Schultz's claim he would adjust to life in prison if given a life sentence.

Schultz presented testimony that his conduct during his only other period of incarceration had been so exemplary that he had worked his way from a Level Three facility to a Level One facility by "keeping productive, by working, by going to school, by training, by behaving [himself], by doing what's expected of ... a state inmate." (21RT 3684, 3686)

Schultz's penology expert testified that the Department of Corrections chooses the most well-adjusted, drug-free, and non-violent inmates for training in fighting wildfires. (21RT 3690, 3721)

Schultz was selected for, and successfully completed firefighting training. (21RT 3724)

Once assigned to a firefighting crew, Schultz worked his way up to sawman, the prestigious and coveted number-two position by learning how to operate a chain saw and demonstrating leadership qualities. (21RT 3724-3725, 3734, 3735, 3746-3747, 3748 Defense Exhibit Nos. Y and Z)

Schultz was also selected to act as a toolman, another prestigious and coveted position. (21RT 3725-3726, 3757) A toolman is responsible for sharpening and repairing the tools the crew uses. He or she performs the work unsupervised in an area outside the perimeter of the camp. (21RT 3725-3726)

Schultz's fire-fighting crew was racially diverse, and Schultz demonstrated an ability to lead and work with individuals of different races and different cultures. (Defense Exhibit Nos. Y and Z)

The officers who supervised him at the camp indicated he never engaged in any violence. (21RT 3721)

In sum, Schultz had freed himself from his addictions and was drug-free and violence-free while incarcerated. (21RT 3729) He was motivated to make a contribution to society and earned the respect of the crew members he served with and the officers who supervised him. (21RT 3736-3737, 3738, 3749, 3752, 3757)

b. The admission of this testimony also harmed Schultz's claim his drug dependency was at the root of his criminal and violent behavior

At the same time, Schultz's presented testimony that his only prior violent conviction — the burglary of the coin machine at the Cal State campus — was rooted in his slavish dependency on methamphetamine and was committed at a time when he was under the influence of methamphetamine. (18RT 3263)

The prosecution's witness testified that most of the anecdotal incidents of domestic brouhahas involving modest levels of violence were also rooted in Schultz's dependency on illegal mind-altering substances:

1989—Schultz assists his father who is attacking Hecht. Schultz and his father were "snorting speed" (19RT 3305)

1991—Schultz restrains his step-father, Nickolas Loprieato

Bruni had forced Schultz to leave the house because he was using drugs. (19RT 3266-3267)

1994—Schultz threatens to smash Mooney's television set when she announces she will break up with him because of his ongoing drug use. (19RT 3221-3222, 3269)

Late 1994 or early 1995—Altercation with Darryl Allen variously described as a confrontation that started either when Allen tried to intervene in a fight between Mooney and Schultz or when Allen was bringing Mooney home from a date after Mooney had terminated her relationship with Schultz because of his uncontrolled drug use. (18RT 3242-3244, 3273-3274)

1995—Schultz pushes Mooney in the buttocks with his knee because Mooney was angry at him for using drugs including pills that had been prescribed for her. (18RT 3219. 3238)

Unknown date between 1993 and 1996—Schultz retaliated by pushing when Mooney repeatedly poked him in the chest and taunted him about his uncontrolled drug use. (18RT 3220, 3223, 3240)

Unknown date between 1993 and 1996--Schultz took Mooney's house keys and car keys when he was

> smoking "crank" and refused to give them back to her. (18RT 3220-3221)

There were only two incidents — the altercation on the beach in 1993 and the alternation with Richard Bowens' girlfriend over a $5.00 debt in 1995 — when Schultz was not described as under the influence of an illegal substance. (18RT 3177-3179, 3229)

Jurors' perceptions of gangs as violent, criminal enterprises likely influenced them to look at Schultz as prone to violent crime and as an individual who posed a continuing danger to society.

Jurors' perceptions of white supremacists likely influenced them to believe that even though Schultz had been the leader of a racially-diverse fire crew, his beliefs not only would make such camaraderie impossible in the future, but his beliefs might make him dangerous to inmates or prison personnel of different races.

Further, the prejudicial effect of this racist gang evidence likely caused jurors to overlook the fact that once Schultz was drug-free, he was violence-free and, therefore, his prison history — rather than

his history of social fracases before his incarceration in 1996 — was a better indicator of his future conduct.

It is difficult to fathom an argument that would demonstrate that evidence unfairly and unconstitutionally linking Schultz with a racist and a gang member would not have harmed his claim he would successfully adjust to a life term. And, respondent cannot demonstrate that hanging a sign around Schultz's neck that said Skinhead had no impact on the jury's decision to deny Schultz a life sentence.

VII. The prosecutor's misconduct during the closing minutes of the penalty trial robbed Schultz of a fair penalty trial. The court erred in denying Schultz's motion for mistrial.

In the closing moments of the penalty phase, the prosecutor asked Investigator Fitzgerald whether Merriman had written to Schultz and offered to send him a "manual from San Quentin." (21RT 3818) This was a question the prosecutor knew could only be answered by reference to material the court had specifically excluded from evidence just moments before — the contents of Merriman's letters to Schultz.

Most cases that address prosecutorial misconduct discuss the prosecutor's unique set of responsibilities in the criminal justice system by referencing all or part of the ubiquitous quote from *Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314]:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such,

> he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger's goal — that prosecutors ensure that "justice shall be done" — is a lofty, but vague, goal. The prosecutor in this case committed misconduct — not by missing some lofty goal — but by violating a well-established everyday trial rule that even a greenhorn in the trial court would know: An attorney cannot ask a question that can only be answered by reference to an area the court has already ruled inadmissible. (*People v. Bell* (1989) 49 Cal.3d 502, 532; *People v. Parsons* (1984) 156 Cal.App.3d 1165, 1170; *United States v. Wiedyk* (6th Cir. 1995) 71 F.3d 602, 607; *United States v. Flores-Chaps* (5th Cir. 1995) 48 F.3d 156, 159.)

Indeed, the prosecutor did not dispute that his question constituted misconduct; he merely contended that the misconduct had not prejudiced Schultz's penalty phase presentation. (21RT 3821, 3823-3824, 3826)

The prosecutor was mistaken.

Erroneous admission of evidence of Schultz's association with Merriman struck the first blow to Schultz's claim the jury should sentence him to a life term because he had demonstrated an ability to function peacefully in the prison milieu. (See, argument VI) The prosecutor's misconduct struck a second blow. The fact this second blow came in the closing minutes of the penalty phase exacerbated that prejudice.

The harm could not be undone by a routine admonition or a generic jury instruction. It could only be undone by granting Schultz's motion for a mistrial.

A. Proceedings in the trial court and summary of argument.

Before Fitzgerald took the stand, the court ruled the salutations and valedictions of Merriman's letters admissible, but the remaining contents inadmissible. (21RT 3811) The prosecutor unambiguously acknowledged his understanding of the court's ruling. (21RT 3812)

Nevertheless, when Fitzgerald took the stand, the prosecutor ignored the court's ruling and asked if one of Merriman's letters offered to send Schultz "a manual from San Quentin." (21RT 3818)

Defense counsel objected immediately and moved to strike Fitzgerald's answer. The court sustained the objection, struck the answer, admonished the jury to disregard the answer, and reminded the prosecutor the court "had ruled at the bench on that issue." (21RT 3818)

At the conclusion of cross-examination, defense counsel advised the court Schultz intended to move for a mistrial on the ground the prosecutor's misconduct had irreparably prejudiced his ability to secure a fair penalty trial. (21RT 3821)

At argument, the prosecutor admitted the question was directly contrary to the court's ruling, but contended there was no prejudice. (21RT 3823)

Defense counsel argued the misconduct left the jury free to speculate the "manual" related to the practices of a racist gang or provided information about joining the gang, and such speculation was fatally prejudicial:

> Now out of the blue we're given the implication that this leader of a gang sends my client a manual, and now the jurors get to speculate as to what that manual could be.
>
> It could be a manual how to get in the gang. Could be a manual on how to do a hit. Could be any number of things. No matter what it is — or if [the juror's] put it together to know who Justin Merriman is, know he's on death row, know he's a member of the Skinhead Dogs. Like I said, the prejudice keeps stacking up and stacking up.
> (21RT 3824-3825)

The court denied the motion because (1) the jury was aware "that at a minimum Schultz would spend the rest of his life in prison without the possibility of parole" and (2) the court believed the jurors would "follow the law as the Court instructs." (21RT 3827)

B. Standard of review.

Schultz acknowledges the trial court is granted discretion in ruling on a denial of a motion for a mistrial, and this Court must find the trial court abused that discretion in order to reverse a sentence. (*People v. Williams* (2006) 40 Cal.4th 287, 321; *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

However, he contends the heightened due process requirements the Eighth Amendment imposes on capital trials means that misconduct that might be overlooked as harmless in a non-capital case cannot be overlooked as harmless in a capital case and ameliorative procedures that might be considered adequate in a non-capital case cannot be considered adequate in a capital case. As a

result, this Court must take a harder look at the trial court's exercise of discretion in a capital case.

Yet, by any measure, Schultz contends the trial court overstepped the bounds of its discretion in denying his motion for a mistrial because neither of the stated reasons for the denial was a judicious exercise of discretion and the ameliorative measures on which the court relied to dissipate the prejudice were ineffective.

In stepping outside the bounds of its discretion, the court violated Schultz's right to due process of law, and his right to confront and cross-examine the witnesses against him as guaranteed to him under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California equivalents, article I, sections 7, 15, 16, and 17 of the California Constitution and undermined the reliability required for a death sentence by the Eighth and Fourteenth Amendments and their opposite numbers under the California Constitution, article I, sections 7, 15, and 17.

The only ameliorative measure that would have been effective was a declaration of a mistrial.

C. The trial court's belief the prejudice was muted because the jury knew Schultz was going to prison was in error. The misconduct was prejudicial precisely because Schultz was seeking a life term.

The court's decision to deny the motion for a mistrial was based, in part, on the court's belief the fact the jury already knew "the defendant's going to spend the rest of his life in prison without the possibility of parole" dispelled the insinuation that Merriman was sending Schultz instructions on how to join a racist gang or instructions on committing violent crimes in prison. (21RT 3827)

The court did not explain the logic behind this conclusion, and it is difficult to fathom that logic.

Schultz contends quite the opposite is true. Schultz contends the prosecutor's misconduct was fatally prejudicial precisely *because* a life sentence without the possibility of parole was an option for the jury.

As a result of the prosecutor's misconduct, Fitzgerald informed the jury that Merriman had offered to send Schultz a manual. The court and both parties agreed that fact the manual was not identified left the jurors free to draw their own conclusions regarding its contents. The prosecutor stated he believed the manual related to prison regulations and he believed jurors would draw the same conclusion. The court disagreed. The court stated there was no basis for the prosecutor's supposition. The court shared defense counsel's concern the jury would conclude the manual provided information about joining a racist gang or provided hints on committing violent crimes in prison. (21RT 3826-3827)

Schultz's penalty phase case focused on providing the jury with reasons to sentence Schultz to a life term rather than to death. A linchpin in that presentation was the testimony of Schultz's penology expert, who opined Schultz's history of good behavior was a valid harbinger of his future behavior in prison. After the miscon-

duct, the jury must have believed that a death sentence was the only way to prevent Schultz from committing crimes in prison.

When the court recognized that Fitzgerald's answer would allow the jurors to conclude Schultz was in receipt of information about joining a gang or committing violent acts in prison, the court should have concluded that this testimony eviscerated Schultz's defense. Reason dictates it was unlikely the jury would sentence a nascent racist gang member to a life term. Accordingly, the court erred in justifying its denial of Schultz's request for a mistrial based on the non-sequitur that the jury already knew Schultz would spend the rest of his life in prison.

D. The court's efforts to dispel the prejudice did not protect Schultz's right to a fair penalty trial.

The court's decision to deny the motion was also based on the court's belief the jury would "follow the law as the Court instructs." (21RT 3827) The court did not identify the instructions on which it placed its reliance. However, there are only two instructions that can reasonably be described as related to this episode of misconduct: the admonition provided to the jury at the close of the day on which the misconduct occurred and the last few sentences of CALJIC No. 1.02 (Database updated March 2012) which was included in the final instructions to the jury.

Neither could effectively dispel the prejudice that had seeped into the penalty phase as a result of the prosecutor's misconduct.

1. The court buried the admonition at the tail end of a routine admonition the jury had heard countless times before and likely did not command the attention needed to dispel the prosecutor's misconduct.

The court admonished the jury on two occasions. Both were routine; neither was calculated to cure the sting of the prosecutor's misconduct.

The first occurred at the time of the misconduct, but was not specifically directed to the misconduct and did not make a particular point of the prosecutor's egregious conduct. (21RT 3818)

Although the court later admonished the jury to disregard the response "made to a question asked by the district attorney in reference to an item allegedly contained in a letter from a Mr. Merriman to defendant," the court buried this brief admonition at the end of the long, routine, cautionary instruction the court had recited to the jurors every time they left the courtroom for weeks.[41] (21RT 3822-3823)

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[41] The entire statement to the jury was:

Burying a warning or a disclaimer is a time-honored practice a drafter uses when he or she hopes the warning will be overlooked.

All right. Ladies and gentlemen of the jury. I'm told there are no further witnesses. And I'm told that you've heard all the evidence you're going to hear on this phase of the case which means we proceed to an argument phase in the case. And we'll commence that tomorrow morning at 9:30 in the morning.

So I need to admonish you're not to form or express any opinion on the matter until it's been submitted to you for your final decision which may be tomorrow, but I don't know. Also, you can't talk about the case, even amongst yourselves, until then. Even then only when all 12 jurors are present in the jury room deliberating upon the case.

Once again you are not to read, listen to, or hear any media coverage concerning the case whether it be television, radio, Internet, or newspaper. And you're not to allow anyone to speak to you about the case whatsoever.

Have a very nice evening.

We'll see you tomorrow at 9:30 in the morning.

I want to admonish you again the objection made to a question asked by the district attorney in reference to an item allegedly contained in a letter from a Mr. Merriman to defendant — objections made to it. I sustained the objection. The answer was stricken.

I want to admonish you again you're not to consider anything that you heard in that answer for any purpose whatsoever in this case.

Thank you. Have a pleasant evening

We'll see you back tomorrow morning at 9:30

(21RT 3822-3823)

Given that the average attention span of an adult is eight seconds, placing this important admonition at the end of a routine cautionary instruction the jurors had heard more than 28 times before[42] effectively ensured that the jurors would pay it no heed. (Statistic Brain, Attention Span Statistics from The Associated Press and verified on May 16, 2012, available online at http://www.statisticbrain.com/attention-span-statistics/ [accessed 6-7-2012].)

The court further diminished the effectiveness of the admonition by delivering it almost as an afterthought. The court seemingly concluded its routine warning by stating — as it had numerous times in the past — "We'll see you back tomorrow morning at 9:30"—and then, as an afterthought, added the admonition. (21RT

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[42] The admonition was tacked on to a routine cautionary instruction. The same, or substantially the same cautionary instruction had been given to the jury on the following occasions after jury selection was completed and the jury had been sworn:
(13RT 2256, 2276, 2339, 2383, 14RT 2425, 2476, 2494, 2516, 2564, 15RT 2615, 2662, 2716, 16RT 2754, 17RT 3030, 3073, 18RT 3080, 3160, 3262, 19RT 3333, 3428, 3441, 20RT 3493, 3515, 3561, 3606, 21RT 3647, 3739, 3822.)

3823) By the time the court added the afterthought, jurors were likely already beginning to file out of the courtroom.

2. The generic instruction the court included in its final instructions to the jury was not specifically drafted to address this specific act of misconduct.

Although the court did not make specific reference to which jury instruction it relied upon, it is plain the only curative instruction included in the final instructions to the jury was that contained in the last sentence of CALJIC No. 1.02, which stated as follows:

> Do not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court; treat it as though you had never heard of it. (22RT 3839)

CALJIC No. 1.02 is a routine instruction, and one is hard-pressed to find a case in which it or its CALCRIM equivalent is not given.

If a routine instruction given in virtually every case was a universal panacea for misconduct, there would be no need for the body of law associated with prosecutorial misconduct at all.

3. Generic instructions and admonitions are not effective in dispelling prejudice.

In *Reid v. Covert* (1957) 354 U.S. 1, 77 [77 S.Ct. 1222, 1 L.Ed.2d 1148], Justice Harlan distinguished between the process that is due a defendant in a capital case and the process due a defendant in a non-capital case stating:

> I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the constitution in a capital case. The distinction is by no means novel, ... nor is it negligible, being literally that difference between life and death.

The process due an offender facing a possible death sentence is the heightened due process of the Eighth Amendment.

Schultz contends that Eighth Amendment requirement that the procedural due process in a capital case comply with a "heightened standard of reliability," prohibits reliance on methods of amelioration that have been scientifically demonstrated to be ineffective. He also contends the Eighth Amendment required the trial court and requires this Court to consider the empirical data available in

deciding whether the taint of prejudice can be sufficiently diluted by an admonition and a generic instruction. As stated in *Lockett v. Ohio, supra,* 438 U.S. at p. 605, "where life hangs in the balance, a fine precision must be insisted upon."

Empirical research indicates that generic jury instructions and admonitions are not effective in removing the inadmissible material from the jurors' minds. Thus, the selection of such ameliorative devices is not countenanced by the Eighth Amendment.

For years Judge Learned Hand recognized the ineffectiveness of admonitions and limiting jury instructions. During the 1940's, he waged a battle against relying on admonitions and generic limiting instructions as an ameliorative measure in trial.

United States v. Antonelli (2nd Cir. 1946) 155 F.2d 631, is typical of Judge Hand's strong feelings in this area. In *Antonelli,* Judge Hand stated that reliance on an admonition to extract the prosecutor's misconduct — bringing the fact that the defendant had absent-

ed himself from his military duties in a time of war — from the jurors' minds was misplaced:

> Indeed, the judge's cautionary instruction may do more harm than good: It may emphasize the jury's awareness of the censured remark — as in the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant.
> (*Id.* at p. 656.)

Justice Jackson's concurring opinion in *Krulewitch v. United States* (1949) 336 U.S. 440, 453 [69 S.Ct. 716, 723, 93 L.Ed. 790] expressed the same lack of faith in admonitions and limiting jury instructions when it stated, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."

Reliable empirical research supports Judge Hand's opinion that admonitions and general jury instructions are of very limited value in purging prejudice. Researchers with the University of Chicago Jury Project found that when jurors are admonished to disregard evidence, they did exactly the opposite! (Tanford, J. Alexander, The Law and Psychology of Jury Instructions, (1990) 69 Neb. L.Rev.

71, 72 citing Broeder, The University of Chicago Jury Project (1959) 38 Neb L. Rev 744.)

Subsequent studies have also shown that jurors are unable or unwilling to follow instructions that ask them to "erase" material from their memories. (Guttel, Ehud, Overcorrection, (2004-2005) 93 Geo. L. J. 241; Dumas, Bethany K., Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues (1999-2000) 67 Tenn. L.Rev. 701)

Current courts have joined Judge Hand in finding generic instructions of very limited use in dissipating prejudice.

In *United States v. Gracia* (5th Cir. 2008) 522 F.3d 597, 605, a non-capital case, the court recognized generic instructions have only a "minor mitigating effect" and can be relied upon only when the prejudice does not "seriously affect[] the fairness, integrity, and public reputation of the [defendant's] judicial proceeding."

In *United States v. Turner* (5th Cir. 2012) 674 F.3d 420, 440 at fn. 69, a non-capital case, relied on *Gracia's* determination that generic instructions are generally not effective, but found the instruction — given immediately after a bench conference had established the misconduct— was effective in this instance.

Yet, in Schultz's case, the trial court relied upon an ameliorative measure that was not closely linked to the actual misconduct and did not dispel the severe prejudice that arose as a result of the prosecutor's misconduct.

E. The prosecutor's misconduct exacerbated the misconduct that had already arisen because the court had erroneously admitted evidence linking Schultz to a white supremacist gang member.

Schultz has already argued the prejudice that inured as a result to the court's erroneous admission of evidence relating to Schultz's connection to Merriman in section VI(H) of this brief, and he incorporates that argument as though fully set forth.

He further argues the prosecutor's misconduct exacerbated the prejudice already created by the evidence of Schultz's association with Merriman because of its timing. The misconduct occurred during the last stages of the testimony of the last witness in the penalty phase. It was very nearly the last words the jury heard during the penalty phase. In *United States v. Carter* (6th Cir. 2001) 236 F.3d 777, 788-789, the court found that the fact the prosecutor's misconduct occurred during his rebuttal argument exacerbated the infection the misconduct had created because the misstatements "were the last words from an attorney that were heard by the jury before deliberations."

It does not take extensive training in psychology to know that the last words a listener hears will likely be remembered longer than words heard at any other time. Human experience confirms this principle — in an argument, all of the arguers jockey to get in the last word. Here the prosecutor got the last word only as a result of his misconduct.

The jury did not easily reach a decision on the appropriate penalty. Deliberations extended over a three-day period. (11CT 2932, 3040-3042, 22RT 4057, 4073-4076)

Some errors simply cannot be corrected except by declaring a mistrial. This was one of those errors.

VIII. Victim impact evidence denied Schultz due process and the right to a reliable penalty determination under the Eighth and Fourteenth Amendments.

A. Introduction.

Burger's family sat through the guilt phase[43] of the trial reliving Burger's last moments as they listened to the coroner explain just how long it takes a person to die of strangulation and stared at autopsy photographs that were so intensely personal even the trial court found them troubling, humiliating, and in bad taste. (8RT 1305-1306, 1307, 15RT 2653-2654)

When finally given the opportunity to have their say, Burger's family spoke plaintively of the devastation and loneliness they felt after her death and in the years her murder remained unsolved. But, they did not stop there. They also shared their feelings about the crime, the investigation, and the perpetrator. They spoke of

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[43] Schultz moved to exclude family members from the courtroom during the guilt phase. (7CT 1847-1891, 8CT 2413-2421, 8RT 1245-1258) Relying on section 1102.6, the court denied the motion. (8CT 2432-2434, 8RT 1258)

Burger's deep religious convictions, and they related affecting anecdotes of events that pre-dated Burger's death by decades and eerie psychic experiences which they believed connected her with them after her death.

Although Schultz is mindful that *Payne v. Tennessee, supra,* 501 U.S. 808 held that testimony regarding a victim's personal characteristics and the impact of the crime on the victim's family is not a *per se* violation of the Eighth Amendment, he contends the Burger family's testimony about the crime, the investigation, and the perpetrator crossed the bright line that separates valid victim impact testimony from that which *Payne* specifically described as violative of the Eighth Amendment.

Schultz also contends the Burger family's emotionally-overwrought testimony describing their grief and shock, stories from the past, Burger's religious beliefs, and belief that they had a psychic connection with Burger even after her death overwhelmed the jury's ability to reach a decision based on reason and injected a

constitutionally intolerable level of emotion into his sentencing hearing in violation of both the Eighth and Fourteenth Amendments. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172; *People v. Howard* (1992) 1 Cal.4th 1132, 1190-1193.)

B. Proceedings in the trial court.

Before trial, Schultz moved to limit victim impact witnesses to those family members who were present at the time of the murder or who came upon the scene immediately after the murder and to exclude prejudicially emotional victim impact testimony. Schultz argued California law did not allow more extensive victim impact testimony, and admission of more extensive victim impact testimony would result in a fundamentally unfair trial. (8CT 2137-2154)

Schultz argued the admission of extensive and emotionally overwrought victim impact testimony would violate his state and federal constitutional guarantees to a fair trial, cross-examination and confrontation of adverse witnesses, and due process of law, and

would deprive him of the right to present evidence in defense, the right to effective assistance of counsel, and the right to a reliable verdict and penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California cousins, article I, sections, 7, 15, 17, and 24 of the California Constitution and would violate section 190.3 and Evidence Code sections 210 and 352. (8CT 2137-2154)

The court denied the defense motion, but limited victim impact witnesses to the victim's mother, father, and sister and limited their testimony to the impact the loss of Burger had on their subsequent lives. (8RT 1331-1332)

Burger's parents, Had and Virgie Burger, and her older sister, Sandra Woodward, testified during the penalty phase of the trial. (18RT 3164-3167, 3168-3175, 19RT 3322-3332)

C. The admission of testimony from Virgie Burger and Sandra Woodward regarding the perpetrator and the crime crossed the boundary set by *Payne* and violated the Eighth Amendment.

Almost exactly twenty years ago to the day, in *Payne v. Tennessee, supra,* 501 U.S. 808, a divided Supreme Court cleared the way for capital sentencing juries to consider victim impact evidence. Reversing its recent prior decisions in *Booth* v. *Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] and *South Carolina* v. *Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876], a six to three majority of the Court held that "if the States chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." (*Payne v. Tennessee, supra,* 501 U.S. at p. 827.)

The *Payne* majority noted that "the consideration of the harm caused by the crime has been an important factor in the exercise of [sentencing] discretion" for years and the lenient and generous admissibility rules relating to defense mitigation evidence had "unfairly weighted the scales in a capital trial." (*Payne v. Tennessee, supra,*

501 U.S. at pp. 820, 822) To right that imbalance, *Payne* declared that the State should not be barred from either offering a " 'quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Payne v. Tennessee, supra,* 501 U.S. at p. 822.)

Payne provided only one clear directive regarding victim impact testimony — "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Payne v. Tennessee, supra,* 501 U.S. at p. 830 at fn. 4.)

Plainly, two of the three Burger family members who testified crossed that line.

1. Virgie Burger's testimony castigated Schultz and voiced opinions about the crime.

Virgie Burger called Schultz a "monster" and referred to the crime as a "horrendous story by a monster who had killed her," the horror of which was "unbelievable." (18RT 3170) Virgie underscored her opinion that Schulz was a monster by contrasting the "monster" with her "wonderful daughter, beautiful daughter, kind, considerate." (18RT 3170)

Virgie summarized the crime itself in an inflammatory manner describing it once again as "a weird horrible story" and stating that "[t]his girl so beautiful both inside and out and was murdered with great pain, fear, and then set fire and then put in a tub of acid." (18RT 3170) Without diminishing what Burger went through in the last moments of her life, there was no evidence Schultz set Burger on fire either before or after she died or that she was placed in a tub of acid. These inflammatory — and factually inaccurate — details crossed the line separating acceptable victim impact testimony from naked anger that sounds a tocsin for revenge.

2. Sandra Woodward's testimony voiced opinions about the crime and the police investigation and expanded the field of victims to include those who were investigated.

Sandra Woodward discussed the crime and the police investigation at length, and she shared with the jury her own interpretation of the ongoing police investigation:

> A[By Woodward]: If I didn't know her friends personally, I knew their names. I knew her sweethearts. I just knew everything about her. And because both the doors in the house had been locked, they thought it was somebody that Cindy knew.
>
> Q[By prosecutor]: When you say "they," who are you referring to?
>
> A: The police department.
>
> Q: Is that what they told you, that they thought that—
>
> A: That was the theory. And, umh, so they would call me. They'd call me every week. They would come to my house. I would go down there. And they would ask me, you know, to think about things, to recall, to name

all these — everybody I could think of.

And as time went on, you know, maybe new incidents would come up, that I would remember something and I would be — they would either call me or I would call them.

I was working so hard to try and find some kind of clue to help them. I felt like if, I could just do that, if I could just help in some way — 'cause I was the older sister. That's what I'd always done.

Q: Did this cause you to suspect that it was someone that you knew or that Cindy had described to you?

A: Oh, boy. Does your mind run wild. I had suspicions and I really worried about it. And some of these people I still had contact with. And they would come to me in the most concerned way. Yet I knew I had given their name to the police department and that they were being checked out and I was saying things about them.

(18RT 3325-3326)

Woodward's constitutionally-prohibited testimony invited the jury to speculate that the police had grilled Burger's friends and investigated their private lives, disrupting friendships and personal relationships thereby creating a coterie of individuals who had been adversely impacted by Burger's death.

Thus, although the trial court had explicitly limited victim impact witnesses to the immediate family, Woodward's testimony introduced victim impact evidence relating to individuals far beyond the immediate family —a group of individuals not available for cross-examination.

Virgie's and Woodward's testimony about Schultz and the crime violated the one bright line set forth in *Payne* and violated Schultz's Eighth Amendment right to a fair and impartial penalty trial and, at the same time, the interjection of constitutionally-forbidden testimony violated his Fourteenth Amendment right to due process of law in violation of *Payne v. Tennessee, supra,* 501 U.S. at p. 831.

D. The admission of testimony from Virgie Burger and Sandra Woodward regarding incidents completely unrelated to the impact Burger's death had on them might have been appropriate for a eulogy, but it was not appropriate for a sentencing hearing.

In *Payne,* the victim impact testimony was extremely limited, consisting of a single witness's response to a single question. Nothing in *Payne* suggests that the states may freely admit any and all quantity or variety of victim impact evidence.

To the contrary, almost every justice wrote an opinion in *Payne,* and every justice who wrote cautioned against allowing the emotion inherent in hearing from the victims to overwhelm the trial. (*Payne v. Tennessee, supra,* 501 U.S. at pp. 825, 831, 833, 836, 860, 866.)

Schultz relies on Justice O'Connor's statement that "[i]f, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment" in urging this Court to find

his rights were violated. (*Payne v. Tennessee, supra,* 501 U.S. at p. 831.)

Schultz also relies on this Court's recognition that emotionally-wrenching victim impact evidence may so overwhelm the jury as to deprive it of the ability to make a reasoned decision:

> We have several times noted that victim impact evidence may be deemed inadmissible if it is so inflammatory that it would tend to divert the jury's attention from the task at hand.
> (*People* v. *Roldan* (2005) 35 Cal.4th 646, 732.)

Also, to the same effect, *People* v. *Zapien* (1993) 4 Cal.4th 929, 992.)

Mindful that avoidance of all emotion is likely impossible in the penalty-phase of a capital trial, *People* v. *Edwards* (1991) 54 Cal.3d 787 cautioned against allowing emotional appeals to hijack the proceedings and held that " 'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.' " (*Id.* at p. 836 quoting *People* v. *Haskett* (1982) 30 Cal.3d 841, 864; accord, *People* v. *Gonzales* (2011) 51 Cal.4th 894, 951-952.)

In *People* v. *Robinson* (2005) 37 Cal.4th 592, 651-652, this Court quoted with approval from *Salazar* v. *State* (Tex.Crim.App. 2002) 90 S.W.3d 330, in which the Texas high court observed that "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Id.* at 335-336.) The Texas court further stated, *"[W]e encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence."* (*Id.* at 336 [Italics in original].)

Virgie Burger and Sandra Woodward testified to picture-perfect family events that occurred long before Burger's death and to eerie psychic connections they experienced after her death. It is reasonably possible this testimony overwhelmed the jury in emotion.

1. Virgie Burger's and Sandra Woodward's testimony about the traumas and difficulties the family faced at the time Burger was born injected pathos and patriotism into the penalty-phase of the trial.

Burger was 44 years old when she died, but Virgie Burger began her testimony with a description of the events surrounding Burger's birth.

Virgie infused her testimony about Burger's birth with all of the pathos of a Hollywood potboiler. In the first scenes, her husband Had, with postman-like dedication undeterred by rain, sleet, or dark of night, boldly drives hour after hour across Kansas determined to be present for the birth of his second child because he had been protecting his country in Guadalcanal when his first child had been born. In the second act Virgie — too ill to care for her newborn — faces life bravely with the help of a loving family:

> Q [By prosecutor]: Can you tell the jury what your daughter Cindy meant to you.
>
> A: Well, I gave birth to her. Her father was 500 miles away and I had to go to the hospital. The roads were — many roads were closed. It was a

storm in Kansas, but he drove all the way. They couldn't stop him because he had to be there when his little boy was born.

So I woke up from a dream, and I looked up and I saw my husband, and I said, "I dream we had a little girl." He said, "We did." And I saw her big blue eyes, lovely dimple in her chin, tow-headed, healthy. We were so happy.

We took her home, and I became ill. But we had relatives to come and help us. Everybody pitched in to take care of Cindy. My sister, my husband's mother. That's where we started our family.

And it was all right with Had that I had a little girl. He said, well, you were there when Sandy was born. He was in Guadalcanal during World War II, but he got to see Cindy and hold her and says, "You have Sandy. This little girl's mine," and that was all right with me.

(18RT 3168-3169)

Woodward underscored her mother's memories of Burger's first years:

[By Woodward]: I was about six years old when Cindy was born. It was quite an exciting time. When mom and Cindy came

> home from the hospital, my mother became very ill. And so there was a lot of concern about taking care of her, and so I got to take care of the baby.
> And I think taking care of her, we just got so bonded. I thought that I had some kind of a special magic because when I would hold her or feed her or change her diapers or anything like that, she just was very calm and happy.

(18RT 3323)

Schultz is mindful that the birth of a longed-for child is a momentous occasion in a parent's and a sibling's life. However, *Payne* does not contemplate that every momentous occasion involving the victim and his or her family is proper evidence in the penalty-phase of a capital case. *Payne* stated that victim impact testimony is "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." (*Payne v. Tennessee, supra* 501 U.S. at p. 825.)

The poignant testimony of a young mother too ill to care for her child, a young husband fighting the foulest of weather, and a little girl playing mother to her newborn sister is an important chapter in the lives of Virgie and Woodward, but it added nothing to the jury's understanding of the harm Schultz had done or the blameworthiness of his conduct. It simply appealed to their emotion and was more appropriate for a eulogy than a capital trial. (*People* v. *Robinson, supra,* 37 Cal.4th at pp. 651-652.)

2. Virgie Burger's testimony about Burger's deep religious convictions unfairly appealed to the jury's emotions.

After sharing the moments surrounding Burger's birth, Virgie moved on to tell the jury Burger was a religious person and a college graduate:

> She graduated from high school and was dedicated to Jesus Christ. Jesus Christ was her hero. She wanted to be the best person she could be. So she told us she wanted to go to college at Calvary Bible College in Kansas City, Missouri, and we stood behind her, and that's where she went and graduated. (18RT 3169)

Like birth, graduations are important events in all families. In religious families, a dedication to Jesus Christ is also an important event.

But, the introduction of a victim's religious beliefs is prejudicial. In *People v. Pollock* (2004) 32 Cal.4th 1153, the trial court allowed one witness to testify she met the victim for the first time when the victim was teaching a Bible study class for children, and another witness to testify she learned of the victim's death from another member of the Bible study class. This Court permitted the testimony on the grounds it was admitted "only to explain" how witnesses knew the victim or had learned of her death. (*Id.* at p. 1182.)

Pollack cautioned that that its decision was based on the fact that no witness "testified about [the victim's] specific religious beliefs, nor did [any witness] suggest religious doctrines should guide or affect the penalty determination process." (*People v. Pollock, supra,* 32 Cal.4th at p. 1182.)

In this case, Burger's specific religious beliefs were presented to the jury. Repeated references to Burger's deep-rooted religious beliefs cast a mantle of saintliness about her and invited the jury to recall the Old Testament call to take vengeance for the righteous:

> The righteous will rejoice when he sees the vengeance;
> He will wash his feet in the blood of the wicked.
> (King James Bible (Cambridge ed.) Psalm 58:10.)

This was prejudicial error.

3. Virgie Burger's and Sandra Woodward's testimony about their psychic connections to Burger after death engulfed the jury in emotion.

Both Virgie and Woodward spoke of post-death experiences that suggested a psychic link to the deceased Burger.

First, Virgie told how she felt she communicated with Burger through her cats:

> But I have — we did take [Burger's] little kitties in. One Himalayan, one a white long-haired Persian. And the little Persian cat I took to right away. It's what helped me so much. *I would feel the fur and I knew that I was feeling Cindy's hands stroking that little kitty.* And we loved

each other so much that at night little Annabelle slept right in my hair fur against hair.
(18RT 3171)

Then, Woodward spoke of a psychic connection to her sister:

It started, umh, soon after the detectives kept asking me to think of things. And I kept waking up about that 3 o'clock time. And at first I didn't notice too much about it, but when I would go out in the kitchen — because I just couldn't roll over and get back to sleep and I didn't want to disturb [her husband] because he had to go to work the next morning.
So I'd go out into the kitchen. And I've got a clock there. And I started noticing it was always right around 3 o'clock. And I did that — I still wake up in the middle of the night. It's always right around that time.
And so when I, umh, had to go to the district attorney's office one day and I was going to meet Therresa [Mooney] for the first time and listen to what Therresa had to say and she told the district attorney that Michael came into the house about between 2:30 or 3:00, I just had a stab to my heart. It all made sense to me. *I knew why I was waking up at 3 o'clock. There was no doubt in my mind.*
(18RT 3329-3330)

Although these quasi-religious experiences provided the jury with little information that would assist it in arriving at a just punishment for Schultz, they cloaked Burger with a mantle of spirituality and other-worldliness and invited jurors to believe that Burger's

spirit would be watching them as they made a decision regarding Schultz's punishment.

E. The victim impact evidence introduced in this case was far in excess of what this Court should permit under section 190.3, subdivision (a).

In *People v. Edwards, supra,* 54 Cal.3d 787, 835-836, this Court determined victim impact evidence fell within the definition of "the circumstances of the crime of which the defendant was convicted in the present proceeding" by defining that phrase to encompass "[t]hat which surrounds 'materially, morally, or logically' the crime."

In the twenty years since *Edwards* was decided, this Court has repeatedly rejected the argument that the *Edwards's* definition of circumstances is far too expansive. (*People v. Jones* (2012) 54 Cal.4th 1 , *People v. Carrington* (2009) 47 Cal.4th 145, 196-197, *People v. Pollock, supra,* 32 Cal.4th at p. 1183.)

With respect, Schultz asks this Court to revisit the issue once again because in the past few years victim impact evidence has grown like Topsy, and, as is evidenced by the victim impact testimony introduced in this case, the elasticity this Court injected into section 190.3, subdivision (a) in *Edwards* is now — like a body put to the medieval rack — so stretched it has reached its breaking point.

Relying on *Edwards*'s expansive definition, the court allowed the Burger family to testify to events that occurred decades before Burger's death, to events that occurred in the immediate aftermath of her death, to events that occurred during the years Burger's murder remained unsolved, and to otherworldly or paranormal connections some of which continued to the time of trial, which was ten years after Burger's death. In all, the court allowed the Burger family to testify to touching vignettes that spanned a period of 54 years.

Schultz contends this wide-ranging testimony far exceeds that contemplated by *Payne* and lends further credence to Justice Mosk's fears that the continuing unruly and undirected expansion of admis-

sible victim impact evidence has the potential to render California's capital sentencing statute unconstitutionally vague. (*People v. Bacigalupo, supra* 6 Cal.4th at p. 457 fn. 2.)

In her concurring and dissenting opinion in *People v. Fierro, supra,* 1 Cal.4th 173, Justice Kennard suggested a more reasonable interpretation of the phrase. Justice Kennard's definition would limit the victim impact evidence to facts and circumstances the defendant knew or should have known at the time of the crime:

> As used in section 190.3, "circumstances of the crime" should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase. This definition appears most consistent with the rule of construction that listed items should be given related meaning and with the United States Supreme Court's understanding of the term as reflected in its opinions
> (*Id.* at p. 264.)

Justice Kennard's suggestion seems particularly appropriate in this case.

1. Schultz knew almost nothing about Burger or her family when he entered her condominium and his own history was so different from hers that he could not begin to imagine the nature of her life or relationships.

All of the evidence suggests Schultz had never met or even seen Burger and did not know her or anything about her when he stumbled into her garage on August 4, 1993. All of the evidence suggests he was wondering around aimlessly in a drug-induced fog when he happened upon an open garage door and took advantage of that opportunity to enter Burger's condominium.

Hours or minutes later when he took Burger's life, all that he knew was that she was a woman entering middle age who lived in a condominium in Port Hueneme.

He had no idea Burger had dedicated herself to Jesus Christ; he had no idea her birth had been the occasion of such joy and, at the same time, had created such difficulties; he had no idea the case would remain unsolved for years and that Woodward would speak with the police every week.

Schultz's life was so very different from Burger's, he not only didn't know how she lived and functioned with her family and those around her, he couldn't even imagine how she lived or the close family ties she had. In fact, his life was so different, he couldn't imagine that *anyone* lived as she did or had close familial ties as she did.

Schultz could not know or imagine Burger had a close relationship with her sister because his sister, Britta, left home when Schultz was only 11 or 12 years old, cut off all contact with him and the rest of the family for over a year, and thereafter had only sporadic contact with him. (18RT 3325, 19RT 3337, 3401, 3403, 3408-3409, 3410)

Schultz could not know or imagine Burger's family supported her educational goals and proudly saw her graduate from high school because he did not graduate from high school and no one in his family cared if he went to school or not. (18RT 3169, 19RT 3402)

Schultz could not know or imagine that Burger had an active religious life because Schultz and his friends dedicated themselves to scoring the next dose of methamphetamine and lived lives punctuated by soaring highs and gloomy lows. (20RT 3474, 3478-3479, 3487)

2. The introduction of aspects of Burger's life that were unknown and unknowable to Schultz allowed the jury to consider illusory "circumstances" of the crime.

Gilbert and Sullivan's Mikado granted himself the authority to sentence according to his owns whims and fancies so as to achieve his "object so sublime...[t]o let the punishment fit the crime." (Gilbert & Sullivan, The Mikado, Song No. 6, "A more humane Mikado" available online at The Gilbert and Sullivan Archive at http://math.boisestate.edu/gas/mikado/webopera/mk206.html [accessed 6-1-12].) Capital juries must make the punishment fit the crime, not by whim or fancy, but by making an appropriately rea-

soned judgment that takes into account the individual defendant and the capital crime he has committed.

With that goal in mind, how fair is it to base Schultz's death sentence on a factor that allows the jury to consider imagined circumstances or circumstances far beyond Schultz's ken?

Justice Kennedy answered that question in *Stringer v. Black* (1992) 503 U.S. 222, 235-236 [112 S.Ct. 1130, 117 L.Ed.2d 367] by stating that a vague aggravating factor creates a risk the jury's sentence rests — not on an individualized assessment of the defendant's guilt — but on an illusory circumstance:

> A vague aggravating factor used in the weighing process is in a sense worse [than one used to determine eligibility], for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Furman v. Georgia (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] demanded the removal of caprice and arbitrariness from the application of the death penalty. The over-expansive definition of "circumstances of the crime" reintroduces caprice and arbitrariness into California's death penalty statute and distracts the jury from the task of individualizing the punishment to the defendant before the court.

This Court should once again revisit this issue and redefine the parameters of admissible victim impact evidence.

F. The victim impact evidence was more prejudicial than probative and should have been excluded.

The gravamen of victim impact testimony is grief and loss. Grief and loss are among the most deeply-felt human emotions. Common sense dictates that the court take particular care in balancing probative value against prejudicial effect when the evidence under consideration is, by its very nature, emotionally charged.

When it is impossible to wring all emotion from probative testimony, it is incumbent upon the court to take whatever measures are available to minimize the prejudicial effect of the surfeit of emotion inherent in the testimony.

1. The court failed to consider various measures to lessen the prejudicial effect of the anticipated victim impact testimony.

Various courts have imposed various limits on victim impact evidence in order to minimize the prejudicial effect inherent in such evidence, and — whether these courts are California courts or not — the measures other courts have found useful in diminishing the prejudicial effect of victim impact testimony, even if not binding, are instructive.

Illinois's and New Jersey's highest courts have limited prejudicial effect by limiting the number of witnesses who could share their feelings with the jury. (*People v. Hope* (1998) 184 Ill.2d 39 [702 N.E.2d 1282], *New Jersey v. Muhammad* (1996) 145 N.J. 23 [678 A.2d

165].) In *Muhammad*, the court stated that only one survivor may testify:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of *one survivor* will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.
> (*Id.* 678 A.2d at p. 180 [Italics added].)

In this case, the court permitted *all* of Burger's surviving immediate family members to testify. Their testimony was often duplicative. Duplicative emotional testimony necessarily ratchets up the prejudicial effect.

The court should have granted the defense request that only one member of the family speak on the issue of grief and loss.

Delaware has limited the prejudicial impact of victim impact testimony by prohibiting victims from discussing the rigors of the trial. (*Gattis v. State* (Del. 1994) 637 A.2d 808, 820.)

Here, the court permitted Virgie Burger to testify that she found it "painful to hear all of the things [Burger] went through." (18RT 3170) As she listened to the testimony, Virgie said she "felt [Burger's] pain." (18RT 3170) Virgie told the jurors that she had dreaded sharing her pain with them and had mulled her testimony over in her head on many occasions:

> [W]hen I find (sic) that they found the killer, we will (sic) be going to court, and I knew that I would have to talk out loud about my daughter, which was — knew would be very difficult for me, because I would think sometimes what would I say and my heart would break again, just break again.
> (18RT 3171)

The court should have limited Virgie's testimony to events more contemporaneous with Burger's death.

The court erred in not exploring the possibility of incorporating these salutary measures into its ruling. As a result, the duplicative and excessive family testimony was more prejudicial than probative.

2. The court failed to curb cumulative testimony describing utter despair.

The prejudicial effect of the family's testimony crested when the court allowed each family member to describe the moment he or she learned of Burger's death. Learning of the death of a loved one is always an emotional experience. Likely, learning a loved one has died an unnatural death is even more upsetting. Here the emotional currency naturally associated with hearing such bad news was exacerbated because all three members of the Burger family were permitted to share details of the circumstances and the emotions they felt at that moment.

Had Burger testified to the suspense and agony created because the deputy who initially contacted him was not certain what had happened:

> Q [By prosecutor]: How did you find out that [Burger] had been murdered?
>
> A [Had Burger]: I was in my office, which is in my bedroom up in San Luis Obispo, doing some office work, and a deputy sheriff

from San Luis came to my home, and he said you daughter's house caught on fire, and I think she got in the bathtub to try to save herself and she drowned, but you should call the coroner and find out. So I immediately did, and the coroner said she'd been strangled to death.

Q: How did that make you feel?

A: Well, I was numb, but I called my son-in-law, my daughter, and my wife was playing golf, got her off. We all had a powwow; went from there.

(18RT 3165)

Virgie testified to the distress occasioned by learning of Burger's death while away from home:

Q [By prosecutor]: How did you learn that [Burger] had died? Do you recall where you were?

A [Virgie Burger]: I was playing team for San Luis Obispo. I was on the golf course, and I had just driven right by our house. It was on the 13th fairway. I was a little worried about the 13th fairway having a house there, and

that's where I was called. The golf pro came out to find me, asked me to come with him, and I knew it was something very serious. And first I said, "Is it Had?" He said, "No, I'm sorry." He said, "It was Cindy."
And he took me home and I found out the story.

(18RT 3169-3170)

Finally, Woodward gave a gut-wrenching description of the moment when she learned of her sister's death:

Q [By prosecutor]: Do you recall how you learned that Cindy had been — well, that Cindy was dead?

A [Woodward]: I'll never forget that morning. It was early in the morning, and my husband Archie hadn't gone to work yet. We were both in the bedroom talking about, you know, the day's events and the phone rang.
And Archie answered the phone, and I could — I could tell he was talking to my dad and things were really serious and upset. And I kind of perked my ears up. And

Archie handed the phone to me.

And my dad told me that my sister was dead, that she was found lying in the bathtub and that there had been a fire and that I better come over to the house right away.

And I was just so shocked. I had just been with Cindy a few days before that for quite a period of time. And so she'd been — I knew what she was doing. I knew her — her routine. I knew what she was going to do that day and that night. And to hear that she was dead was just a shock.

And I remember this pain, unbelievable pain, just coming through my body. And I knew I needed to go over and see my parents. And I wasn't dressed yet. I was still in my bathrobe. And I remember walking into the closet. And this pain was so intense that I couldn't hardly breathe.

And I remember walking to the back of the closet and going into a ball, and I heard myself just screaming and sobbing. And this terrible pain. And it just wouldn't stop.

> And I remember, umh, my husband coming over to me and saying, "Sandy, you've got to get up. Your parents need you. You've got to get dressed. We've got to go over there."
> And that's what we did.

(19RT 3323-3325)

Overall, the prejudicial effect created when all three members of Burger's family were permitted to share touching stores and family recollections spanning a 54 year period and the raw emotion engendered by learning of Burger's abrupt death far outweighed the limited information regarding the circumstances of Burger's death their testimony provided. The court erred in not excluding this testimony.

G. The introduction of emotionally-charged constitutionally-impermissible victim impact testimony about events unrelated to the impact Burger's murder had on her family requires reversal.

The standard of prejudice for federal constitutional error in the penalty phase is whether it appears beyond a reasonable doubt that the assumed error did not contribute to the death verdict. (*Chapman* v. *California, supra,* 386 U.S. at p. 24; *People* v. *Carter, supra,* 30 Cal.4th at pp. 1221-1222.)

The standard of prejudice for state law error in the penalty phase is whether there is a reasonable possibility that the error affected the verdict. (*People* v. *Carter* (2003) 30 Ca1.4th 1166, 1221-1222; *People* v. *Brown supra,* 46 Ca1.3d at pp. 446-448.)

Schultz contends respondent cannot carry its burden under either standard.

1. The emotionalism of the Burger family's testimony encouraged the jury to turn a blind eye to Schultz's attempt to explain how his family background had molded him into the person who entered Burger's garage.

Defense counsel's mantra throughout the penalty phase was that Burger's murder was not excused, but was understandable in light of Schultz's history and the unique circumstances of his formative years. During the penalty phase, defense counsel repeated some version of the phrase: "Evidence the defense presents does not excuse what happened it helps explain what happened," more than nineteen times. (17RT 3002, 3003, 3010, 3017, 3023, 3027, 22RT 3918, 3942, 3943, 3945, 3949, 3994, 4000-4001, 4003, 4018, 4019, 4025)

To help the jury to understand how Schultz ended up in Burger's bedroom taking her life, the defense presented Schultz's life story.

The defense explained that the person Schultz was on August 4, 1993 was the result of a childhood and adolescence spent under

the thumb of an alcoholic, drug-dependent father who physically and emotionally abused him.

The defense explained Schultz, Sr. regularly beat his children with a belt. (19RT 3345) Always anxious to keep his children terrified, Schultz, Sr. punished all three children for the misstep of any one of them. (19RT 3347)

Painful and demeaning as repeated physical abuse was, Schultz, Sr.'s penchant — nay delight — in various forms of emotional abuse brought even more terror to Schultz and his siblings. Schultz, Sr. would interrogate Schultz for hours on end asking the same or a similar question over and over hoping for an inconsistency and pouncing on it when it finally came — as it inevitably did as Schultz grew more and more exhausted and confused. (19RT 3345-3346)

To further terrorize the children, Schultz, Sr. — who kept an arsenal of weapons in the house — threatened to kill the pets and then the children. (19RT 3359)

Among Schultz, Sr.'s favorite punishments was one he called "de rodillas." This punishment forced Schultz to kneel on the hard kitchen floor for hours at a time and combined physical pain with emotional trauma. (19RT 3346, 3358)

To further torture Schultz and his siblings, Schultz, Sr. forced them to watch as he mercilessly beat their mother and even forced them to watch as he urged her to kill herself so he would be rid of her. (19RT 3356, 3361-3362)

When Bruni fled the house after a beating, Schultz, Sr. bundled his children into the car and forced them to join him as he hunted down Bruni. Schultz's sister remembered that the children were afraid their mother would be found and afraid she wouldn't be found at the same time. (19RT 3363)

Finally, Schultz was confused by his father's changing feelings. Schultz, Sr. was initially enamored of his son, but grew increasingly distant as Schultz grew up. (19RT 3345)

The highly-charged victim impact testimony likely robbed Schultz's story of much of its luster because it painted such a poignant picture of the Burger family and invited the jury to weigh the value of Burger's life — a college educated, gainfully-employed woman beloved by her family who had dedicated her life to Jesus Christ — with the value of Schultz's life — an unemployed, uneducated, homeless, ex-convict cast off by his dysfunctional family whose life was controlled by illicit mind-altering drugs — and to base its punishment decision on which life was more valuable to society.

The testimony of the Burger family invited the jury to compare the two families and to decide Schultz's punishment based upon the relative merit of the families:

- Both fathers were military men, but Had Burger drove 500 miles through a storm to be present at his child's birth, Schultz Sr. raped his stepdaughter, introduced his children to drugs, and con-

stantly punished them for imagined infractions. (18RT 3168-3169, 19RT 3354-3358, 3364-3366, 3369, 3393-3394, 3414-3415, 3420, 20RT 3521)

- Both Schultz and Burger had older sisters, but Sandra bonded with Burger when Burger was still an infant and knew everything about her sister's life, friends, home, and problems; Britta felt trapped into taking care of her brothers and felt she couldn't control them and lost contact with her brothers when she ran away from home in her late teens. (14RT 2462-2463, 2465, 2469, 19RT 3322-3323, 3326-3327, 3332, 3337, 3344, 3348-3349, 3363-3364)
- Both families lived in neighborhoods jurors would know. The Burgers had a home in Rancho Mirage and another right next to the fairway on the 13th tee at the San Luis Obispo Country Club

indicating finances were not a pressing problem; the Schultz family lived a peripatetic existence depending upon whether or not the parents were employed. (18RT 3174, 20RT 3524-3527, 3528-3529, 3530, 3535-3536, 3541-3542, 3543)

2. In final argument, the prosecutor acknowledged that the emotionally-charged testimony from the Burger family might result in sensory overload for some jurors. Nevertheless, he reminded the jury of the most desperately painful experiences the family had related.

The prosecutor recognized the victim impact testimony had been drenched with pain, torment, despair, and anguish, and he urged jurors to guard against being overwhelmed by the strong emotions the Burger family had conveyed:

> Please be aware of falling into a mind-set which because it's so painful to consider this, the pain and suffering and consequences are to a family, that you tend to shut it out and turn those thoughts into an abstraction, because it needs to be very real.
> (22RT 3987)

Nevertheless, the prosecutor spoke at length about the most affecting victim impact testimony—the detailed descriptions of the circumstances and emotions that surrounded the moment each family member learned of Burger's sudden death. The prosecutor urged the jury to believe that Schultz was a callous person and contrasted that assumed callousness with the family's despair:

> The next thing you consider is victim impact testimony. And what you heard about in the testimony in this trial from — from the parents of Cindy Burger is about the phone call that every parent hopes they never get. And that is that every parent expects to outlive their children. (sic) Didn't happen here.
>
> The Burger family got a phone call that was just horrific and so bizarre in its own nature: "Your daughter has died. There's a fire and she was found in the bathtub." And their reaction had to be: How could — what are you talking about? It doesn't even make any sense.
>
> And then when the pieces came together, that, no she didn't just end up in the bathtub, she was put there by the defendant after he raped her and murdered her. He considered her an object to be brutalized and then evidence to be destroyed. That's all she was to him
>
> And the parents, they get that phone call. And it doesn't matter what country club you belong to. It doesn't matter how much money you have or you don't

> have. Nothing can make up for that. Nothing can ease that pain, the pain of losing a loved one.
> (22RT 3869)

And, again during the prosecution's second address to the jury:

> You can't quantify the suffering of human heart-ache. Sandra Woodward, the victim's sister, talked to you about how she never could have believed the actual physical pain and suffering and grieving over her sister, Cindy. The pain, it was absolutely physical. And I'm confident that we all understand that words just can't describe it.
> (22RT 3986-3987)

This was not an easy case for the jury to decide. The jury deliberated for over a day and a half before reaching a verdict. (22RT 4057, 4060, 4071-4072, 4073-4076)

No matter how this Court measures the prejudice engendered by the testimony of Virgie Burger and Sandra Woodward, the conclusion must be that the testimony of these women violated his right to due process as well as his right to a reliable penalty verdict under the Eighth and Fourteenth Amendments to the federal constitution.

This Court must reverse the jury's verdict of death and grant Schultz a new penalty trial.

IX. Section 190.3, subdivision (b), which allows the jury to rely on unadjudicated acts involving even limited use of force or violence to impose the ultimate penal sanction, violates the Eighth and Fourteenth Amendments.

The Eighth Amendment — the shortest Amendment by far — states quite simply that the government shall not inflict cruel and unusual punishments. For more than 50 years — guided by the plain language of the Amendment — the United States Supreme Court's decisions in the Eighth Amendment arena have asked the same two questions: Is the punishment unusual? Is the punishment cruel?

The Court deems a punishment unusual if it is not in sync with evolving standards of decency and deems a punishment cruel if it penalizes without furthering one of the three goals of punishment — rehabilitation, deterrence, and retribution. (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 419-420 [128 S.Ct. 2641, 171 L.Ed.2d 525].)

Schultz contends that section 190.3, subdivision (b) is both cruel and unusual. The section is cruel because it does not serve the intended penal purposes of capital punishment — furthering retribution and deterrence by imposing the ultimate punishment only on the worst of the worst. It is unusual because the admission of a broad range of unadjudicated acts as a statutory aggravating factor in a death penalty case is out of step with the evolving standards of decency which ban or limit the admission of unadjudicated acts as either a statutory or a non-statutory aggravating factor.

A. Proceedings in the trial court.

Before trial, Schultz moved to exclude evidence of unadjudicated acts on several grounds[44] including the claim the introduction of this evidence subjected Schultz to cruel and unusual punishment as prohibited by the Eighth Amendment and article I, section 17 of the California Constitution. (8CT 2027, 2062)

After argument, the court denied the motion. (8RT 1329)

At trial the court allowed the prosecutor to introduce evidence that Schultz had: (1) engaged in several shoving matches with his on-again, off-again girlfriend, Mooney, during arguments regarding

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[44] Schultz's motion contended the admission of evidence of unadjudicated acts as an aggravating factor violated Schultz's "independent state and federal constitutional guarantees to a fair trial, cross-examination and confrontation of adverse witnesses, due process of law, the right to affirmatively present evidence in one's defense, right to effective assistance of counsel, and right to a reliable verdict and penalty determination as set forth in the California Constitution, Article I, sections 7, 15, 17, 24; the United States Constitution, Amendments 5, 6, 8 and 14; Penal Code section 190.3; Evidence Code section 352." (8CT 2026-2027) Schultz raises only the Eighth Amendment and article I, section 17 violations on appeal.

his use of methamphetamine (18RT 3219-3220, 3220, 3220-3221), (2) threatened to destroy Mooney's television and had actually damaged her door on one of the many occasions when Mooney broke off her relationship with him (18RT 3221-3222), (3) grabbed his new stepfather after taking offense when his step-father intervened in a quarrel with his mother (18RT 3192-3194), (4) took a swing at the boyfriend of the individual he was squabbling with over an outstanding $5.00 loan (18RT 3177-3179, 3180-3181, 3185), (5) acted as his father's second during a free-for-all involving Hecht, Schultz, Sr., and Schultz (18RT 3295-3298, 3318), and (6) engaged in acts of machismo with several apparent rivals for Mooney's affections (18RT 3208-3210, 32120-3212, 3214-3215, 3216-3217, 3253-3254, 19RT 3271-3272).

Most were not reported to authorities; only one incident resulted in charges and, in that incident — the incident involving Michael Hecht — the charges were brought against Hecht, not against Schultz. (18RT 3299-3300) The Hecht incident was also the only in-

cident that resulted in any significant injuries. During that fracas, Hecht suffered a swollen and dislocated jaw, a bloody nose, a concussion, and injuries to his ribs, and Schultz suffered knife wounds. (18RT 3298-3299, 3300)

B. Standard of review.

The admission of unadjudicated acts under the aegis of section 190.3, subdivision (b) impacted Schultz's state and federal constitutional rights. This Court must independently review the settled facts of the case. (*People v. Cromer, supra,* 24 Cal.4th at p. 905.)

C. Development of the Eighth Amendment jurisprudence.

In the first 150 years of its existence, the Supreme Court decided only three cases under the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the first of these cases was not decided until almost 100 years after the Eighth Amendment was incorporated into the Constitution. (*Wilkerson v. Utah* (1878) 99 U.S.

130 [25 L.Ed. 345]; *In re Kemmler* (1890) 136 U.S. 436 [10 S.Ct. 930, 34 L.Ed. 519]; *Louisiana el rel Francis v. Resweber* (1947) 329 U.S. 459 [67 S.Ct. 374, 91 L.Ed. 422].)

Wilkerson, Kemmler, and *Resweber* interpreted the Eighth Amendment's prohibition of "cruel and unusual punishment" as a prohibition of "unusually cruel punishment," and each focused on whether the punishment at issue was especially ruthless — *Wilkerson* upheld death by public shooting, *Kemmler* upheld death by electrocution, and *Resweber* upheld a repeat attempt at execution following a botched attempt.

Since criminal punishment has not focused on torture or the gratuitous infliction of pain for centuries, the Court's interpretation turned the Eighth Amendment into a virtual dead letter in constitutional jurisprudence.

The Eighth Amendment remained on the shelf until the early twentieth century when the Court took it off the shelf, dusted it off, and moved it in an entirely new direction. Since then, the dead letter has morphed into a complicated body of jurisprudence.

The morphing process began in 1910 in *Weems v. United States* (1910) 217 U.S. 349 [30 S.Ct. 544, 54 L.Ed. 793]. In *Weems*, the defendant was sentenced to 15 years of forced labor while chained at the wrists and ankles for falsifying a public document. *Weems* developed the concept that the Eighth Amendment was fluid rather than static and, as a result of that fluidity, the definition of unconstitutional punishment necessarily changed as public opinion became more enlightened and as various methods of punishment became less socially acceptable:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions.
>
> .....
>
> The [Cruel and Unusual Punishments Clause] may be therefore progressive, and is not fastened to the

> obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.
> (*Weems v. United States, supra,* 217 U.S. at pp. 373, 378.)

Relying on the Eighth Amendment's fluidity, *Weems* found the punishment — while not literally torture — was torturous in light of the crime and violated the Eighth Amendment because more serious crimes were punished less severely. (*Weems v. United States, supra,* 217 U.S. at p. 380.)

Almost forty years later, *Trop v. Dulles* (1958) 356 U.S. 86 [78 S.Ct. 590, 2 L.Ed.2d 630] further expanded the ambit of the Eighth Amendment by treating the words "cruel" and "unusual" as embodiments of separate concepts and interpreting the Eighth Amendment not as a prohibition against cruelly unusual punishment, but as a prohibition against cruel punishment and against unusual punishment:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... While the State has the power to punish, the Amendment stands to assure that this power is exercised within the limits of civilized standards.... [W]hen the [*Weems*] Court was confronted with a punishment of 12 years in irons at hard

> and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character.
> (*Trop v. Dulles, supra* 356 U.S. at p. 101) (Internal citation omitted.)

Trop also introduced the concept of an evolving standard of decency as a basis for determining whether a particular punishment or penal statute is unusual:

> The Court recognized in [*Weems*] that the words of the Amendment are not precise, and that their scope is not static. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.
> (*Trop v. Dulles, supra,* 356 U.S. at pp. 100-101)

In the 50 years since *Trop,* the United States Supreme Court has analyzed every single major Eighth Amendment challenge by considering whether the punishment is unusual when measured by contemporary standards and whether the punishment is cruel when measured by penological goals. The language in *Kennedy* sums up the Court's approach:

> The Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." This is because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change."
>
> Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.... [P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.
>
> (*Kennedy v. Louisiana, supra,* 554 U.S. at pp. 419-420 quoting *Trop v. Dulles, supra,* 356 U.S. 86 and *Furman v. Georgia, supra,* 408 U.S. at p. 382 and citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 999 [111 S.Ct. 2680, 115 L.Ed.2d 836].) (Internal citations omitted.)

When one applies this analysis to section 190.3, it is apparent that the section violates the Eighth Amendment because (1) it is unusual because evolving standards of decency, as measured by objective criteria such as legislative enactments, do not countenance the unfettered admission of unadjudicated acts as a statutory aggravating factor and ban or limit their use as a nonstatutory aggravating factor, and (2) it is cruel because it allows the imposition of the ultimate penalty on those who are simply human rather than those who

are supremely wicked and thus thwarts the valid penological purposes — deterrence and retribution — of the death penalty.

D. Section 190.3 — the only statute in the country to include a statutory aggravator that allows a jury to impose the death penalty based upon unadjudicated everyday spats and quarrels — is out of step with contemporary standards of decency.

1. State legislative action and state prosecutorial and jury decisions determine contemporary standards of decency.

To ensure reliability, the Court demands that "evolving standards [of decency] should be informed by 'objective factors to the maximum possible extent.' " (*Atkins v. Virginia* (2002) 536 U.S. 304, 312 [122 S.Ct. 2242, 153 L.Ed.2d 335] quoting *Rummel v. Estelle* (1980) 445 U.S. 263, 274-275 [100 S.Ct. 1133, 63 L.Ed.2d 382])

The Court has identified and relied upon a number of benchmarks to define evolving standards of decency including the number of states that permit or prohibit the death penalty for the particular circumstance or the particular class of defendant, the frequency

of jury verdicts imposing the death penalty when the particular circumstances or the particular type of defendant are at issue, polling data, international law, and the official positions held by professional organizations.

Of these, the Court has long maintained that "legislative enactments and state practice with respect to executions" are the most important, most influential, and most reliable benchmarks in death cases. (*Kennedy v. Louisiana, supra,* 554 U.S. at p. 421 quoting *Roper v. Simmons* (2005) 543 U.S. 551, 563 [125 S.Ct. 1183, 161 L.Ed.2d 1].)

The Court's dedication to reliance on the statutes enacted by state legislatures and the enforcement of those statutes by prosecutors or by jury verdict as the pivotal benchmarks of evolving standards of decency is illustrated by reference to every significant Eighth Amendment decision in recent memory with the exception of *Miller*

v. Alabama (June 25, 2012 Nos. 10-9646 & 10-9647) ___ U.S. ___ [12 Cal. Daily Op. Serv. 7078, 2012WL2368659].[45]

In *Enmund v. Florida* (1982) 458 U.S. 782, 792 [102 S.Ct. 3368, 73 L.Ed.2d 1140] — holding the Eighth Amendment prohibits the death penalty for an offender who did not kill, attempt to kill, or intend to kill — the Court established the contemporary standard of decency by analyzing the death penalty statutes in the thirty-six jurisdictions that authorized the death penalty at the time of the decision.

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[45] In *Miller* — unlike any other Eighth Amendment case — the Court eschewed the traditional evolving-standards-of-decency analysis because the Court was imposing a requirement for a particular sentencing process and was not imposing a categorical bar prohibiting the imposition of a penalty on a class of defendants as had been the case in every previous case:

> For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime — as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process — considering an offender's youth and attendant characteristics — before imposing a particular penalty.
>
> (*Miller v. Alabama, supra,* ___ U.S. ___ [12 Cal. Daily Op. Serv. 7078, 2012 WL2368659) (Internal footnote deleted.)

The Court found only eight jurisdictions authorized the death penalty for all participants in a felony murder. The Court then closely scrutinized the remaining twenty-eight jurisdictions and found felony murder was not a capital crime in four, eleven required proof the defendant harbored a specific mental state, one limited death to actual killers, two limited the death penalty to principals, and one narrowed application of the felony-murder rule. The remaining nine prohibited execution solely on the basis of vicarious liability and six of the nine made minimal participation a mitigating circumstance. Based on this assessment of contemporary legislation, the Court concluded that only a small minority of jurisdictions would permit execution of a defendant who played a limited role in a felony murder. (*Id.* 458 U.S. at pp. 789-792)

Enmund also canvassed reported appellate court decisions and determined that the fact reported decisions showed few instances in which a death sentence was imposed on an aider and abettor in a felony murder case was evidence that jurors were loath to impose

the ultimate penalty on such individuals and prosecutors were averse to seeking the ultimate penalty for such individuals. (*Enmund v. Florida, supra,* 458 U.S. at pp. 794-795.)

In *Atkins v. Virginia, supra,* 536 U.S. at pp. 314-316 — holding the Eighth Amendment prohibits the death penalty where the offender is, or becomes, intellectually disabled — the Court looked — not at the number of state statutes espousing or rejecting a particular position, but at the direction of state legislative action.

Atkins focused on the growing number of state legislatures that had enacted statutes barring the execution of the intellectually-challenged and on the fact that not a single state had recently added a provision allowing for execution of the intellectually-challenged:

> Responding to the national attention received by the Bowden execution and our decision in *Penry,* state legislatures across the country began to address the issue. In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. ... [I]n

> 2000 and 2001 six more States — South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina — joined the procession. The Texas Legislature unanimously adopted a similar bill, and bills have passed at least one house in other States, including Virginia and Nevada.
>
> It is not so much the number of these States that is significant, but the consistency of the direction of change.
>
> (*Atkins v. Virginia, supra,* 536 U.S. at pp. 314-315.) (Internal footnotes deleted.)

In *Roper v. Simmons, supra,* 543 U.S. at pp. 564-565 — holding the Eighth Amendment prohibits the use of the death penalty where the offender is under eighteen at the time of the crime — the Court included states that banned the death penalty in the calculus to conclude that thirty states formally prohibited the execution of juveniles. *Roper* also noted that "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent" and "[i]n the past 20 years, only three [states] have done so." (*Ibid.*)

Finally, the Court noted that— although the Court had affirmed imposition of the death penalty on Kevin Stanford, a juvenile, in *Stanford v. Kentucky* (1989) 492 U.S. 361 [109 S.Ct. 2969, 106

L.Ed.2d 306], the Governor of Kentucky had later commuted Stanford's sentence to life with the declaration that the State "ought not [to] be executing people who, legally, were children." (*Roper v. Simmons, supra,* 543 U.S. at pp. 564-565.)

Four years ago, in *Kennedy v. Louisiana, supra,* 554 U.S. at p. 424 — holding the Eighth Amendment prohibits the use of the death penalty where the crime is not a homicide — the Court focused on the evolution of punishment for child rape. The Court took particular notice that in 1925 twenty jurisdictions authorized the death penalty for child rape, but the pendulum had swung in the intervening years. The Court noted that, by the time of the opinion, forty-two jurisdictions — including those that banned the death penalty altogether — prohibited the execution of an individual for a child rape.

Once again turning its attention to enforcement by prosecutors and juries, the Court noted Kennedy was one of "only two individuals now on death row in the United States for a non-homicide

offense," and both Kennedy and the other individual were on death row in Louisiana. (*Id.* at pp. 422-425.)

Most recently in *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011, 176 L.Ed.2d 825] — holding the Eighth Amendment prohibits a term of life without parole for offenders under the age of eighteen who did not commit a homicide — the development of the contemporary standard was complicated by the fact that the sentence at issue was imposed only because the juvenile's case had been transferred to adult court thereby making the juvenile eligible for adult penalties. *Graham* circumvented this problem by turning to actual sentencing practices and finding that juvenile life-without-parole sentences for non-homicides were "most infrequent." (*Graham v. Florida, supra,* 560 U.S. at p. ___ [130 S.Ct. at p. 2023.)

When an evolving-standards-of-decency analysis is applied to section 190.3, subdivision (b), one finds that the section — like the statutes ruled unconstitutional in *Enmund, Atkins, Roper, Kennedy,* and *Graham* — is out of step.

2. Evolving standards of decency do not permit a defendant to be sentenced to death based solely upon a history of inconsequential, unadjudicated, criminal acts, involving actual, or attempted, trifling levels of force or violence as evidenced by a survey of state laws.

a. California, Indiana, Nebraska, North Carolina, and Washington — the states that include unadjudicated conduct as a statutory aggravating factor.

Of the thirty-three states that currently have a death penalty statute, only four — California, Indiana, Nebraska, and Washington — have enacted a statute that includes any sort of unadjudicated conduct as a statutory aggravating factor. However, a closer look at these four state statutes reveals that one has been invalidated by the state's highest court and two are significantly limited by statute and case law leaving only one — California's section 190.3, subdivision (b) — which allows the jury to base a death verdict solely on the unrestricted admission of unadjudicated acts involving trivial levels of violence.

Indiana's capital statute includes a provision that seemingly includes unadjudicated acts of murder — and murder *only* — as an aggravating factor:

> (b) The aggravating circumstances are as follows:
> (8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.
> (IN ST § 35-50-2-9(b)(8).)

Although the statute remains on the books, the Indiana Supreme Court ruled the provision unconstitutional in *State v. McCormick* (1976) 272 Ind. 272, 278 [397 N.E.2d 276] on the ground the unfairness inherent in having a jury that has just convicted a defendant of capital murder decide whether that defendant has committed another murder admission violates due process, appeals to caprice and emotion rather than to reason, and injects unreliability into a capital case:

> We hold that Ind. Code § 35-50-2-9(b)(8) is unconstitutional as applied to this defendant. The procedure to be utilized in this case as provided for by statute and case law will be, in fact, two trials. The defendant will first be tried to a jury for the killing of [the alleged victim in the capital case]. If he is convicted, a sentencing

> hearing will take place. At this sentencing hearing, the defendant will, in essence, be tried for the murder of [another alleged homicide victim]. This hearing will be before the same jury which will have just recently convicted the defendant of another, unrelated murder. ... Thus, the effect of the statutory procedure in the present case is obvious: defendant McCormick would be fully tried on two separate, unrelated charges before the same jury. He would be tried on the second count to a jury which has been undeniably prejudiced by having convicted him of an unrelated murder.

Accordingly, Indiana cannot be counted among states that include unadjudicated acts among the specifically-named aggravating factors.

Two of the remaining three — Washington and Nebraska — dramatically restrict the admissibility of unadjudicated acts by limiting either the type of such evidence that is admissible or by limiting the circumstances under which such evidence is admissible.

Washington narrows the admission of unadjudicated acts to (1) three or more unadjudicated acts of harassment or assault within a five-year period, (2) involving the same individual who is the victim in the capital case so long as (3) that victim and the defendant

were members of the same household or family when the unadjudicated acts took place:

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:
> (14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:
> (a) Harassment as defined in RCW 9A.46.020; or
> (b) Any criminal assault.
> (Wash. Rev. Code Ann. § 10.95.020 (West).)

Nebraska limits the admission of unadjudicated acts to a "substantial prior history" of completed — as opposed to attempted or inchoate — acts that are either seriously assaultive or which struck intense fear in the victim:

> The aggravating and mitigating circumstances referred to in sections 29-2519 to 29-2524 shall be as follows:
> (1) Aggravating Circumstances:
> (a) The offender was previously convicted of another murder or a crime involving the use or threat of vi-

olence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;

(Neb. Rev. Stat. § 29-2523.)

The Nebraska Supreme Court has interpreted "substantial history" to mean an "actual, material, and important history of acts of terror of a criminal nature" and not an occasional act and not a non-terrifying act. (*State v. Ellis* (2011) 281 Neb. 571, 594 [799 N.W.2d 267, 290].)

Plainly, Nebraska and Washington limit the admission of unadjudicated acts in a manner section 190.3, subdivision (b) does not, and Indiana bans it completely leaving California as the only state that allows unbridled admission of unadjudicated conduct in a capital case as a statutory aggravating factor.

In sum, forty-nine jurisdictions would not countenance a death sentence based upon an express aggravating factor that allowed the jury to conclude that a defendant involved in barroom shoving matches, domestic squabbles, shouting matches between neighbors, run-ins at social gatherings, or shows of bravado or ma-

chismo by competing suitors. Yet, the aggravating evidence on which Schultz's sentences is based rests almost exclusively upon such evidence.

Imposition of a death sentence in reliance on a statutory aggravating factor that allows admission of a broad spectrum of unadjudicated acts is out of sync with the evolving standards of decency and a violation of the Eighth Amendment.

b. States with a death penalty statute based upon or which mimics the language of the Former Model Penal Code.

Seventeen states incorporate language from Former Model Penal Code section 210.6[46] which allowed evidence "as to any matter

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[46] The American Law Institute Council recommended withdrawal of Section 210.6 from the Model Penal Code "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." The American Law Institute withdrew the section in 2009. (Message from ALI Director Lance Liebman, available online at http://www.ali.org/_news/10232009.htm [accessed 7-13-2012].)

that the Court deems relevant to sentence."[47] Many states interpret this language to allow the prosecution to introduce a variety of unadjudicated acts as a non-statutory aggravating factor.

Five of these states allow the introduction of a variety of unadjudicated acts as a non-statutory aggravating factor with few, if any, restrictions. (*Whatley v. State* (December 10, 2011 Ala. No. CR-08-0696) ___ So.3d ___ [2011 WL6278296]; *Ortiz v. State* (Del. 2005) 869 A.2d 285, 297; *Crump v. State* (1986) 102 Nev. 158, 161 [716 P.2d 1387]; *State v. Tucker* (1993) 315 Or. 321, 335 [845 P.2d 904]; *Jackson v. State* (Tx. 1999) 992 S.W.2d 469, 477.)

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[47] The following state statutes include a provision that either mimics or closely parallels the language of Former Model Penal Code Section 210.6: Ala. Code § 13A-5-45, Ariz. Rev. Stat. § 13-751, Colo. Rev. Stat. Ann § 18-1.3-1201, Del. Code Ann. 11 § 4209, Fla. Stat. Ann § 921.141, Id. Stat. § 19-2515, Kan. Stat. Ann. § 21-6617, Md. Crim Law § 2-303, Miss. Code Ann. § 99-19-101, 11 Nev. Rev. Stat. Ann § 175.552, N.C. Gen. Stat. Ann. § 15A-2000, Or. Rev. Stat. Ann. § 1163.150, Pa. Cons. Stat. Ann § 9711, Tenn. Code Ann. § 39-13-204, Tx. Crim Pro. Art. 37.071, Wash. Rev. Code Ann. § 10.95.020, Wyo. Stat. Ann. § 6-2-102.

The majority, however, ban or strictly limit the use of unadjudicated acts as a non-statutory factor on the grounds the admission of such evidence is unfairly prejudicial to defendant and is inherently unreliable. (*State v. Murray* (1996) 184 Ariz. 9, 40 [906 P.2d 542] and *People v. Harlan* (Colo. 2000) 8 P.3d 448, 494, admission limited to rebuttal of a mitigation claim; *Donaldson v. State* (Fl. 1998) 722 So.2d 177, 184, statute "specifically limits evidence to that of a violent crime for which the defendant is actually convicted;" *Scott v. State* (1983) 297 Md. 235, 248 [465 A.2d 1126], "evidence relating to other crimes for which there has not been a conviction or a plea of guilty or nolo contendere" excluded; *State v. Moses* (1999) 350 N.C. 741, 768-69 [517 S.E.2d 853] admits unadjudicated violent crimes that are part of a pattern of intentional acts establishing that in defendant's mind, there existed a plan, scheme or design involving the murder of the victim; *Commonwealth v. Hoss* (1971) 455 Pa. 98, 117 [283 A.2d 58], "testimony of Mere (sic) arrests is without foundation in either law or reason;" *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945,

954-955, "evidence of murders other than the defendant's record of convictions" inadmissible to show aggravating circumstance; *State v. Bartholomew* (1984), 101 Wash.2d 631 [683 P.2d 1079], banned entirely; *Hopkinson v. State* (Wy. 1981) 632 P.2d 79, 170, "previous conviction" not "previous commission" of crime required for admission.)

The ruling of the Washington Supreme Court in *State v. Bartholomew, supra,* 101 Wash.2d 631[48] is typical:

> We also find offensive to state due process the portion of RCW 10.95.060(3) which authorizes the admission of "evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity."
>
> We note again that such evidence is rarely admissible in criminal trials except under limited circumstances. The reason for the restriction on this type of evidence

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[48] Washington's death penalty statute is unique in that it contains a statutory aggravator — Wash. Rev. Code Ann. § 10.95.020 — that allows admission of unadjudicated acts of domestic violence when the victim of the unadjudicated acts is the victim of the homicide *and* a non-statutory aggravator provision that mimics the Former Model Penal Code — Wash. Rev. Code Ann. § 10.95.060. Schulz has addressed the express provision — § 10.95.020 — ante in section IX(D)(2)(a) of this opening brief. The *Bartholomew* decision relates only to that portion of the Washington State death penalty statute that mimics the Model Penal Code which is § 10.95.060.

is that it is usually highly prejudicial and of questionable relevance. Again, we decline to suspend in a capital case protections afforded all other criminal defendants. We adhere to the analysis from our prior decision regarding the admissibility of such evidence:

> Different considerations apply, however, where the prosecution seeks to put prior criminal activity other than convictions before the jury. Here, the element of prejudice looms larger. At least one court has held that allowing the jury to consider a previous murder, of which the defendant was accused but never convicted, was so prejudicial as to be a violation of due process.
>
> To allow the jury which has convicted defendant of aggravated first degree murder to consider evidence of other crimes of which defendant has not been convicted is, in our opinion, unreasonably prejudicial to defendant. A jury which has convicted a defendant of a capital crime is unlikely fairly and impartially to weigh evidence of prior alleged offenses. In effect, to allow such evidence is to impose upon a defendant who stands in peril of his life the burden of defending, before the jury that has already convicted him, new charges of criminal activity. Information relating to defendant's criminal past should therefore be limited to his record of convictions.

(*Id.* at p. 641 quoting, *State v. Bartholomew* (1982) 98 Wash. 173, 196-197 [654 P.2d 1170] and citing *State v. McCormick* [272 Ind. 272], 397 N.E.2d 276 [1979].)

The decisions of these states are strikingly similar to the position espoused by Justices Marshall and Brennan who unsuccessfully urged the Court to accept a petition for review that asked the Court "to resolve the question whether the State may, consistent with the Eighth and Fourteenth Amendments, introduce evidence of unadjudicated criminal conduct at the punishment phase of a capital trial:"

> [T]he use of unadjudicated offenses ... at sentencing is at tension with the fundamental principle that a person not be punished for a crime that the state has not shown he committed. In the context of capital sentencing, this tension becomes irreconcilable. This Court has repeatedly stressed that because the death penalty is qualitatively different from any other criminal punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." In my view, imposition of the death penalty in reliance on mere allegations of criminal behavior fails to comport with the constitutional requirement of reliability.
> (*Williams v. Lynaugh* (1987) 484 U.S. 935, 937-938 [108 S.Ct. 311, 98 L.Ed.2d 270] quoting *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

The Court denied a similar petition for review without comment in 2002. (*Fox v. Coyle* (2002) 537 U.S. 819 [123 S.Ct. 97, 154 L.Ed.2d 27].)

c. States with a death penalty statute not modeled on the Former Model Penal Code.

Sixteen states — including California — have enacted death penalty statutes that are not modeled on the Former Model Penal Code. Nine of these states permit the introduction of unadjudicated conduct. Eight admit such evidence with few restrictions; one admits such evidence in very limited circumstances and subject to significant procedural safeguards.

The statutes of Arkansas, Georgia, Missouri, Ohio, Oklahoma, South Carolina, Utah, and Virginia allow the admission of unadjudicated acts in the penalty phase generally to prove that the defendant will present an unreasonable danger to society if not executed. (*Ward v. State* (1999) 338 Ark. 619, 627-628 [1 S.W.3d 1]; *Fair v. State* (1980) 245 Ga. 868, 870 [870 S.E.2d 216; *State v. Christeson* (Mo. 2001)

50 S.W.3d 251, 269; *State v. Glenn* (Oh. 1990) 1990WL136629, not reported in N.E.2d;[49] *Paxton v. State* (Okla. 1993) 867 P.2d 1309, 1321-

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[49] This Ohio case is an unpublished opinion of the Court of Appeals of Ohio. Appellant cites it only because no published Ohio opinion can be found, and appellant believes the opinion is citable under Ohio law for the purpose it is cited in this opening brief. Ohio Rules for Reporting Opinions, Rule 4 provides that unpublished opinions of the Court of Appeals of Ohio may be cited as follows:

(A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, "controlling" and "persuasive" opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.

(C) Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following purposes:

(1) Seeking certification to the Supreme Court of Ohio of a conflict question within the provisions of sections 2(B)(2)(f) and 3(B)(4) of Article IV of the Ohio Constitution;

(2) Demonstrating to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or for other reasons warrants further judicial review;

(3) Establishing *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;

1322; *State v. Lafferty* (Ut. 1988) 749 P.2d 1239, 1259; *Walker v. Commonwealth* (1999) 258 Va. 54, 64-65 [515 S.E.2d 565].)

Louisiana allows the admission of unadjudicated acts, but employs substantive and procedural safeguards to ensure that evidence of unadjudicated acts is vetted by the court before presentation to the jury and to ensure that the admissible acts are limited to those that involve violence against the victim of the homicide for which the defendant is being tried and for which the statute of limitations has not run:

> Because of the legislative silence on the admission of unrelated and unadjudicated criminal conduct in a capital sentencing hearing, there were no limitations on this type of evidence when the admissibility was established in *Ward* and *Brooks.* Recognizing the evident need for such limitations, this court granted certiorari at the pretrial stage in *State v. Jackson,* 608 So.2d 949 (La. 1992),

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(4) Any other proper purpose between the parties, or those otherwise directly affected by a decision.

Ohio Rules for Reporting Opinions, Rule 8(A) provides:

(A) The failure of the Supreme Court Reporter or a court to designate an opinion for print-publication shall not be considered a statement as to the merits of the law stated in the opinion.

> and established significant limitations. The most significant limitation was the rule that the evidence of the unadjudicated criminal conduct *must involve violence against the person of the victim for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for the capital offense for which he or she is being tried....* The court noted that these limitations were necessary "in order to insure that due process is not violated by the injection of arbitrary factors into the jury's deliberations and to prevent a confusing or unmanageable series of mini-trials of unrelated and unadjudicated conduct during the sentencing hearing." *Id.* at 955.
> (*State v. Comeaux* (La. 1997) 699 So.2d 16, 20)

d. States with no relevant appellate record.

Two states — Kansas and New Hampshire — have not executed anyone since 1976 when the death penalty was reinstated in the United States.

South Dakota has executed only one individual.

Kentucky, Idaho, and Montana have executed only three individuals in that period of time.

The state supreme courts of these states reviewed these convictions and sentences. A review of the decisions of these state su-

preme courts demonstrates that evidence of unadjudicated acts was not an issue in any of these cases.[50]

The fact so few executions have taken place in these states coupled with the fact that a canvas of the reported decisions of these states has failed to find any instance in which an individual's death sentence was related to an unadjudicated act is an indication that unadjudicated acts are not admissible as non-statutory aggravating factors in these six states.

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[50] South Dakota — *State v. Page* (2006) 2006 S.D. 2 [709 N.W.2d 739].
Kentucky — *Harper v. Commonwealth* (Ky. 1985) 694 S.W.2d 665; *Harper v. Commonwealth* (Ky. 1998) 978 S.W.2d 311; *McQueen v. Commonwealth* (Ky. 1984) 669 S.W.2d 519; *Chapman v. Commonwealth* (Ky. 2007) 265 S.W.3d 156.
Idaho — *State v. Wells* (1993) 124 Id. 836 [864 P.2d 1123]; *State v. Rhoades* (1991) 120 Id. 795 [820 P.2d 665], *Rhoades v. State* (2000) 135 Id. 299 [17 P.3d 243]; *State v. Leavitt* (1992) 121 Id. 4 [822 P.2d 623]; *State v. Leavitt* (2005) 141 Id. 895 [120 P.3d 283]; *State v. Leavitt* (June 5, 2012 No. 39941) ___ Id. ___ [2012WL1994981].
Montana — *State v. McKenzie* (1978) 177 Mont. 280 [581 P.2d. 1205]; *State v. Langford* (1991) 248 Mont. 420 [813 P.2d 936]; *State v. Dawson* (2006) 331 Mont. 444 [133 P.3d 236].

Finally, Mississippi has executed 18 individuals since 1976. The Mississippi Supreme Court considered all of those cases on appeal — most more than once.[51]

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[51] *Gray v. State* (Miss 1979) 375 So.2d 994; *Evans v. State* (Miss. 1979) 725 So.2d 994; *Johnson v. State* (Miss. 1982) 416 So.2d 383; *Edwards v. State* (Miss. 1982) 413 So.2d 1007; *Hansen v. State* (Miss. 1991) 592 So.2d 114; *Williams v. State* (Miss. 1989) 544 So.2d 782; *Williams v. State* (Miss. 1996) 684 So.2d 1179; *Nixon v. State* (Miss. 1988) 533 So.2d 1078; *Wilcher v. State* (Miss. 2004) 863 So.2d 776; *Wilcher v. S*tate (Miss. 1997) 697 So.2d 1087; *Berry v. State* (Miss. 1997) 703 So.2d 269; *Berry v. State* (Miss. 1990) 575 So.2d 1; *Bishop v. State* (Miss. 2002) 812 So.2d 934; *Woodward v. State* (Miss. 2003) 843 So.2d 1 (evidence of prior unadjudicated conduct introduced by defense to show defendant had always been "troubled."); *Woodward v. State* (Miss. 1993) 635 So.2d 805; *Holland v. State* (Miss. 1991) 587 So.2d 848; *Holland v. State* (Miss. 1997) 705 So.2d 307; *Burns v. State* (Miss. 2007) 813 So.2d 668; *Burns v. State* (Miss. 2004) 879 So.2d 1000; *Stevens v. State* (Miss. 2002) 806 So.2d 1031; *Stevens v. State* (Miss. 2004) 867 So.2d 219; *Gray v. State* (Miss. 2004) 887 So.2d 158; *Gray v. State* (Miss. 1998) 728 So.2d 36; *Turner v. State* (Miss. 1999) 732 So.2d 937; *Turner v. State* (Miss. 1990) 573 So.2d 657; *Puckett v. State* (Miss. 1999) 737 So.2d 322; *Puckett v. State* (Miss. 2001) 788 So.2d 753; *Puckett v. State* (Miss. 2002) 834 So.2d 676; *Puckett v. State* (Miss. 2004) 879 So.2d 920; *Mitchell v. State* (Miss. 2001) 792 So.2d 192; *Mitchell v. State* (Miss. 2004) 886 So.2d 704; *Jackson v. State* (Miss. 1999) 732 So.2d 187; *Jackson v. State* (Miss. 1996) 672 So.2d 468; *Jackson v. State* (Miss. 1996) 684 So.2d 1213; *Brawner v. State* (Miss. 2004) 872 So.2d 1; *Brawner v. State* (Miss. 2006) 947 So.2d 254; *Simmons v. State* (Miss. 2002) 805 So.2d 452; *Simmons v. State* (Miss. 2004) 869 So.2d 995

Only one of these reported cases contains any reference to an unadjudicated act. In that case, *Woodward v. State* (Miss. 2003) 843 So.2d 1, the *defendant* introduced evidence of prior unadjudicated juvenile acts in *mitigation* to show that he had been troubled all his life, but had consistently attempted to overcome his troubles.

On the other hand, the majority of these Mississippi cases contain a discussion or a reference to evidence of prior convictions in Mississippi or elsewhere as part of the penalty phase.

The absence of any reference to an unadjudicated act coupled with repeated references to adjudicated acts leads inevitably to the conclusion that Mississippi does not permit death-penalty jurors to rely upon a defendant's past unadjudicated acts.

Thirty-four states prohibit or severely limit the admission of unadjudicated acts as a non-statutory aggravating factor; only sixteen states admit such acts without significant statutory or case law limitations. Even among these states, a review of the cases cited demonstrates that the unadjudicated conduct admitted in is almost

always extraordinarily violent conduct — the unadjudicated conduct was most often a killing. (*Whatley v. State, supra,* (December 10, 2011 Ala. No. CR-08-0696) ___ So.3d ___ [2011 WL6278296]; *Crump v. State, supra,* 102 Nev. at p. 161; *Cummings v. Polk* (4th Cir. 2007) 475 F.3d 230, 237-238; *State v. Tucker, supra,* 315 Or. at p. 335; *Fair v. State, supra,* 245 Ga. at p. 870; *Paxton v. State, supra,* 867 P.2d at pp. 1321-1322.)

Plainly, evolving standards of decency do not contemplate imposing a death sentence based upon a defendant's history of unadjudicated acts with little or no actual force or violence either as a statutory aggravating factor or as a non-statutory aggravating factor. Section 190.3, subdivision (b) is out of sync with evolving standards of decency and therefore subjects defendants to unusual punishment in violation of the Eighth Amendment.

The question then becomes: Is it also cruel punishment? The answer, as explained in more detail in the next section, is: Yes, it is.

E. Section 190.3 violates the Eighth Amendment because it does not serve a valid penal purpose.

Punishment is cruel if it does not further rehabilitation, deterrence, or retribution. *Gregg v. Georgia* (2009) 428 U.S. 153, 183 [96 S.Ct. 2909, 49 L.Ed.2d 859] stated the obvious — rehabilitation is not a penal goal in a capital case; the penal goals in capital cases are retribution and deterrence:

> The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

Building on this language from *Gregg, Enmund v. Florida, supra,* 458 U.S. 782 reiterated the concept that a death penalty statute that does not further deterrence or retribution simply imposes purposeless pain in violation of the Eighth Amendment:

> In *Gregg v. Georgia* the opinion announcing the judgment observed that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Unless the death penalty when applied to those in Enmund's position measurably contributes to one or both of these goals,*

> *it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment.*
> (*Enmund v. Florida, supra,* 458 U.S. at p. 798 quoting *Gregg v. Georgia, supra,* 428 U.S. at p. 183 and *Coker v. Georgia (1977)* 433 U.S. 584, 592 [97 S.Ct. 2861, 53 L.Ed.2d 982].) (Internal citations and footnote deleted.)

1. Subdivision (b) fails to foster retribution because it does not limit retribution to the worst of the worst as required by the Supreme Court.

Retribution is a form of "just deserts." Since *Trop,* the Supreme Court's Eighth Amendment jurisprudence has required that just deserts be proportionate to the severity of the offender's infraction; the death penalty is just deserts only for the most vicious and callous offenders — the "worst of the worst." (*Kansas v. Marsh* (2006) 548 U.S. 163, 206 [126 S.Ct. 2516, 165 L.Ed.2d 429].)

Death penalty statutes foster constitutional retribution — not by drawing circles large enough to include the majority of those

convicted of murder — but by drawing circles small enough to exclude the majority of those convicted of murder:

> "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " One object of the structured sentencing proceeding required in the aftermath of *Furman* is to eliminate the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty, and the essence of the sentencing authority's responsibility is to determine whether the response to the crime and defendant "must be death." ... The point, however, is that within our legal and moral system, which allows a place for the death penalty, "must be death" does not mean "may be death."
> (*Kansas v. Marsh, supra,* 548 U.S. at p. 206 quoting *Atkins v. Virginia, supra,* 536 U.S. at p. 319, *Penry v. Lynaugh* (1989) 492 U.S. 302, 328–329 [109 S.Ct. 2934, 106 L.Ed.2d 256], and *Spaziano v. Florida* (1984) 468 U.S. 447, 461 [104 S.Ct. 3154, 82 L.Ed.2d 340].) (Internal citations and some internal punctuation omitted.)

Section 190.3, subdivision (b) draws a circle so gargantuan there are few Californians convicted of murder who will not be included within the circle.

Section 190.3, subdivision (b) contains no statutory limitation on the admission of unadjudicated conduct other than the requirement that the conduct involve the "use or attempted use of [some] force or violence" or the "express or implied threat to use such force." Case law has further bloated subdivision (b) by interpreting the provision expansively:

- Conduct barred by the applicable statute of limitations is admissible. (*People v. Harris* (2008) 43 Cal.4th 1269, 1316; *People v. Jurado* (2006) 38 Cal.4th 72, 135)
- Conduct dismissed as part of a plea bargain is admissible. (*People v. Jones* (2011) 51 Cal.4th 346, 378 at fn. 6 citing *People v. Rodriguez* (1995) 8 Cal.4th 1060, 1157.)
- Conduct committed while just a child is admissible. (*People v. Rundle* (2008) 43 Cal.4th 76, 185.)

People v. Jurado, supra, 38 Cal.4th 72 is emblematic of subdivision (b)'s breath. In *Jurado,* the prosecutor introduced evidence that — during his teenage years — defendant had quarreled with his mother on three occasions.[52] On one of those occasions he announced he hated her, and, on another, he shoved her. *Jurado* held that even such teenage angst — a commonplace part of growing up — was sufficient to support a death verdict:

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[52] Although Schultz was not a teenager when any of the unadjudicated acts admitted into evidence occurred, he questions the continued viability of *Jurado* and similar cases which admit juvenile conduct in light of the United States Supreme Court's reliance on social science that states that teenage conduct is not a reliable predictor of conduct in adulthood or a reliable measure of redeemability:

> [A] child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." (*Miller v. Alabama, supra,* ___ U.S. at p. ___ [12 Cal. Daily Op. Serv. 7078, 2012 WL2368659) quoting *Roper v. Simmons, supra,* 543 U.S. at p. 569.)

> We reject the argument that defendant's conduct toward his mother was not admissible under section 190.3, factor (b) .... [Defendant] argues that the evidence was "not the kind of evidence that justified sentencing [him] to execution," because it is "unfortunately not that uncommon for a teenager or a nineteen-year-old to have such confrontations with his parents." But the admissibility of section 190.3, factor (b), evidence does not depend on how common or uncommon the criminal conduct is, or whether *viewed in isolation* it would be sufficient to justify a death sentence. The evidence met all statutory requirements for admission under section 190.3, factor (b).
> (*People v. Jurado, supra,* 38 Cal.4th at p. 142.)

In *People v. Booker* (2011) 51 Cal.4th 141, 187, this Court determined that subdivision (b) allowed the jury to impose the death penalty on a defendant based upon a finding the defendant had — years before the homicide for which he was on trial — once "chased someone down the street while wielding a stick."

Section 190.3, subdivision (b) casts too wide a net. In doing so, it undermines — rather than forwards — the penal goal of retribution.

2. Section 190.3, subdivision (b) fails as a deterrent because its breath allows uneven enforcement and fails to give notice of the conduct an offender must avoid to elude punishment.

Deterrence is prevention of conduct through fear of reprisal. At the heart of deterrence is the notion that a potential lawbreaker — mindful of the penalty — will strive to avoid that penalty. Deterrence works only if a would-be offender believes it likely that he or she will suffer the punishment if the crime is committed.

Subdivision (b) is a veritable bouillabaisse thickly stocked with unadjudicated acts; the stew includes *all acts*, whether actual or attempted, involving *all levels of force* or violence from *any time* in the defendant's life.

Individual prosecutors are free to dip into the stew, fish around, and find an unadjudicated act he or she thinks can be sufficiently established to support a subdivision-(b) finding. This invests prosecutors with an extraordinary measure of discretion in deciding whether to seek the death penalty. When different decision-makers

have so much discretion within a large pool of death-eligible defendants, decisions will necessarily be inconsistent.

Inconsistent prosecutions destroy the deterrent value of a penal statute. In criticizing the 1978 revision of the Arizona Penal Code, a commentator pointed out that "[p]enalty inconsistencies [in the Code], which may seem unimportant in the abstract, become vastly significant when prosecutors can choose from a lengthy charging list.... (Rudolph J. Gerber, *Arizona Criminal Code Revision: Twenty Years Later* (1998) 40 Ariz. L. Rev. 143, 153.) Reported decisions reflect the inconsistency in prosecution occasioned by the bouillabaisse of acts encompassed by subdivision (b). In *People v. Booker, supra,* 51 Cal.4th at p. 153, the Riverside District Attorney elected to seek the death penalty based upon such unadjudicated, non-lethal acts as chasing an individual down the street or quarreling with neighbors; in *People v. Hendricks* (1988) 44 Cal.3d 636, 645, the San Francisco District Attorney elected to seek the death penalty based upon three unadjudicated murders.

Such extraordinary discretion also increases the risk of racial or geographic disparity further diluting a would-be offender's belief that commission of the offense will lead to conviction and forfeiture of life.

Subdivision (b) also fails to serve as a deterrent because its breath destroys its ability to serve notice of what conduct is proscribed. Section 190.3, subdivision (a) serves notice that a death-eligible murderer who acts with particular malice or viciousness will more likely suffer the death penalty; section 190.3, subdivision (c) serves notice that a death-eligible murderer who has been convicted of other felonies will more likely suffer the death penalty. The fact subdivision (b) includes *all acts*, whether actual or attempted, involving *all levels of force* or violence from *any time* in the defendant's life makes it impossible for an individual to understand the totality of the proscribed conduct.

Finally, the inclusion of such a broad range of conduct, robs subdivision (b) of any value as a deterrent because, although a would-be murderer may be deterred by the sobering thought that he or she has a long criminal history or is acting with especial viciousness, it strains credibility to believe that a would-be murderer will be deterred by the recollection he or she once shoved a domestic partner.

In capital jurisprudence, all murderers are wicked, but some murderers are more wicked than others. Because some are more wicked, the Eighth Amendment requires that state death-penalty laws provide a means for the jury to separate the simply wicked from the especially wicked to ensure that the ultimate punishment is imposed only on the "worst of the worst." Section 190.3, subdivision (b) fails to accomplish that task because it is out of step with evolving standards of decency and fails to serve a valid penological goal.

X. The admission of unadjudicated acts through anecdotal evidence is an unreliable method of deciding who should suffer the ultimate punishment.

Since 1972, the Supreme Court has repeatedly emphasized the "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342 [113 S.Ct. 2112, 124 L.Ed.2d 306].)

The requirement of reliability based upon the notion that "death is different" has deep historical roots in Anglo-Saxon jurisprudence, and is a concept that cannot be ignored.

Common law courts were exceptionally concerned with the reliability and fairness of capital procedures, a concern that was clearly driven, as it is today, by the extremity and finality of a death sentence.

In 17th and 18th Century England, courts "construed [indictments, statutes, and procedural rules] literally and strictly" to ensure that the benefit of clergy which provided a more lenient sentence was afforded to the greatest number of capital defendants. (Hale,

Matthew, Historia Placitorum Coronae: The History of the Pleas of the Crown, (1736) First American Edition with notes and references by Stokes, W. A. and Ingersoll, E. (1847), Vol. 2, Chptr. XLVI at p. 335. (Available online at Google books [accessed 6-12-2012].) ("Hale")

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the majority's key historical citation is to a chapter in Hale that discusses aspects of capital cases and begins, "The strictness required in indictments is great because life in in question." (Hale, *supra,* Chptr. XXIV, at p. 168.)

All death-penalty states admit evidence of prior felony convictions to demonstrate a defendant's historical record of lawlessness and, if appropriate in that state, as a barometer of the defendant's future conduct.

Convictions — as opposed to hazy and biased recollections from long ago — provide that modicum of reliability required by the Eighth Amendment.

Unadjudicated acts are generally introduced into evidence through the alleged victim. One need only spend one evening watching the ID channel or peruse the latest volume of case reports to know that defendants in death penalty trials almost never exercise their right to testify. As a result, only the victim's recollection of the incident will be presented to the jurors.

This is a reality this Court cannot ignore.

XI. California's death penalty statute, as interpreted by this Court and applied at Schultz's trial, violates the United States Constitution.

Many features of California's capital sentencing scheme violate the United States Constitution, and — although mindful the trial court was obliged to consider this Court's consistent rejection of arguments pointing out these deficiencies — Schultz unsuccessfully argued these constitutional deficiencies in the trial court and now presents them on appeal.

In *People v. Schmeck* (2005) 37 Ca1.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257 [106 S.Ct. 617, 88 L.Ed.2d 598].) In light of this Court's directive in *Schmeck*, Schultz briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, Schultz requests the right to present supplemental briefing.

A. The elements of California's sentencing scheme must be considered individually and as a unified whole in which each element combines with each of the other elements

To date the Court has considered each of the defects Schultz presents here and which others appealing from a death sentence have presented in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective.

As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179 at fn. 6[53]

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[53] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Kansas v. Marsh, supra,* 548 U.S. at p. 178.)

[126 S.Ct. 2516, 165 L.Ed.2d 429]) See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29] (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders who should be subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its maw. It then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on section 190.2, the "special circumstances" section of the statute — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact

that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

1. Penal Code section 190.2 is impermissibly broad.

Death is an extraordinary penalty to be imposed only "on those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " (*Kennedy v Louisiana, supra,* 554 U.S. at p. 420 quoting *Roper v. Simmons* (2005) 543 U.S. 551, 568 [125 S.Ct. 1183, 161 L.Ed.2d 1] in turn quoting *Atkins v. Virginia, supra,* 536 U.S. at p. 319.) To pass constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few "worst of the worst" cases in which the death penalty may be appropriate from

the many cases in which it may not. (*Kennedy v. Louisiana, supra,* 554 U.S. at p. 420) (*See,* also, *People* v. *Edelbacher, supra,* 47 Ca1.3d 983, 1023, citing *Furman* v. *Georgia, supra,* 408 U.S. at p. 313.)

Without demeaning the tragedy inherent in every murder, meeting this criterion requires a state to narrow the class of murderers eligible for the death penalty by setting forth rational and objective criteria which realistically elevate a murder from the commonplace to the truly heinous. (*Zant* v. *Stephens* (1983) 462 U.S. 862, 878 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

Plainly, the expansive language of California's capital sentencing scheme does not limit this ultimate sanction to the worst of the worst. In 1993 when Burger died, section 190.2 contained 22 special circumstances, including subdivision (1) which allowed the death penalty to be imposed for a murder committed during the commission or attempted commission of 12 qualifying felonies.[54]

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[54] In 1993, Former Penal Code section 190.2 included the following the special circumstances:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.

(3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or

the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.

(9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried

out in retaliation for, or to prevent the performance of, the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

(E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288.

(F) Oral copulation in violation of Section 288a.

(G) Burglary in the first or second degree in violation of Section 460.
(H) Arson in violation of subdivision (b) of Section 451.
(I) Train wrecking in violation of Section 219.
(J) Mayhem in violation of Section 203.
(K) Rape by instrument in violation of Section 289.
(L) Carjacking, as defined in Section 215.
(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

(19) The defendant intentionally killed the victim by the administration of poison.

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

One is hard-pressed to imagine a circumstance in which a murder is not committed in a matter which will qualify for capital sentencing. Nevertheless, this Court routinely rejects challenges to the statute's lack of any meaningful narrowing. *(People* v. *Stanley* (1995) 10 Ca1.4th 764, 842-843.) Schultz urges this Court to reconsider *Stanley* and strike down Penal Code section 190.2 as it existed in 1993 and as it currently drafted on the ground the statute is, and was, so all-inclusive it guaranteed arbitrary imposition in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. The broad application of section 190.3(a) violated Schultz's constitutional rights.

Section 190.3, factor (a), embodied in CALJIC No. 8.85 (Database updated March 2012.), directs the jury to consider in aggravation the "circumstances of the crime." The court provided the jury in Schultz's case with a slightly modified version of CALJIC No. 8.85. (11CT 2996-2997, 22RT 3846-3848.)

Relying on the language of section 190.3, the prosecutor in Schultz's case — like almost all other prosecutors throughout California — argued the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (22RT 3867-3869.)

Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In this case, for instance, the prosecutor argued that Burger's murder was aggravated because Burger was roused from sleep and raped and strangled in her bed and that she feared being raped and murdered. (22RT 3867-3868.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Ca1.4th 686, 749 ["circumstances of

crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be, and have been, characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the murder of which the defendant has been convicted, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright, supra,* 486 U.S. at p. 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [114 S.Ct. 2630, 129 L.Ed.2d 750] [factor (a) survived facial challenge at time of decision].)

Schultz is mindful that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase re-

sults in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Ca1.4th 595, 641; *People v. Brown* (2004) 33 Ca1.4th 382, 401.) Nevertheless, he urges the Court to reconsider this holding.

B. The death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof.

1. Schultz's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt.

California law does not require that a reasonable-doubt standard be used during any part of the penalty phase, except when the issue is proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People* v. *Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].)

In conformity with this standard, Schultz's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Blakely v. Washington (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584, 604 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey, supra,* 530 U.S. at p. 478, require any fact other than a prior conviction that is used to support an increased sentence to be submitted to a jury and proved beyond a reasonable doubt.

In order to impose the death penalty in this case, Schultz's jury had to first make several factual findings: (1) aggravating factors were present; (2) the aggravating factors outweighed the mitigating factors; and (3) the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88, 11CT 3029-3030, 22RT 3859-3860) Because these additional findings were required before the jury could impose the death sentence, *Blakely,*

Ring, and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." *(People v. Sedeno* (1974) 10 Ca1.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302 [101 S.Ct. 1112, 67 L.Ed.2d 241].)

Schultz is mindful this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning *of Apprendi (People v. Anderson* (2001) 25 Ca1.4th 543, 589 fn. 14), and does not require factual findings *(People v. Griffin* (2004) 33 Ca1.4th 536, 595). The Court has rejected the argument that *Apprendi, Blakely,* and *Ring* impose a reasonable-doubt standard on California's capital penalty phase proceedings. *(People v. Prieto* (2003) 30 Ca1.4th 226, 263.) Nevertheless, Schultz urges the Court to reconsider its holding in *Prieto* and conform California's death penalty scheme with the principles set forth in *Apprendi, Ring,* and *Blakely.*

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Schultz contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra,* 36 Ca1.4th at p. 753.) Schultz requests that the Court reconsider this holding.

2. Some burden of proof is required, or the jury should have been instructed that there was no burden of proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and Schultz is, therefore, constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, Schultz's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

The instructions given here — CALJIC Nos. 8.85 and 8.88 — fail to provide the jury with the guidance legally required for admin-

istration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. (11CT 2996-2997, 3029-3030, 22RT 3858, 3859-3860) This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral, and thus unlike other sentencing. *(People v. Lenart* (2004) 32 Ca1.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. *(People v. Arias* (1996) 13 Ca1.4th 92, 190.) Schultz is entitled to jury instructions that comport with the federal Constitution, and thus he urges the Court to reconsider its decisions in *Lenart* and *Arias.*

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Ca1.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction,

there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Schultz's death verdict was not premised on unanimous jury findings.

a. Aggravating factors.

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty true. (See *Ballew* v. *Georgia* (1978) 435 U.S. 223, 232-234 [98 S.Ct. 223, 55 L.Ed.2d 234]; *Woodson* v. *North Carolina, supra,* 428 U.S. at p. 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Ca1.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra,* 536 U.S. 584. (*People v. Prieto, supra,* 30 Ca1.4th at p. 275.)

Schultz asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [110 S.Ct. 1227, 108 L.Ed.2d 369].)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded non-capital defendants (See, *Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615]; *Harmelin v. Michi-*

gan, supra, 501 U.S. at p. 994), and since providing more protection to a non-capital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (See e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one-year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" *(People v. Medina* (1995) 11 Ca1.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Schultz asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Schultz's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 11CT 2999-2930, 22RT 3848-3850.) Consequently, Schultz contends any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, subdivision (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 [108 S.Ct. 1981, 100 L.Ed.2d 575] overturning death penalty based in part on vacated prior conviction].)

This Court has routinely rejected this claim. *(People v. Anderson, supra,* 25 Ca1.4th at pp. 584-585.)

Here, a substantial part of the evidence presented by the prosecution described unadjudicated criminal activity allegedly committed by Schultz. (18RT 3188-3206, 3208-3227, 3252-3261, 19RT 3266-3269, 3266-3267, 3286-3301.)

1989—Schultz assists his father who is attacking Hecht. (19RT 3305)

1991—Schultz restrains his step-father, Nickolas Loprieato. (19RT 3266-3267)

1993—Altercation at the beach with a male friend of Mooney's. (18RT 3177-3179)

1994—Schultz threatens to smash Mooney's television set when she announces she will break up with him because of his ongoing drug use. (19RT 3221-3222, 3269)

Late 1994 or early 1995—Altercation with Darryl Allen variously described as a confrontation that started either when Allen tried to intervene in a fight between Mooney and Schultz or when Allen was bringing Mooney home from a date after Mooney had terminated her relationship with Schultz because of his uncontrolled drug use. (18RT 3242-3244, 3273-3274)

1995—Altercation outside apartment with Richard Bowens' girlfriend over a $5.00 debt. (18RT 3220-3221)

1995—Schultz pushes Mooney in the buttocks with his knee because Mooney was angry at him for using drugs including pills that had been prescribed for her. (18RT 3219. 3238)

Unknown date between 1993 and 1996—Schultz retaliated by pushing when Mooney repeatedly poked him in the chest and taunted him about his uncontrolled drug use. (18RT 3220, 3223, 3240)

Unknown date between 1993 and 1996--Schultz took Mooney's house keys and car keys when he was smoking "crank" and refused to give them back to her. (18RT 3220-3221)

The prosecution argued that such activity supported a sentence of death. (See, e.g., 22RT 3874-3877, 23RT 3879-3880, 3880-3881, 3883).

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], *Blakely v. Washington, supra,* 542 U.S. 296, *Ring v. Arizona, supra,* 536 U.S. 584, and *Apprendi v. New Jersey, supra,* 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Schultz is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Ca1.4th 186, 221-222.) Nevertheless, he asks the Court to reconsider its holdings in *Anderson* and *Ward.*

4. The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard.

The question of whether to impose the death penalty upon Schultz hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (22RT 3860.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright supra,* 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. *(People v. Breaux* (1991) 1 Ca1.4th 281,316 at fn. 14.) This Court should reconsider that opinion.

5. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. *(Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the, same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" *(Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255]), the punishment must fit the offense and the offender, i.e., it must be appropriate. (see *Zant*

v. Stephens, supra, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Ca1.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. *(People v. Arias, supra,* 13 Ca1.4th at p. 171.) Schultz urges this Court to reconsider that ruling.

6. The instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See

Boyde v. California (1990) 494 U.S. 370, 377 [110 S.Ct. 1190, 108 L.Ed.2d 316].) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated Schultz's right to due process of law. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Schultz requested an instruction that would have advised the jury that if it found mitigation equaled or out-weighed aggravation, a sentence of life without parole was mandatory. (10CT 2790-2791)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Schultz submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-

1015; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an life-without-parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See, *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474 [93 S.Ct. 2208, 37 L.Ed.2d 82].)

7. The instructions violated the Sixth, Eighth and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296 [127 S.Ct. 1706, 167 L.Ed.2d 622]; *Mills* v. *Maryland* (1988) 486 U.S. 367, 374 [108 S.Ct. 1860, 100 L.Ed.2d 384]; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina, supra,* 428 U.S. at p. 304.) Constitutional error occurs when

there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde* v. *California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation because Schultz's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors applied the guilt-phase instruction and believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy* v. *North Carolina, supra,* 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (See also

Mills v. *Maryland, supra,* 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of Schultz's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The penalty jury should be instructed on the presumption of life.

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126].) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be in-

structed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272 [113 S.Ct. 1222, 122 L.Ed.2d 620].)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.) and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibiiity. *(People v. Arias, supra,* 13 Cal.4th at p. 190.)

However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

C. Failing to require that the jury make written findings violates Schultz's right to meaningful appellate review.

Consistent with state law *(People v. Fauber* (1992) 2 Cal.4th 792, 859), Schultz's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 195.)

This Court has rejected these contentions. (*People v. Cook* (2006) 39 Ca1.4th 566, 619.) Schultz urges the Court to reconsider its decisions on the necessity of written findings.

D. The instructions to the jury on mitigating and aggravating factors violated appellant's constitutional rights.

1. The use of restrictive adjectives in the list of potential mitigating factors.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 11CT 2996-2997; 22RT 3846-3847) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. at p. 384; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.) Schultz is aware that the Court rejected this very argument in *People v. Avila* (2006) 38 Ca1.4th 491, 614), but he urges reconsideration.

2. The failure to delete inapplicable sentencing factors.

Many of the sentencing factors set forth in CALJIC No. 8:85 were inapplicable to Schultz's case. (See, e.g., CALJIC No. 8.85 (e) [victim participation], (f) [moral justification], (g) [duress or domination], (i) [age of defendant], (g) [minor participation].) The trial court failed to omit those factors from the jury instructions (11CT 2996-2997, 22RT 3846-3847), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of Schultz's constitutional rights. Schultz asks the Court to reconsider its decision in *People v. Cook, supra,* 39 Ca1.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (11CT 2996-2997, 22RT 3846-3847) The Court has upheld this practice in *People v. Hillhouse* (2002) 27 Ca1.4th 469, 509. As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 — factors (d), (e), (t), (g), (h), and (i) were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Ca1.3d 1142, 1184; *People v. Davenport* (1985) 41 Ca1.3d 247, 288-289.) Schultz's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance.

Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black, supra,* 503 U.S. at pp. 230-236.)

As such, Schultz asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

E. The prohibition against inter-case proportionality review guarantees arbitrary and disproportionate imposition of the death penalty.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173,253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and

Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Schultz urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

F. The California capital sentencing scheme violates the equal protection clause.

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Ca1.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.)

In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Schultz acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Ca1.4th 547, 590), but he asks the Court to reconsider.

G. California's use of the death penalty as a regular form of punishment falls short of international norms.

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v.*

Dulles (1958) 356 U.S. 86, 101 [78 S.Ct. 880, 2 L.Ed.2d 630]; (*People v. Cook, supra,* 39 Ca1.4th at pp. 618-619; *People v. Snow* (2003) 30 Ca1.4th 43, 127; *People v. Ghent, supra,* 43 Ca1.3d at pp. 778-779.)

In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons, supra,* 543 U.S. at pp. 551, 554, Schultz urges the Court to reconsider its previous decisions.

XII. When all of the instances of error in the guilt phase are considered together, it is apparent that the cumulative effect was prejudicial. Cumulative prejudice requires reversal of Schultz's conviction and sentence.

Schultz believes that each of the numerous errors urged in this opening brief is sufficiently important to justify reversal of his sentence in and of itself. These errors, individually, and cumulatively, deprived Schultz of due process, a fair trial, the right to present a defense and to confront the evidence against him, a fair and impartial jury, and a fair and reliable guilty and penalty determination in violation of his right under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their opposite numbers in the California Constitution.

Should this Court find more than one error, but conclude that each error, standing alone, can be deemed harmless, then this Court should consider the cumulative effect of the errors. (*Williams v. Taylor* (2000) 529 U.S. 362, 399 [120 S.Ct. 1495, 146 L.Ed.2d 389]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Cardenas* (1982) 31 Cal.3d

897, 907; *People v. Duran* (1976) 16 Cal.3d 282; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Williams* (1971) 22 Cal.App.3d 34, 40; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 386-387; *People v. Cruz* (1978) 83 Cal.App.3d 308, 334.)

Indeed, the due process and reliability concerns expressed in the Fifth, Eighth, and Fourteenth Amendments dictate meaningful appellate review in capital cases. (*Parker v. Dugger, supra,* 498 U.S. at p. 321.)

In other words, in some situations an error may be found to be sufficiently minor that a more favorable result on retrial is unlikely. However, if there is a series of errors that could all be corrected at a retrial, it becomes much more difficult to conclude that the trial under review was fairly and constitutionally conducted and that a different result is unlikely.

Cumulatively, the guilt phase errors resulted in the deprivation of a fundamentally fair trial by an impartial jury, in accordance with the Fifth, Sixth, and Fourteenth Amendments and equivalent state guarantees. Furthermore, as a result of the errors that Schultz has demonstrated, the ability of the jury to fairly resolve the disputed facts was inadequate to assure the degree of reliability needed to satisfy the Eighth and Fourteenth Amendments in the case of a guilt judgment and to support a death sentence. (*Beck v. Alabama, sup*ra, 447 U.S. 625, 638 at fn. 13; *Woodson v. North Carolina, supra,* (1976) 428 U.S. 280.) The likelihood of a more favorable verdict absent the errors was substantial. Thus, none of the errors can be deemed harmless, and together they present an especially strong case for finding prejudice.

CONCLUSION

Schultz asks this Court to find that each of the arguments he has presented in this brief is valid and that each error irreparably harmed his defense in either the guilt phase or the penalty phase. Based on those findings, he asks this court to reverse his conviction and his sentence.

In the alternative, Schultz asks this Court to find that the arguments he has presented in this brief are valid and that the combination of errors irreparably harmed his defense in either the guilt phase or the penalty phase. Based on those findings, he asks this court to reverse his conviction and his sentence.

Respectfully submitted,

Jeralyn Keller
Attorney for defendant and appellant
MICHAEL JOSEPH SCHULTZ

California Rules of Court, rule 8.360

I, Jeralyn Keller, certify that I was appointed to act as appellate counsel for Michael Joseph Schultz for the direct appeal by the California Supreme Court and that I continue to act as Mr. Schultz's appellate counsel.

I prepared the Appellant's Opening Brief on my word processor utilizing Microsoft Word. The program indicates Appellant's Opening Brief, excluding this certificate, the Proof of Service, the Table of Contents, and the Table of Authorities contains 74,235 words.

_____

JERALYN KELLER

PROOF OF SERVICE BY MAIL

I, JERALYN KELLER, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is 790 East Colorado Boulevard, Suite 900, Pasadena, California 91101-2113. On August 14, 2012, I served the within

APPELLANT'S OPENING BRIEF

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Pasadena, California addressed as follows:

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I declare under penalty of perjury the document was printed on recycled paper and foregoing is true and correct and I signed the declaration on August 14, 2012 at Pasadena, California.

_____
JERALYN KELLER