IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHESTER DEWAYNE TURNER, Defendant and Appellant.	No. S154459 (Los Angeles County Superior Court No. BA273283-01)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

HONORABLE WILLIAM R. POUNDERS, JUDGE

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INTRODUCTION

Chester Turner ("appellant") was charged in this case because his DNA profile matched DNA profiles found in crime scene evidence using the Combined DNA Indexing System or CODIS. CODIS is a computer network that connects forensic DNA laboratories in different jurisdictions. When a DNA profile is developed from crime scene evidence and entered into the crime scene index of CODIS, the database software searches thousands of convicted offender DNA profiles and a suspect is identified if there is a match between the crime scene evidence and a DNA profile in the database.[1] As appellant will show, there is continuing scientific controversy about the statistical understanding of the matches unearthed after a database

[1]See U.S. Department of Justice, *Using DNA to Solve Cold Cases: NIJ Special Report* (2002) National Institute of Justice, available at <https://www.ncjrs.gov/pdffiles1/nij/194197.pdf> (as of November 17, 2014).

search. Because of this controversy, the statistics giving meaning to the DNA match were inadmissible under *People v. Kelly* (1976) 17 Cal.3d 24. The error in admitting those statistics requires reversal of appellant's convictions and sentence.

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code, § 1239, subd. (b).)[2]

STATEMENT OF THE CASE

By an information filed on November 7, 2005, appellant was charged in Los Angles County Superior Court case number BA273283 with ten counts of murder. (Pen. Code, § 187, subd. (a).) Count 5 charged appellant with the murder of a fetus. (§ 187, subd. (a).) In connection with Count 10 a special circumstance of murder in the commission of rape was alleged. (§ 190.2, subd. (a)(17).) Special circumstance allegations multiple murder were charged in connection with all counts. (§ 190.2, subd. (a)(3).) All offenses were charged as serious felonies. (§ 1192.7, subd.(c).) (1CT 133-138.)[3]

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[2]All statutory references are to the California Penal Code unless otherwise indicated.

[3]Appellant refers to the pages of the clerk's transcript with the volume number, followed by "CT" and the appropriate page number. There are three supplemental clerk's transcripts in the case. Appellant refers to the supplemental clerk's transcript with a roman numeral, indicating which supplemental transcript is cited, followed by the appropriate page number. There are two sets of reporter's transcripts. The first set consists of volumes containing transcripts of the proceedings between October 24, 2004, and November 1, 2005. The second set consists of volumes containing the proceedings between July 15, 2005 and July 10, 2007. Appellant's references are largely to the second set of transcripts. When citing to the first set, appellant uses a roman numeral, indicating the volume number, followed by the number "1" to indicate the first set of transcripts, followed by "RT" and the appropriate page number. When citing to the

(continued...)

Jury selection began on March 14, 2007 (2RT 159; 2CT 343) and concluded with the jury being sworn on March 23, 2007. (5RT 681; 2CT 368.) The prosecution's opening statement was on April 3, 2007. (6RT 805; 2CT 392.) The presentation of evidence at the guilt phase began on that day (6 RT 837; 2CT 392), and ended on April 19, 2007. (16RT 2411; 13CT 3476.) Arguments were on April 24, 2007 (17RT 2426, 2464, 2495; 3CT 3481.) The jury was instructed the next day. (17RT 2517; 13CT 3483.) On April 30, 2007, the jury returned guilty verdicts on all counts, and found all of the special allegations and special circumstances to be true. (17RT 25; 14CT 3549.)

Opening statements at the penalty phase were on May 2, 2007. (18RT 2106; 14CT 3554) and presentation of the evidence began the same day. (18RT 2605; 14CT 3554.) The presentation of evidence concluded on May 8, 2007. (20RT 2981; 14CT 3569.) The jury instructions and arguments were on May 10, 2007 (20RT 2994, 3028, 3043; 14CT 3571-3572), and the jury began its penalty deliberations on that day. (20RT 3071; 14CT 3572.) On May 15, 2007, the jury returned death verdicts for all murders (20RT 3079; 14CT 3626), including a death verdict for appellant's conviction of second degree murder in Count 5. (20RT 3081; 14CT 3606.)

On June 19, 2007, appellant filed a motion for new trial (14CT 3627) and a motion to reduce the penalty to life without parole pursuant to Penal Code section 190.4, subdivision (e) (14CT 3632.) The court denied both motions on July 10, 2007. (20RT 3092, 3095; 14CT 3712.) The court sentenced appellant to death on Counts 1 through 4 and 6 through 11. The court imposed a sentence of life in prison on Count 5. (20RT 3079-

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[3](...continued)
second set, appellant will use the volume number followed by "RT" and the appropriate page number.

3080;14CT 3709 .) $200 was ordered paid under Penal Code section 1202.4, subdivision (a)(3). Victim restitution of $9,020.86 was ordered. (20RT 3117; 14CT 3711.)

STATEMENT OF FACTS

A. Discovery of the Victims and Cause of Death

The prosecution presented testimony regarding discovery of the bodies of nine women in the 1980's and 1990's in Los Angeles, and regarding the collection of evidence from the scenes of each of these crimes. The prosecution also put on evidence that one of the victims was pregnant with a viable fetus. Los Angeles County Deputy Medical Examiner Dr. Lisa Scheinin testified about the cause of death.[4]

Diane Johnson In March 1987, Larry Redmond discovered a body off of southbound Highway 110 and called the police. (6RT 841, 843.) Officer Marty Weston responded to the area where he found the face-down body of an African-American female, who was later identified as Diane Johnson. (6RT 854, 858, 888.) The Figueroa area where Ms. Johnson was found was well-known for prostitution. (6RT 860.) Los Angeles Police Department Detective Rudy Lemos responded to the scene. (6RT 881.) He observed that Ms. Johnson was nude from the waist down and that she had blood on her nostrils. (6RT 883-884.) Criminalist Heidi Robbins gathered trace evidence from Ms. Johnson's body. (8RT 1182.) The cause of death was listed on the autopsy report as strangulation. (12RT 1794; People's Exhibit No. 10.)

Annette Earnest Charles Brown saw a body on his way home from work in October 1987 alongside Highway 110 near 106th Street

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[4]With one exception, Dr. Scheinin did not perform the autopsies which were the basis for her testimony. Instead, she reviewed autopsy reports done by other medical examiners and made her own conclusions about the cause of death. (12RT 1792; 13RT 1885.)

and Grand (6RT 920-923) and called the police (6RT 925). Los Angeles Police Department Officer Matthew Jaroscak responded. (7RT 935.) He saw the face-down body of an African-American female whose pants had been pulled down, whose shoes were missing and whose top was partially pulled up. (7RT 935, 938.) Officer Jaroscak thought that the area where her body was found was an area known for prostitution. (7RT 940.)

Victor Pietrantoni was the Los Angeles Police Department detective who responded to the scene and observed Ms. Earnest's body (7RT 944.) He testified that Ms. Earnest was initially identified as a Jane Doe, but was later identified using either family members or prints. (7RT 948.) He noted that the area was noted for prostitution and drug abuse because it was secluded and there was construction. (7RT 953.) In particular, during the time when Ms. Earnest was found, the area was known for "strawberries," who were women who prostituted themselves for cocaine. (7RT 954; 16RT 2311.) Heidi Robbins gathered trace evidence from the scene. (8RT 1126.) She also gathered a sexual assault kit after the body was taken to the Coroner's Office. (8RT 1129; People's Exhibit No. 21.) The cause of death was given on the autopsy report as strangulation. (12RT 1807; People's Exhibit No. 20.) Ms. Earnest's mother, Mildred White, testified that her daughter had a drug abuse problem . (6RT 916 .)

Anita Fishman On January 20, 1989, Enrique Alvarez discovered a body in the alley behind South Figueroa between 98th and 99th Streets. (7RT 979.) Los Angles Police Department Homicide Detective Joe Callian responded to the scene, where he discovered the victim, Anita Fishman, on her side behind a door by the garage. (7RT 995, 997.) Her pants were slightly pulled down. (7RT 999.) Criminalist Lloyd Mahaney processed the scene and later did a partial sexual assault kit. (8RT 1172-1178.) The cause of Ms. Fishman's death was strangulation. (12RT

1809.) Jason Sulzbach testified that Anita Freeman was his aunt. (7RT 971.) She had a problem with substance abuse. (7RT 974.)

Regina Washington and Washington Fetus On August 23, 1989, Los Angeles Police Department Officer Dan Reedy responded to 8858 South Figueroa after getting a call about a death. (7RT 1061.) Inside the garage of a boarded up house he found the body of an African-American female, Regina Washington. (7RT 1063-1064.) There was a black TV cable wrapped around her neck. (7RT 1064.) The cable was also attached to a box above the body. (*Ibid.*) Her pants were unfastened, but pulled up (7RT 1067) and the shirt was pulled up (7RT 1071). Detective Richard Marks responded to the scene. (7RT 1073.) He noticed that the cable around the neck was loose. (7RT 1079.) Near Ms. Washington's body was lots of trash, used condoms and discarded clothing. (7RT 1076, 1091.) The area was commonly used for prostitution and to smoke narcotics. (8RT 1077, 1091.) Criminalist Lloyd Mahaney collected a sexual assault kit from Ms. Washington. (7RT 1183; People's Exhibit No. 54.)

The cause of death on the Regina Washington autopsy report was asphyxia due to strangulation. (12RT 1812.) At the time of her murder, Ms. Washington was pregnant. Baby Girl Washington died from "anoxic intrauterine fetal demise." The fetus was female, 825 grams, approximately 6 and one half months' gestation. The fetus died because the mother was strangled. (12RT 1820-1821.) Dr. Scheinin concluded that at the time of her death the fetus was viable. A fetus is considered viable after the twenty-second week and 500 grams or above. Ms. Washington's fetus was above that. (12RT 1822.)

Dorothy Patterson testified that her mother was Ms. Washington. (7RT 1054.) Patterson had heard that her mother abused drugs, but not seen it herself. (7RT 1057.)

Andrea Tripplett On April 2, 1993, Stuart Young was working near 7812 South Figueroa Street when he discovered a body in the backyard of a house he was working on. (10RT 1401-1402.) Mr. Young believed that the house could have been used as a crash pad or to use drugs. (10RT 1404.) Richard Simmons, who was a Los Angeles Police Department homicide detective, responded to the scene. (8RT 1256-1257.) He observed the body of an African-American woman, later identified as Andrea Tripplett, near the wall of the motel at the back. (8RT 1261-1262.) The area where Ms. Tripplett was found was a high crime area known for prostitution and drug use. (8RT 1280.) Criminalist Manuel Jose Munoz collected a sexual assault kit. (9RT 1300-1303; People's Exhibit No. 66.) The cause of death listed on Andrea Tripplett's autopsy report was manual strangulation. (12RT 1828; People's Exhibit No. 65.) She was pregnant when she died. The fetus was pre-viable, about five months and 305 grams. (12RT 1832.)

Jerri Johnson identified the victim as her daughter. (8RT 1251.) Johnson knew that Ms. Tripplett had a drug problem. (8RT 1254.)

Desarae Jones aka Tracy Williams In 1993, Maricela Leyva, discovered a body behind her house. (9RT 1339-1340.) The woman was later identified as Desarae Jones. (9RT 1345.) On May 16, 1993, Los Angeles homicide detective Rosemary Sanchez responded to the scene near 6821 South Estrella Ave where Ms. Jones was found. (9RT 1343.) Sanchez observed that the body was by a house that was trashy, burned and boarded up. (9RT 1346.) She found condoms, beer bottles, and old lighters at the scene. (9RT 1349.) Ms. Jones was not wearing anything below the waist and had no shoes. (9RT 1353.) Fingerprints found at the scene did not match appellant's. (9RT 1364.) Criminalist Mahaney took a sexual assault kit from Ms. Jones. (11RT 1544; People's Exhibit No. 77.) The cause of death was listed as asphyxia due to manual strangulation. (12RT

1833; People's Exhibit No. 75.) Ms. Jones' mother, Patricia Jones, identified Ms. Jones as her daughter and stated that she had an a.k.a. of Tracy Williams. (9RT 1331.) Her daughter had problems with cocaine abuse. (9RT 1334.)

Natelie Price On February 12, 1995, Los Angles Police Department Officer Jim Willis responded to the discovery of a body at 532 W. Eightieth Street. (9RT 1379.) Homicide detective Victor Corella discovered the body of an African-American female in the walkway of a house. (10RT 1425-1426; People's Exhibit No. 82.) The woman was identified as Natelie Price by Ms. Price's sister. (10RT 1430.) Her blouse and bra were pushed up and her pants were pulled down about mid-thigh. There was dirt on the trousers, stomach and forearms. (10RT 1433-1434.) Because of the condition of the clothing, the state of partial undress, and fluid leaking from the vaginal area, Officer Corella thought that a sexual assault might have occurred and asked that a sexual assault kit be taken. (10RT 1435, 1454.) The detective also observed petechia in her eyes and saw redness on the neck. (10RT 1456-1547.) Criminalist Mahaney took a complete sexual assault kit. (11 RT 1549.) The cause of death for Natalie Price was given in the report as manual strangulation. (12RT 1841; People's Exhibit No. 88.) There was mud and dirt in the teeth and tongue, according to the report, and a laceration on the inside of the lower lip, which could have been the result of a struggle. (12RT 1842-1843.) There were also vaginal hemorrhages which could have been the result of sexual penetration. (12RT 1845-1846.) Ms. Price's daughter, Tacora Leggett, knew that her mother had a problem with cocaine and had seen her mother using drugs. (10RT 1407-1408.)

Mildred Beasley On November 6, 1986, Los Angeles Police Department Officer James Weigh responded to the discovery of a body of an African-American female near 9611 Broadway. (10RT 1489.) The

body was later identified as that of Mildred Beasley. She was found in an alley up an embankment behind a hole in a fence. (10RT 1491-1494.) There was a lot of trash in the area. (10RT 1494, 1500.) Homicide detective Sal Labarbera investigated the case. He observed that Beasley had a jacket, t-shirt and bra pulled up to her shoulders. She did not have on lower garments. (10RT 1510.) He saw what he thought were ant bites on the face, suggesting that the body was beginning to decompose. (10RT 1511.) Officer Labarbera ordered a sexual assault kit be taken. (10RT 1511-1512, 1520.) He found a glass pipe used to inhale cocaine at the scene. (10RT 1517.) Stephenie Winter-Sermano, who was at the time a criminalist for the Los Angeles County Coroner's Office, collected a sexual assault kit with the assistance of a second criminalist. (10RT 1527-1528; People's Exhibit No. 101.) She noted ant activity and blood in the area of the vagina. (10RT 1532, 1534.) The cause of Mildred Beasley's death was asphyxia due to strangulation. (12RT 1846; People's Exhibit No. 99.) There was also blunt trauma to the head near the forehead and a laceration in the lower lip that could have been due to a blow. (12RT 1847, 1250; 13RT 1878.) Mary Midoviski was Mildred Beasley's sister. (10RT 1478.) She knew that Ms. Beasley had a problem with cocaine. (10RT 1480.) Robert Williams, Ms. Beasley's brother, was also aware of her drug problem. (10RT 1483, 1485.)

Paula Vance In 1998, Robert McCue, Jr., was a security guard at a building on 630 West Sixth Street in Los Angeles. (15RT 2232.) On February 3, 1998, he discovered a body in a walkway of one of the buildings he guarded and called 911. (15RT 2233, 2235.) The paramedics came and called the police. (15RT 2237.) Officer Mark J. Pompano responded. (11RT 1590-1591.) He was taken to a walkway between some buildings and discovered the body of an African-American female under a blanket. (11RT 1593.) This was Paula Vance. The paramedics Officer

Pampano met at the scene gave him the impression that Ms. Vance died of natural causes. (11RT 1594.) He saw a video surveillance camera above the scene, which he thought might have useful information because it was pointed to the area where the body. (11RT 1595, 1601.) Officer Pampano talked to Mr. McCue, who told him there was a tape in the camera which would have recorded what happened in the area the previous night. (11RT 1602; 15RT 2240.) The officer viewed the videotape and then called the detectives. (11RT 1604; 15RT 2247.) Mr. McCue also found a tape from another camera in the area of a woman walking into the walkway, which he though might show the woman whose body was found. (15RT 2241.)

Jay Moberly and Cliff Sheppard were the homicide detectives on the case. (11RT 1608-1609.) Detective Moberly found Ms. Vance at the scene under a blanket. He observed that her pants and panties were partially pulled down. (11RT 1611.) He saw two surveillance cameras covering the area. (11RT 1616.) The detectives collected the tapes from the previous night as evidence. (11RT 1619; 15RT 2266.) Detective Moberly attended the autopsy and observed bruising underneath Ms. Vance's chin and throat. (11RT 1621.) A sexual assault kit was done. (11RT 1620.) Dan Anderson, a supervising criminalist at the coroner's office, examined the paper-work for the Vance sexual assault kit. (12RT 1717, 1720.) Criminalist Ty Lawson took the samples under his supervision. (12RT 1720-1721; People's Exhibit Nos. 113A, 113B.)

The jury viewed copies of the two videos collected that day. (People's Exhibit Nos. 135A, 135B; 15RT 2270, 2277, 2288.) Several enhanced still photos made from the videos showing a man in a jacket approaching the scene were admitted. (People's Exhibits Nos. 145, 146; 16RT 2306-2307; People's Exhibits Nos. 144, 145.)

Dr. Scheinin did the autopsy in the Vance case. (12RT 1850; People's Exhibit No. 112.) The cause of death was asphyxia due to neck

compression and probable manual strangulation. Ms. Vance was likely strangled by bare hands. (12RT 1851.) The doctor thought there was sexual trauma due to the laceration of the posterior forchette, i.e., the area right behind the opening of the vagina. (12RT 1852.)

At the time Ms. Vance's body was discovered, there was a lot of cocaine use in the area where she was found. (16RT 2308.)

Brenda Bries On April 6, 1998, Los Angeles Police Department Patrol officer Daniel Hudson went to 560 South Gladys Avenue to investigate a death. (11RT 1674.) The area was a skid row area with old motels, transients, narcotics and prostitution. (11RT 1675, 1687.) He found the body of a woman in a Porta-Potty at the scene. This was Brenda Bries. (16RT 1694.) Ms. Bries was slumped over the toilet on her hip with her knees and legs underneath her. Her pants and underwear were down around her knees and her shirt was pulled up. (11RT 1677, 1706.) There was a green fabric cord around her neck. The bra was intertwined with the cord. It was tight and cut into the skin. (11RT 1680.) There were condoms inside of the Porta-Potty. (11RT 1684-1686.) The homicide detective who investigated the case was Albert Marengo. (11RT 1690.) He saw a string from a shoe or a jacket tightly wrapped around Ms. Bries' neck. (11RT 1691.) Marengo saw petechia in the eyes. (11RT 1696.) Marengo had information from other officers that Ms. Bries used narcotics. (11RT 1701.) A sexual assault kit was collected by criminalist Dan Anderson. (12RT 1726-1727; People's Exhibit No. 126.)

The cause of death for Brenda Bries was listed as asphyxia. (12RT 1854; People's Exhibit No. 123.) However, a photo showed that a ligature was used. (*Ibid.*) There were bruises to both sides of the head suggesting a struggle. (12RT 1855-1856; 13RT 1879.) Although the medical examiner who did the autopsy listed acute cocaine intoxication and a seizure disorder

as possibly been contributing to death, Dr. Scheinin did not think that the seizure disorder had anything to do with Ms. Bries' death. (12RT 1856.)[5]

B. Evidence of Appellant's Residency

Officers testified about encounters with appellant during which he revealed addresses that were in the vicinity of the homicides in the case. Los Angeles Police Officer James Vena encountered appellant on July 3, 1984 (12RT 1752) when appellant told him that his address was 612 West Century Boulevard. (12 RT 1753.) On October 15, 1987, Officer Reyes had contact with appellant. Appellant gave his address as 614 West Century Boulevard. (12RT 1757.) He also said that he worked at Domino's Pizza at Century and Van Ness in the Figueroa corridor. (12RT 1758, 1761.) On March 2, 1991, Officer Robert Boyle had contact with appellant, who gave his address as 614 West Century Boulevard. (12 RT 1768-1769.) Officer Ronecia Lark encountered appellant on May 3, 1995, when he gave his address as 226 West 85th Street. (12RT 1771.) On May 3, 1996, Officer Ernest Garcia encountered appellant at 88th and Broadway. Appellant told him he lived at 9529 South Figueroa Street. (12RT 1774-1775.) Detective Rodolfo Rodriguez had contact with appellant on October 22, 1996, and appellant said he lived at 807 East 103rd Street. (12RT 1778-1779.) Peace Officer Walt Schaefer had contact with appellant in 1998. (13RT 1871.) Appellant told him he was living on Sixth Street in Los Angeles. (13RT 1873.)

A map of the area showing where appellant resided during the periods of the homicides was admitted. (People's Exhibit No. 132; 16RT

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[5]Many of the victims had cocaine in their system. Diane Johnson had .7 mg. Annette Earnest had .08 mg. Anita Fishman had .81 mg. Regina Washington had the smallest amount. The largest amount was Tripplett – 1.60 mg. Paula Vance had none. Brenda Bries had .64 mg. (13RT 1882.) Baby Girl Washington had a cocaine level of 0.09 mg/ml. (13RT 1890.)

3212.) A second map showed that appellant's 1998 residence was near Gladys Street. (People's Exhibit No. 132A.)

C. Assault of Maria Elizabeth Martinez

Maria Elizabeth Martinez testified about an incident when she was sexually assaulted by appellant. In 2002, Ms. Martinez was homeless. She sometimes went to eat at the Midnight Mission on Boyd Street. (15RT 2160-2161.) There was a women's shelter near the mission. (15RT 2161.) She was married at the time to Emilio Castellanos. (15RT 2161.) She was a prostitute. (15RT 2162.) She had been convicted both of prostitution and possession of cocaine for sale. (15RT 2163.) She met appellant at the mission. (*Ibid.*)

On March 16, 2002, she was on her way to get something to eat at 88 Burgers and saw appellant across the street. He saw her and asked for her lighter. She crossed the street to give it to him. (15RT 2166-2168.) He used the lighter to light a pipe of cocaine. He grabbed her arm when she tried to get the lighter back. (15RT 2170.) He then choked her with the other hand. (15RT 2171.) She could hardly breathe and could not scream. He dragged her to behind a dumpster, told her to take her clothing off and then took it off for her. (15RT 2172, 2174.) He squeezed her neck and she tried to get his hand off her. (15RT 2174.) He pushed her down and she landed on her knees. (15RT 2176.) When he pushed her down, she was on her stomach. One of his hands was on her back; the other hand covered her mouth and he turned her face to the wall. He entered her anally with his penis. (15RT 2177.) A man and a woman approached and asked what was happening. Appellant said that everything was cool and the two went away. (15RT 2178-2179.) Appellant continued to rape her. (15RT 2179.) They were together for what seemed like two hours. (15RT 2180.) He twice told her that if she told the police he would kill her. (15RT 2181.)

She went to 88 Burgers, but because he followed her there she went inside the police station at nearby Sixth and Main. (15RT 2182.) She told the officers what happened, but was told to sit and felt ignored and so left. (15RT 2183.) She went to the mission on Boyd Street where she saw her husband, but did not tell him what had happened. (*Ibid.*) The next day, she went to the women's center near the mission and told some women there what had happened. Before that she took a shower and threw her clothing away because she felt disgusting. (15RT 2185, 2222.) She then went to the police station and told them what had happened. The police went with her back to the mission, where she had previously seen appellant. (15RT 2186.) The police got appellant and she went to the hospital. (15RT 2187.)

Carrie Gatlin testified that in March 2002, she worked at Midnight Mission. (14RT 2115.) She saw Ms. Martinez there. (14RT 2116.) She told Gatlin that she had been raped by one of the men in the program. Martinez went into details about the rape. She said that she was raped and then pinned up against a wall and held by her neck. Martinez said that she had not been using drugs with the man and showed Ms. Gatlin bruises on her knee and chest. Ms. Martinez identified her assailant as having a distinctive scar, which matched the scar Gatlin knew appellant to have. (14RT 2121-2122.) Martinez also told Gatlin that she started to go to the station, but got scared because the person who had raped her was outside. (14RT 2119.) Someone at the mission called the watch commander and Gatlin called the hospital. (14RT 2120.) In court, Ms. Gatlin identified appellant as the man she thought matched the description Martinez gave. (14RT 2122.) At the time of the incident appellant lived at the Midnight Mission. (*Ibid.*)

A minute order in *People v. Turner*, Case BA229165, showing appellant's no contest plea to violating Penal Code section 261(A)(2) (rape by force or fear) and section 289(A)(1) (unlawful sexual penetration) was

admitted into evidence. (15RT 2226-2227; People's Exhibit No. 114.) The parties stipulated that Ann Allison would testify that she did a sexual assault kit for Ms. Martinez and found bruises on the back but not the front of the neck and that she had a scratch on her right buttocks. (15RT 2227.)

D. DNA Evidence

Detective Dennis Meuller testified that on July 2, 2002, he took a cheek swab from appellant pursuant to court order. (13RT 1902.) The detective took the swab in connection with a sexual assault he was investigating. The victim in that case was Maria Martinez. (13RT 1908.)

Gary Sims from the Department of Justice DNA laboratory in Richmond, California explained the basics of DNA testing. (13RT 1917.) DNA is in the chromosomes of cells and can be obtained from substances found at crime scenes, for example, blood, sperm and epithelial or skin cells. (13RT 1923-1924.) Some parts of DNA molecules vary a lot between people and that is the part a scientist tests in forensic cases. (13RT 1924-1925.) A locus is the cite of variation on the DNA molecule. Alleles are alternative forms of the molecule at a particular locus. (13RT 1926.) "STR" stands for short tandem repeats, which are repeats of a small number of alleles. (*Ibid.*) Using STR's, one can determine a type for the person, which can powerfully distinguish one person's DNA from another's. (13RT 1927.) Looking at a lot of different loci lowers the probability of identity. (*Ibid.*) The COfiler process and the Profiler Plus are standard kits used by the FBI in testing DNA. (13RT 1929-1930.) They look at fourteen loci and are very powerful. (13RT 1929.) The chances of a random match is extremely small in such cases. (13RT 1931.)

When processing evidence, scientists take a sample, and then increase or amplify the amount of the target loci available for testing using PCR (Polymerase Chain Reaction). (13RT 1932.) They run the amplified sample through a genetic analyzer and generate a DNA profile using the

various loci. One of the loci is amelogenin which can determine the gender of the person who donated the DNA sample. (13RT 1925.) Scientists then compare the profile of the crime scene sample to other profiles, including the profile obtained from the suspect person. (13RT 1932, 1935, 1926.) If the profiles do not match, there is an exclusion. (13RT 1935.)

If there is a match at all the tested loci, then the question is what is the rarity of the profile. (13RT 1938.) Scientists determine the rarity of a DNA profile by looking at a population database which has information about how often a profile occurs in the population. (*Ibid.*) The profile databases are by racial group. The scientists get this information for each loci and then by multiplying across all the tested loci, arrive at an overall frequency for the profile. (13RT 1939-1940.) The overall frequency is the probability that a randomly chosen person would match the evidence profile. This is called the RMP – random match probability. (13RT 1940.)

Sometimes a sample contains a mixture of samples from people with different DNA profiles. (13RT 1941.) For example, a vaginal swab collected from a sexual assault could have female DNA from the epithelial cells from the vaginal walls (the epithelial fraction) and male DNA in the sperm (the sperm fraction). There is a chemical way of separating the two, although sometimes the separation is not complete. (*Ibid.*) If the separation is not complete, there is carryover. (*Ibid.*) When there is separation, one can chemically remove the female DNA and look only at the male DNA profile. (13RT 1942.)

DNA type does not change with the age of the sample, although sometimes information is lost when the sample is degraded. Sometimes the peaks in the report are not as high and sometimes they do not appear. (13RT 1943-1944.) It is possible for someone to have sex with a victim and two and a half weeks later still get sperm DNA (a "sperm faction"), so that

it is difficult to assess how long before the sample was taken that the person who left the sperm had sex with the victim. (13RT 1950.)

Carl Matthies, a criminalist from the Los Angeles County Sheriff's Department, testified about his testing. He used the AMEFSTR Profiler class and the COfiler amplification kit and he analyzed thirteen loci plus the amelogenin marker to determine gender. (13RT 1961.) He detected a DNA profile for appellant using a reference sample. (13RT 1965.)

Mr. Matthies tested samples from the sexual assault kits taken from Martinez, Beasley, Vance, Price, Tripplett, Jones, Fishman, Johnson, Earnest and Bries. In each case except that of Jones, with the exception of a few alleles consistent with carryover from the epithelial fraction, the DNA profile for the sperm fraction from the tested swab matched the DNA profile for appellant. (13RT 1967-1968, 1970, 1974, 1978, 1980, 1983, 1991, 1995, 1998-1999, 2004.) In the Jones case, there was evidence of DNA in the sperm fraction from a third party that was not appellant or carryover from the victim. (13RT 1983.) However, the profile of the major donor was consistent with appellant. (13RT 1984.) There was a match or near match between the victim's DNA profile and the profile for the epithelial cells in the samples. In some cases, there were loci that did not match due to artifacts (13RT 1972) or to carryover from the male portion of the DNA. (13RT 1975, 1978, 1981, 1983, 1986, 1991, 1998-1999.) In each case, the random match probability between appellant's profile and the profile of the sperm fraction of the crime scene samples was one in one quintillion. (13RT 1968, 1973, 1981, 1986, 1990, 1994, 1996, 1999, 2004.) There were a few unknowns in the cases Matthies tested. However, the same unknown did not repeat from victim to victim. (13RT 2008.)

Mr. Matthies tested one tube from each kit. He did not know if other people's DNA was or was not in the other kit samples. (13RT 2010.) He did not know where the kits were stored before he recovered them from the

freezer for testing. (13RT 2011.) Degradation is important to consider. However, it would not effect the loci results. Testing would always yield the result, irrespective of degradation. (13RT 2013.) He was not present when the samples he tested were collected. (13RT 2015.) He could not tell from his test when DNA was deposited. (*Ibid.*) DNA can stay in the vagina of a live female between five and seven days, longer for a dead person. (13RT 2016.)

Jody Hrabal, a DNA analyst from Orchid Cellmark ("Cellmark") (14RT 2033) testified. Her office used the Profile Plus and COfiler systems to test the DNA in the case, looking at 13 locations and using the amelogenin marker to determine gender. (14RT 2036.)

In the Johnson case, Cellmark's profile was consistent with Mr. Matthies', but the lab had tested another marker, so the profile was more complete. (14RT 2040.) The sperm cell fraction of the vaginal sample had a dominate profile consistent with appellant. There was also a marker from a second minor contributor that was not a carry over. (14RT 2041-2042.) The major donor to anal sperm cell fraction matched appellant, although there was also a minor component. (14RT 2043-2044.) In the nipple samples, Cellmark detected a mixed profile which could not exclude Johnson. (14RT 2045.) As to the right nipple swab, there was an inconclusive result that could have been a third party. (14RT 2089.)

For the sperm cell fraction from the anal sample in the Ernest case, the major profile matched appellant and the minor matched Ernest. (14RT 2046.) The profile in the sperm fraction of the external genital swab matched appellant. There was an "additional typing" that could not be attributed to anyone, which meant the presence of the DNA of an unknown. (14RT 2047.) It was difficult to say if the person was a male. (14RT 2090.) The profile of the epithelial fraction of the external genital swab matched appellant, mixed with a profile matching Ernest. (*Ibid.*) The

profile of the dominate epithelial fraction of the left nipple swab matched appellant; that of an unknown person was also present. (14RT 2049.)

Cellmark got the same profile as Matthies for all intents and purposes in the Fishman case. (14RT 2049.) The profile of the sperm cell fraction of the vaginal swab matched appellant. (14RT 2050.) The profile for the epithelial cell fraction of the vaginal swab was a mixture, consistent with appellant and Fishman. (*Ibid.*) With the oral swab sperm cell fraction, there was a mixture withe an unknown male, with appellant excluded; Fishman could not be excluded from the mixture. (14RT 2050-2051, 2091.)

Cellmark's profile for Washington was the same as Matthies'. (14RT 2051.) The profile for the sperm fraction of the vaginal swab matched appellant with minor alleles consistent with Washington. (14RT 2052.) The profile for the sperm fraction of the external genital swab was a mixture consistent with appellant and an unknown person. (*Ibid.*) Ms. Hrabal could not tell if the third person was male or female and could not tell when the person donated DNA. (14RT 2092-2093.) The profile of the external genital epithelial fraction was a mixture of three people, including Washington, an unknown male and appellant. (*Ibid.*) At places there was "drop out" and no conclusion could be drawn. (14RT 2054.) The profile of the right nipple swab was partial, but matched Washington. (14RT 2056.)

The DNA profile Matthies typed for Tripplett matched Cellmark's. (14RT 2056.) The predominate profile from the sperm fraction of the vaginal DNA matched appellant. (*Ibid.*) There was some evidence another type of DNA present in the sample, but not there was not enough to make any conclusions. (14RT 2057.) Cellmark found an extra allele at one locus, but could not confirm that this was a true allele. (14RT 2107.) It was not possible to say whom that allele came from. It could have come from anyone consistent with the result. (14RT 2113.) The profile of the epithelial fraction of the vaginal sample matched Tripplett. (*Ibid.*) The

profile of the sperm and epithelial fractions of the anal sample matched Tripplett. (*Ibid.*) The profile for the red stains found at the scene was the same and was an unknown male, with appellant excluded. (14RT 2058-2059, 2093-2094.)

Cellmark testing yielded the same profile for Jones as Matthies obtain. (14RT 2059.) The epithelial fraction of the anal swab contained a profile consistent with Jones, with a minor contributor consistent with appellant. (14RT 2060.) The sperm fraction of the external genital swab was a mixture of two people, one was an unknown female or male. The other major profile "was identified as originating from Turner." (*Ibid.*) With the epithelial fraction of the external genital sample there was mixture, including an unknown male, and contributors consistent with appellant and Jones. (14RT 2061-2062.) There was no way of knowing the order the samples in the mixture were deposited. (14RT 2095-2096.) With the sperm cell fraction of the oral swab, the predominate profile matched appellant; the profile of the epithelial fraction matched Jones and one unknown male, with appellant excluded. (14RT 2063.) The epithelial fraction of the left nipple swab was a mixture, including one unknown male. Appellant's profile could not be excluded. (*Ibid.*) A swab from a condom found at the scene was tested. The predominate profile of the sperm fraction of the sample was that of an unknown male, with appellant excluded. (*Ibid.*) The epithelial fraction was consistent with an unknown female and an unknown male. (14RT 2064.)

Cellmark got the same profile as Mr. Matthies for Price. (14RT 2065.) The profile for the sperm fraction of the vaginal sample matched appellant. (14RT 2066.) There were other alleles in that sample, but not enough to make a conclusion. (14RT 2067.) The sperm fraction of the anal sample yielded a partial profile consistent with appellant. Because the lab got results for less than 13 loci, this was considered only a partial profile.

(*Ibid.*) There was not enough to make a positive identification, but there was no evidence of another person's DNA in the sample. (14RT 2097-2098.) The profile of the sperm and epithelial fractions of the external genital swab matched appellant. (14RT 2068.) The lab could not make a conclusion about the possible donors for either the epithelial or the sperm fraction of the oral swab. (14RT 2068-2069.) With the right nipple swab, there was a mixture of individuals. The major profile was appellant and Price could not be excluded. There was a third unknown. (14RT 2069.) There was no way of knowing the order in which the samples were deposited. (14RT 2098.) The left nipple swab was a mixture of two people and the major profiled matched appellant. (14RT 2069.)

The DNA profile Cellmark got for Beasley matched that of Matthies. (14RT 2070.) The profile for the sperm fraction of the vaginal swab matched appellant with carryover alleles consistent with Beasley. (*Ibid.*) The profile of the sperm fraction of the anal sample matched appellant. The epithelial fraction of the anal sample contained a mixture, with Beasley and appellant both potential contributors. (*Ibid.*) The profile only matched at nine rather than13 loci, so Cellmark did not identify him as a donor. (14RT 2100.) The predominant profile of the sperm fraction of the external genital swab matched appellant. There was a minor type present, but the lab was unable to determine who could have contributed it. (*Ibid.*) The epithelial fraction of the external genital swab was a mixture, with the major profile matching appellant and the minor matching Beasley. (*Ibid.*) With the right nipple swab, the major profile matched appellant with minor alleles consistent with Beasley. (14RT 2072.) The lab was unable to make a conclusion with regard to the left nipple. (14RT 2073.)

With Vance, the lab got the same profile as Matthies. (14RT 2073.) The profile for the vaginal sample sperm fraction matched appellant. (*Ibid.*) The profile for the epithelial fraction of the vaginal sample was a mixture,

consistent with Vance and carryover consistent with appellant. (*Ibid.*) There were no results for the sperm and epithelial fractions of the anal sample because there was not enough DNA. (14RT 2074.) The sperm fraction of the external genital swab matched appellant and the epithelial fraction of the external genital swab was a mixture including Vance and appellant. (*Ibid.*) The profile in the right nipple swab matched appellant. There was not enough sample left nipple sample to get results. (14RT 2075.)

Cellmark's profile for Bries matched Matthies'. (14RT 2075.) The profile of the sperm fraction of the vaginal swab matched appellant. (*Ibid.*) The profile of the epithelial fraction of the vaginal sample was a mixture, with the profiles matching Bries and appellant. (14RT 2076.) The profile of the sperm fraction of the anal sample matched appellant. (*Ibid.*) There was not enough DNA in the epithelial fraction of the anal sample to test. (*Ibid.*) The profile of the sperm fraction of the external genital swab matched appellant. (14RT 2077.) The epithelial fraction of the external genital swab was a mixture; the major profile matched appellant; a minor contributor was consistent with Bries. (*Ibid.*) The sperm fraction of the oral swab was a mixture, consistent with Bries and an unknown male, with appellant being excluded. (*Ibid.*) This unknown person was not appellant. (14RT 2102.) The right nipple swab contained the profile of an unknown male, also not appellant. (14RT 2078, 2102.) The unknown profile in the oral sample was a different male profile than the profile in the right nipple sample. (*Ibid.*) The left nipple had a mixture, with an unknown male profile consistent with the profile in the right nipple sample. (*Ibid.*)

The only profile found in the sperm fractions in the case was consistent with appellant. (14RT 2079.) There was no unknown male profile that repeated from victim to victim. (14RT 2080.) Ms. Hrabal calculated the random match probability as one in 6.725 quintillion. (14RT

2082.) Ms. Hrabal was not given any clothing to test. (14RT 2101.) She could not tell when DNA was deposited, just as one cannot tell when fingerprints are left. (14RT 2104.)

E. Defense Evidence

The parties stipulated that the defense asked for any evidence of DNA results from material found on the victims' clothing and that the prosecution did not do any DNA tests on clothing. (16RT 2400.)

Marc Scott Taylor, a criminalist with Technical Associates, testified about the DNA testing he did. Mr. Taylor used a technique that could separate out male DNA when there is a mixture of DNA that is primarily female. Usually, if there is a lot of female DNA in a sample, the male DNA is not detectable. (16RT 2324.) However, with the Y-STRS system, which looks at short tandem repeats on the Y-chromosome, an analyst can target the DNA on the Y chromosome, i.e., the DNA that is unique to a male, so that the results pertain only to male DNA in the sample. (*Ibid.*) Mr. Taylor did the Y chromosome test on samples in the case. (16RT 2326.)

He looked at samples from nine victims, but not Anita Fishman. (16RT 2363, 2384.) In each victim, he found DNA that could have originated from appellant. (16RT 2384.) In some of the samples, he found profiles for unknown males. He could not determine that any one unknown male profile repeated from victim to victim. (16RT 2385.) Because he only had partial information for other male profiles, it was difficult to do a comparison. (*Ibid.*) There could be masking. (16RT 2399.)

Mr. Taylor tested the anal swab from Beasley. (16RT 2327.) He could not exclude appellant as the source of the sample, and did not see any indication that there was another profile in the mixture. (16RT 2328.) For the sperm fraction of the anal swab he found no activity. (16RT 2378.) In the epithelial fraction, he found activity consistent with appellant and no one else. (16RT 2378-2379.) In some of the other samples from Beasley,

there were a few alleles detected, but not enough that he could make any conclusions. (16RT 2329.) On the left nipple sperm fraction, he found a profile consistent with appellant and an unknown male using the Y-STRS technique. On the epithelial fraction of the right nipple he found no activity. (16RT 2331.) The right nipple swab sperm fraction had the result of appellant and an unknown male. (16RT 2332.)

Mr. Taylor tested samples from Bries. He did an epithelial and a sperm fraction test of the external genital swab. With the epithelial cell fraction, appellant could be the source of the sample and there were no indications that there were other contributors. (16RT 2332, 2382.) With the sperm fraction of the oral swab, his lab found two male donors, neither of which was consistent with appellant. (16RT 2333, 2382.) One of these was at a trace level, meaning that there was less DNA available for testing. (16RT 2333.) The nipple swab showed a mixture of DNA – a primary and a trace. Neither were consistent with appellant. (16RT 2334.) There was low activity in the sperm fraction of the Bries' right nipple swab, but there was trace DNA from an unknown male. (16RT 2383.) With the epithelial fraction of the right nipple, there was also a mixed profile with an unknown male as the primary source and an unknown male as a trace. One of the unknowns could have been carryover. (*Ibid.*) With sperm and epithelial fractions of the left nipple swab, there was a limited profile of an unknown male plus trace evidence. (16RT 2383-2384.)

With the epithelial fraction in the Earnest case, appellant could not be eliminated as a source. With the sperm fraction, there was a mixture. The primary donor could have been appellant, but there was also an unknown male. (16RT 2336.) There was more appellant DNA than unknown. (16RT 2362.) Vaginal sample epithelial and sperm fractions from Earnest were tested. The epithelial fraction was inconclusive. The sperm fraction was a mixture. Appellant could have been the primary

donor, but there were two other unknown males (*Ibid.*) An epithelial and sperm fraction from the anal swab was tested. They found no male DNA in the epithelial fraction. With the sperm fraction from a nipple sample the result was only DNA consistent with appellant. (16RT 2337, 2361-2362.)

Mr. Taylor tested samples from Johnson. (16RT 2337.) He did an epithelial and sperm fraction for the right nipple swab. In the epithelial fraction, there was a mixture of two unknown males; with the sperm fraction there was a profile consistent with appellant as the primary, with at least one secondary donor at a trace level. He had some doubt about whether that indicated another male – it could be real; it might not be. (16RT 2360.) There was a similar result on the left nipple. The left nipple sperm fraction was consistent with appellant. (16RT 2338.) The trace on the left nipple might be real or it might not be. (16RT 2361.) Appellant could not be eliminated from the sperm fraction of the vaginal DNA. (*Ibid.*) He found no indications of DNA from another. (16RT 2359.)

Mr. Taylor tested samples from Vance. (16RT 2346.) With the external genital sperm and epithelial fractions, both could have come from appellant alone. (16RT 2346, 2380.) With the right nipple swab, there was DNA consistent with appellant and a male unknown in the epithelial fraction. (16RT 2346.) There was a remote possibility that the unknown was an artifact. (16RT 2381.) With the sperm fraction of the right nipple there was only DNA consistent with appellant. (16RT 2346, 2380.) With the left nipple swab epithelial fraction, there was a weak unknown male reaction. (*Ibid.*)

Mr. Taylor did tests on the Washington samples. (16RT 2347.) The external genital swab sperm and epithelial fraction showed results for appellant as the major donor, plus an unknown. (16RT 2368.) The sperm and epithelial fractions for the left nipple sample showed no activity, suggesting that there was no male DNA in the sample. (16RT 2369.) The

right nipple sperm fraction showed no DNA in the epithelial fraction and activity from an unknown male in the sperm fraction. (*Ibid.*)

In the external genital swab for Price, there was a profile that could be appellant for both the epithelial and the sperm fractions. (16RT 2348, 2376.) With the anal sperm fraction, the DNA consistent with appellant. (16RT 2349.) There were also some additional trace alleles, which might or might not be real. (16RT 2349, 2376.) With the sperm fraction from the right nipple, there was only DNA consistent with appellant. (16RT 2377.) With the right nipple swab in the non-sperm fraction there was a mixture of DNA; the primary donor could have been appellant, the secondary was unknown. (16RT 2349.) There was more DNA consistent with appellant than DNA from the unknown. (16RT 2377.) With the left nipple swab epithelial fraction, there was no detectable DNA. (16RT 2378.) With the left sperm fraction there was a mixed profile consistent with appellant as the major donor together with and an unknown male. (16RT 2377.)

Mr. Taylor tested samples from Tripplett. (16RT 2349.) The anal epithelial fraction showed no male DNA. (16RT 2350, 2370.) The anal sperm fraction gave a mixed profile; the major donor could have been appellant; the minor was unknown male. (*Ibid*; 16RT 2370.) He obtained two unknowns for a red stain connected to the Tripplett scene. (16RT 2371-2372.)

Samples from Jones were tested. With the right nipple swab, the epithelial fraction showed no detectable male DNA; the sperm fraction showed a major profile from an unknown person and a secondary that could have been appellant. There was also a profile from a third male. (16RT 2350, 2374.) In the left nipple epithelial fraction, there was a partial profile and the lab could not conclude what the source was. With the sperm fraction, there was a profile consistent with appellant and two unknown males. (16RT 2350.) The epithelial fraction on the anal sample could have

come from appellant, but there were trace alleles that could have been from another. (16RT 2351.) With the trace amount, the test was at the lower level of detectability and the trace could have been a stutter. (16RT 2373.) With the sperm fraction there, was DNA that could have been appellant, but also some third person. (16RT 2351.) However, the trace could also have been a stutter artifact. (16RT 2373.)

Mr. Taylor opined that DNA could be completely removed between 24 and 48 hours. (16RT 2340.) With a dead female, the DNA is not washed out by more vaginal fluid so the DNA will not dilute as quickly. There are examples of sperm found in females as long as two weeks after death. (*Ibid.*) It was therefore possible that the detected DNA could have been deposited two to four days before death. (16RT 2341.) The fact that a profile was at a greater level, does not mean that the person with that profile was the one to last contribute DNA. (16RT 2396.)

F. Penalty Phase Aggravation

Assault of Carla Whitfield Ms. Whitfield testified that on the evening of October 22, 1996, she was walking near Spring Avenue and Second in Los Angeles when appellant grabbed her. He grabbed her arm with one hand and her private area through her pants with the other. (18RT 2608.) He tried to drag her into an alley, but she screamed and as a patrol car passed appellant ran away. (18RT 2609-2610.)

Murder of Elandra Bunn On June 5, 1987, Alvin McThomas discovered a body, later identified to be that of Elandra Bunn. (18RT 2629.) Los Angles Police Department Officer Scott D. Lemons responded to an alley behind Figueroa Street near 87th Avenue. (18RT 2635.) Los Angles Police Department Homicide Detective Joe Callian investigated. (18RT 2644.) He found Ms. Bunn behind a hotel. (18RT 2649.) Her pants were pulled down around her ankles. She had extensive facial trauma and her left eye was swollen shut. (18RT 2647, 2650.) He

found a tissue at the scene about three to five feet from her knee, which he had booked into evidence. (18RT 2656.) Blood on nearby vegetation was also booked. (*Ibid.*) A criminalist at the scene took a sexual assault kit, but that kit was destroyed in April, 1996. (18RT 2657-2658.)

Criminalist Heidi Robbins responded to the scene. (18RT 2671.) She observed blood smears on Ms. Bunn's calf and angle and medium velocity blood splatter on her shirt. (18RT 2673.) The blood splatter on the shirt was consisted with it having been deposited as the result of blunt force trauma. (18RT 2675.) She saw petechia hemorrhaging in the eyes and bruising and scratching on the neck. (*Ibid.*) She thought the prints around the scene showed that there had been a fight. The lower lip was split. (18RT 2676.) She took a sexual assault kit and noted that the anal swab was bloody and that there was bleeding from the rectum. (18RT 2678.)

Carl Matthies testified that he analyzed the tissue and vegetation found at the scene. (18RT 2684.) Both items tested positive on a presumptive test for blood. (*Ibid.*) He typed the blood found on the vegetation and determined that it came from a female. (18RT 2686.) He compared the profile of a DNA sample taken from the tissue with appellant's profile and determined that they were a match. (*Ibid.*) The random match probability was one in one quintillion. (18RT 2687.) Mr. Matthies could not say when the blood was deposited on the tissue and could not say how long the tissue had been at the scene. (18RT 2688.)

Dr. Scheinin examined the autopsy report for Ms. Bunn. (18RT 2693.) The cause of death was strangulation, likely manual strangulation because there were no marks on the neck. (18RT 2694.) There were many facial injuries, bruising to the left eye, abrasions on the cheek, bruising of the right upper eyelid, abrasions on the nose, underneath the lower lip and to the chin and a laceration on the lip. (18RT 2694-2695.) The injuries to the eyes were consistent with a blow on the face. (18RT 2697.) The

abrasions were consistent with the face being pushed into or dragged across a rough surface. (*Ibid.*) There were defensive crescent shaped abrasions on the left side of the neck. (18RT 2701.) Ms. Bunn was in an early stage of pregnancy at the time of her death. (18RT 2707.) The toxicology report was positive for cocaine. (*Ibid.*)

Sheree Jackson identified Ms. Bunn as her sister. (18RT 2619.) She testified that Ms. Bunn had a cocaine problem. (18RT 2621.)

Incident Resisting Law Enforcement In 1997, Christian Hanson was a watch officer for the Los Angles Police Department. On March 9, 1997, he responded with a partner, Officer Wilson, to a hotel in the area of Third and 88th Street where appellant was staying. (18RT 2720.) Appellant opened the door of the hotel room, and Officer Hanson told him to turn around and put his hands over his head. (18RT 2723.) Appellant would not put his hands completely behind his head. (18RT 2723.) Officers Hanson and Wilson put their hands on appellant's wrists to handcuff him; he resisted and the three struggled. (18RT 2724.) Appellant dragged the two men down the hall of the motel; he fell and took the officers with him. (18RT 2725.) He kicked Officer Hanson in the chest and legs. (*Ibid.*) Eventually,Hanson stood up and appellant grabbed at Hanson's holster. Hanson hit appellant with his baton, after which appellant ran away, jumped a cinder block wall and disappeared. (18RT 2726-2727.)

Officer Hanson called for help, and officers including a K9 unit responded. (18RT 2727.) Hanson was part of the search team and was armed with a beanbag gun. (18RT 2728.) One of the dogs, Condor, alerted on a nearby woodpile, indicating that appellant might be present. (18RT 2728.) Appellant stood up and threw a fiberglass sink at the dog. (18RT 2729.) He then ran at the officers and Officer Hanson shot him with a bean

bag shotgun round. (18RT 2730.) Appellant kicked at Hanson and Hanson used his flashlight on appellant's knee to get him to stop kicking. (*Ibid.*)

Incident at the Los Angeles County Jail Michael McMorrow testified that he was a Los Angeles County Deputy Sheriff working at the men's Twin Towers Correctional Facility. (19RT 2765.) On May 19, 2006, he was working in Module 132, which was a K-10 unit for high profile or hostile inmates. (19RT 2766.) Officer Natalie Jenkinson Uyetatsu, the only female in the unit, was also on the floor during this period. (19RT 2768, 2772.) Officer McMorrow noted that although appellant was a good inmate for him, he was different with Officer Uyetatsu. With her, he was intimidating. Appellant put his hands against the door of the cell and stared at her as long as she was in eye-shot. (19RT 2770-2771, 2779.) Antonio M., another inmate in the module, slipped a note to Officer McMorrow who then arranged to talk with him. (19RT 2773, 2775.) McMorrow learned what was in the note and there was an investigation after which Officer Uyetatsu was moved from the module to keep her away from appellant. (19RT 2777.) The officer had heard that appellant had filed complaints against Officer Uyetatsu. (19RT 2778.)

Jail inmate Antonio M. testified that he had been convicted of many crimes including making terrorist threats, petty theft with a prior and burglary. (19RT 2795.) He was housed as a K-10 in the same module as appellant. (19RT 2796.) He gave Officer McMorrow a note about a conversation he had with appellant. (19RT 2797.) Appellant told him that when he was found guilty he would kill Officer Uyetatsu because she had put him on lockdown. (19RT 2798-2799.) He was angry he could not take a shower or use the phones because of the lockdown. (19RT 2799.) Antonio M. thought appellant was serious because he was very upset about losing privileges and thought the officer was "doing him dirty." (19RT 2800-2801.) Antonio M. believed that appellant was the kind of guy who

would do this because he hated women, which Antonio M. thought because appellant did not want to watch women on television. (19RT 2803.)

Officer Uyetatsu testified that she worked in Module 132 and had contact with appellant. (19RT 2830-2831.) She wrote him up several times for rules violations. One time was for "delayed meals," when appellant did not come to the door of his cell for his meal, as the rules required. (19RT 2831-2832.) Appellant got lockdown for this. He lost his program for the following day, which was an hour to come out of his cell, to shower, watch TV and shave. Appellant wrote up a complaint against her, in which he included a statement that she did not feed him. Appellant was disgusted with her, which she thought was because she was female. Appellant stood at the cell door with his arms upraised showing his arm pits when she was there. (19RT 2834.) He glared at her. She was later told that appellant had threatened to kill her. (19RT 2835-2836.)

Victim Impact Many family members of the victims testified. Sheryl King was Anita Fishman's older sister. (19RT 2851.) Ms. Fishman was a normal child in New York, but her life went on detour when she got involved with drugs. (19RT 2852.) The day Ms. King got a call from her mother about her the murder was the worst of her life. (19RT 2854.) It was especially hard on her mother. (*Ibid.*) Ms. Fishman had five children. (19RT 2855.) Phyllis Fishman was Anita Fishman's mother (19RT 2857.) Ms. Fishman was sweet. She loved to sing and wanted to go to law school and was a good student until she got involved with drugs. They struggled with her to get her off them. (19RT 2859.) She still missed her daughter. (19RT 2860.)

Dorothy Patterson was Regina Washington's daughter. (19RT 2862.) They had a close relationship and did lots of things together. (19RT 2863-2864.) It hurt her that her mother was not there and it hurt her to explain to her three children what happened to Ms. Washington. (19RT

2865.) Patterson had a hard time coping with the loss. (19RT 2866.) There was a lot of pressure waiting to see if someone would be held responsible for her murder. (19RT 2867.)

Tiviea Wade-Moore was Desarae Jones' niece and was the one to identify Ms. Jones body. (19RT 2869-2870.) They had a close relationship because they were close in age. (19RT 2870.) Jones had a drug problem, but told Ms. Wade-Moore to avoid them. (19RT 2871.) Wade-Moore was in law school and it had been her goal to bring justice to the person who murdered her aunt. (*Ibid.*) It affected her being the first one to know about Ms. Jones death. (19RT 2872.) The family will be affected until justice is served. (19RT 2873.) Patricia Jones was Desarae Jones' mother. She was a sweet girl. (19RT 2876.) She helped out at a board and care home they owned. (19RT 2877.) They thought Ms. Jones might beat drugs. (19RT 2878.) Patricia Jones had never gotten over seeing the picture the police had of her daughter and looks at a picture of her everyday. (19RT 2879.)

Tacora Leggett was Natalie Price's daughter. (19RT 2881.) Ms. Price had five children. (19RT 2882.) Without Price, Ms. Leggett and her brothers were raised by a grandmother. (*Ibid.*) Her grandmother was sick, but they had help from the family. (19RT 2883.) Ms. Leggett's son would never know his grandmother. Her grandmother was particularly affected because she and Ms. Price were best friends. (19RT 2884.) Ms. Leggett's aunt identified the body, but does not like to talk about it. (19RT 2885.)

Shantell Jackson was Mildred Beasley's niece. (19RT 2888.) Ms. Beasley raised her. Ms. Beasley was not judgmental, you could talk with her and she was a lot of fun. (19RT 2889.) Ms. Jackson only learned later that she was on drugs because Ms. Beasley worked and was a mother to four boys. Ms. Jackson was more like Beasley's only daughter. (19RT 2890.) She found out about what happened to Ms. Beasley through an aunt. The whole family was devastated and it was very hard not to know what

had happened. (19RT 2891.) Ms. Jackson would not wish this on anyone and the pain of her death is still with her. (19RT 2892.) Ms. Beasley was happy and loving. She was an angel who did not get to stay very long. (*Ibid.*) Bobbie Williams was Ms. Beasley's younger sister. Ms. Beasley was a sweetheart. She was a best friend and a mother to everyone in the neighborhood. Beasley had sons who could not bear to be in court. (19RT 2896.) They have had problems and have all been incarcerated. (19RT 2897.) Ms. Williams lost it when she heard that Ms. Beasley had been murdered because she had lost a best friend. The fact that she had been sexually assaulted was particularly hard. (19RT 2899.) She thanked God that a name had been found for the killer. (19RT 2900.)

Mildred White was Annette Ernest's mother. (19RT 2902.) Ms. Earnest grew up in Los Angeles and was a happy girl who liked to have fun. (19RT 2903.) She had two children, Lannette and Lonnie, whom Ms. White raised when her daughter died. (19RT 2904.) She met Jerri Johnson, the mother of Andrea Tripplett, through bowling. (19RT 2906.) Ms. Johnson helped her cope with the loss. (19RT 2907.) She knew that Ms. Earnest had a drug problem. It hurt a lot that her daughter had been sexually assaulted. (19RT 2908.) It was devastating to bury her own child. (19RT 2909.)

Jerri Johnson was the mother of Andrea Tripplett. (19RT 2910.) Her daughter was a cheerleader and on the basketball team in high school. (19RT 2911.) Her children are Keandra and Daniel. When Tripplett was murdered, Ms. Johnson became a mother again. The two children were scarred and could not understand why Ms. Tripplett did not come home. (19RT 2912.) Ms. Johnson learned from her mother that Ms. Tripplett was dead. (19RT 2913.) She was still impacted by having buried her own child. (19RT 2914.) She became friends with Mildred White who consoled her. (19RT 2915-2916.) They have talked about how they both had

daughters and they both became mothers again. (19RT 2917.) It was agonizing to find out who killed her daughter. (19RT 2918.)

Prior Convictions Documentary evidence was introduced of appellant's felony convictions. There was a 1997 felony conviction for resisting arrest and 2002 convictions for rape by force or fear and unlawful sexual penetration. (People's Exhibit No. 168.)

G. Penalty Phase Mitigation

Appellant's mother, Audrey Turner, testified. (20RT 2928.) Appellant was born in 1966 in Warren, Arkansas, when she was married to Chester Lee Turner. (*Ibid.*) Ms. Turner and her husband separated and she lived on her own with young Chester without assistance from his father. (20RT 2929-2930.) In 1970, when appellant was four, she moved to California. (20RT 2930.) She worked full time while a friend, Mandy Mae, took care of her son. (20RT 2932-2933.) Appellant did not do well in elementary school and got into trouble although he was good and fun-loving. (20RT 2934.) They lived alone. (*Ibid.*) For a year, appellant went back to Arkansas to be with his father, but after that he had no contact with him. (20RT 2957, 2963.) He had no emotional or financial support from his father. (20RT 2958.)

When appellant was fifteen, she got a second job working in building maintenance at night. (20RT 2935.) For a while her ex sister-in-law helped with appellant and his brother Anthony Vick, who was born in 1980. (20RT 2938, 2941.) In 1984, her father came to live with them. (*Ibid.*) Sometimes she left both her sons with a babysitter. (*Ibid.*) She had two jobs until 1992 and was very busy with work. (20RT 2938-2929.) She saw her son at night. (20RT 2940.) Appellant went to high school at the public school, but dropped out. (20RT 2940-2941, 2944.)

Audrey Turner moved to Salt Lake City in 1991. (20RT 2945.) Anthony Vick did not move with her and continued to live with appellant

and Audrey's father so Vick could continue in the same school. (*Ibid.*) Appellant had four children: Christopher, Clarence, Kimberly and Audrey. Maria Condon is the mother of at least three of the children. (20RT 2947.) Christopher's mother might be Felicia Collier. (*Ibid.*) Appellant did not provide financial support because he was in trouble with the law and in and out of custody. (20RT 2965.) Appellant had an on-going relation with some of his children by letter. (20RT 2968.) He moved to Salt Lake City in 1992. (20RT 2952.) She asked him to leave because he was smoking and drinking with his friends and using illegal drugs. (*Ibid.*) He worked for Domino's Pizza. (20RT 2953.) At some point, appellant got shot in a dispute with the family of Felicia Collier and came back to live with her to recover. During that time, he treated her well, helped her with her cleaning job and cooked and cleaned for the family, including her father and Pauletta, his girlfriend. (20RT 2955, 2966.) Appellant was living with his children. They loved him too. (20RT 2956.)

Anthony Vick (appellant's half-brother) testified. When he was eleven or twelve, Mr. Vick lived with appellant. (20RT 2974-2975.) Appellant got him up to go to school and took care of his clothing. He kept him out of trouble and warned Mr. Vick to stay in school. (20RT 2976.) Appellant was the primary caretaker and was like a father. (20RT 2979.) Later when Mr. Vick moved to Salt Lake City he got into trouble and has been convicted of a felony for possession of cocaine. (20RT 2979-2980.)

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I

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF THE RANDOM MATCH PROBABILITY IN A COLD HIT CASE

A. Introduction

Appellant was identified as a suspect through a database trawl. Having been convicted of a felony offense, his DNA profile was uploaded into the state and national DNA database commonly referred to as CODIS. Subsequently, DNA profiles from evidence samples from a number of crime scenes were searched against the database. The DNA profiles from the evidence samples matched appellant's DNA profile.[6] After the cold hit matches, appellant's DNA was again tested and found to match the scene DNA. At trial the prosecution sought to offer only the evidence of this confirmatory match at trial without reference to the manner in which appellant was identified as a suspect, i.e., without reference to the fact that appellant's DNA was only found to match crime scene DNA after comparison with an unknown number of profiles. However, the DNA evidence in this case was only compelling by virtue of the match statistic associated with it. The prosecution offered as evidence the DNA match and the random match probability which represents the chance that a randomly selected person would coincidentally match the evidence profile.

Appellant urged that the fact of the database search could not be ignored in an accurate representation of the significance of the DNA match and that, in fact, scientists had not determined the appropriate method by which to calculate the match statistic when the DNA match was the result of a database trawl. As such, appellant moved to exclude the prosecution's

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[6]Other than the fact that law enforcement determined that appellant's DNA matched the evidence from crime scene profiles, there is no evidence in the record regarding the details of the database trawl in this case other than that appellant's DNA profile was uploaded to CODIS. (1RT 150.)

evidence of the random match probability under *People v. Kelly* (1976) 17 Cal.3d 24 (hereafter "*Kelly*"). The trial court denied appellant's *Kelly* motion and ruled that the evidence was admissible. The trial court's admission of the evidence was error requiring reversal of appellant's convictions.

B. Evidence of DNA Statistics at Trial

1. Appellant's Motion to Exclude the Random Match Probability Statistic and Request for a *Kelly* Hearing

Appellant moved to exclude the prosecution's DNA evidence and evidence of the random match probability and requested a hearing pursuant to *Kelly, supra*, 17 Cal.3d 24, urging that the use of random match probability had not achieved general scientific acceptance in cold hit cases. Counsel explained why appellant's case was a "cold hit" case. Appellant was sent to prison for rape in 2002. His blood was drawn and uploaded to a DNA database. DNA profiles from the evidence from homicides from the years 1985 to 1995 were searched against the offender database and found to match appellant's. (2CT 205.) Then: "[o]nce the crime lab did their tests, they produced some quantification which indicated that Mr. Turners [sic] samples were a match to within one quintillion." (*Ibid.*) The defense agreed that the underlying procedures used had been found to be generally accepted in the scientific community under the first prong of *Kelly*; however, it argued that "the application of the statistical calculations to the case of a suspect's identity discovered through a method such as this [i.e. through a database search] has never been endorsed by any appellate court." (2CT 204.) The defense argued that given the manner in which appellant's profile "was determined, the standard statistical calculation, namely the Random Match Probability, is not the appropriate statistical analysis for this case." (2CT 208.) Rather, "any assessment of the probability that a person will be coincidentally implicated by DNA evidence produced in this type of

case must take into account the database search process, which is the only reason this person came under suspicion." (2CT 209.)

The defense then urged that there was no scientific consensus on the manner in which the probability that a person will be coincidentally implicated by DNA evidence in a cold hit case should be calculated. (2CT 209.) The defense pressed the point that the statistical debate regarding the manner in which the probability of a coincidental match should be reported revolved around different methods.[7] Appellant urged that there were scientists in various camps who presented rigorous arguments to support their positions. (2CT 212.) The trial court should not choose sides in the debate: "It must be left to the scientific community, not prosecution experts or the court, to determine acceptance within its own community." (*Ibid.*) Citing *People v. Barney* (1992) 8 Cal.App.4th 798, 819 (hereafter "*Barney*"), appellant asserted that once the court discerned "'a lack of general scientific acceptance'" it had "'no choice but to exclude the "bottom line" expression of statistical significance in its current form.'" (2 CT 212-213.) Appellant also pointed out that the one method proposed by the prosecution to interpret the meaning of a cold hit match, i.e., using the random match probability alone, was universally rejected as the appropriate method for calculating the statistical significance of a cold hit match. (2CT 213.)

In it's responsive pleadings, the prosecution relied largely upon *United States v. Jenkins* (D.C. 2005) 887 A.2d 1013 (hereafter "*Jenkins*"), and asserted that there was "no debate in the scientific community over the methodology, mechanics, or mathematics underlying the various statistical formulas used to calculate significance or in the results produced under the various formulas." (2CT 223, citing *Jenkins*, *supra*, 887 A.2d at p. 1016.)

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[7]The details of the three methods are discussed at I.C.3., *infra.*

It asserted that the use of the product rule to calculate the random match probability has long been accepted by the scientific community. (2CT 224-225, citing *People v. Reeves* (2001) 91 Cal.App.4th 14, 31, *People v. Soto* (1999) 21 Cal.4th 512, 524-525 [hereafter "*Soto*"].) The prosecution characterized appellant's assertion that the significance of a cold hit match needed to account for the fact that the match was made after a database trawl as a "false dichotomy," and that there was no difference between "a suspect identified by 'traditional' investigative means (e.g. eyewitness accounts, suspicious activities), and one identified as the result of a database match." (2CT 227.)

2. The Argument on Appellant's Request for a *Kelly* Hearing

On June 16, 2006, the court heard argument on appellant's *Kelly* motion. The prosecutor asserted that the fact of the database search made no difference to the statistical evidence the prosecution would put on regarding the match of appellant's profile to the profile of the scene evidence and that it would only put on one statistical calculation --the random match probability. (2RT 65-66.) The prosecutor cited *Jenkins* for the proposition that all of the statistics delineated in appellant's motion were generally accepted and that because they were generally accepted and the only issue was legal relevance there was no need for a *Kelly* hearing. (2RT 68-69.) The prosecution noted the recent opinion in *People v. Johnson*,[8] which, though not final, hit the issue: ". . . head on, that a cold hit is simply not subject to the Kelly/Frye[9] standard of admissibility when it is simply used to identify a possible suspect, as it was in the case of Mr.

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[8]The prosecution's reference is to *People v. Johnson* (2006) 139 Cal.App.4th 1135.

[9]The prosecution's reference is to *United States v. Frye* (D.C. Cir. 1923) 293 F. 1013.

Turner. They [the appellate court in *Johnson*] simply found that the data base search did not matter." (2RT 66-67.) The prosecutor urged that after appellant was identified law enforcement would use the standard techniques it would use in any case. (*Ibid.*)

The defense urged that so "long as there is this controversy out there, this needs to be decided by the courts, that I don't think refining it to one simple statistic is appropriate. I think that as long as the controversy exists out there, that you know, the – use of one statistic would be improper in this case." (2RT 70.) The defense also contended that the single statistic the prosecution wanted to introduce should be excluded on Evidence Code section 352 grounds:

> So what you're saying here is look it, we're finding one in one quintillion, but the data base does not matter, and so I think in this case that to use that statistic would be improper at this point, and I would make a motion to exclude it under 352 at this point until we have a situation at least reliable or the court's make a decision one way or the other.

(*Ibid.*)

The trial court agreed with the prosecution that the single statistic was admissible and adopted the reasoning of the *Johnson* case that the fact that the match to appellant was the result of a database search was irrelevant. (2RT 72.) The court then denied appellant's motion, stating: "I do conclude that no Kelly/Frye hearing is necessary. The statistical analysis is generally accepted, and so the motion to exclude – well, the motion to exclude DNA evidence and the random match probability is denied." (*Ibid.*) The judge also stated that his decision was not based on the *Johnson* case , "although I do believe that that is also determinative." (*Ibid.*) He stated that he was not relying on *Johnson* because it was not final, but that it was persuasive. (*Ibid.*)

3. The Evidence of DNA Statistics at Trial

The prosecution presented its DNA evidence through experts. Dr. Gary Sims, a criminologist from Richmond, explained "DNA for beginners." (13RT 1921.) He asserted that by looking at the areas of DNA that showed a lot of variation between people, law enforcement "can really do a very good job at separating one person's DNA out from another." (13 RT 1928.) Testing at these places can "lower[ ] what we call the probability of identity." (*Ibid.*) On the PowerPoint Sims showed the jury, he defined "the probability of identity" as: ". . . the likelihood that *two people*, chosen at random, will have the *same DNA* types at the loci tested." (People's Exhibit No. 136 [PowerPoint slide No. 18], italics in original.)[10] He stated that if the scientist looks at "thirteen STR locis [*sic*]," which is possible using the "profiler plus" and "cofiler" kits, (13RT 1930) "this is [a] very powerful [way of] distinguishing one person's DNA." (13RT 1929.) When you have 13 loci ". . . the probability that two people would be the same in those 13 just becomes extremely rare," about one in 400 trillion if one looked at the Caucasian population of the United States and one in two quadrillion for the African American population. (13RT 1931-1932.)

Dr. Sims described how a match was done. The technician determines a "sample profile, and then as far as the genetics, we do a comparison of that sample profile to profiles of reference samples." (13RT 1933.) If a match occurs, "we determine the rarity of a DNA profile and then we generate a case report with a random match probability." (*Ibid.*) Dr. Sims explained that if there is a match the question is "what is the significance of the match between the evidence DNA profile and the

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[10]A copy of Dr. Sim's PowerPoint was admitted into evidence. (16RT 2403.) Appellant will move to have the exhibit transferred to this Court at the appropriate time. (See Cal. Rules of Ct., Rule 8.224.)

person's 2 [sic] DNA profile that was illustrated and you can look at it in terms of how often would you expect the evidence DNA profile in the population."[11] (13RT 1938.) The technician gets a frequency in the population for each of the thirteen loci tested and then multiplies "for each one of those cites of variation." (13RT 1940.) Then he does a calculation:

> So we look at this calculation for each one of these 13 loci or sites or addresses, and we multiply them across, and that's how we come up with a very rare frequency overall. In this case one in for [sic] trillion for Caucasians.
>
> So the probability that a randomly chosen person would match the evidence profile is about one in four trillion in the Caucasian population. That's called the Random Match Probability.

(*Ibid.*) Dr. Sim's slide on Random Match Probability reads as follows:

> Statistical Evaluation of DNA Typing Results
> In this example, the probability that a randomly chosen person would match the evidence profile is 1 in Four Trillion for Caucasians. This is called the random match probability.

(People's Exhibit No. 136, slide 35.)

Carl Matthies testified about the DNA statistics in the case. Matthies got a reference DNA sample from Maria Martinez (13RT 1957) and a reference sample from appellant (13RT 1964) and determined the profile for both (13RT 1965). He analyzed a vaginal swab from the crime scene. (*Ibid.;* People's Exhibit No. 31.) He separated the sperm cell fraction from the epithelial fraction in the vaginal swab and got a DNA profile for the sperm cell or male fraction. (13RT 1966.) Matthies testified that the major

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[11]Dr. Sim's PowerPoint put it as follows:

> DNA Typing Comparison
> What is the significance of the match between the evidence DNA profile and Person 2's DNA profile?
> How often would you expect to see the evidence DNA profile in the population?

(People's Exhibit No. 136, slide 31.)

DNA profile obtained from a sperm cell fraction of the vaginal swab matched appellant's DNA profile. (13RT 1967.) Mr. Matthies then characterized the statistics related to the match, stating the probability of the match in terms of the probability of a random match:

> Q. And what was the probability of these matches?
>
> A. I wrote that the combination of genetic marker types found in the major profile item 1-2B(S) from Chester Turner occurs in approximately one in one quintillion individuals, and that the DNA profile obtained from the – the combination of genetic markers found in item 1-2B(E) of Maria Martinez occurs in one in one quadrillion individuals.
>
> Q. All right. So the matches of sperm fractions from the vaginal swab matched Chester Turner's profile, and *the probability is one in one quintillion*; is that correct?
>
> A. *The probability of a random match of unrelated individuals is one in one quintillion.*

(13RT 1968-1969, italics added.)

Matthies testified in a similar manner regarding the evidence for the remaining crime scenes. In each case, he found that there was a match between appellant's profile and the sperm fraction of the crime scene evidence.[12] In each case, Matthies characterized the meaning of the match as the "random match probability."

For the Mildred Beasley case, Matthies was asked;

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[12]See 13RT 1970 and People's Exhibit No. 102 [Mildred Beasley]; 13RT 1974 and People's Exhibit No. 114 [Paula Vance]; 13RT 1978 and People's Exhibit No. 91 [Natalie Price]; 13RT 1981 and People's Exhibit No. 67 [Andrea Tripplett]; 13RT 1983-1984, 1985, 1986 and People's Exhibit No. 78 [Desarae Jones]; 13RT 1990 and People's Exhibit Nos. 38 and 143 [Anita Fishman]; 13RT 1993-1994 and People's Exhibit No. 55 [Regina Washington]; 13RT 1995-1996 and People's Exhibit No. 12 [Diane Johnson]; 13RT 1999 and People's Exhibit No. 22 [Annette Earnest]; 13 RT 2004 and People's Exhibit No. 127 [Brenda Bries].

Q. What was the random probability that you would have seen matching the profile between Turner and the vaginal sperm cell fraction.

A. It's going to be the same, *one in one quintillion individuals as a random match probability.*

(13RT 1973, italics added.) For the Paula Vance case, he was asked:

Q. All right. And what were the numbers on this particular case in terms of the *random probability of those matches* occurring.

A. The combination of genetic marker types exhibit by 1A(S) [the sample tested by Matthies] occurs in approximately one in one quintillion individuals and I don't believe that I reported a match, *a random match probability* for the epithelial fraction.

(13RT 1976, italics added.) For the Natalie Price case, he was asked about the meaning of the match in terms of the random probability of the match:

Q. What was the *random probability of that match*?

A. Combination of genetic markers occurs in approximately one in one quintillion individuals.

(13RT 1978, italics added.) For the Desarae Jones case he testified:

Q. And what is the *random probability of that match* occurring?

A. That match, *random match* would occur in approximately one in one quintillion individuals.

(13RT 1985, italics added.) He testified about the Anita Fishman case:

Q. And what is the *random probability of that match occurring*?

A. It occurs in approximately one in one quintillion individuals.

(13RT 1990, italics added.) The testimony was the same for the Regina Washington case:

Q. And what was the *random probability* of that single DNA profile matching Chester Turner?

A. That DNA profile occurs in approximately one in one quintillion individuals.

(13RT 1994, italics added.) For the Diane Johnson case:

Q. What is the probability of that or the *random probability of that match* between Chester Turner and the primary DNA profile from the sperm fraction of the anal swab occurring?

A. That DNA profile occurs in approximately one in one quintillion individuals.

(13RT 1996.) And for Annette Earnest:

Q. And what is the *random probability of those matches occurring or that match* occurring?

A. That combination of genetic markers occurs in approximately one in one quintillion cases.

(13RT 1999, italics added.) Finally, regarding the match for Brenda Bries, Matthies testified:

Q. And what is the *random probability of that match* occurring?

A. The combination of genetic marker occurrence is approximately one in one quintillion individuals.

(13RT 2004-2005, italics added.) Matthies was briefly asked about the statistics on cross-examination:

A. [T]he idea is that by showing that all of these markers are independently inherited, you get to employ what's know as the statistics is [*sic* - what's known in statistics as] the product rule, which says that the probability of having a type at one locus is totally independent from the other loci, and hence you get to multiply the probabilities by each other the probabilities of each genotype.

(13RT 2018-2019.)

Jody Hrabal, a DNA analysist from Cellmark who retested the DNA, testified about the statistical meaning of the match, also relying on the concept of the "random match probability":

Q. Miss Hrabal, on the samples where you matched it to Chester Turner and he was the single source of your DNA, what was the probability of those matches?

A. The calculation we do is a random match probability, and it basically means that the profile we are able to obtain from this evidence, if you were to randomly select an unrelated individual from that same – from a population group, what is the probability that some random individual would have the exact same profile.

So the – in the case in the black population group, the probability of selecting a random individual that would have the same profile as the evidence is one in 6.725 quintillion.

(14RT 2081-2082.)

There was also evidence of random match probability at the penalty phase of appellant's trial. Criminalist Matthies testified that the profiles from DNA found at the crime scene of murder victim Joyce Elandra Bunn matched that of appellant. (18RT 2686.) The random match probability of the match was one in one quintillion. (18RT 2687.)

C. The Trial Court Erroneously Denied Appellant's Motion to Exclude the Random Match Probability

1. Introduction

The trial court's denial of appellant's motion to exclude the DNA evidence was error implicating appellant's state and federal constitutional rights and requiring the reversal of his convictions and death sentence. Appellant recognizes this issue was addressed in *People v. Nelson* (2008) 43 Cal.4th 1242 (hereafter "*Nelson*"). Appellant will show that *Nelson* was wrongly decided because its position regarding the role of science in the assessment of the evidence of DNA statistical inferences is inconsistent with California jurisprudence.

2. *Kelly* Hearings Assure the Reliability of DNA Statistics

"[U]nder the *Kelly-Frye* rule the proponent of evidence derived from a new scientific methodology must satisfy three prongs, by showing, first,

that the reliability of the new technique has gained general acceptance in the relevant scientific community, second, that the expert testifying to that effect is qualified to do so, and, third, that "correct scientific procedures were used in the particular case." (*People v. Roybal* (1998) 19 Cal.4th 481, 505, citations omitted.) This case concerns only the first prong, i.e., the acceptance of a new technique in the scientific community.

"DNA evidence consists of two distinct elements: the match evidence – evidence that the defendant could be the perpetrator; and the statistical evidence – evidence that a certain number of people in the population could be the perpetrator." (*People v. Pizarro* (2003) 110 Cal.App.4th 530, 541 [hereafter "*Pizarro*"], disapproved on another ground in *People v. Wilson* (2006) 38 Cal.4th 1237, 1251.) "[T]he match evidence deems the defendant a possible perpetrator, but does not establish his identity as the perpetrator." (*Id.* at p. 542.) "The statistical calculation step is the *pivotal element* of DNA analysis, for the evidence means nothing without a *determination of the statistical significance of a match of DNA patterns*." (*Barney, supra,* 8 Cal.App.4th at p. 817, italics added.)

In *Pizarro, supra,* 110 Cal.App.4d 530, the Court of Appeal emphasized the essential role the court plays in assuring the reliability of forensic DNA evidence. Citing *Kelly, supra,* the Court of Appeal found that the trial judge played a gatekeeper role for the jury and stressed the importance of careful consultation with science and scientists in evaluating the admissibility of scientific evidence:

> In the *Kelly* review process, the trial judge serves as gatekeeper, allowing only evidence that is sufficiently reliable and trustworthy to reach the jurors. In performing this function in the context of scientific evidence, the judge must rely on the educated testimony of scientific experts. Thus, the first prong of the *Kelly* test – the general acceptance of the procedure by the relevant scientific community – is intended to confirm the reliability of a procedure too sophisticated or technical for the average lay person to readily understand.

(See *People v. Kelly, supra,* 17 Cal.3d at pp. 30–32, 130 Cal.Rptr. 144, 549 P.2d 1240; *Frye v. United States, supra,* 293 F. 1013.)

(*Id.* at p. 555.) The *Pizarro* court found that the authoritative role of scientists was critical and that the first prong of a *Kelly* analysis "assures that *those most qualified to assess the general validity of a scientific method will have the determinative voice.*" (*Id.* at p. 556, citing *Kelly, supra,* 17 Cal.3d at p. 31, italics in original.) The *Pizarro* court counseled caution in a trial court's assessment of DNA evidence in a criminal case, and observed that the "[e]xercise of restraint is especially warranted when the identification technique is offered to identify the perpetrator of a crime. "'When identification is chiefly founded upon an opinion which is derived from utilization of an unproven process or technique, the court must be particularly careful to scrutinize the general acceptance of the technique.'" [Citation.]" (*Ibid.*, citing *Kelly, supra,* 17 Cal.3d at pp. 31-32; see also *People v. Law* (1974) 40 Cal.App.3d 69, 75, citing *People v. Collins* (1968) 68 Cal.2d 319, 332 ["'[W]e have strong feelings that [novel scientific evidence], particularly in a criminal case, must be critically examined in view of the substantial unfairness to a defendant which may result from ill conceived techniques with which the trier of fact is not technically equipped to cope.'"].)

In *People v. Venegas* (1998) 18 Cal.4th 47 (hereafter "*Venegas*"), this Court considered the admissibility of statistical calculations for DNA evidence. The Court first clarified what the evidence of the statistics relating to a DNA match prove, thus framing the context for discussion of the reliability issue. It then examined the statistical evidence introduced against Venegas to see if the statistics were the product of an untested scientific technique. The *Venegas* court observed that "[a] determination that the DNA profile of an evidentiary sample matches the profile of a suspect establishes that the two profiles are consistent, but the

determination would be of *little significance* if the evidentiary profile also matched that of many or most other human beings. The evidentiary weight of the match with the suspect is therefore inversely *dependent* upon the *statistical probability* of a similar match with the profile of a person drawn at random from the relevant population." (*Venegas*, *supra,* 18 Cal.4th at p. 82, italics in original.) The Court then characterized the role the DNA match plays in a juror's assessment of guilt:

> The question properly addressed by the DNA analysis is . . . this: Given that the suspect's known sample has satisfied the 'match criteria,' what is the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample? . . . A greater probability . . . would tend to favor the suspect by increasing the probability that one or more other persons has a DNA profile matching the evidentiary sample." (Fn. omitted.)

(*Id.* at pp. 63-64.) In a footnote immediately after the above quote, this Court confirmed the characterization of the statistical question as the Court of Appeal characterized it in *Barney*, *supra*, 8 Cal.App.4th 798: "*Barney* appears to equate the 'statistical significance of a match' with 'how unlikely it is that the crime scene samples came from a third party who had the same DNA pattern as the suspect.'" (*Id.* at p. 64, fn 16, citing *Barney*, *supra*, 8 Cal.App.4th at p. 809, italics omitted from *Venegas* quote.) This Court characterized the statistical question identically in *Soto*, a year after the *Venegas* opinion. (*Soto*, *supra*, 21 Cal.4th at p. 523 ["The question properly addressed by the DNA analysis is therefore this: Given that the suspect's known sample has satisfied the 'match criteria,' what is the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample?"].)

Having pinpointed how the statistical evidence was relevant, the *Venegas* court then examined the question of whether the probabilities

associated with a DNA match were inadmissible under *Kelly* in the case before it. Defendant Venegas asserted that the statistics interpreting the DNA match that resulted from use of the RFLP technique[13] (the method the prosecution was using at the time) should be excluded because there was not a general acceptance of the methodology. (*Id.* at p. 76.) The defendant observed that some scientists asserted that because the frequencies at each locus tested were independent, scientists could simply use the product rule to determine the chances of a random match (the random match probability). The product rule is simply the multiplication of frequencies found at each locus studied. (*Id.* at p. 66; see *People v. Axell* (1991) 235 Cal.App.3d 836, 847, & fn. 3 [explaining the product rule].) The defendant pointed out that other geneticists urged that the product rule could not be used to calculate the chances of a random match because of the possibility that the frequencies were not independent. These scientists urged that a more conservative number, calculated using the "ceiling principle" be used. (*Id.* at pp. 86-87.) Defendant Venegas asserted that there was not a general consensus between the scientists about these two calculations and that under *Kelly* the DNA evidence was inadmissible.

This Court observed that the Attorney General had asserted that unlike the technical procedures for analyzing a sample and for determining when two samples matched:

> the procedures for determining the statistical significance of the match are *immune* from the requirements of *Kelly/Frye*. He argues that estimating the probability of a random match of such DNA bands requires no more than well-established

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[13]The particular DNA technique under consideration in *Venegas* was "Restrictive Fragment Length Polymorphism" or "RFLP." RFLP was the technique developed by the FBI to generate and compare profiles. (*Venegas*, *supra*, 18 Cal.4th at p. 53.) This technique has largely been replaced with the Short Tandem Repeat ("STR") technique, as was used in appellant's case.

> mathematical formulae such as those used to calculate the frequency of blood-group markers (see *People v. Fierro,supra*, 1 Cal.4th at p. 215 [remaining citation omitted] [upholding admission of expert testimony that "based on population frequency statistics, only one-half of 1 percent of California's general population had the victim's blood type"]).

(*Venegas, supra*, 18 Cal.4th at p. 82, italics added.) This Court disagreed. It held that there were significant differences between the blood-group markers alluded to by the Attorney General and DNA evidence under consideration. Because the frequencies of blood groups are relatively high, calculating the frequencies associated with those markers is a straight-forward matter of counting. (*Id.* at pp. 82-83.) Moreover, the independence of the frequencies for purposes of applying the product rule to blood-groups has long been established. (*Ibid.*, citing *People v. Coleman* (1988) 46 Cal.3d 749, 760.) They were readily understandable by the jury and did not need to be screened. (*Ibid.*) In contrast, "calculating the statistical probability of a random DNA/VNTR match is much more complicated." (*Ibid.*) The question of statistical independence of individual frequencies for purpose of applying the product rule required the consideration of various precautions to protect a defendant from the possibility that the frequencies were not in fact independent. The kind of precautions developed by geneticists, and whether they were in fact necessary, had been the subject of vigorous scientific debate. (*Ibid.*) As such, even though the issue was the use of the same mathematical formula as the blood-group evidence (i.e., the product rule) the complexities of calculations associated with the newer DNA technique required an analysis under *Kelly*.

This Court emphasized that the necessity of the *Kelly* evaluation was driven by the complexity of the statistical issue:

> It is the very complexity of the issues surrounding the propriety of the various recognized methods of computing RFLP probability frequencies that draws them under the *Kelly*

> */Frye* umbrella. To . . . leave it to jurors to assess the current scientific debate on statistical calculation as a matter of weight rather than admissibility, would stand *Kelly-Frye* on its head.

(*Venegas*, *supra*, 18 Cal.4th at p. 83.) It was improper to ask jurors to do what was well-beyond their scientific abilities:

> We would be asking jurors to do what judges carefully avoid – decide the substantive merits of competing scientific opinion as to the reliability of a novel method of scientific proof. . . . The result would be predictable. The jury would simply skip to the bottom line – the only aspect of the process that is readily understood – and look at the ultimate expression of match probability, without competently assessing the reliability of the process by which the laboratory got to the bottom line. This is an instance in which the method of scientific proof is so impenetrable that it would '". . . assume a posture of mystic infallibility in the eyes of a jury . . . ." [Citation.]' (*People v. Kelly*, *supra*, 17 Cal.3d at p. 32, 130 Cal.Rptr. 144, 549 P.2d 1240, quoting *United States v. Addison* (D.C.Cir.1974) 498 F.2d 741, 744.)

(*Venegas*, *supra,* 18 Cal.4th at p. 84, citing *Barney, supra,* 8 Cal.App.4th at pp. 817-818.) This Court held that the statistical calculation phase of DNA analysis therefore requires *Kelly* screening of evidence on statistical probabilities of random matches at loci to assure that both that the methodology used is generally accepted in the scientific community, and that the calculations in the particular case followed correct scientific procedures. (*Ibid.*; accord *People v. Brown* (2001) 91 Cal.App.4th 623, 649; *People v. Taylor* (1995) 33 Cal.App.4th 262, 266.)

3. The *Nelson* Opinion

In *Nelson*, this Court considered the issue of cold hit statistics for the first time. Nelson asserted that there was no scientific consensus on the issue of what statistic should be used when presenting the meaning of a cold hit match and, as such, the DNA match was inadmissible.

As a preface to its discussion of the *Kelly* issue, this Court described the scientific controversy. When law enforcement uses DNA to verify existing suspicions about a known suspect, "the number derived from the product rule 'represents two concepts: (1) the frequency with which a particular DNA profile would be expected to appear in a population of unrelated people, in other words, how rare is this DNA profile ("rarity statistic"), and (2) the probability of finding a match by randomly selecting one profile from a population of unrelated people, the so-called "random match probability."'" (*Nelson*, *supra*, 43 Cal.4th at p. 1266, quoting *Jenkins*, *supra*, 887 A.2d at p. 1018.) In a cold hit case, however, where the investigation *starts* with a DNA match found by trawling a database, the number generated by the product rule represents one concept: the rarity of the DNA profile. The product rule calculation does *not* express the likelihood that a cold hit match is coincidental because the fact that many profiles have been searched increases the probability of finding a match. (*Ibid.)*

The fact that the match is made after a database trawl complicates the statistical evidence. As the *Nelson* court explained: ". . . in a cold hit case, four different methods for calculating the statistical significance of a match have been suggested." (*Nelson*, *supra*, 43 Cal.4th at p. 1261.) All four of these methods yield different probabilities. In the *Nelson* case, the prosecution relied upon "the random match probability calculated by use of the product rule." (*Ibid.*) A second method for calculating the statistical significance of a match in a cold hit case "'was suggested by the National Research Council in 1992 (Nat. Research Council, *DNA Technology in Forensic Science* (1992) (hereafter NRC-1).'" (*Nelson*, *supra*, 43 Cal.4th at p. 1261, quoting *Jenkins, supra*, 887 A.2d at p. 1019-1020.) "The NRC-1 report suggested that in a databank search, one set of loci could be used to screen and identify a suspect and then a different set of loci could be used to

confirm a match. Statistical analysis using the product rule would be done on the second set of loci." (*Ibid.*) This method's "approach would obviously use fewer loci to calculate the odds than when all of the loci are considered, which would result in shorter odds; the loci used in the screening process would be ignored in the statistical evaluation. This approach would give a result that is reliable, although one that might be unnecessarily conservative." (*Ibid.*) *Nelson* noted that in *Jenkins* the highest court in the District of Columbia did not address "this approach because it 'is no longer accepted or followed by the relevant scientific community.'" (*Nelson, supra*, 43 Cal.4th at pp. 1261-1262, quoting *Jenkins, supra*, 887 A.2d at p. 1022, fn. 17.)

Another method has been referred to as the "'database match probability'" calculation "because it gives the probability of a match from the database." (*Nelson, supra,* 43 Cal.4th at p. 1262, citing *Jenkin, supra*, 887 A.2d at p. 1020.) "This method was suggested in the 1996 report of the National Research Council. (Nat. Research Council, *The Evaluation of DNA Forensic DNA Evidence* (1996) (hereafter 1996 NRC report))." (*Ibid.*)[14] Like the random match probability concept in a non-cold hit case, database match probability calculates the likelihood that a cold hit is actually a coincidental match. Under this approach, the expected frequency of the profile (*i.e.*, its rarity) is calculated through use of the product rule, and the result is then multiplied by the size of the database being searched. (*Jenkins, supra,* 887 A.2d at p. 1018.) "'The result would be the expected frequency of the profile in a sample the size of the databank and thus the random chance of finding a match in a sample of that size. The result may be significant when few loci are tested and the discriminatory power of the

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[14]It is also sometimes referred to as either the "NRC II" or "NP" approach. (See, e.g., *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1155, fn. 19.)

testing is limited, but the significance tends to disappear when many loci are tested.' [Citation.]" (*Nelson, supra,* 43 Cal.4th at p. 1262, citing 1996 NRC at pp. 7, 40, 141.)[15]

Nelson observed that *Jenkins* had "noted that 'the "database match probability'" [approach] . . . more accurately represents the chance of finding a cold hit match' and 'can overcome the "ascertainment bias" of database searches. "Ascertainment bias" is a term used to describe the bias that exists when one searches for something rare in a set database.' [Citation.]" (*Nelson, supra,* 43 Cal.4th at p. 1266, quoting *Jenkins, supra,* 887 A.2d at pp. 1018-1019.) To explain how the database match probability method can overcome the ascertainment bias of database searches, the *Nelson* court gave the following example:

> Assume the product rule calculated a random match odds of one in 1,000,000. If a single suspect were compared and a match found, the result would be surprising unless the suspect were the actual donor of the evidence. But if a database of 100,000 were searched, the odds - or database match probability - would be about one in 10 that a match would be found even if the actual donor were not in the database. Thus, a match would be less surprising. If the database had a million profiles, at least one match would be expected even if the actual donor were not in the databank.

(*Nelson, supra,* 43 Cal.4th at p. 1262.) Or, as explained in *Jenkins*, "if the frequency of a given profile is expected to occur in 1 out of every 100,000

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[15]In *Nelson*, this Court observed that the Court of Appeal had noted that the databank in that case contained about 184,000 profiles and that even if the match statistics in the case were divided by 184,000, the resulting numbers would still be astronomical and that odds for Hispanics, the group producing odds most favorable to defendant, would then be about one in five followed by 18 zeros. This Court agreed with the Court of Appeal that "it seems most unlikely that the difference would be significant to the jury." (*Nelson, supra,* 43 Cal.4th at p. 1262, fn. 1.) In appellant's case, there is no evidence of the size of the database used to get the cold hit match between appellant and the crime scene samples.

people, the chances of finding a match increase if one searches a database with 50,000 entries versus a database with only 10 entries." (*Jenkins, supra,* 887 A.2d at p. 1018, fn 8.) The database match probability is the interpretation suggested by the FBI DNA Advisory Board. (*Id.* at pp. 1262-1263, citing *Jenkins*, *supra*, 887 A.2d at p. 1020.)

A fourth method is referred to as the "'Balding-Donnelly' approach" or "the use of a 'Bayesian formula.'"[16] (*Nelson, supra,* 43 Cal.4th at p. 1263.) Balding and Donnelly "posit that in obtaining a match in a database search, one simultaneously eliminates other profiles as being the source of the sample. This elimination of known persons increases the chances that the identified individual is the actual source of the sample DNA. In Balding and Donnelly's model, there is a slightly greater probability that the person identified is the source of the DNA than that expressed by the random match probability." (*Ibid*, quoting *Jenkins, supra,* at p. 1020.) "[T]his method would result in evidence slightly more favorable to the prosecution than would use of the product rule." (*Ibid.*)

On appeal, Nelson, citing the controversy outlined above, asserted that the application of the product rule to the cold hit situation was a new scientific method about which there was no scientific consensus, so that the evidence of the product rule statistic was inadmissible. This Court characterized the issue as follows: "If use of the product rule in a cold hit case is a new scientific technique, it must pass the *Kelly* test, i.e., it must have gained general acceptance in the field to which it belongs." (*Nelson*, *supra*, 43 Cal.4th at p. 1260, citing *Venegas*, *supra*, 18 Cal.4th at p. 76.)

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[16]Statisticians David Balding and Peter Donnelly first advocated this method in 1996. (*See* Balding & Donnelly (1996) *Evaluating DNA Profile Evidence When the Suspect is Identified Through a Database Search*, 41(4) J. Forensic Sci. 603.)

This Court characterized the dispute between scientists as a "disagreement among experts as to which of these methods is best," adding:

> Thus, when a suspect is first found by means of a cold hit from a database search, additional methods can be used to calculate the significance of a match that do not exist when a sole suspect is compared to the crime scene evidence. The record in this case suggests some disagreement among experts as to which of these methods is the best, i.e., the most probative, way to judge the significance of a cold hit.

(*Nelson, supra*, 43 Cal.4th at p. 1263.) Note that in the above quotation this Court characterizes the three methods (the NCR-1 method, the database probability method [from the 1996 NRC report], and the Balding-Donnelly method) as "additional methods" apart from the product rule. Note also that the Court equates the "best" method with the "most probative" method. This Court then turns to the *Kelly* question, asserting that the question of what is "best" or "most probative" is not a *Kelly* question: "But the question before us is not what technique is 'best,' but whether use of the product rule in a cold hit case is permissible." (*Ibid.*) This Court then cited to the *Nelson* Court of Appeal's opinion that a dispute about which technique is the "best" does not amount to a dispute that demands a *Kelly* analysis, finally adopting the reasoning of the Court of Appeal:

> [N]othing in the *Kelly* test requires that there be one and only one approach to a scientific problem. The question is whether scientists significant in number or expertise publicly oppose a technique as unreliable, not whether some scientists believe there may be an alternative, perhaps even better, technique available.

(*Ibid.*) Adopting the premise that the product rule is one technique among many of quantitatively expressing the statistical significance of a cold hit match, this Court stated: "It is already settled that the product rule reliably shows the rarity of the profile in the relevant population. (*People v. Soto, supra*, 21 Cal.4th 512, 88 Cal.Rptr.2d 34, 981 P.2d 958.) To this extent, the product rule has already passed the *Kelly* test." (*Ibid.*)

This Court turned again to the opinion in *Jenkins*, where it found similar reasoning, with which it agreed:

> *Jenkins* explained its reasoning: "At the heart of this debate is a disagreement over the competing questions to be asked, not the methodologies used to answer those questions. The rarity statistic, the database match probability, and the Balding-Donnelly approach each answer unique and potentially relevant questions."

(*Nelson*, *supra*, 43 Cal.4th at p. 1264, citing *Jenkins*, *supra*, 88 A.2d at p. 1022.) The Court agreed with *Jenkins* that:

> [T]here is no controversy in the relevant scientific community as to the accuracy of the various formulas. In other words, the math that underlies the calculations is not being questioned. Each approach to expressing significance of a cold hit DNA match accurately answers the question it seeks to address. The rarity statistic accurately expresses how rare a genetic profile is in a given society. Database match probability accurately expresses the probability of obtaining a cold hit from a search of a particular database. Balding-Donnelly accurately expresses the probability that the person identified through the cold hit is the actual source of the DNA in light of the fact that a known quantity of potential suspects was eliminated through the database search.

(*Ibid.*, quoting *Jenkins, supra*, 88 A.2d at pp. 1222-1223, fn. omitted.) This Court adopted the *Jenkins* court's view that the only relevant question relating to "accuracy" in the disagreement among the scientists was the accuracy of the proposed three formulas, meaning that each of the three formulas each answer the "question it seeks to address." (*Ibid.*) This Court also adopted *Jenkins* premise that what was meant by "accuracy" was that the three formulas produced the correct number for the proposed method. So, this Court agreed with *Jenkins*, that "these competing schools of thought do not question or challenge the validity of the computations and mathematics relied upon by the others." (*Ibid.*) Any other disagreement between the scientists was a disagreement only about "whether the formulation was more probative not more correct." (*Ibid.*) In short, this

Court held that: "Thus, the debate . . . is one of relevancy, not methodology. . . ." (*Ibid.*)[17]

Having characterized the debate of one of relevancy only, this Court then concluded that a *Kelly* hearing was not required. Scientists and statisticians had nothing more to contribute to the issue because once the *Kelly* issue is disposed of the only remaining issue is relevance, which is not a scientific issue, but rather solely a legal one: "For these reasons, we conclude that the admissibility of the calculation derived from the product rule in this case turns on the legal question whether it is relevant." (*Nelson, supra*, 43 Cal.4th at p. 1265.) This Court agreed with the Court of Appeal's holding that because the use of the product rule has been found reliable, "it was for the trial court, not the scientific community, to determine the relevance of the technique to this criminal prosecution." (*Ibid.*) This Court cited *Jenkins*: "Relevancy is a legal issue for courts to answer. We agree with *Jenkins* that "[w]hat is and is not relevant is not appropriately decided

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[17]This Court also quoted extensively from the Nelson Court of Appeal's opinion:

> The testimony presented to the trial court established that to the extent there is a debate, it is over relevance rather than reliability. Most of the experts who testified agreed that the rarity of the DNA profile in the population is a relevant question. Dr. Mueller, the defense expert, did not disagree that the unmodified product rule establishes rarity in the population, but said he does not find that to be the interesting question. It was apparent that he was referring to relevance and not reliability. [¶] The issue [under the *Kelly* test] is reliability. (*People v. Soto, supra*, 21 Cal.4th at p. 519, 88 Cal.Rptr.2d 34, 981 P.2d 958.) The court does not determine whether the technique is reliable as a matter of scientific fact; rather, the court defers to the scientific community and considers whether the technique is generally accepted as reliable in the scientific community. (*Ibid.*)

(*Nelson, supra*, 43 Cal.4th at p. 1265.)

by scientists and statisticians." (*Ibid.*, citing *Jenkins*, *supra*, 887 A.2d at p. 1025.)

The *Nelson* opinion then addressed the question of whether the evidence from the product rule is "relevant," without reference to the scientific debate. It held that "'[r]elevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.) '"The test of relevance is whether the evidence tends, 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive."'" (*Id.* at p. 1266, citing *People v. Wilson* (2006) 38 Cal.4th 1237, 1245.) The Court then held that the rarity statistic was relevant in a cold hit case, just as it is in a case where the suspect is identified by other means: "In a non-cold-hit case, we said that '[i]t is relevant for the jury to know that most persons of at least major portions of the general population could not have left the evidence samples.' (*People v. Wilson*, *supra*, 38 Cal.4th at p. 1245, 45 Cal.Rptr.3d 73, 136 P.3d 864.)." (*Id.* at p. 1267) This Court then held:

> We agree with other courts that have considered the question (the Court of Appeal in this case; *People v. Johnson*, *supra*, 139 Cal.App.4th 1135, 43 Cal.Rptr.3d 587; and *Jenkins, supra,* 887 A.2d 1013) that this remains true even when the suspect is first located through a database search. The database match probability ascertains the probability of a match from a given database. "But the database is not on trial. Only the defendant is." (Modern Scientific Evidence, *supra,* § 32:11, pp. 118–119.) Thus, the question of how probable it is that the *defendant,* not the database, is the source of the crime scene DNA remains relevant. (*Id.* at p. 119.) The rarity statistic addresses this question.

(*Ibid.*)

4. *Nelson* Misapplied California Law

In holding that the rarity statistic was admissible despite the agreement between scientists that the rarity statistic was not a correct

calculation of the chances of a random match, this Court for the first time held that DNA statistics were exempt from *Kelly* analysis. This directly contradicts this Court's holdings in *Venegas* and *Soto*. In *Venegas*, this Court specifically held that the dispute about the use of the product rule was not immune from the *Kelly* because there were significant differences between previous uses of the product rule and the new use proposed in that case. (*Venegas, supra*, 18 Cal.4th at pp. 82-83.)

In *Soto, supra*, 21 Cal.4th 512, this Court addressed a scientific controversy similar to *Venegas* about the use of the product rule. In that case, just as in *Nelson*, there was no dispute that the product rule itself was a well-understood mathematical principle; it was the use of the product rule under the particular circumstances of the case that needed clarification. So, in *Soto*, the random match probability statistics were subject to *Kelly* scrutiny because of a "then on-going dispute among population geneticists" about the underlying use of the product rule – when it was questioned whether each multiplied frequency was statistically independent from all others given concerns about the effect of population substructure (racial subgroups) on DNA data. (*People v. Soto, supra*, 21 Cal.4th at p. 525.) In other words, general acceptance of the fundamental validity of the product rule with respect to DNA evidence in *Soto* was at issue because of the possibility that the result the product rule gave was not the proper way to quantify the chance of a coincidental match. Because of the possibility of population sub-structuring, some scientists proposed a second statistic, using the ceiling principal, which modified the product rule in a way that reflected the possibility that the frequencies were not independent and that the product rule understated the chances that the match was random. In other words, when it came to the issue of population substructures, the scientists did not disagree about what numbers the product rule versus a

ceiling rule yielded; rather, they disagreed about whether the product rule was "reliable, valid, and meaningful. . . . " (*Id.* at p. 538.)

In the present case, there is an equivalent debate about which statistic correctly represents the chance of a coincidental match in a cold hit case. Just as in those cases, here there is disagreement about whether the product rule is "reliable, valid, and meaningful." (*Soto*, *supra*, 18 Cal.4th at p. 538.) In *Soto,* the controversy raged between population geneticists who disagreed about the assumptions that underlay rarity calculations in the case. Those who opposed the use of the product rule urged that the rarity figures were in error by many degrees of magnitude. In neither *Venegas* nor *Soto* did this Court side-step the debate by characterizing the debate as one about the "best" way of quantifying the significance of the match.

In the cold hit dispute, the debate is not between population geneticists who disagree about the facts of population structures and sub-structures; rather, it is between statisticians who disagree about which analytic framework to use to calculate the chance that the match that is the result of a database trawl is coincidental. Each group of highly qualified mathematicians proposes a different method for calculating the likelihood that the cold hit search will identify a person who is not the source of the crime scene evidence, with each claiming that it is correct and that the other is wrong. Although the cold hit debate is equally scientific, this Court in *Nelson*, re-characterized the question as one of legal relevance only for which the opinions of scientists did not matter. The equivalent move in the *Soto* and *Venegas* cases would have been to declare that the views of population geneticists were just different ways of "best" calculating the chance of a random match and to let the parties present evidence of both methods, leaving the jury to sort out the confusion. Yet this is exactly what this Court forbade in *Venegas,* emphasizing that it was the "very complexity" of the statistical issues that required a *Kelly* evaluation.

(*Venegas*, *supra*, 18 Cal.4th at p. 83.) This Court's side-step of the issue in *Nelson* has set "*Kelly-Frye* on its head." (*Ibid.*)

The debate between the NRC-1 scientists, the proponents of the database match probability (the 1996 NRC report method) and the Balding-Donnelly group is a debate "over a new scientific technique" within the meaning of this Court's *Kelly* jurisprudence. In *People v. Stoll* (1989) 49 Cal.3d 1136, this Court elaborated *Kelly*'s definition of a "new scientific technique." It held that the definition of a "new scientific technique" is closely related to the effect of technical evidence on the jury:

> Because the inventions and discoveries which could be considered 'scientific' have become virtually limitless in the . . . years since *Frye* was decided, application of its principle has often been determined by reference to its narrow 'common sense' purpose, i.e., to protect the jury from techniques which, though 'new,' novel, or '"experimental,"' convey a ' "misleading aura of certainty." ' [Citations.]

(*Id.* at p. 1155.) The point was reiterated in *Venegas*: "The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. . . . In most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them." (*Venegas*, *supra*, 18 Cal.4th at p.80, citations omitted; *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196; *People v. Mitchell* (2003) 110 Cal.App.4th 772, 782-783.) "The rule serves its salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods." [Citation.]' (*People v. McDonald* (1984) 37 Cal.3d 351, 372-373, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896.) The cold hit statistics are certainly the product of a "procedure" that is foreign to lay-persons and is exceptionally difficult to understand. It is simply beyond the ken of the overwhelming majority of jurors to weigh the pros and cons of the limited

loci method, the random match probability, the database match probability or the Balding-Donnelly statistic. The debate is cloaked in technical terminology such as "likelihood ratios," "ascertainment bias," etc., and is bolstered by complicated statistical analysis that a juror is in no position to evaluate. (See *People v. Leahy* (1994) 8 Cal.4th 587, 606, citing *People v. Ojeda* (1990) 225 Cal.App.3d 404, 408 ["[T]he principal obstacle to the admissibility of the horizontal gaze nystagmus test may be its pretentiously scientific name. A jury might be unduly swayed by HGN evidence solely by reason of its technical nomenclature". [internal citations omitted]].)

The application of the product rule in the cold hit arena is a "new scientific technique," requiring a *Kelly* evaluation. In *People v. Stoll, supra*, 49 Cal.3d at p. 1156, this Court held that the definition of a "new scientific technique" had two parts: "First, *Kelly/Frye* only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new to science and, even more so, the law*. The courts are willing to forego admission of such techniques completely until reasonably certain that the pertinent scientific community no longer views them as experimental or of dubious validity" (*Id.* at p. 1156, italics added.) Second, "the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury. The most obvious examples are machines or procedures which analyze physical data. Lay minds might easily, but erroneously, assume that such procedures are objective and infallible. [Citations.]" (*Ibid.*.) Cold hit statistics satisfy both parts of *Stoll*. The application of the statistical techniques to database searches is new to science and new to the law. Moreover, lay minds could easily assume that the statisticians have the "objective and infallible" truth about the meaning of the DNA match.

Assessing when a scientific technique is "new" for the purpose of a *Kelly* analysis is a matter of careful attention. As the Court of Appeal in *Pizarro* observed, at some point there are enough differences between procedures that the old is new:

> There is an obvious danger that courts may neglect or misunderstand which differences nudge a procedure into material distinctness. How different must a procedure be to qualify as distinct? In the continuum of what can be defined as differences in procedure, there inevitably comes a point at which the differences are dramatic enough to transform the procedure into a distinct procedure.

(*Pizarro, supra*, 110 Cal.App.4d at p. 616.) Statistical techniques can be applied in such materially distinct ways, that they constitute "materially different scientific techniques." So, the Court of Appeal observed that the use of the product rule to a new DNA technology could be a technique subject to a *Kelly* hearing. In *People v. Reeves, supra*, 91 Cal.App.4th at p. 39, the Court of Appeal rejected the government's argument that a court's acceptance of the product rule in relation to one DNA technology should be read broadly as an "endorsement of all applications of the product rule." (*Id.* at p. 39.) The previous discussion of the product rule's application to an older technology could be informative, but it did not settle the question of the admissibility of the statistical technique. (*Ibid.*, citing *San Diego Gas and Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 943.) As was pointed out in *People v. Johnson, Kelly* general acceptance determinations

> are not static; they represent analyses of the state of science, and state of the law, as of the time the cases were decided. 'Science, like time, marches on' (*People v. Yorba* (1989) 209 Cal. App. 3d 1017, 1023), and the cases do not stand for the proposition that certain techniques or procedures are subject to Kelly's foundational requirements whenever they arise, forevermore.

(*People v. Johnson, supra*, 139 Cal.App.4th at p. 1149.)

Just as was true for the uses of the product rule in *Venegas, Soto*, and *Reeves*, cold hit statistics presents an old calculation (the product rule) in an entirely novel context such that it is a materially different scientific technique requiring a *Kelly* evaluation. The differences between the application of the product rule in a cold hit situation presents materially new statistical issues because unlike the previous use of the product rule, the cold hit match is not random. The use of the product rule to represent for the jury the chances of a coincidental match when the match is the product of a random search was settled by *Soto.* However, that case cannot settle the issue of whether the product rule accurately represents the chance of a coincidental match when the match is the result of a database search, which is not random.

The admissibility of a new scientific technique under *Kelly* is controlled by whether there is a scientific acceptance of the technique under new circumstances, irrespective of whether the technique is accepted in other circumstances. This Court's opinion in *People v. Bledsoe* (1984) 36 Cal.3d 236 is instructive. In *Bledsoe*, this Court considered the admissibility of rape trauma syndrome in a rape trial. The question this Court faced was: Is the evidence that a victim is suffering rape trauma syndrome, i.e., an acute stress reaction related to the trauma the person suffered (see *id.* at p. 242), admissible to show that the defendant committed a rape. (*Id.* at p. 248.) This Court noted that rape trauma syndrome was developed not to determine the truth of a past event (i.e., whether a woman had been raped); rather, it was developed to help identify and treat the emotional problems of clients. (*Id.* at pp. 249-250.) This Court did not question that the syndrome was scientifically accepted among counselors for the purpose of treatment; however, it was "not relied on in that community for the purpose for which the prosecution sought to use it in this case, namely, to prove that a rape in fact occurred." (*Id.* at p. 251.) As

such, it was inadmissible. (*Ibid.*) In this case, as in *Bledsoe*, there is an accepted use for the product rule, i.e., where the match is random, but in the cold hit case where the match is not random there is no such accepted use.

The cold-hit case is unlike the cases holding that the application of old scientific techniques to new situations is not subject to *Kelly* analysis. In those cases, the court found that there was no material distinction between the old and new applications. So, for example, in *People v. Wash* (1993) 6 Cal.4th 215, 243, which rejected defense claims for a new *Kelly* hearing when electrophoresis was used to analyze sexual assault evidence, rather than blood stains, this Court stated that the techniques in the two situations were equally reliable. In *People v. Cooper* (1991) 53 Cal.3d 771, 812-813, this Court rejected defense challenge to the electrophoretic testing of blood for transferrin -- a serum protein that was not tested or at issue in the previous cases because electrophoretic testing was a "valid application" of established methods. In both those cases, and cases like them, there was no question that the application of an old technique to a new kind of evidence was valid. In other words, there was no controversy in the scientific community regarding the application of an accepted scientific technique to a new type of evidence. Here there was and is a controversy about the application of the product rule to determine the chance of a coincidental match in cold hit cases. The on-going debate about which statistical framework should be used shows this.

This Court's sealing off of the question of relevance from scientific input is counter to this Court's holding in *People v. Leahy, supra*, 8 Cal.4th 587. In that case, this Court has explained that in the case of evidence based on a new scientific technique, a determination of reliability under the *Kelly* rule is, in fact, a determination of relevance, and that "[t]he reliability of a scientific technique . . . is determined under the requirement of Evidence Code section 350, that '[n]o evidence is admissible except

relevant evidence. . . .'" (*Id.* at p. 598.) Relevance, therefore, in the case of scientific evidence, is not just a legal question, but is also a question raised and answered by the *Kelly* inquiry into the reliability of the scientific techniques which produced the evidence.

5. In Holding that the Only Issue is Relevance, *Nelson* Misconstrued the Nature of the Scientific Debate

This Court's description of the debate on the issue as a dispute between the scientists over what is "best" or "most probative" (*Nelson, supra*, 43Cal.4th at p. 1263) is factually incorrect. For example, in the disagreement between scientists advocating the Balding-Donnelly formula and those advocating the NRC II formula, both the NRC II scientists and those who advocate the Balding-Donnelly method are trying to figure out the best way of incorporating the effect of the database search ("ascertainment bias") on the chances that the match is coincidental. Rather than merely "answering different question," as this Court put it (*id.* at p. 1264), proponents of these two competing methodologies are seeking to answer the very same question: What is the correct way to statistically account for ascertainment bias? The *Nelson* court errs when it asserts, as it appears to have done, that it is the task of a court to itself decide, without reference to the science, that all the proposed methods have validity – particularly when the scientists themselves do not agree about this.

In fact, Drs. Balding and Donnelly's articulation of their alternate methodology was framed *explicitly* as a correction to the methodology recommended by the 1996 NRC committee, which Balding and Donnelly viewed as wrong. (Balding & Donnelly, *Evaluating DNA Profile Evidence When the Suspect is Identified Through a Database Search,* 1996, 41(4) J. Forensic Sci. 603.) Balding and Donnelly sought to answer the same question as the 1996 NRC committee – the same question to which *Barney*

and *Venegas* requires an answer prior to the admission of any DNA match evidence – and yet arrived at a different, conflicting answer.

The controversy is profound: As put by Dr. Balding, the 1996 NRC report recommendation was "based on flawed intuition and misconceived analyses." (Balding, *Errors and Misunderstandings in the Second NRC Report* (1997) 37 Jurimetrics J. 469, 473.) Dr. Balding further described the 1996 recommendation as infected by a "dramatic error," which turned on a "false analogy," (*Id.* at p. 472), and calls the 1996 NRC position "absurd[]." (*Ibid.*) This is but one example of the vibrant debate among the leading scientists in the relevant scientific disciplines concerning the proper method to calculate the chance that a cold hit is coincidental.[18]

Mathematicians themselves are perplexed by their exile from the courtroom. Dr. Keith Devlin is a notable Stanford mathematician who has weighed in on the issue of the admissibility of cold hit DNA statistics. He

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[18]The controversy continues unabated. A frequently used expert, Dr. Chakraborty, has asserted that the use of a database does not matter because a large database makes it more likely that the match is to the actual perpetrator. (Chakraborty & Ge, *Statistical Weight of a DNA Match in Cold-hit Cases* (2009) 11(3) Forensic Science Communications, available at <http://www2.fbi.gov/hq/lab/fsc/backissu/july2009/index.htm> [as of June 30, 2014].) Other scientists disagree. Professor Devlin does not advocate using the random match probability. (Devlin, *Scientific Heat About Cold Hits,* Unfinished Draft, January 15, 2007, available at <http://www.stanford.edu/~kdevlin/Cold_Hit_Probabilities.pdf> [as of Octobert 30, 2014].) Some scientists advocate a compromise method. (See Storvik & Egeland, *The DNA Database Search Controversy Revisited: Bridging the Bayesian-frequentist Gap* (2007) 63 Biometrics 922-925 [advocating a way of bridging the gap between the methods]; see also Rudin & Inman, *A Frosty Debate: The Chilling Effect of a Cold Hit in a DNA Database,* CAC News (1st Quarter 2007, pp. 31-35), available at http://www.forensicdna. com /assets/1stq07a.pdf [as of October 30, 2014] [summarizing the debate]; Taylor & Colman, *Forensics: Experts Disagree on Statistics from DNA Trawls* (2010) 464 Nature 1266-1267 [asserting that laboratories disagree about which statistic to report, or to report all statistics and leave it up to trial courts].)

recently observed that the profession remains divided about what the best way to understand the statistical significance of a cold hit match. As a statistician, he recommended that, given the controversy, the court adopt the most conservative estimate about which there was no controversy (the NRC-1 approach). However,

> [w]hat the courts should definitely not do, in my opinion . . . is simply take it upon itself to decide, as a matter of law rather than scientific accuracy, which calculation should be used. That is not how the courts normally act in matters of scientific evidence, and in my view it is not how they should act here.
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> . . .
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> We are, after all, talking here not about opinions, but *what number, as a matter of actual fact, most accurately measures the mathematical likelihood of a false conviction.* The fact that at present different groups of statisticians do not agree on the answer does not make this any less a matter of actual fact. It just means that the relevant professional community have not yet reached consensus on what that actual fact is.

(Keith Devlin, "Statisticians Not Wanted", http://www.maa.org/external_archive/devlin/devlin_09_06.html, italics in original [accessed March 21, 2014].) Professor Devlin compared the situation with cold hit statistics to that of contemporary physics, which at the boundaries of knowledge is the subject of intense dispute. It would be absurd for a court to reject the knowledge of physicists should the question of, say, gravity waves, for some reason be the subject of a jury's consideration. Controversy abounds in science:

> This kind of thing is hardly unknown in science. Physicists are currently in disagreement as to whether string theory correctly describes the universe we live in. But should that too be a matter for the courts to resolve? The answer is of course not. It is obviously true that the question of what is relevant is a matter for a court. However, it is preposterous to that they would do so without the informed opinion of the appropriate scientists.

(*Ibid.*) To be sure, the issue at hand is not an issue of population geneticists conducting new experiments. Rather, the controversy is statistical: what is the best way to quantify the chances of a coincidental match when the match is not random? It might appear strange to non-mathematicians that there would be a statistical disagreement about which calculation is appropriate, "but in fact in the history of mathematics, and in particular the history of probability theory, there have been several cases where it took some time before a consensus emerged as to what calculation was appropriate in a particular situation." (Ruby, *Checking the Math: Government Secrecy and DNA Databases* (2010-2011) 6:2 I/S: a Journal of Law and Policy 257, 262, fn. 29.)

To follow Professor Devlin's thinking to its conclusion:

> If the statisticians agree on a number or numbers that describe a certain situation, the court must, if it decides such numbers are relevant, use that number or numbers - and definitely no others. If the statisticians express disagreement, the court would be wise to act on the assumption that either view may be correct. (Correct here does not mean which *calculation* is correct as a calculation. In the present cold hit controversy, no one argues that any particular *calculation* is incorrect. Rather, the "correctness" in dispute is which calculation (and hence the result of that calculation) best describes the actual situation before the court.)

(*Ibid.*) Professor Devlin's emphasis that the issue regarding the scientific understanding of the correct statistic is not merely a matter of "calculation" bears emphasis. Statistics is not just the application of formulas. Contrary to this understanding, this Court has conceived of the contribution of the science of statistics to the DNA debate as simply firing up the right formula. This Court in *Nelson* incorrectly understood the scientific input regarding the admissibility of cold hit DNA statistics to be complete with the development of different formulas, which the statisticians could accurately, and trivially, calculate.

As noted above, this Court stated that the disagreements among the experts were disagreements about which methods were "best," and since that was all the disagreement was about, the product rule method was as good as the others and therefore permissible: "[T]he question before us is not what technique is 'best,' but whether use of the product rule in a cold hit case is permissible." (*Nelson, supra*, 43 Cal.4th at p. 1264.) However, this statement is wrong. The question of the correct interpretation of cold hit statistics is emphatically not a question of which statistic is "best" – so that Jack has his opinion and Jill has hers. The dispute is not about the "best" way to calculate the statistic. For an analogy: two Marin residents could disagree about the best way to get to the California Supreme Court. One thinks the best way is to take the ferry; one thinks the best way is to drive. Reasonable minds could differ about the "best" way to get to the courthouse. However, here the debate is better analogized to where the courthouse is. It either is or is not on McAllister Street; there is no "better" or "best" view about this. It is a question of which address is right. So to in the scientific debate, it is a question of which statistic is *right*. It might be that the random match probability figure is the right one; it might be the database match probability figure; it might be the Balding-Donnelly number; it might ultimately be some other calculation. The point is that once a scientist has done these calculations, there is still the open question – a scientific statistical question – as to which calculation is correct.

This Court's statement that once the calculation is correct, the "math is correct," as if all there were to statistics was the rote application of formulas with no consideration as to the appropriateness of the formula is a far too narrow view of scientific and statistical questions.[19] The Court

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[19]"Statistics" is variously described. It is a mathematical body of science that pertains to the collection, analysis, interpretation or

(continued...)

implied that once the math underlying the calculations was correct, there was nothing more for science to tell the court. This is not right: It is the role of scientific expert opinion to determine which, if any, of the current characterizations of the way to quantify the chance of a coincidental match in a database trawl are correct.

Finally, *Nelson* runs counter to this Court's recent emphasis on the role of the trial court in assuring the reliability of scientific evidence. In *Sargon Enterprises, Inc. v. Univeristy of Southern California* (2012) 55 Cal. 4th 747, this Court held: "Under California law, trial courts have a substantial 'gatekeeping' responsibility." (*Id.* at p.769.) This means trial courts are duty bound to vet the challenged expertise to determine if it meets evidentiary standards for admission. Describing the foundational requirement for credible evidence provided by an expert, this Court quoted *Herman Schwabe, Inc. v. United Shoe Machinery Corp.* (1962) 297 F.2d 906, 912 with approval, noting: "'something more than a minimum of probative value' is required. (citation) These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than

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[19](...continued)
explanation, and presentation of data (Moses,Think and Explain with Statistics (Addison-Wesley 1986) pp. 1-3) or as a branch of mathematics concerned with collecting and interpreting data (Hays, Statistics for the Social Sciences (Holt, Rinehart & Winston 1973) p.xii). It is only at the most basic high school or perhaps beginning college level that statistics, or any mathematics for that matter, involves the mechanical application of formulas – plugging the numbers in so to speak. Real statistics, the science of statistics, involves a systematic approach to solving statistical problems. It has "been described as understanding the need for data, the importance of data production, the omnipresence of variability, and the quantification and explanation of variability." (Cobb, *Teaching Statistics* in Heeding the Call for Change: Suggestions for Curricular Action (Steen edit., 1992.), pp. 3-43.)

usual to protect it." (*Ibid.*) Further, "[T]he expert's opinion may not be based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors. . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)" (*Id.*, at p. 770; see also *People v. Richardson* (2008) 43 Cal.4th 959, 1008 [the foundational predicate for the admission of expert testimony is will the testimony assist the trier of fact to evaluate the issues it must decide]; *People v. Moore* (2011) 51 Cal.4th 386, 485 [same].)

Although *Kelly* was not at issue in the case, *Sargon* reaffirmed that *Kelly* applies to new scientific techniques. (*Sargon, supra*, 55 Cal.4th at p. 772, fn. 6.) In his concurring opinion in *People v. Jones* (2013) 57 Cal.4th 899, Justice Liu, citing *Sargon*, urged that the trial court plays a critical role as a gatekeeper in determining the admissibility of DNA statistics: "The circumstances here provide an occasion to emphasize that trial courts play a vital gatekeeping role when it comes to expert testimony whose underlying conceptual or methodological basis has not been shown to be reliable." (See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 [additional citations omitted].) Given the particularly persuasive power of DNA evidence, trial courts must be vigilant to ensure that the proponent of such evidence has established its reliability." (*Id.* at p. 985.)

6. Nelson Mistakenly Held that the Rarity Statistic Was Relevant

In *Nelson,* this Court did not hold that any of the debated statistical positions were right. Rather, it limited itself to the legal relevance of the

only statistic presented at Nelson's trial, i.e., the rarity statistic. It left open the possibility that the database match probability might be admissible, but did not rule on this. (*Nelson*, *supra*, 43 Cal.4th at p. 1268, fn. 3 ["The conclusion that statistics derived from the product rule are admissible in a cold hit case does not mean that they are the only statistics that are relevant and admissible. The database match probability statistic might also be admissible."].[20]

This Court held that the rarity statistic (which, as noted above, is not the same as the random match probability in a cold hit case) is nevertheless relevant in that it represents the frequency with which a particular DNA profile could be expected to appear in a population. (*Nelson*, *supra*, 43 Cal.4th at p. 1267.) Recall once again this Court's holding regarding what issue match statistics are evidence for: "What is the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample?" (*Venegas, supra*, 18 Cal.4th at pp. 63-64); or: "how unlikely it is that the crime scene samples came from a third party who had the same DNA pattern as the suspect." (*Id.* at p. 64, fn 16, citing *Barney*, *supra*, 8 Cal.App.4th at p.809.)

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[20]*Nelson* also did not discuss the admissibility of the Balding Donnelley approach, noting only that in defendant Nelson's case there was no evidence regarding the size of the database searched and the number of profiles searched before there was a match, which would impact the Balding-Donelley calculation, but that this was not an problem impacting the random-match probability calculation. (*Nelson*, *supra*, 43 Cal.4th at p. 1265, fn. 2.) This Court also observed that the Court of Appeal found the Balding-Donnelley approach inherently confusing, difficult to explain to a jury, and possibly misleading. (*Id.* at p. 1262.) Nevertheless, many statisticians advocate for the Balding-Donnelley calculation as the accurate way to calculate the match. If juries find such calculations confusing and difficult to explain, surely the area is one that is appropriate for a *Kelly* analysis. If judges could be mislead by this evidence, surely juries would be.

Once it is clear what the relevance of DNA match statistics is, it is clear that this Court's holding regarding rarity statistics is wrong. Why is "the rarity of a particular profile" the correct measure of the probability "a person chosen at random would have the same profile"? Indeed, why is it even relevant to this proposition? In fact, the lack of relevance is easily articulated. The rarity statistic is clearly relevant in a confirmation case where the suspect has already been identified by other evidence because the rarity frequency is also the random-match probability, which can be understood as the probability of a matching profile when the defendant is not the source – exactly the question that confronts the jury. (See *Venegas, supra*, 18 Cal.4th at pp. 63-64, quoted immediately above.) But this logic only applies to a confirmation case. In that kind of a case, the random match probability is the same as the probability of a coincidental match to an innocent person. (See Kaye, D. *Rounding up the Usual Suspects: A Legal and Logical Analysis of DNA Trawling Cases* (2009) 87 N.C. L.Rev. 425, 445[hereafter "Kaye 2009"].)

But in a database trawl, the defendant is not the only person tested. A number, possibly a very large number of profiles, are tested. If everyone in the database were innocent, "it still would be no great surprise to learn that one or more of them matched. . . . Hence, there is a solid argument that the rarity statistic is not only not the best measure of the probative value of the evidence, it, in fact, presents an utterly inaccurate picture of the statistics. It is thoroughly misleading." (Kaye 2009 at 445.)

By characterizing the issue as one of "relevance," without acknowledging that relevance in relation to DNA statistics is a question of what the chances are of a coincidental match, this Court simply sidesteps this issue. Rather than struggle with the science, the Court assumes that the jury would benefit from the rarity statistic, leaving open the possibility that it might also find the answers to the other calculations relevant (i.e., the

1996 NRC method and the Balding/Donnelly methods). "But why are these questions relevant, and why is any one of them more apposite than another? Judicial fiat cannot supply the answer. Neither can the disciplines of population genetics, human genetics, or molecular biology. The issue is one of probability, statistics, and inductive logic." (Kaye 2009 at 446.) *Nelson* aside, judicial fiat does not answer the question. By announcing that the rarity statistic was relevant, *Nelson* did *not* answer the legal question the courts must resolve: namely, which statistic or statistics will help the jury accurately assess the statistical significance of a DNA match. In assessing which statistic will help a jury accurately assess the statistical significance of a DNA match, the Court rejects the assistance of science, when it is the very debate among statisticians that essentially bears on the legal issue.

As noted above, in *Nelson* this Court cited a well-regarded treatise on scientific evidence, *Modern Scientific Evidence,* for the proposition that the rarity statistic, as opposed to the database match probability, addresses the question of how "probable it is that the defendant, not the database, is the source of the crime scene DNA . . . ." (*Nelson, supra,* 43 Cal.4th at p. 1265, citing 4 Faigman et al., *Modern Scientific Evidence* (2006) Objections to DNA evidence – Presenting incriminating DNA results – Should match probabilities be excluded?– The effect of a database search, § 32:11, p. 119.) However, in the later version of this same treatise that came out after this Court's opinion in *Nelson*, the treatise authors accuse the Court of begging the question when it by-passed the scientific question and simply asserted without analysis the relevance of the rarity statistic. They point out that this Court (also indicting the *Jenkins* court):

> simply assumes that the various statistics – the population frequency, the random-match probability, and the database-match probability – are all relevant. It assumes, in other words, that in a database-search case, the jury could benefit from the answers to three distinct questions, which it suggests are connected to these statistics: (1) "how rare a

> genetic profile is in a given society?"; (2) how probable "a cold hit match from a search of a particular database" would be when the culprit is not in the database?; and (3) how probable it is "that the person identified through the cold hit is the actual source of the DNA in light of the fact that [the defendant's DNA profile matched while] a known quantity of potential suspects was eliminated through the database search?"

(4 Faigman et al., *Modern Scientific Evidence* (2013-2014) Current objections to DNA admissibility—Population genetics—Cold hits and the database match probability, § 31.20.)[21] The relevance of the answers to these three questions is not obvious. The treatise writers were also troubled by the possibility "that despite the Court's assertion that all three statistics provide important, accurate, and yet slightly different information, it did not mandate presentation of all three of those numbers to the jury. In effect, the court allowed only one-third of a complicated picture to be presented, despite acknowledging the correctness of the remaining two computations." (*Ibid.*)

Thus, this Court erred in holding the rarity statistic – which is incontestably inaccurate as a calculation of the chances of a coincidental match in a cold hit case – was relevant. As noted, the question of the relevance of scientific evidence must be viewed through the lens of a *Kelly* inquiry. In failing to require such an inquiry before finding critical DNA statistical evidence relevant this Court erred in *Nelson.*

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[21]In spite of the treatise's endorsement of a method which would permit all three statistics to come before the jury, no California appellate court has required the admission of all three statistics.

7. The Trial Court Incorrectly Reasoned that the Evidence was Inadmissible Because Subsequently Confirmed With Other Tests

The trial court overruled appellant's motion on grounds not considered in the *Nelson* opinion. The trial court held that the random match probability was admissible because the fact that the match to appellant was the result of a data base search was irrelevant. (2RT 72.) The judge compared using a database search to law enforcement's use of a confidential informant:

> I see a parallel between confidential reliable informants that point the finger of suspicion but don't have percipient knowledge about a criminal case where its then followed up by law enforcement. [¶] . . . [¶] The cold hit case is a point of initiating the investigation as to a particular suspect, and the fact that like the confidential reliable informant might know something about the suspect or in the cold hit case we get some general statistics, you don't know the data base was used, what difference does it make.

(2RT 70-71.) The trial court denied the *Kelly* motion based on the assumption that the problem with a database search disappears once the match is replicated with a fresh sample from the suspect. In so doing, the trial court relied upon the Court of Appeal's opinion in *People v. Johnson*, *supra*, 139 Cal.App.4th 1135 (2RT 72), which at the time was not final, but which since has been published. The trial court's reasoning and the reasoning in *Johnson* are utterly fallacious.

In *Johnson*, the defendant was identified as suspect in a rape after a trawl through a national DNA database. (*People v. Johnson*, *supra*, 139 Cal.App.4th at p. 591.) Investigators then took a blood sample from Johnson and the DNA from that sample matched the DNA from the rape. (*Ibid.*) At trial, a criminalist testified that the profile would "occur at random in the general population in about one in 130 quadrillion African-Americans, one in 240 quadrillion Caucasians, and one in 4.3

quadrillion Hispanics." (*Ibid.*) On appeal, Johnson asserted that "because the instant case involved a cold hit, the foundation concerning the statistical interpretation of the DNA evidence was insufficient to satisfy the [general acceptance] standard for scientific evidence." (*Id.* at p. 594.)

Noting the recent opinion in *Jenkins*, the Court of Appeal observed that "the presentation of various statistical analyses" of the three questions listed in *Jenkins* "would raise significant relevancy and [prejudice] issues." (*People v. Johnson, supra*, 139 Cal.App. 4th at p. 1155.) However, the Court of Appeal declined to adopt the reasoning in *Jenkins* that the question of which statistic to apply is a matter of relevance, not science. (*Id.* at pp. 1154-1155.) Instead, the court sought to avoid the statistical question on grounds that "the database search merely provides law enforcement with an investigative tool, not evidence of guilt." (*Id.* at p. 1150.) It held that general acceptance does not apply to the method of computing a match probability for a database search because "the use of database searches as a means of identifying potential suspects is not new or novel" and "no authority [applies the] requirements to a mere investigative technique." (*Ibid.*)

> As pointed out by Professor Kaye, it is true:
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> > that the initial match in the database will be replicated by drawing and analyzing a new sample from the individual involved . . . . Such replication is a red herring, however, because the challenge is not to the use of a convicted-offender DNA database as an investigatory tool. The objection is to the use of the random-match probability at trial to gauge the power of the later match when the defendant has not been selected for DNA testing "at random" -- that is to say, on the basis of factors that are uncorrelated with his DNA profile. When the defendant is selected for a later test precisely because of his known DNA profile, the replication adds no new information about the hypothesis that the defendant is unrelated to the actual perpetrator and just happens to have the matching DNA profile.

(Kaye 2009 at p. 448, footnote omitted.) If the defendant is innocent and the match with the crime scene sample is coincidental, there will still be a match with subsequent samples. If the defendant is guilty and the DNA matches because the defendant is the source of the crime scene DNA, he will have the same profile in all of the subsequent tests – and there will still be a match. There is no new information learned by the subsequent match. It is no surprise that the laboratory would find the same profile after a second test and the replication will occur whether or not the original match was coincidental. (See Kaye 2009 at p. 150, fn. 132.)

The *Johnson* court fails to recognize this simple piece of statistical information, asserting that the initial match is "logically" irrelevant:

> In our view, the means by which a particular person comes to be suspected of a crime—the reason law enforcement's investigation focuses on him—is irrelevant to the issue to be decided at trial, i.e., that person's guilt or innocence, except insofar as it provides *independent* evidence of guilt or innocence.

People v. Johnson, supra, 139 Cal.App.4th at p. 1150.) The Court of Appeal analogized between a DNA database trawl and a case involving eyewitness identification. The Court asserted that it does not matter whether the suspect is identified in a traditional investigation or a DNA database trawl, just as it does not matter whether the evidence that the defendant is the perpetrator is an eyewitness identification, or whether the police use facial recognition software after an image is captured by a surveillance camera. The *Johnson* court reasoned that in the eyewitness case, no matter how the initial identification was made, law enforcement subsequently goes to the suspect, who confesses. If the facial recognition was used, it does not matter how many images the computer software searched. In both cases, what matters is the subsequent confirmatory investigation – the suspect's confession. (*Id.* at p. 1150-1151.)

This analogy is flawed because it assumes that the perpetrator is no more likely to confess if he or she is found by the facial recognition software than if discovered by conventional means. But suppose that in the case of the facial recognition software the police pressure the defendant to confess, but do not do so with traditional identification. In that case, the fact that the defendant was initially identified by the software is critical. (Kaye 2009 at pp. 449-450.) In a DNA database case, the chances of a coincidental match are greatly increased by the search itself – which does not occur if the match is developed through traditional law enforcement techniques. In a case, where the investigation itself changes the value of the evidence, the investigation is indeed relevant. The trial court thus erred in holding that the DNA statistics were not subject to *Kelly* because the DNA trawl was irrelevant to the statistical analysis in a cold-hit case. The trial court thus erred in admitting the evidence.

D. The Admission of the Evidence Violated Appellant's State and Federal Constitutional Rights and Requires Reversal of the Verdicts

Admission of the random probability match evidence violated appellant's rights to fourteenth and fifth amendment due process and fair trial protections against the admission of unreliable evidence. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114; U.S. Const. 5th & 14th Amends.) The admission of unreliable evidence violates a defendant's due process right to a fair trial under the Fourteenth Amendment. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *People v. Badgett* (1995) 10 Cal.4th 330, 347-348 [admission of unreliable evidence at trial can violate federal right to due process under 14th amendment].) The erroneous admission of unreliable evidence may also, as it did here, violate a defendant's Fifth and Fourteenth Amendment right to due process and a fair trial. (*Barefoot v. Estelle* (1983) 463 U.S. 880, 899.)

In particular, appellant has a due process right to a trial free from unreliable identification evidence. (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114; *United States v. Wade* (1967) 388 U.S. 218, 230; *White v. Illinois* (1992) 502 U.S. 346, 363-364 [Thomas, J., concurring]; see also *Lisenba v. California* (1941) 314 U.S. 219, 236; *McDaniel v. Brown* (2010) 558 U.S. 120, 134-135 [per curiam] [noting, though deeming forfeited, defendant's argument, under *Manson v. Brathwaite*, that DNA identification testimony must be reliable to comport with due process].)

The erroneous admission of the unreliable random match statistic was also a violation of appellant's federal due process right to state court evidentiary rules and evidentiary rulings which result in the admission of only reliable evidence. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53 (plurality opinion) [erroneous evidentiary rulings, resulting in admission of unreliable evidence, can rise to level of federal due process violation]; *Dutton v. Evans* (1970) 400 U. S. 74, 96-97 (Harlan, J., concurring in result) ["[T]he Fifth and Fourteenth Amendments' commands that federal and state trials, respectively, must be conducted in accordance with due process of law" is the "standard" by which to "test federal and state rules of evidence"]; *Michigan v. Bryant* (2011) 131 S.Ct. 1143, 1162, fn. 13 [The due process clause of the Fifth and Fourteenth Amendments may bar admission of unreliable evidence].) When such evidentiary errors "so infuse[] the trial with unfairness as to deny due process of law" to the defendant, the due process clause is violated. (*Estelle v. McGuire* (1991) 502 U.S. 62, 75; *Mathews v. Eldridge* (1976) 424 U.S. 319; U.S. Const., 5th & 14th Amends.)

The federal constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, also require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *People v. Sengpadychith* (2001)

26 Cal.4th 316, 324; U.S. Const., 5th & 14th Amends.) Since the scientific evidence presented in this case lacks validity, the prosecution did not prove its case beyond a reasonable doubt and the evidence is insufficient to support the verdicts in violation of those rights.

As discussed above, evidence based upon a new scientific technique is not admissible under Evidence Code Section 350 unless it passes scrutiny under *Kelly, supra*. As such, the court's misapplication of the law in *Kelly, supra,* also violated the federal due process right under the Fifth and Fourteenth Amendments to fair application of state statutory procedures. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

Appellant's rights under the due process clauses of the Fifth and Fourteenth Amendments and the ban on cruel and unusual punishment in the Eighth Amendment were also violated. (U.S. Const., 5th, 8th, & 14th Amends.) The Supreme Court has recognized death is a unique punishment, qualitatively different from all others. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Beck v. Alabama* (1980) 47 U.S. 625, 638.) As a consequence, the Eighth Amendment requires that procedures in death penalty cases increase the reliability of both the guilt and penalty phase processes. (See, e.g., *Herrera v. Collins* (1993) 506 U.S. 390, 406, fn. 5; *Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida, supra*, 430 U.S. at p. 357; *Oregon v. Guzek* (2006) 546 U.S. 417, 525-526 ["The Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.' [Citation.]".) In addition, under the due process clause "[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6.) The random match

probability evidence was unreliable and grossly misleading in violation of the rights enumerated above.

The error in admitting the random match probability requires reversal under any standard. The DNA evidence in the case was virtually the only evidence against appellant. The only other evidence connecting appellant to the crimes was the rape of Maria Martinez and a grainy video allegedly showing appellant's participation in the murder of Paula Vance. However, without the DNA evidence, these two pieces of evidence did not show beyond a reasonable doubt that appellant was involved in the murders. The Vance video, for instance, only connected appellant to one of the homicides. The Martinez rape could not tie appellant to the other crimes without evidence that appellant was involved in them and without the DNA evidence, there was no evidence that appellant was involved. Hence, absent the DNA evidence that should have been excluded, it is reasonably probable that appellant would have been acquitted of all charges (*Venegas*, *supra*, 18 Cal.4th at p. 93 [citing *People v. Watson* (1956) 46 Cal.2d 818, 836]), and respondent cannot show that the death verdict was surely unattributable to the errors. (*People v. Clair* (1992) Cal.4th 629, 678, citing *People v. Brown* (1988) 46 Cal.3d 432, 446-448, and *Chapman v. California* (1967) 386 U.S. 18, 24.) Hence, reversal of the murder convictions, special circumstances, and death sentence is warranted.

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II

BECAUSE THERE WAS NO EVIDENCE OF THE RARITY OF APPELLANT'S DNA PROFILE, INSUFFICIENT EVIDENCE SUPPORTS THE VERDICT

A. Sufficiency of the Evidence

Sufficiency of the evidence has always been viewed as a question necessarily and inherently raised in any contested trial of any issue of fact, and requiring no further steps by the aggrieved party to be preserved for appeal. (*In re K.F.* (2009) 173 Cal.App.4th 655, citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217; *People v. Butler* (2003) 31 Cal.4th 1119, 1126.) In reviewing the sufficiency of the evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question to be asked is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson* v. *Virginia* (1979) 443 U.S. 307, 319.) Under California law, the question is whether a rational trier of fact could not have found guilt based on the evidence and inferences drawn therefrom. (*People v. Lewis* (2006) 39 Cal.4th 970, 1044; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1131; *People v. Young* (2005) 34 Cal.4th 1149, 1180.)

"Substantial evidence does not mean any evidence, or a mere scintilla of evidence." (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 614.) Upon challenge based on the sufficiency of the evidence to sustain a conviction, "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578; *People v. Jones* (1990) 51 Cal.3d. 294, 314.)

Although substantial evidence may derive from reasonable inferences, "[w]hether a particular inference can be drawn from the evidence is a question of law." (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1604, citing *People v. Morris* (1988) 46 Cal.3d 1, 20-21, disapproved on another ground in *People v. Palmer* (2001) 24 Cal.4th 856, 861.) "Whether or not a given set of facts provides the necessary support for drawing a particular inference is a question of law." (*People v. Creath* (1995) 31 Cal.App.4th 312, 319; *People v. Romo* (1990) 220 Cal.App.3d 514, 519, citing *People v. Hannon* (1977) 19 Cal.3d 588, 597.)

"Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 325, *citing People v. Redmond* (1969) 71 Cal.2d 745, 755.) "Mere speculation cannot support a conviction . . . . To be legally sufficient, evidence must be reasonable, credible, and of solid value." (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) In other words, the substantial evidence test is not met where the case against the accused "is so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt." (*People v. Reyes* (1974) 12 Cal.3d 486, 500.)

This Court has also observed that the substantial evidence test serves as a bulwark to protect against convictions based solely on dubious identification evidence. (See *People v. Cuevas* (1995) 12 Cal.4th 252, 274.)

B. In a Cold Hit Case, the Product Rule Calculation is Irrelevant to the Probability of a Random Match

As this Court noted in *Nelson*, in cold hit cases statistics generated by use of the product rule represent only the "rarity statistic" and not the "random match probability statistic." As also noted in *Nelson*, there can be a large difference between a cold-hit product rule statistic and a random

match probability statistic when it comes to a database search. "[T]he expected frequency of the profile could be calculated through use of the product rule, and the result could then be multiplied by the number of profiles in the databank. The result would be the expected frequency of the profile in a sample the size of the databank and thus the random chance of finding a match in a sample of that size." (*Nelson, supra*, 43 Cal.4th at p. 1262.) That means that in a cold hit case, a product rule statistic will overstate the odds (database match probability) by a factor the size of the database.

It follows that, even assuming, as *Nelson* held, that the rarity statistic is relevant and admissible, product-rule statistics are not relevant in a cold hit case to show the probability of a coincidental match. The product rule inaccurately states the probability of a random match in a cold hit case because, as noted in the previous argument, it does not take into account that the match is the result of a database search. The product-rule calculation is therefore irrelevant to the issue of the probability of a random match and cannot be considered for that purpose in application of the substantial evidence test. Even if the rarity statistic is admissible, the product rule calculation when it is used as evidence of the chances of a coincidental match in a cold hit case is irrelevant. The random match probability cannot be treated the same as the rarity statistic in a cold hit case and the evidence of the former is not sufficient evidence of the latter.

In *People v. Koua Xiong* (2013) 215 Cal.App.4th 1259 (hereafter "*Koua Xiong*"), the Court of Appeal rejected the argument that random match probabilities are not an appropriate measure of the significance of a database match. This is incorrect. First, this Court's opinion in *Nelson* explicitly ruled out such a holding. Citing *Jenkins*, in *Nelson*, this Court recognized:

> that in a cold hit case, the product rule derived number no longer accurately represents the probability of finding a matching profile by chance. The fact that many profiles have been searched increases the probability of finding a match." (*Jenkins, supra,* 887 A.2d at p. 1018, fn. omitted.) The footnote in the middle of this quotation [from *Jenkins*] elaborated: "In other words, the product rule number no longer accurately expresses the random match 'probability.'

(*Nelson*, *supra*, 43 Cal.4th at p. 1266, quoting *Jenkins*, *supra*, 887 A.2d at p. 1018.) Thus, the Court of Appeal's statement that the frequency and the random match probability are "two ways of representing the same thing, the same numbers couched in different concepts" (*Koua Xiong*, *supra*, 215 Cal.App.4th at p. 1274) is simply not correct in the cold hit context.[22]

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[22]The Court of Appeal asserted that this Court in *Nelson* did not draw a distinction between the rarity statistic and the random match probability. (*Koua Xiong, supra*, 215 Cal.App.4th at p. 1273 ["Futhermore, Nelson's use of the terms 'frequency' and 'random match probability' demonstrates that the court was not drawing a distinction between the two."]) This assertion flies in the face of this Court's explicit recognition that the rarity statistic, i.e., the "frequency with which a particular DNA profile would be expected to appear in a population of unrelated people" is a different concept from "the probability of finding a match by randomly selecting one profile from a population of unrelated people," (*Nelson*, *supra*, 43 Cal.4th at p. 1266.)

The Court of Appeal also cites a legal treatise authored by Justice Chin for the proposition that this Court in *Nelson* was not distinguishing between the rarity statistic and the random match probability. (*Koua Xiong, supra*, 215 Cal.App.4th at pp. 1273-1274.) This is not correct. In the treatise cited by the Court of Appeal, Justice Chin stated, quoting *Nelson*: "The rarity of the DNA profile shared by the perpetrator and defendant, expressed by the random match probability statistic, is always relevant and admissible, even in cold hit cases where the defendant was originally identified in a database search: '[I]t is relevant for the jury to know that most persons of at least major portions of the general population could not have left the evidence samples.' [Citation.] We agree ... that this remains true even when the suspect is first located [through] a database search. (*People v. Nelson*[, *supra*,] 43 Cal.4th [at p.] 1267.)" (*Ibid.*, citing Chin et al., *Forensic DNA Evidence: Science and the Law* (2012) Statistics for

(continued...)

Moreover, the Court of Appeal's reasoning is wrong. The Court of Appeal made three arguments in support of its conclusion that the random match probability was relevant in a cold hit case. First, the Court of Appeal suggested that the random match probability and the rarity statistics are both relevant in a database case because both "refer to the perpetrator's profile and therefore are unaffected by any particular defendant or suspect. The frequency assesses how few people possess the perpetrator's profile, and the random match probability assesses how unlikely it is that a random person possesses the perpetrator's profile." (*Koua Xiong*, *supra*, 215 Cal.App.4th at p. 1274.) The Court of Appeal asserts that neither the rarity statistic nor the random match probability "have . . . to do with a particular defendant or suspect, or the manner in which he was found, and they can be calculated before any suspect is located." (*Koua Xiong*, *supra,* 215 Cal.App.4th at p. 1274.) This argument is a non sequitur. The fact that the random match probability and the rarity statistic can both be calculated without reference to how the suspect was found does not mean that if the rarity statistic is relevant then the random match probability is also relevant. The Court of Appeal's statement that the random match probability correctly states the chances of a random match no matter how the search is done does not make the random match probability relevant in a cold hit case for the simple fact that the match in a DNA cold hit case is not random.

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[22](...continued)
Autosomal STR Profiles, § 5:4, pp. 5-9.) This quotation is simply Justice Chin's reaffirmation of the *Nelson* holding that the rarity statistic is admissible – a statistic which in non-cold hit cases is the same as the random match probability. This is the meaning of the statement in the quotation that the rarity is "expressed by the random match probability statistic." It is not a statement that the random match probability is relevant in a case where the match is not random.

Second, the Court of Appeal asserts that the argument that the random match probability is not relevant because the cold hit match is not random is wrong-headed because:

> "[t]he point is the rarity of, or the chance of finding, the perpetrator's profile in the perpetrator's population(s). The chance of finding a particular defendant in an artificially created "population" of criminals and arrestees is not germane.

(*Ibid.*) The Court of Appeal then asks the reader to assume "that a particular defendant is identified after searching a database containing the DNA profiles of 1,000 musicians" (*Ibid.*), and then asks whether "the search itself or the population of musicians affect the rarity of the perpetrator's profile in the *relevant* population (rarity statistic), or the probability of finding the perpetrator's profile in the *relevant* population (random match probability)?" (*Ibid.*) The Court of Appeal correctly states that the search does not affect the rarity in the relevant population. It is also correct that the composition of the population does not make a difference to the analysis of the random match probability. The random match probability applies to all populations, and it does not matter how the population or database is composed – it could be musicians, convicted offenders, poet, judges, anyone – so long as they are unrelated. However, it does not follow from the fact that the details of how the database is constructed do not matter that the search of a database does not matter. The search of the database does matter. As noted, when a database is searched, the product rule number understates the chances of a coincidental match.

Third and finally, the *Koua Xiong* court makes the argument that "the database search merely provides law enforcement with an investigative tool, not evidence of guilt. . . . [W]hat matters is the subsequent confirmatory investigation." (*Koua Xiong*, *supra*, 215 Cal.App.4th at p.

1275, citing *People v. Johnson*, *supra*, 139 Cal.App.4th at pp. 1150-1151.)[23] Although it may be true that subsequent investigation yields evidence that is highly probative, as appellant showed above (see I.C.7., *supra*), a subsequent confirming match between the defendant and crime scene profiles adds nothing to the weight of the initial match. Even if evidence that comes from later investigation is probative, that "does not make it appropriate to present the original DNA evidence as more (or less) probative than it really is." (Kaye et al., *The New Wigmore: Expert Evidence* (2014 supp.) § 14.5.3 [database trawls].)

C. There Was No Evidence of the Rarity Statistic in Appellant's Case

In this case, there was no evidence of the rarity statistic. Instead, as detailed above, all three prosecution DNA experts testified about the random match probability, not about the rarity of appellant's profile. So, criminalist Matthies testified repeatedly that: "The probability of a random match of unrelated individuals is one in one quintillion." (13RT 1968-1969.) The prosecution's DNA teaching expert, Dr. Gary Sims, explained the significance of the DNA match as "the probability that a randomly chosen person would match the evidence profile" and called the match the "random match probability." (People's Exhibit No. 136, slide 35.) Jody Habral explained her calculations thus: "The calculation we do is a random match probability, and it basically means that the profile we are able to obtain from this evidence, if you were to randomly select an unrelated individual from that same – from a population group, what is the probability that some random individual would have the exact same profile." (14RT 2081-2082.) None of the experts testified about the rarity statistic.

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[23]Both *Koua Xiong* and *Johnson* are inconsistent with this Court's holding in *Nelson* recognizing that the fact of a database search impacts the statistical meaning of the match.

As such, there was no evidence of the relevant statistic giving meaning to the DNA match before the jury. As argued above, "[t]he statistical calculation step is the *pivotal element* of DNA analysis, for the evidence means nothing without a *determination of the statistical significance of a match of DNA patterns*." (*Barney, supra*, 8 Cal.App.4th at p. 817, italics added.) The only evidence the jury had regarding the statistical significance of the profile matches was the random match probability as representing the chances of a random match – which is irrelevant in cold hit cases. Irrelevant evidence is not substantial evidence. "Evidence, to be 'substantial' must be 'of ponderable *legal significance* . . . reasonable in nature, credible, and of solid value." (*People v. Johnson, supra,* 26 Cal.3d 557, 576, italics added.) "Substantial evidence is *relevant* evidence of ponderable legal significance which is reasonable in nature, credible, and of solid value." (*City of Commerce v. National Starch & Chemical Corp.* (1981) 118 Cal.App.3d 1, 18, italics added; *Jarchow v. Trans-america Title Ins. Co.* (1975) 48 Cal.App.3d 917, 948, overruled on another ground in *Soto v. Royal Globe Ins. Corp.* (1986) 184 Cal.App.3d 420, 433-434.) Irrelevant DNA statistical evidence cannot supply substantial evidence of guilt.

D. The Lack of Meaningful DNA Statistics Requires Reversal of the Verdict

As argued above (see I.D., *supra*), the DNA evidence in the case was virtually the only evidence in the case against appellant. The evidence of the Martinez rape and a grainy video were the only other evidence connecting appellant to the crimes and, without the DNA evidence, these two pieces of evidence did not show beyond a reasonable doubt that appellant was involved in the murders. After viewing the evidence in the light most favorable to the prosecution, "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"

(*Jackson* v. *Virginia* (1979) 443 U.S. 307, 319) As such, reversal of appellant's sentences and death verdict is required. Under California law, appellant's convictions must be reversed because a rational trier of fact could not have found guilt based on the evidence and inferences drawn therefrom. (*People v. Lewis, supra,* 39 Cal.4th at p. 1044.)

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III

THE TRIAL COURT IMPROPERLY EXCUSED TWO PROSPECTIVE JURORS BECAUSE OF THEIR LIFE LEANING VIEWS ON THE DEATH PENALTY

A. Factual Background

1. The Record

Over the objection of defense counsel, two prospective jurors, "Prospective Juror No. 4," and "Prospective Alternate Juror No. 1," were excused for cause following the prosecution's assertion that the prospective jurors were substantially impaired and could not impose the death penalty. (3RT 425-426; 5RT 715.) The record regarding both these individuals is confused and requires explanation.

"Prospective Juror No. 4," is also called three other things in the record: "Barbara Braggs," "061938301," and "Prospective Juror B-8301." There is a questionnaire in the record for an individual identified as 061938301, on the cover sheet of the questionnaire, and with the proper name, Barbara Braggs, on the signature sheet of the questionnaire. (3CT 435, 456.) Early in the proceedings, the trial court stated that he would refer to the prospective jurors by initial, apparently of the last name, and by the last four digits of the assigned juror number. As such he identified the person being questioned as "Prospective Juror B-8301." (1RT 170.) When that prospective juror answered a question, the reporter identified the speaker as "Prospective Juror B-8301." However, the trial judge did not consistently do that; nor does the court reporter consistently refer to 061938301 / Barbara Braggs as "Prospective Juror B-8301." In his initial questioning of Ms. Braggs (061938301), the trial judge called her "8301," and the reporter reports her answer as from "Prospective Juror No. B-8301." (3RT 318.)

However, later in the transcript Ms. Braggs / 061938301 / Prospective Juror B-8301 is also referred to as "Prospective Juror No. 4, or

"No. 4." The prosecution referred to B-8301 as "No 4" during a discussion of juror hardship. (3RT 333.) In that reference, the prosecutor is clearly reading the name and number off a list that all of the parties have in their possession but which is not part of the record. Later, Prospective Juror B-8301 is called to the box. She is the fourth person called. (3RT 339.) After this the trial court addresses Ms. Braggs / 06193801 / Prospective Juror B-8301 as "Prospective Juror No. 4," or as "Juror No. 4." (See, e.g., 3RT 371.) The court reporter also identified the person answering questions as "Prospective Juror No 4," rather than "Prospective Juror B-8301." (*Ibid.*) The trial judge did not explain on the record that he would identify jurors by the number they assumed in the box. However, it is apparent that he is doing so. This is clear by comparing the answers Prospective Juror No. 4 gave on the record to the answers Ms. Braggs / 06193801 gave on her questionnaire. Prospective Juror No. 4 reported her age as 50 years old (3RT 371-372), as did Ms. Braggs / 061938301 / in her questionnaire. (3CT 435.) Prospective Juror No. 4 reported that she worked with a "Bobbie Jean Williams," as did Ms. Braggs / 061938301 / in her questionnaire. (3RT 372, 3CT 437.) It is a fair inference from the matching answers that Prospective Juror No. 4 is the same person as Prospective Juror B-8301 / 06193801 / Barbara Braggs.

There is a similar record difficulty relating to Prospective Alternate Juror No. 1. There is a questionnaire in the record for someone identified as 061996780 on the first page of the questionnaire and as "Ralph Oliver" on the signature page of the questionnaire. (10CT 2374, 2393.) When the clerk called up prospective jurors to be questioned as alternate jurors, O-6780 was called as the first juror. (5RT 682.) That person was henceforth identified as "Prospective Alternate Juror No. 1." This is how the trial judge addressed the prospective alternate juror and this is how the court reporter referred to him. (5RT 683, 684.) Comparison with the

questionnaire for Ralph Oliver / 061996780, and the answers Prospective Alternate Juror No. 1 gave to the questions the trial judge posed makes it clear that this is the same man. For example, the trial judges asked Prospective Alternate Juror No. 1 about his statement on "page 3" that a relative or friend was murdered. (5RT 682-683.) On page three of the questionnaire for Ralph Oliver / 061996780, Mr. Oliver answered a question about a friend or relative being murdered. (10CT 2378.) The trial judge also asked Prospective Alternate Juror No. 1 about a concern he expressed on page four of his questionnaire concerning his wife having been accused of a crime. (5RT 683.) On page four of his questionnaire, Mr. Oliver stated in answer to a question about whether he had a friend or relative wrongfully accused that his wife had been wrongfully accused. (10CT 2379.)

In Appellant's Motion to Correct, Complete And Settle the Record on Appeal filed May 31, 2012, appellant's counsel asked that the references to "Prospective Juror No. 4" be deleted, that the reporter check her notes, confirm that "Prospective Juror No 4" was the same person as "Prospective Juror B-8301," and, if so, replace the references to "Prospective Juror No. 4," with references to "Prospective Juror B-8301. (III Supp.CT. 114.) This request was denied. (III Supp.CT 135.) For the purposes of this argument, appellant refers to the two people at issue as "Prospective Juror No. 4," and as "Prospective Alternate Juror No. 1." Where necessary for clarity appellant adds the designation "Prospective Juror B-8301" or "Prospective Alternate Juror O-6780."

2. Prospective Juror No. 4

As to the death penalty, Prospective Juror No. 4 revealed on her questionnaire that she was moderately in favor of the death penalty. (3CT 443.) She would not refuse to vote for guilt of first degree murder or find the special circumstances true in order to keep the case from going to the

penalty phase. (*Ibid.*) Nor would she always vote for guilt or find the special circumstances true in order to get the case to the penalty phase. (*Ibid.*) If the jury found a defendant guilty of first degree murder she would not always vote for death. (*Ibid.*) She did not think that a defendant who was convicted of multiple murder or of "murder plus" should automatically be put to death. (*Ibid.*) She thought that the death penalty served a purpose, viz., it kept someone else from being killed by the defendant. (3CT 444.) She thought that death was a worse punishment than life in prison without the possibility of parole. (*Ibid.*) In regards to the death penalty she thought that ". . . some people that will never know they are wrong, so they should be put out of their misery." (3CT 445.)

When informed that appellant's case involved the multiple murder special circumstance she stated that she could "possibly" impose the death penalty. (3CT 445.) Her religion did not have any special views on the death penalty. (3CT 446.) She stated that she could under the appropriate circumstances reject the death penalty and choose life without the possibility of parole; she could also, under the appropriate circumstances, reject life without the possibility of parole and choose the death penalty. (*Ibid.*) She strongly disagreed with the statement that anyone who intentionally kills should get the death penalty because "[t]he circumstances are not all the same[;] could have been self-defense. I would have to wait and hear what the circumstances were." (*Ibid.*) She also strongly disagreed with the statement than anyone who intentionally kills another person should never get the death penalty because "[a]gain I need to hear what cause [*sic*] the person to act as they did." (3CT 447.)

She also stated that she could not set aside her "sympathy, bias, or prejudice" for a victim because "[b]eing a female that was killed, I would have sympathy for that person." (3CT 449.) She also answered "yes" to the question "Is there any reason why you would not be a fair and impartial

juror for both the prosecution and the defense in this case." (3CT 453.) She did not elaborate on this answer.

The trial court questioned Prospective Juror No. 4 about the death penalty and about her answers on the questionnaire. The trial court asked the following:

> The Court: About the penalty phase. I asked the question on page 9, "The murders alleged in this case involve the special circumstances of multiple murder and also the one allegation of murder during the course of rape as a special circumstance.
>
> "Do you think that depending on the evidence, the circumstances of the case and the evidence presented in the penalty phase," and again I mentioned that unusual evidence that include attempting to save someone's life in a fire, perhaps an arson fire or something like that and risking their own lives to save that individual, art work, poetry, anything could be offered during that phase.
>
> Do you think that depending on the aggravating and mitigating circumstances in the penalty phase, you could impose the death penalty in such a case?

(3RT 375.) Prospective Juror No. 4 stated that she would "have to hear everything." (*Ibid.*) The court asked her if she would be "open," and she stated: "I am open." (*Ibid.*)

Immediately after this exchange the Prospective Juror No. 4 stated: "I would not vote for death." (3RT 376.) However, she then explained: "No. I'd have to listen to everything and, you know, get an understanding and the good and the bad and all of that." (*Ibid.*) She added: "And it would be a hard decision to say now." (*Ibid.*) The trial judge then pointed out that "there are some people that believe in the death penalty, support it but cannot participate in the process," and asked Prospective Juror No. 4 if she was one of those people. She said: "Possibly, yeah." (*Ibid.*) The court then asked her about her questionnaire answer that she would have sympathy with the female victims in the case, and queried her whether this

sympathy would give her a bias against the defense. (3RT 377.) She stated: "Of course I'd have sympathy, but I would still have to go by the law and the evidence." (*Ibid.*) In response to a question from the judge, she reiterated her position in the questionnaire that there was no reason why she would not be "a fair and impartial juror for both the prosecution and the defense," in both the guilt and penalty phases. (3RT 377-378.)

A short while later Prospective Juror No. 4 was questioned by the prosecutor, Ms. Do. Ms. Do stated:

> I was kind of watching you as you were answering the judge's questions on the penalty issue, and I saw some reluctance on your part about this decision, and we are asking each of you if you are to serve on this case to make a very heavy decision.
>
> I don't want you to be mistaken, we are seeking the death penalty in this case. We are going to ask 12 citizens selected by both parties to come to this case, look at this man and say we've judged your crimes, we've looked at your conduct, we've looked at everything in your background, and we believe you deserve the death penalty.

(3RT 413.) Prospective Juror No. 4 stated that she understood. (*Ibid.*) Do then asked if the prospective juror saw herself "as someone who could actually come into court, look at a human being and say, I judge you. I've looked at your crimes, I looked at your conduct, I looked at your character, and you deserve to die. (3RT 413.) Prospective Juror No. 4 said: "Yes, I think I could." (*Ibid.*)

The following exchange then occurred between Ms. Do and the prospective juror:

> Ms. Do: And so given some of the reluctance that I'm seeing in you, knowing that it's a choice, do you think that if you have the option of giving a person, a human being life without parole, that you would always choose that?
>
> Prospective Juror No. 4: I have a hard time putting someone to death. Most likely my choice would be the life in prison.

Ms. Do: Okay.

Prospective Juror No. 4: I would have a hard time with the other.

Ms. Do: All right. So do you think that you might, if we get to penalty phase, walk in predisposed to life without parole?

Prospective Juror No. 4: Most likely, yes.

Ms. Do: Okay. And would the prosecution have quite a burden to prove to you that death would be appropriate to overcome that predisposition?

Prospective Juror No. 4: Yeah.

(3RT 414.)

Later Ms. Do challenged Prospective Juror No. 4 for cause:

Ms. Do: We would challenge for cause Juror No. 4. I noted during her questioning by the court some visible reluctance on her part, and I don't know if the court heard it, but she did, in response to one of the questions, state sort of in a very low voice, "I would not vote for death." And then in my questioning of her, I think that she's the kind of person that might support it in the abstract but does not possess the personal conviction to actually make that choice.

She stated in many different terms that it would be hard, it would be a difficult choice, but she would go into penalty predisposed to life without parole and require a significant amount from the prosecution to overcome that predisposition.

(3RT 425.) Defense counsel, Mr. Tyre, opposed the challenge asserting: "that's what we are supposed to do when we go into a penalty phase. It's supposed to be a difficult decision to put a person to death, and I think she says it would be very difficult, but I think that that's what you're supposed to do. She did not say it was impossible, she just said it would be very difficult . . . ." (3RT 426.)

The court dismissed the juror, concluding that she "would not fairly impose the death penalty." (3RT 426.) He stated: "I did notice also her

body language as she was answering her questions, and she seemed to be very tightly drawn, is what I would say. That's a bad description, but not open and free with her feelings about it but someone defensive about it." (*Ibid.*)

3. Prospective Alternate Juror No. 1

Prospective Alternate Juror No. 1 answered questions about the death penalty on his questionnaire. He stated that he was not "for the death penalty" in answer to the question whether he would always vote guilty to first degree murder and true to the special circumstances in order to get the case to the penalty phase. (10CT 2382.) In answer to the question whether the death penalty was imposed too often he stated: "I'm not sure; I don't feel it should be use[d]." (10CT 2384.) He also stated that he would "perform my civil duty but I'm not for it." (*Ibid.*) He noted that his religious organization was "anti death penalty." (10 CT 2385.) However, he added: "but I can do what I'm ask[ed] to do regardless of my views." (*Ibid.*) He also stated: "I'm not for the death of anyone." (10 CT 2386.) Finally, he answered "no" to the question about whether there was any reason he "would not be a fair and impartial juror for both the prosecution and the defense in this case." (10CT 2392.)

Prospective Alternate Juror No. 1 was questioned by the judge about his views on the death penalty:

> The Court: Okay. You've indicated on page 7 you are strongly against the death penalty.
>
> Do you feel there are any circumstances in which you could vote for the death penalty?
>
> I've given you, of course after the questionnaire, all of those factors to consider, not only the circumstances of the crime and prior felony convictions, if any, but also the unusual things like art work, poetry, extraordinary efforts on the part of the defendant to save someone's life, things like that have to be considered as well.

No matter what you hear, would you always vote against the death penalty?

Prospective Alternate Juror No. 1: Not always, but I'd say if it was on a scale, it would be more towards life than death.

The Court: Okay. But open to -- open to making that vote?

Prospective Alternate Juror No. 1: If I have to, you know, I will follow the instructions I was given, so.

(5RT 684-685.) He then stated that in his own personal view, he "would lean towards life." (5RT 685.) He then stated that he did not really see himself voting for the death penalty. (*Ibid.*) The court then pointed out that under the law he was never "compelled to make that decision in favor of the death penalty." The judge then asked him whether "given that kind of leeway," would he never vote for the death penalty. (*Ibid.*) He responded: "I say I could, I could perform my duty, but you said my personal view, I would lean towards life." (*Ibid.*) The court then asked if he could "vote for the death penalty if you felt that the aggravating circumstances were so substantial in comparison to the mitigating circumstances that it warranted the greater penalty, could you vote for death? (5RT 685.) Prospective Alternate Juror No. 1 answered yes. (*Ibid.*)

Prosecutor Do questioned Prospective Alternate Juror No. 1. In response to her question about how long he had held his views about the death penalty, Prospective Alternate Juror No. 1 stated that he "decide[d] to think about the death penalty because of the Stanley Tookie Williams case." (5RT 706.) He added in response to the prosecution's question that his death penalty views were "somewhat" grounded in religious and moral reasons. (*Ibid.*) He agreed with the prosecutor when she reiterated his position from the questionnaire that he believed that the death penalty should not be used. (*Ibid.*) The following exchange then occurred between Ms. Do and Prospective Alternate Juror No. 1:

Ms. Do: Let me just ask you very directly. Given that you are opposed to the death penalty because of your religious and moral views and you don't think that it should be used, do you want to be in that position where you might have to actually come in and make a decision that would end a man's life?

Prospective Alternate Juror No. 1: I'm not sure if could do that.

Ms. Do: Okay. So at this point do you think that it would be a very -- and it should be a difficult decision, but what I'm asking is do you think that it might get to a point where because of your views, you might have a block, you might not be able to?

Prospective Alternate Juror No. 1: Based on the way you explained it the other day, family members or somebody here, would you be comfortable with that, I don't know if I could.

Ms. Do: Okay. And I'm letting you know that that is a possibility, because we do everything here in open court. You may see some people in the audience and they may be his family members, and, in fact, regardless of family members, you're looking at a human being regardless of what the crimes are, this is a human being.

Prospective Alternate Juror No. 1: Yes.

Ms. Do: And so do you think you could do it?

Prospective Alternate Juror No. 1: I'm not sure.

(5RT 708.)

The prosecution challenged Prospective Alternate Juror No. 1 on the grounds that he "is substantially impaired and would not realistically consider the death penalty as a viable option." (5RT 714.) Defense counsel Mr. Robusto argued that although the prospective juror was strongly against the death penalty, "he would listen to the evidence, and if the law required him to vote for death, that he would." (*Ibid.*) The Court responded: "But that was the answers to the questions that he gave to the prosecution that indicate he couldn't do that, especially if there were any people in the

courtroom related to the defendant." (*Ibid.*) He then allowed the challenge for cause. (*Ibid.*)

B. Applicable Law

Although the United States Supreme Court has declined to find that the process of death qualification violates a defendant's Sixth and Fourteenth Amendment right "to a jury selected from a representative cross section of the community," (*Lockhart v. McCree* (1986) 476 U.S. 162, 173), its jurisprudence is nevertheless animated by the Court's concern about the distorting effects of death qualification on the impartiality of capital jurors, particularly when there has been a systematic exclusion of death scrupled jurors.

Thus, the high court has emphasized that "[t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'" (*Gray v. Mississippi* (1987) 481 U.S. 648, 658-659, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 423.) "To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members" and "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.'" (*Gray v. Mississippi*, *supra*, at pp. 658-659, quoting *Witherspoon*, *supra*, 391 U.S. at p. 523; accord, *People v. Pearson* (2012) 53 Cal.4th 306, 332 [to "exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process"].)

As the high court explained in *Witherspoon v. State of Illinois* (1968) 131 U.S. 510, 519, fn. omitted: "[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." (See, *People v. Gamache* (2010) 48 Cal.4th 347, 389 [because jurors *are* "the conscience of the community," it was not error for the prosecutor to say so in argument, citing *Witherspoon, supra*, 391 U.S. at p. 519.]) A jury "cannot speak for the community" if it has been "[c]ulled of all who harbor doubts about the wisdom of capital punishment–of all who would be reluctant to pronounce the extreme penalty." (*Witherspoon, supra*, 391 U.S. at p. 520.)

It follows that "[s]tate may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths," but it may not "exclude jurors whose only fault [is] to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected" by their views on the death penalty. (*Adams v. Texas* (1980) 448 U.S. 38, 50-51; accord, *People v. Pearson, supra,* 53 Cal.4th at p. 332 [a "juror is not disqualified by his or her failure to enthusiastically support capital punishment"].)

"A prospective juror in a capital case may be excused for cause on the basis of his or her death penalty views if, but only if, those views would prevent or substantially impair the performance of a juror's duties under the court's instructions and the juror's oath." (*People v. Tate* (2010) 49 Cal.4th 635, 665-666, citing *Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Stewart* (2004) 33 Cal.4th 425, 441 & fn. 3; *People v. Heard* (2003) 31 Cal.4th 946, 958; and *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) "Thus, a prospective juror may be excused if his or her views on capital punishment would cause him or her invariably to vote either for death, or for life, in the case at hand." (*Id.* at p. 666, citing inter alia *Morgan v. Illinois* (1992) 504 U.S. 719, 726-728.)

In cases on direct review from a criminal conviction, the standard of review when reviewing a trial court's decision to excuse a capital-case juror

for cause is whether the state carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror." (*Wainwright v. Witt, supra*, 469 U. S. at p. 424.) Where a juror gives equivocal responses, the state has not carried its burden. (*Adams v. Texas* (1980) 448 U.S. 38,45; *Gray v. Mississippi* (1987) 481 U.S. 648, 661, fn. 10.) Although "the reviewing court generally must defer to the judge," who had the opportunity to observe the juror's demeanor, (*People v. Jones* (2012) 54 Cal.4th 1, 41), the trial court's exclusion of a juror for cause must be supported by substantial evidence (*People v. Pearson, supra,* 53 Cal.4th at p. 333).

C. The Court Erred When It Wrongly Excluded Two Prospective Jurors Who Were Reluctant But Not Unwilling to Impose the Death Penalty

1. Prospective Juror No. 4

There was not substantial evidence in the record that Prospective Juror No 4's views on the death penalty would prevent or substantially impair the performance of her duty as a juror. She stated on her questionnaire that she was moderately in favor of the death penalty and could impose the death penalty in a case like appellant's where there was multiple murder and other circumstances. (3CT 443, 445.) Upon questioning by the judge, Prospective Juror No. 4 reiterated that she would be "open" to the death penalty. (3RT 375.)

Upon questioning by the prosecution, she agreed with the prosecution that she had a preference for life without the possibility of parole and that the prosecution would have "quite a burden" to prove to her that death was the appropriate punishment. (3RT 414.) However, Prospective Juror No. 4's preference for life without the possibility of parole, even if a strong preference, is not evidence of substantial impairment. As noted above, "[t]he State's power to remove jurors does not extend beyond its interest in removing those jurors who would 'frustrate

the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'" (*Gray v. Mississippi, supra,* 481 U.S. at pp. 658-659, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

It is true that the trial court made reference to Prospective Juror No. 4's "body language" when she was questioned during voir dire in arriving at its conclusion that his responses were equivocal (3RT 426), and undoubtedly, respondent will point to this reference and argue that this Court's holding that the deference it accords to the trial court's observations forecloses further review of the trial court's ruling. (*People v. Lewis* (2008) 43 Cal.4th 415, 483; *Uttecht v. Brown* (2007) 551 U.S. 1, 9.) However, deference, even where appropriate, is not the same as abdication. (*Miller-El v. Cockrell* (2003) 537 U.S. 332, 340.) So:

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment.

(*Uttecht v. Brown*, *supra*, 551 U.S. at p. 20.) Deference to the trial court's purported ability to perceive jurors' demeanor does not require affirmance where the record discloses no basis for a finding of substantial impairment.

Even though the judge refers to the juror seeming "tightly drawn" (3RT 426) that demeanor is entirely consistent with the gravity of the decision she was being questioned about – the execution of a young man. In addition, it is perfectly understandable that the prospective juror would be tense given that the prosecution was doing all it could to emphasize how serious the decision was. Indeed, Ms. Doe, the prosecutor, personalized the decision asserting that Prospective Juror No. 4 would herself have to look at a "human being" and reject him as a person and sentence him to die. (3RT 413.) Yet, even in the face of this, Prospective Juror No. 4 still affirmed she could follow the law and the evidence, even if it would be hard.

This Court has correctly recognize the constitutional necessity of death-scrupled jurors serving on capital juries unless they are truly unable to follow the law. It is precisely because the constitutionality of the death penalty depends upon jurors recognizing the enormity of their responsibility that it is *not* permissible to excuse for cause prospective jurors who might take their role with "special seriousness." (*Adams v. Texas, supra*, 448 U.S. at pp. 50-51.) As the high court explained,"[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with–and indeed as indispensable to–the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Caldwell v. Mississippi* (1980) 472 U.S. 320, 330.)

This Court has therefore held that "*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 "he or she were unwilling or unable to follow the trial court's instructions." (*People v. Stewart, supra,* 33 Cal.4th at p. 446, italics added; accord, *People v. Pearson, supra,* 53 Cal.4th at p. 332.) Dismissing Prospective Juror No. 4 simply because she was "tightly drawn" when asked about the possibility of putting a follow human being to death gets the law exactly backwards. A jury comprised of individuals who did *not* struggle with the prosecutor's

hypothetical would not be fit to render a constitutionally reliable verdict.[24]

2. Prospective Alternate Juror No. 1

Neither was there substantial evidence in the record that Prospective Alternate Juror No. 1's views on the death penalty would prevent or substantially impair the performance of his duty as a juror. The prospective juror said that he was opposed to the death penalty, but that he would do his civil duty if asked to do so. (10CT 2382, 2384.) When questioned by the trial court he stated that he would not always vote against the death penalty (5RT 684) and that he would follow the instructions he was given. (5RT 685.)

The trial court gave as a reason for the dismissal of Prospective Juror No. 1 the prospective juror's statement, in response to the prosecutor's question, that he was not sure that he could impose the death penalty if the

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[24]Significantly, in *Witherspoon*, the Supreme Court noted that one effect of the exclusion of scrupled jurors was a growing gap between the number of death sentences imposed and those actually carried out. (*Witherspoon, supra,* 391 U.S. at p. 520, fn. 19.) The gap, the Court observed, reflected a widening "divergence of belief between the juries we select and society generally." (*Ibid.*) The same is true of California, in which the number of death sentences imposed vastly outstrips the number of executions, leaving California with the largest death row in the nation and an expensive, dysfunctional death penalty system, buckling under its own weight. (See generally Alarcon & Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle* (2011) 44 Loyola. L.A. L. Rev. S41; Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience* (2009) 93 Marq. L. Rev. 495; Cal. Comm'n on the Fair Admin. of Justice, Final Report and Recommendations on the Administration of the Death Penalty in California 116-117 (Gerald Uelmen ed., 2008), available at <http://www.ccfaj.org/documents/ CCFAJFinalReport.pdf> [as of Sept. 28, 2014].) These considerations underscore the importance of enforcing vigilantly the constitutional limitations on prosecutors' use of challenges for cause to remove death scrupled jurors so that qualified jurors, who take the responsibility of serving on a capital jury with utmost seriousness, are not improperly excluded.

defendant's family was in the courtroom. (5RT 508, 514.) This response does not support his removal for cause. This answer was not driven by implacable opposition to the death penalty, but by an understandable discomfort at the prospect that he would be required to announce a death verdict in front of the defendant's family. A juror need not feel comfortable with announcing a verdict in front of the defendant's family to qualify to sit on a death penalty jury. This is not part of a juror's duty. (See *People v. Chacon* (1968) 69 Cal.2d 765, 772 [error to excuse for cause jurors who "indicated that they would not undertake what they regarded as the greater moral burden of the jury foreman," when their answers "did not show that they would have refused to vote for the death penalty"], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.) It was improper for the prosecutor through her questioning to create hesitation on the part of a prospective juror by suggesting that he would personally have to sentence the defendant to death and that he, not the State of California, bears responsibility for his execution. This hesitation created by an improper question is not substantial evidence of the prospective juror's inability to sit as a capital juror. This man repeatedly said he could perform his duty despite his personal reservations about the death penalty. It is inconsistent with the purposes of *Wainwright v. Witt* to allow the prosecution to ask misleading questions to create a pretext to dismiss an otherwise perfect juror for a death penalty trial.

Appellant acknowledges that this Court has upheld similar questioning as "an acceptable means of impressing upon each prospective juror that the verdict of death would affect a real person who would be in the courtroom at that time" and ascertaining "whether, under these circumstances, the prospective juror nevertheless would be able to vote for death." (*People v. Lynch* (2010) 50 Cal.4th 693, 734, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 853.) However, appellant submits that this

is inconsistent with other decisions of this Court, which correctly recognize the constitutional necessity of death-scrupled jurors serving on capital juries unless they are truly unable to follow the law.

D. Conclusion

A person who favors life without possibility of parole over death can be entrusted to make the choice between life or death, given the facts in a specific case. Prospective Juror No. 4 and Prospective Alternate Juror No. 1 indicated they would consider all facts and the law and would follow the trial court's instructions. Because they were prepared to follow the law, despite their personal reservations about the death penalty, the trial court erred in dismissing them. As a result, appellant's rights to due process, a jury trial, a fair trial, a reliable determination of penalty, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts were violated. The erroneous dismissal of even one juror on death qualification grounds requires that appellant's death sentence be reversed and the case remanded for a new sentencing hearing. (*Gray v. Mississippi* (1987) 481 U.S. 648 665-668; *People v. Pearson*, *supra*, 53 Cal.4th at p. 333.)

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IV

THE TRIAL COURT'S ERRONEOUS EXCLUSION OF THIRD-PARTY CULPABILITY EVIDENCE DENIED APPELLANT HIS RIGHTS TO PRESENT A COMPLETE DEFENSE AND TO A FAIR TRIAL

A. Facts and Procedural History

In Counts Four and Five of the information, appellant was charged with the murder of Regina Washington and of the fetus she was carrying. (1CT 133-138.) Five days before jury selection, defense counsel informed the prosecution and court that counsel intended to elicit evidence of the comparison of the partial footprint that was found on Regina Washington's t-shirt to Ray Anthony Williams's shoe. (5RT 786.) The court deferred ruling on admissibility of the evidence in order to learn more about the strength of the evidence. (5RT 787.) The court stated:

> We'll have to see how strong that evidence is and also how significant the print is, meaning that how close to the crime scene and what kind of crime scene. If it's an area of high transient traffic, it may not mean anything.

(5RT 786-787.)

During its guilt phase case in chief, the prosecution elicited evidence from Lloyd Mahaney, a criminalist with the Los Angeles County Coroner's Office, that a partial shoe print, which left a complete impression of the sole, was found on victim Regina Washington's white t-shirt. (8RT 1204-1206; People's Exhibit No. 47.) The shoe also left an impression through the shirt on Washington's skin. (8RT 1207-1208; People's Exhibit No. 48.)

William Lewellen, a criminalist with the Los Angeles Police Department, was then called to testify about the Washington crime. At the prosecution's request, the trial court held a hearing pursuant to Evidence Code section 402 regarding Lewellen's testimony. The prosecutor told the court that she intended to elicit evidence from Lewellen regarding his analysis of the partial shoe print found on Washington's shirt. She planned

to ask questions about his determinations of the shoe print's size and quality, and whether the shoe print was partial or complete. However, the prosecutor asked the court to exclude evidence of Lewellen comparing the shoe print to Ray Anthony Williams's shoe because the evidence connecting Williams to the offense was hearsay. (8RT 1220-1221.) The prosecution asserted that the criminalist could not eliminate Williams as the source of the shoe print. (8RT 1221.)

Defense counsel opposed the motion to exclude this evidence. Counsel argued that if the prosecution could elicit evidence regarding the shoe print, he should be able to elicit evidence regarding whether Lewellen ever compared a shoe to a shoe print and whether Lewellen subsequently eliminated that shoe as being a potential source of the shoe print. He contended that the proffered evidence was relevant and appropriate. (8RT 1221-1222.)

The trial court excluded the evidence. The court ruled the evidence inadmissible under Evidence Code section 352 because the evidence of a comparison to Williams's shoe implied that there was a basis for making the comparison and hearsay provided that basis. The court explained:

> [T]he problem is this: By making the comparison, it suggests to the jury that there was a reason for the comparison, which is hearsay, which is not admissible.

(8RT 1222.) In response to defense counsel asking if the prosecution would be able to elicit evidence about what Lewellen did with the shoe print, the court declared that evidence regarding the quality of the shoe print would be admissible. (8RT 1222.) Defense counsel responded that if Lewellen testified that he could make a comparison and, thus, an identification, defense counsel "should be able to ask did he make any comparison of that shoe print to anybody else in order to try and eliminate them from a suspect of this case." (8RT 1222-1223.) The court, adopting the prosecutor's view

that admission of the comparison would amount to admitting inadmissible hearsay, disagreed:

> It doesn't include or eliminate because it's not sufficient to do that. And by making that – by bringing forth the fact of the comparison, it suggests that there is more than the actual evidence in the case, which is the reason for it, which is hearsay.

(8RT 1223.) The court added: "Obviously comparisons wouldn't have anything to do with Turner." (8RT 1223.) Accordingly, the court excluded the evidence.

When the jury returned to the courtroom, the prosecution elicited evidence from Lewellen regarding the shoe print. Lewellen testified that he examined the partial shoe print on Washington's t-shirt and measured it to be approximately one square inch. (8RT 1225.) He added that the quality and size of the partial shoe print prevented him from making any determinations regarding the source of the partial shoe print. (8RT 1226.) Lewellen answered "no" to the prosecution's question asking if the one square inch was "enough in terms of size and quality for [him] to make any determination." When a complete, clearly defined shoe print is found, a criminalist could identify the make, model, and size of the shoe that had left the impression. (8RT 1226.) Criminalist Lewellen also testified he was never asked to compare any of appellant's shoes to the shoe prints discovered in this case. (8RT 1229.)

B. Legal Principles

All relevant evidence is admissible. (Evid. Code, § 351.) Relevant evidence is all evidence "including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) In determining whether evidence has a tendency to prove a material fact, it must be determined whether it

"""logically, naturally, and by reasonable inference""" establishes the fact. (*People v. Thompson* (1980) 27 Cal.3d 303, 316, citations omitted, overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.) A trial court has wide discretion in determining the relevance of evidence. (*People v. Warner* (1969) 270 Cal.App.2d 900, 908.)

The principles underlying third party evidence are long standing. Third party culpability evidence is treated like all other evidence: if relevant, it is admissible. (*People v. Hall* (1986) 41 Cal.4th 826, 833; *People v. Alcala* (1992) 4 Cal.4th 742, 792.) Just like other evidence, third party evidence is admissible if it is "'capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.'" (*People v. Page* (2008) 44 Cal.4th 1, 38, citing *People v. Hall* (1986) 41 Cal.4th 826, 833; *People v. Geier* (2007) 41 Cal.4th 555, 581; *People v. Prince* (2007) 40 Cal.4th 1179, 1242; *People v. Robinson* (2005) 37 Cal.4th 592, 625.) To introduce third party culpability evidence, a defendant must show that the evidence is relevant and that its probative value is not "substantially outweighed by the risk of undue delay, prejudice, or confusion. (Evid. Code, § 352)" (*People v. Hall, supra*, 41 Cal.4th at p. 834.)

C. The Evidence of the Shoe Print Comparison Was Relevant and Admissible as Third Party Culpability Evidence

The proffered evidence of law enforcement's inability to exclude Ray Williams as the source of the shoe print found on Regina Washington's clothing and skin connected a possible alternative perpetrator to the Regina

Washington homicide. As such, it was clearly relevant to show that someone other than appellant was responsible for the Washington crime. The evidence not only showed that someone else was present at the scene, it showed that someone other than appellant was responsible for the murder. The location of the footprint on Washington's clothing tends to show that it was made by the person who killed her. Moreover, the footprint was also found on Washington's skin, evidence that the footprint was made during Washington's strangulation. As the prosecution noted in its closing argument, the footprint showed that the perpetrator used his foot to apply force to Washington while he raped and strangled her. (17RT 2455.) Clearly, the person who left the footprint was the perpetrator. Because the comparison did not rule out Williams as a source of the shoe print, the evidence showed that Williams was a potential perpetrator.

Evidence of an alternative perpetrator's presence at the scene is relevant even if it does not definitively establish his presence. In *People v. Burgener* (1986) 41 Cal.3d 505, this Court found relevant evidence that a substance was found on the defendant's shoes. The substance could have been human blood, animal blood, vegetable enzymes, or fecal material. The existence of material on the defendant's shoes did not establish that the defendant was present at the crime scene; nevertheless, this Court found the evidence to be relevant on the issue of whether the defendant was present. This Court explained that "the presence of a substance which might be blood on defendant's shoes certainly has some tendency in reason to prove that he might have been present at the scene of a bloody shooting the night before his arrest." (*Id.* at p. 527, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 756.) Likewise, evidence that Williams's shoe may have left the footprint on Washington's t-shirt had some tendency in reason to prove that Williams was present at the crime scene.

This evidence was admissible as evidence of third-party culpability

because it was"capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall*, *supra*, 41 Cal.4th at p. 833.) This Court has held that the presence of a third party near a crime scene is not enough, by itself, to make third party evidence admissible. (*People v. Alcala*, *supra*, 4 Cal.4th at p. 792.) Yet the shoe comparison showed more than mere presence since it showed both that someone other than appellant was at the scene and that this third person committed the murder. Forensic evidence connecting a third person to the crime is very important in assessing the admissibility of third party culpability evidence. (See *People v. Adams* (2004) 115 Cal.App.4th 243, 253 [distinguishing presence case from one where physical evidence left at the crime scene].) This constitutes "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall*, *supra*, 41 Cal.4th at p. 833.) The trial court appears to have believed that to be admissible the shoe print evidence had to show that appellant could not have been the source of the shoe print. The trial court reasoned that because appellant's shoe was not eliminated as the source of the print, "[o]bviously comparisons wouldn't have anything to do with Turner," so that the evidence was inadmissible. (8RT 1223.) This is not correct. As *Hall* clearly holds, the evidence had only to raise a reasonable doubt about the defendant's guilt, not affirmatively show that he was not guilty.

This Court has recognized the importance of presence in other third-party-culpability cases. In *People v. Hall*, *supra*, 41 Cal.3d at p. 833, the alleged alternative perpetrator's footprints in the victim's bedroom was a significant factor in finding that the trial court erred in excluding third-party culpability evidence. This Court found the evidence of presence probative although the homicide occurred in a different room in the victim's home. (*Ibid.*) As explained above, in *People v. Burgener*, *supra*, this Court recognized that evidence suggesting that an alleged alternative perpetrator

might have been present at the crime scene is relevant to that person's guilt.

The decisive role of trace evidence connecting a third party to the scene in determining the admissibility of such evidence has been recognized by courts from other jurisdictions. In *State v. Barriner* (Mo. 2003) 111 S.W.3d 396, 400, the Missouri Supreme Court held that the trial court committed reversible error when it excluded evidence of hair found at the crime scene that matched neither the defendant nor the victim: "The hairs are physical evidence that could indicate another person's interaction with the victims at the crime scene. Barriner was entitled to present to the jury this evidence of another person's direct connection to the murders. [Footnote.]" (*Id.* at p. 400.) Likewise, in *State v. Cerreta* (Conn. 2002) 796 A.2d 1176, the Connecticut Supreme Court reversed a conviction because the trial court erroneously excluded forensic evidence that connected an unknown third party to the crime scene. The *Cerreta* court explained that the presence of hair and fingerprints was "reliable, physical evidence that had undergone the rigors of forensic analysis." (*Id.* at p. 1183.) The court thus found the evidence exculpatory and probative. (*Id.* at pp. 1183-1184.) Finally, the alternative perpetrator's connection to a gun used to kill the victim together with evidence of the third person's presence at the scene was a crucial factor in the New York Court of Appeals's reversal of a conviction for the erroneous exclusion of third-party culpability evidence in *People v. Primo* (N.Y. 2001) 753 N.E.2d 164, 169.

As relevant evidence of third-party culpability, the shoe print testimony was only inadmissible if the proffered testimony failed the Evidence Code section 352 balancing test. However, the trial court never made any analysis under section 352. Rather, it agreed with the prosecution that the evidence relied on hearsay. (8RT 1223.) It does not. The defense did not attempt to elicit evidence of what somebody had told criminalist Lewellen. Nor did the defense seek to admit any statement into evidence,

let alone attempt to elicit evidence of an out-of-court statement to prove the truth of the matter asserted. Lewellen's action in comparing Williams's shoe to the impression left on Washington's t-shirt is not hearsay, as actions that a person does in response to something he had been told are not hearsay. For purposes of the hearsay rule, conduct constitutes hearsay only if it is assertive. An act is assertive if the actor at the time intended the conduct to convey a particular meaning to another person. (Evid.Code, § 225 [defining statement to include "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression"].) Lewellen did not make the comparison as a substitute for verbal or written expression. The proffered evidence therefore did not constitute hearsay. (*People v. Jurado* (2006) 38 Cal.4th 72, 129.)

Once the hearsay issue is removed, the evidence passes the section 352 test. The evidence was clearly probative in that it showed that appellant was not the perpetrator. There would be no delay caused by presenting the evidence; it was quite straight forward in connecting Williams to the crime scene; and it was surely not "prejudicial" in the sense that word is used in the section 352 context, i.e., tending to "evoke an emotional bias against the defendant." (*People v. Crew* (2003) 31 Cal.4th 822, 836.) The trial court thus abused its discretion in excluding relevant third party culpability evidence tending to show that appellant was not the perpetrator.

D. The Exclusion of the Evidence Deprived Appellant of His Right to Present a Complete Defense and Denied Him a Fair Trial

November 17, 2014 The exclusion of the third-party-culpability evidence violated appellant's constitutional right to present a defense. (See *Green v. Georgia* (1979) 442 U.S. 95, 97.) The compulsory process clause of the Sixth Amendment and article I, section 15 of the California Constitution, and the due process clause of the Fourteenth Amendment and article I,

sections 7 and 15 of the California Constitution provided appellant with the right to present a complete defense. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Notions of fundamental fairness inherent in the due process clause require "that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*Trombetta, supra*, at p. 485, quoted in *Crane, supra*, at p. 690.)

The Constitution does not tolerate bars on defense evidence if the evidentiary bar violates a defendant's weighty interest and is arbitrary or disproportionate to the purposes the evidentiary bar was designed to serve. (*Holmes v. South Carolina, supra*, 547 U.S. at p. 324.) United States Supreme Court precedents establish that exclusion of defense evidence violate a defendant's right to present a defense if the evidence is exculpatory and critical to the defense, and does not violate the integrity of the adversarial process. In finding a violation of the right to present a defense, the United States Supreme Court has emphasized the centrality of the excluded evidence to the defense. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 57; *Crane v. Kentucky, supra*, 476 U.S. at p. 690; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Davis v. Alaska* (1974) 415 U.S. 308, 317-318; *Chambers v. Mississippi, supra*, 419 U.S. at p. 302.) In this instance, the shoe print evidence was exculpatory, indeed critical to the defense, because it showed that someone other than appellant committed the crime. This evidence outweighed any possible interest the state had in excluding the evidence.

E. The Error Was Prejudicial and Requires Reversal

Under state law, the exclusion of third party culpability evidence is reviewed for an abuse of discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 372-373; *People v. Cudjo* (1993) 6 Cal.4th 585, 607.) State law error

is reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836 to determine whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." When the federal constitutional guarantee to a meaningful opportunity to present a complete defense is violated, this Court must reverse a defendant's conviction unless the constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 691; see *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Under either standard, the error was prejudicial. In this case, the defendant faced the mighty evidence of a DNA match which the prosecution used to argue that the odds that someone other than appellant was present at the scene and participated in the crime were vanishingly small – one in one quintillion. The defense strove through cross-examination to show that the DNA tests were not performed adequately and, with the Y-STRS evidence it put on, that there was other male DNA present at the scene. The Williams shoe print evidence was a critical piece of the evidence that there were reasonable doubts about the prosecution's case that appellant was the perpetrator. Without this evidence, the prosecution was able to argue that the evidence pointed unmistakably to appellant – when it did not.

In response to this argument respondent might suggest that the DNA evidence points exclusively to the defendant, as the prosecutor argued in closing argument (17RT 2435 ["Again all three experts tell you it's Turner only"]), so that the evidence of the shoe print made by a third party would pale in the glare of the DNA evidence. The characterization of the DNA evidence in this case as conclusive is mistaken. For example, there were instances in which the DNA testing of the scene samples yielded results that were consistent with appellant being the donor of the sample, along with a

second person. The prosecution elicited testimony that any alleles which were not consistent with appellant's profile must have come from the victim through an incomplete separation of the sample into male and female DNA. This is not so. The alleles inconsistent with appellant's profile could have come from a third party, i.e., a male whose DNA profile was inconsistent with that of appellant, though also consistent with the victim. It is only if the factfinder assumes that the source of the extraneous alleles is "breakthrough" from an incomplete separation of male and female DNA that the explanation for the extraneous alleles is that they belonged to the female victim. However, there is no basis for that assumption. Nevertheless, the prosecution was able to suggest that its DNA evidence exclusively implicated the defendant – when it did not. All the more important was the shoe print evidence: it showed that the defense was right to attack the manner in which the DNA was collected and tested because the evidence was fundamentally flawed and there was a possibility that a third party was guilty of some of the murders.

As appellant has discussed above, a DNA match only puts the defendant in a pool of possible suspects – it never exclusively picks out an individual. The evidence that the random match probability was one in one quintillion in appellant's case was evidence that the likelihood that the match was random was tiny. However, the random match statistic is not the same as evidence that appellant was the source of the crime scene DNA. The error in conflating the random match probability with the source probability is called the "prosecutor's fallacy" or the "fallacy of the transposed conditional." The former is the chance of a random match; the latter is the "chance that the defendant is the source of the DNA given the evidence." (Roth, *Safety in Numbers - Deciding when DNA Alone is not Enough* (2010) 85 N.Y.U.L.Rev. 1130, 1151.) These two are not the same and one can conclude nothing about the weight of the evidence of the

random match probability without the assessment of all the other evidence. As the authors of the amicus brief in *McDaniel v. Brown* noted:

> [U]seful conclusions about source probability thus generally requires considering DNA evidence in conjunction with other evidence in a case. If other evidence points strongly to defendant's guilt, a jury could reasonably conclude that there is a high likelihood that defendant is the source of the blood, even though he is only one of many people who could have been the source. In contrast, if the other evidence points to someone else, a jury could reasonably conclude that the match to defendant was just a coincidence. As any player of poker knows, seemingly improbable events sometimes occur just by chance.

(*McDaniel v. Brown*, 2009 U.S. S.Ct. Briefs Lexis 592, 24.) Without the evidence of the shoe match, the random match probability evidence incorrectly suggested that there practically could have been no other contributor to the DNA at the crime scene – when that was not the case. There was the possibility that another man was responsible for the crime. As such, the prosecution cannot show beyond a reasonable doubt that had the evidence been admitted that the verdicts would have been the same.

The trial court's error also invalidates the other convictions as well as all of the death sentences. Because the jury was permitted to aggregate all of the evidence in determining appellant's guilt of each offense, the error in excluding this evidence, and thus calling into question appellant's guilt of the Washington and Washington fetus offenses, impacts the other convictions as well. Since the jury was not required to segregate the evidence which was pertinent to each offense, it is likely that an assessment of guilt of the Washington offenses contributed to the convictions of the other offenses.

Similarly, since an assessment of death is a "normative" judgment, it is likely that the finding of guilt of the Washington offenses played a significant role in the jury's ultimate determination that death was the

appropriate punishment for the other offenses. As such, the trial court's ruling also denied appellant his Eighth Amendment right to a reliable sentencing determination. Even if the jury had convicted appellant of the Washington murder after considering the evidence of third party culpability, the jury still could have considered it as lingering doubt evidence at the penalty phase. (See *People v. Terry* (1964) 61 Cal.2d 137, 145-146, disapproved on another ground in *People v. Laino* (2004) 32 Cal.4th 878, 893 [jury may determine that guilt proven beyond reasonable doubt but still demand greater degree of certainty for imposition of death penalty].) The failure to permit appellant to introduce this evidence effectively removed his ability to present a potential mitigating factor in violation of the Eighth and Fourteenth Amendments. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) As such, appellant's death sentences must be reversed.

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V

THE INSTRUCTION ON FETUS VIABILITY WAS REVERSIBLE ERROR

A. Introduction

Appellant was charged in Count Five with the 1989 first degree murder of the fetus carried by Regina Washington. (1CT 133-138.) Because the crime was in 1989, the prosecution was required to prove beyond a reasonable doubt that the Washington fetus was viable. However, the instruction the trial court gave failed to adequately instruct on viability. This was error. Because the instruction permitted conviction of murder upon proof of less than beyond a reasonable doubt, the instruction violated appellant's right to a fair trial, due process and a fair and reliable penalty phase determination. (U.S. Const., Amends. 6, 8 and 14.) The error requires reversal.

B. Evidence of Viability and the Jury Instruction

Los Angeles County Deputy Medical Examiner, Dr. Lisa Scheinen, did not examine either Regina Washington's body or that of the fetus. Instead, she testified solely on the basis of her examination of the autopsy report. (12RT 1791.) The prosecution asked Dr. Scheinen what was the cause of the fetus' death. She testified:

> It is listed as anoxic intrauterine fetal demise. And then there's some additional information, female, 825 grams, approximately six and one-half months' gestation, and that is due, meaning the whole phase anoxic intrauterine fetal demise due to maternal strangulation.

(12RT 1820.) The medical examiner then testified that the baby died because the mother was strangled. (*Id.* at p. 1821.) The prosecution asked and Dr. Scheinen answered:

> Q. Now, does that mean that the medical examiner that did this autopsy came to the conclusion that the fetus in this case could have lived outside the womb but for the fact that the mother had been strangled to death by her murder[er]?

A. Well, she's saying that the baby died because the mother was strangled. She doesn't really say anything specific about whether the baby could have survived, but just looking at the numbers, the age of the baby would indicate that it was a viable fetus, meaning it has a *chance* for life by itself.

(*Ibid.*, italics added.)

Dr. Scheinen did not further testify about the definition of viability in terms of the chances a viable fetus has for survival. However, she did testify about the age of viability:

> Okay. I have to explain that the literature talks about gestational age, which is done in weeks, so they talk rather than talking about months, they'll talk about something being so many weeks of age inside the mother.
>
> Six and a half months is approximately 27 to 28 weeks. Seven months is 28 weeks. And the World Health Organization generally says that a fetus can be considered viable after the 22nd week or a weight of 500 grams.
>
> In this case we have a gestational age that is well above that. You're talking 27 to 28 weeks, and you have a weight that is 825 grams rather than 500 grams.

(*Id.* at p. 1822.)

The prosecution asked Dr. Scheinen whether the standard was the same in 1989. The doctor stated that it was "very similar" (12RT 1823) and referred to a chart from a 1983 book, which, she stated, "shows the dividing line between what is considered pre-viable for a baby that would have no chance of surviving outside the womb and what is considered a viable fetus." (*Ibid.*) Using that chart, which was marked for evidence as People's Exhibit No. 141 (12RT 1824), the doctor indicated that 500 grams was the limit of viability (12RT 1825). Again referring to the chart, the doctor stated that they were "in this ballpark here by weight, so it's clearly well into the range that's considered viable." (12RT 1826.)

The prosecution asked: "Now, in this particular autopsy report, do you recall if the medical examiner made any notation with respect to whether the baby was well developed or well nourished?" The doctor answered "Yes," and added that the report stated: "'In fact, the fetus appears generally as well or better preserved than the mother.'" (*Ibid.*) She noted that the report also stated: "'that there is no congenital abnormality.'" (*Ibid.*) Finally, the prosecution asked about the notation in the report that Regina Washington had cocaine in her blood stream at the time of her death:

> Q. Okay. Now, given the fact that the deputy medical examiner that did the original autopsy report noted that the baby in this particular case was well developed and well nourished, is it still your opinion, noting the cocaine levels that were reflected in the toxological [sic] study, that this baby would be viable?
>
> A. Okay. Now, were you asking me about the cocaine level of the baby or mother?
>
> Q. Mother.
>
> A. Okay. And yes, okay. Your question is whether I'd see anything in the baby that would suggest that there was anything other than a healthy baby; is that right?
>
> Q. Correct.
>
> A. No, I see nothing in the report to that affect.

(*Id.* at p. 1827.)

During a discussion of jury instructions the prosecutor stated that she would look at the instruction defining a viable fetus because the "definition of a viable fetus may have been different in 1989, and that would be the correct year for Regina Washington's murder." (17RT 2415.) The judge agreed that he would also check the instruction. There were no further discussions regarding the instruction and the jury was instructed on fetal murder as follows:

> Every person who unlawfully kills a human being or fetus with malice aforethought or during the commission or attempted commission or rape is guilty of the crime of murder in violation of Penal Code 187.
>
> In the crime of murder, a human fetus is defined as a viable unborn child. Viability is defined as the capability of the fetus to maintain independent existence outside of the womb even if this existence required artificial medical aid.

(14CT 3508; 17RT 2541-2542.)[25] The jury found appellant guilty murder in the second degree for the death of the Washington fetus. (14RT 3526.)

C. The Instruction Failed to Adequately Define Viability

In *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 617, a majority of this Court held that a man who had killed a fetus carried by his estranged wife could not be prosecuted for murder because the Legislature intended the phrase "human being" to mean a person who had been born alive. The Legislature reacted to the *Keeler* decision by amending the murder statute, section 187, subdivision (a), to include within its proscription the killing of a fetus. (§ 187, subd. (a) (West Supp. 1998) (amended by Stats.1970, ch. 1311, § 1, p. 2440)); see Note, *Is the Intentional Killing of an Unborn Child Homicide* (1971) 2 Pacific L.J. 170.) In the next decade the Court of Appeal limited the applicability of section 190 to "viable" fetus. (See *People v. Davis* (1994) 7 Cal.4th 797, 821 [discussing cases].) In *Davis*, this Court overruled those cases, holding that the murder of a fetus applied to any fetus, not just viable ones. (*Id.* at p. 810.) However, this Court also held that its holding created "unforeseeable judicial enlargement of a criminal statute." (*Id.* at p. 811, citing *Bouie v. City of Columbia* (1964) 378 U.S. 347 and *Rose v. Locke* (1975) 423 U.S. 48.) Accordingly, this Court held that the new interpretation of the statute should apply prospectively only. (*Id.* at p. 811.)

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[25]There is nothing in the record regarding the source of this instruction.

Because it could not apply its new interpretation of Penal Code section 187 to Davis, this Court used the former interpretation of the statute. (See *People v. Davis*, *supra*, 7 Cal.4th at p. 813.) At the time CALJIC No. 8.10 defined viability as follows: "A viable human fetus is one who has attained such form and development of organs as to be normally capable of living outside of the uterus." (*Id.* at p. 813, citing CALJIC No. 8.10 (1988 5th Ed.).) Yet, the trial court gave the jury a modified version of CALJIC No. 8.10: "Within the meaning of Penal Code section 187, subdivision (a), as charged in Count One, a fetus is viable when it has achieved the capability for independent existence; that is, when it is *possible* for it to survive the trauma of birth, although with artificial medical aid." (*Ibid*, italics in original.)

The *Davis* Court revisited its opinion in *People v. Hamilton* (1989) 48 Cal.3d 1142, where it had "reviewed an instruction substantially identical to the modified version of CALJIC No. 8.10 given here." (*People v. Davis*, *supra*, 7 Cal.4th at p. 813.) The *Davis* Court noted that the defendant in *Hamilton* had asserted that:

> the jury should have been instructed pursuant to the United States Supreme Court's pronouncement on a woman's constitutional right to an abortion in *Roe v. Wade, supra,* 410 U.S. 113, 93 S.Ct. 705, and the subsequent definition of viability adopted by the Court of Appeal in *Colautti v. Franklin, supra,* 439 U.S. at page 388, 99 S.Ct. at page 682, that a fetus is not viable under our murder statute unless " 'there is a reasonable likelihood of [its] sustained survival outside the womb, with or without artificial support.' " (*Hamilton, supra,* 48 Cal.3d at p. 1171, 259 Cal.Rptr.701, 774P.2d730.)

(*Id.* at p. 806.) This Court did not address Hamilton's argument that the jury was incorrectly instructed because there was no possibility of prejudice: "Uncontradicted and conclusive evidence established that the likelihood of this fetus's sustained survival was high." (*Id.* at p. 813.)

However, in *Davis* this Court adopted the reasoning of the *Hamilton* Court that the parameters of *Roe v. Wade* (1973) 410 U.S. 113, and cases following it governed the definition of viability prior to its opinion. It noted that although CALJIC No. 8.10 was not a "model of clarity" the wording of the instruction "defining viability as 'normally capable of living outside of the uterus,' . . . suggests a better than even chance – a probability – that a fetus will survive if born at that particular point in time." (*People v. Davis*, *supra*, 7 Cal.4th at p. 814.) It held that the instruction given there suggested a "possibility" of survival and essentially amounted to a finding that a fetus incapable of survival outside the womb for any discernible time would nonetheless be considered "viable" within the meaning of section 187, subdivision (a). The Court concluded that "[b]ecause the instruction given by the trial court substantially lowered the viability threshold as commonly understood and accepted (as defined by *Roe v. Wade, supra,* 410 U.S. at pp. 162-164, 93 S.Ct. at pp. 731-732, *K.A. Smith, supra,* 59 Cal.App.3d at pp. 752-753, 129 Cal.Rptr. 498, and its progeny), we conclude that the trial court erred in instructing the jury pursuant to a modified version of CALJIC No. 8.10." (*Ibid.*)

The definition of viability supplied to appellant's jury falls short of a requirement that the prosecution show a "better than even chance – a probability – that a fetus will survive." (*People v. Davis*, *supra*. 7 Cal.4th at p. 814.) The trial court's instruction required only that the fetus have the "capability" to maintain independent existence without making it clear that there needed to be evidence that there was a likelihood, i.e., a better than even chance, that the fetus survive. Just as the trial court had done in *Davis*, the trial court in appellant's case altered the standard language of CALJIC No. 8.10 to lower the burden of proof from that required. CALJIC No. 8.10 at the time required that the prosecution show that the fetus be "normally capable of living outside of the uterus." The words "normally capable" are

critical to the *Davis* court's conclusion that the evidence show a better than even chance of survival. However, the trial court in this case left out that language stating only that a fetus must have the "capacity" to survive – incorrectly suggesting that if a fetus might survive, it is viable.

The instruction also incorrectly implies that if a fetus has the capacity to survive for just a moment or two it is viable. As noted, this Court has held that the definition of viability is determined by the limits of abortion law; and viability, at least in the context of United States Supreme Court law on abortion, and is reached when "there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." (*Colautti v. Franklin* (1979) 439 U.S. 379, 388.) Sustained survival means just that – "'there must be a potentiality of 'meaningful life' [citation], not merely momentary survival.'" (*Id.* at p. 387, quoting *Roe v. Wade*, *supra*, 410 U.S. at p. 163.)

D. The Error Violated Appellant's Constitutional Rights and Requires Reversal

The viability instruction in this case was clearly wrong and permitted appellant's conviction for murder of a fetus with less evidence than was required by the statute and this Court's precedent. Appellant had a right to proof beyond a reasonable doubt of each element of the charged offense. (*In re Winship* (1970) 397 U.S. 358, 361; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524; *Carella v. California* (1989) 491 U.S. 263, 265.) Jury instructions relieving the prosecution of the burden of proving each element beyond a reasonable doubt violates the Sixth Amendment right to a jury trial, as well as the due process clause. (*Sullivan v. Louisiana* (1993) 508 U.S.275; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Carella v. California*, *supra*, 491 U.S. at p. 265.) As such, misinstruction on a necessary element of the offense was error of federal constitutional magnitude. (*Neder v. United States* (1999)

527 U.S. 1, 9-10 & cases therein cited; *California v. Roy* (1996) 519 U.S. 2, 5; *Pope v. Illinois* (1987) 481 U.S. 497, 503, 504.) Respondent as the beneficiary of the error bears the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under state law, "[t]he question then is whether it is reasonably probable a result more favorable to defendant would have been reached absent the instructional error. (*People v. Watson* (1956) 46 Cal.2d 818, 299 P.2d 243.)" (*People v. Davis, supra*, 7 Cal.4th at p. 814.)

The error is reversible under either *Chapman* or *Watson.* The evidence in this case did not show the fetus had a probability of survival, much less a probability of sustained survival. The medical examiner testified only that there was a "chance" that the Washington fetus could survive. (12RT 1821.) Without clear testimony about the definition of viability, none of the testimony about the fetus' weight or gestational age had any meaning and certainly did not show that there was a probability of survival or a likelihood of sustained survival. With the lower standard instruction the jury was given, i.e., that the fetus had to have a "capability of independent existence," a juror could conclude that the prosecution had met its burden of proof with the evidence that the fetus merely had a "chance" of living. Had the jury been properly instructed, it is likely that at least one juror would not have found that the fetus was viable and would not have found appellant guilty of murder. As such, the prosecution cannot show that the error was harmless and reversal is required.

The error also infected the penalty phase proceedings. Jurors likely would believe appellant more culpable if guilty of the murder of a fetus and, therefore, they would be more likely to impose the death penalty on appellant. The instructional error rendered the jury's death verdict constitutionally unreliable under the Eighth Amendment. Whether assessed

under the reasonable doubt test (*Chapman v. California*, *supra,* 386 U.S. at p. 24) or the reasonable possibility test (*People v. Brown* (1988) 46 Cal.3d 432, 448-449), the judgment of death must be reversed.

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VI

THE EVIDENCE OF CRIMINAL THREAT AT PENALTY PHASE WAS INSUFFICIENT FOR ANY JUROR TO FIND THAT APPELLANT HAD COMMITTED THE CRIME BEYOND A REASONABLE DOUBT

A. Factual Background

In its Notice of Intent to Introduce Evidence of Aggravating Factors at Penalty Phase Pursuant to Penal Code Section 190.3, the prosecution stated that it would seek to introduce "[t]he facts and circumstances surrounding the situation relating to the threatening of a correctional officer that occurred on April 5, 2004."[26] (2CT 282.)

Deputy Michael McMorrow testified about information he received from inmate Antonio M regarding Deputy Natalie Uyetatsu and appellant.[27] Both he and Deputy Uyetatsu worked in the K-10 or "keep-away," part of the Los Angeles County Jail. (19RT 2765, 2768.) Deputy McMorrow knew both appellant and inmate Antonio M from the unit. (19RT 2768-2769.) Deputy McMorrow observed that appellant was very talkative with him and with the other male deputy (Deputy Gunn), but that when Deputy Uyetatsu was there appellant would be silent and "stare in her direction." (19RT 2770.) The deputy thought appellant was being intimidating. Appellant put his hands up on the door above his head and stared directly at her. (19RT 2771.) He stared at her stone faced as long as she was in eyesight. This was for as long as five or ten minutes. (19RT 2772.)

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[26]The notice of aggravations misstates the year of the alleged incident. The threat alluded to was in 2006, not 2004. (See 19RT 2831 [testimony of Natalie Uyetatsu regarding reporting appellant for not following the rules in April or May, 2006].)

[27]The parties agreed that the inmate witness to the event would be referred to on the record without using his last name. (19RT 2763.)

Deputy McMorrow thought that the change in demeanor was unusual. (*Ibid.*)

On May 9, 2006, the deputy got a note from Antonio M. (19RT 2772-2773.) After Deputy McMorrow got the note, he told Antonio M that he had a clinic pass. This was a pretext to get him out of his cell so that he could talk to Antonio M. without compromising the inmate's safety. (19RT 2775.) The deputy was aware that there was a code among the inmates not to tell law enforcement anything. (19RT 2774.) When Deputy McMorrow talked to Antonio M, the inmate seemed worried and said that he was looking out "for you guys," and that he did not want to see anything happen. (19RT 2775-2776.)

The note Antonio M gave Deputy McMorrow was destroyed. (19RT 2776-2777.) The sergeant said that they "didn't have enough for the 422, the terrorist threats." (19RT 2779.) The sergeant believed that the elements of the crime of criminal threat had not been met, but this decision was not reviewed by a prosecuting attorney. (19RT 2784.) The note would have been booked into evidence if they had "written a report for the terrorist threats." (19RT 2780.)

After the note, "they" kept Deputy Uyetatsu away from appellant. (19RT 2777, 2784.) She was transferred or kept away because they did not want her there for her own safety. (19RT 2781.) Appellant never made any moves towards Deputy Uyetatsu because there was a door between him and her. (19RT 2779.) Deputy Morrow observed that when appellant was questioned about this, appellant thought that the incident was minor. (19RT 2785.)

Inmate Antonio M testified that in Los Angeles County jail he was housed where Deputies McMorrow and Uyetatsu worked and that he knew appellant. (19RT 2795.) In May 2006, they were both housed in the module for "keep away" inmates. (19RT 2797.) In May of that year,

Antonio M passed a note to Deputy McMorrow in which he wrote that appellant was mad because a female blonde deputy had put him on lockdown so that he could not shower or use the phone, so he "threatened to kill the bitch." (19RT 2798.) According to Antonio M, appellant "said if he got found guilty, he was going to kill the bitch." (19RT 2798-2799.) Appellant being found guilty referred to the charges pending against him at the time. (19RT 2800.) Antonio M did not think appellant was joking around because he was very upset that he had been denied his privileges. (*Ibid.*) Appellant told Antonio M that the deputy was "doing him dirty" and after appellant said that he said that "if he gets convicted of the charges, he was going to kill the bitch." (19RT 2801.) Antonio M thought this was serious, so he wrote the note about what appellant said which he gave to Deputy McMorrow. (19RT 2802.) Antonio M believed that appellant would carry out the threat because of what he was in jail for. (19RT 2803.)

Deputy Natalie Jenkinson Uyetatsu testified that she wrote appellant up for not following the program. (19RT 2831-2832.) The incident involved appellant not getting his meal and then pushing the emergency button in his cell to indicate that he wanted food, when the button was to be used for emergencies only. (19RT 2832, 2843.) The deputy returned with food and asked him (according to procedures) to sit at his stool or lay on his bunk as he did so. (19RT 2833, 2839.) He did not do so, and as a result he was locked down and he lost his program the following day. (19RT 2834.) Appellant told her something to the effect that it was not fair that she did not feed him and also wrote a complaint. (19RT 2834, 2837, 2840.) He treated her with "utter disgust," which she thought was due to her being female. (*Ibid.*) He also glared at her and stood at his cell door with his armpits raised. (19RT 2834-2835.) She was told that appellant had threatened her and that if given the "opportunity, he would take [her] out." (19RT 2835.) She thought that he would take the opportunity if he got it.

(19RT 2836.) In the next months, the deputy's partners, rather than Deputy Uyetatsu, were the ones who opened appellant's cell door. (*Ibid.*) Deputy Uyetatsu noticed a difference between the way appellant treated her and the way he treated the male deputies. He was more at ease with the males and spoke to them causally. (19RT 2845.) To Deputy Uyetatsu's knowledge, appellant had not threatened to kill any other deputy. (19RT 2847.)

The jury was instructed with CALJIC 8.87, in relevant part, as follows:

> Evidence has been introduced for the purpose of showing that the defendant Chester Turner has committed the following act[ ] or activit[y] which involved the express or implied use of force or violence or the threat of force or violence: Criminal Threats against Deputy Natalie Uyematsu [*sic*]. Before a juror may consider any criminal acts or activities as aggravating circumstances in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts or activities. "A juror may not consider any evidence of any other criminal acts or activities as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(14CT 3594.) The jury was not otherwise instructed with the definition of criminal threat.

B. Background Legal Principles

Penal Code section 190.3 subdivision (b) requires the jury to consider in aggravation "the presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (§ 190.3, factor (b).) Evidence of criminal activity under factor (b) must be limited to conduct that demonstrates the commission of a violation of a

penal statute. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 [construing 1977 death penalty statute]; *People v. Boyd* (1985) 38 Cal.3d 762, 776-778; *People v. Belmontes* (1988) 45 Cal.3d 744, 808, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 422.) The trial court should not permit the penalty jury to consider an uncharged crime as an aggravating factor unless "'a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Boyd* (1985) 38 Cal.3d 762, 778, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576 [quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319]; see *People v. Clark* (1992) 3 Cal.4th 41, 156-157.) Even if the evidence is properly admitted, the prosecution must still establish each element of the offense beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 54; accord, *People v. Anderson* (2001) 25 Cal.4th 543, 589.)

C. There was Insufficient Evidence on the Record of Criminal Threat Because There Was No Evidence of an Immediate Prospect of the Execution of the Threat, Nor Was the Deputy in a Sustained State of Fear

The prosecution had the burden of proving each element of criminal threat beyond a reasonable doubt. (*People v. Robertson, supra*, 33 Cal.3d at p. 54.) This Court has construed making a criminal threat under Penal Code section 422[28] as comprising five elements: (1) The defendant willfully

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[28]Section 422 states in pertinent part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished. . . ."

threatened to commit a crime that would result in death or great bodily injury; (2) the defendant made the threat with the specific intent it be taken as a threat; (3) the threat, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat caused the victim to be in sustained fear for his or her own safety or for his or her immediate family's safety; and (5) the victim's fear was reasonable. (Penal Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) However, not all threats can be characterized as criminal; the statute was specifically drafted to limit the type of utterance that would rise to the level of a crime. (*People v. Toledo*, *supra*, 26 Cal.4th at p. 228.) Indeed, the statute was not enacted to punish "emotional outbursts," *People v. Felix* (2001) 92 Cal.App.4th 905, 913, nor is the statute violated "by mere angry utterances or ranting soliloquies, however violent" (*People v. Teal* (1998) 61 Cal.App.4th 277, 281).

In *People v. Mendoza* (1997) 59 Cal.Appl4th 133, 1340-1341, the Court of Appeal held that section 422 does not focus on the precise words of the threat, but whether the threat communicated a "gravity of purpose and immediate prospect of execution of the threat." The immediacy of purpose and immediate prospect of execution of the threat can be based on all of the surrounding circumstances and not just words alone. (*People v. Butler* (2000) 85 Cal. App. 745, 754 ["Thus, it is the circumstances under which the threat is made that give meaning to the actual words used."].) "This includes the defendant's mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)

The use of conditional language in a threat does not necessarily take a threat out of the purview of section 422. (*People v. Bolin* (1998) 18 Cal.4th 297, 338.) However, the threat must be "so" unconditional or

immediate that it satisfies the requirements of the statute. As the Court of Appeal held in *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157, the use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim. The Second District went on to explain,

> The statute focuses on the effect of the threat on the victim, to wit, communication of a gravity of purpose and immediate prospect of execution of the threat. These impressions are as surely conveyed to a victim when the threatened harm is conditioned on an occurrence guaranteed to happen as when the threat is absolutely unconditional. (Citation omitted). Indeed the language "so unconditional" implies that there are different degrees of unconditionality. A threat which may appear conditional on its face can be unconditional under the circumstances. For example, the threat, "you all better have my personal items to me by five o'clock today or its going to be a lot of hurt people there," was found to be sufficiently unconditional when "there was no way that the defendant's personal property could be delivered to him by the five o'clock deadline to which he referred" and the victim therefore had a reasonable apprehension that defendant would act in accordance with the threat. (*United States v. Cox* (6th Cir. 1992) 957 F.2d 264, 265-266.)

(*People v. Stanfield, supra*, 32 Cal.App.4th at p. 1158.)

In this case, the circumstances surrounding the alleged threat did not support a finding that appellant announced an unconditional threat to kill Deputy Uyetatsu. Appellant was locked in a cell and was never in menacing physical proximity. There was no evidence that appellant's purported threat was accompanied by any physical action and there was no evidence that appellant and Deputy Uyetatsu had a history of difficulties. (See *In re Ricky T.* (2001) 87 Cal.App.4th 1134, 1138, and cases cited therein; see also *People v. Butler, supra,* 85 Cal.App.4th at p. 754.) Moreover, the alleged threat was conditioned on an event – appellant being

found guilty of the crimes he was charged with – that would take place in the distant future, if at all. A threat to kill the deputy at some undefined point in the future lacks sufficient immediacy to satisfy section 422. (See *Ricky T., supra,* 87 Cal.App.4th at pp. 1137-1138.) Indeed, there was even less of a possibility of appellant carrying out the threat after he was found guilty of capital murder.

Penal Code section 422 also "incorporates a mental element on the part of not only the defendant but the victim as well. In order to establish a section 422 violation, the prosecution must prove ". . . that the victim was in a state of 'sustained fear.'" (*People v. Garrett* (1994) 30 Cal.App.4th 962, 966-967.) "The word fear, of course, describes the emotion the victim experiences." (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.) There is no evidence in the record about what emotions the deputy felt. Morever, the record does not show that appellant's threat caused Deputy Uyetatsu "sustained fear for her personal safety." The term "sustained fear" is defined as a "period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Momentary fear cannot support a finding of sustained fear within the meaning of section 422. (*In re Ricky T., supra*, 87 Cal App. 4th at p. 1140.) In appellant's case, there is no evidence that Deputy Uyetatsu was afraid of appellant at all – much less that she was afraid of him for an extended period of time. The threat was not made directly to the deputy – rather she learned of it through the investigation of the note Antonio M gave the officers. She did not testify that she wanted to be removed from the unit where appellant lived because she was afraid; rather, others made the decision to move her.

Thus, appellant was not charged with the threat for good reason. Because nothing established (1) that appellant's threat conveyed an immediate prospect of execution; and (2) that Deputy Uyetatsu was in

"sustained fear" for her safety, appellant's guilt of criminal threat could not be proven beyond a reasonable doubt.

D. The Admission of the Uyetatsu Evidence Violated the Federal Constitution Because the Evidence Skewed the Selection Process Towards Death and Was Constitutionally Irrelevant

In *Brown* v. *Sanders* (2005) 546 U.S. 212, the United States Supreme Court considered the question of when a capital-sentencing jury's consideration of an invalid aggravating factor violates the Eighth Amendment. The high court announced:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(*Id.* at p. 220.) Accordingly, under California's penalty scheme, when the jury considers an invalid aggravating factor in deciding the sentence, constitutional error ensues "only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Id.* at p. 221.) Such error occurred here. The legal insufficiency of the Uyetatsu threat to establish criminal activity involving the use of force or attempted use of force under factor (b) rendered its use as an aggravating factor in this case invalid. Accordingly, the jury was not entitled to consider this aggravating factor or the evidence introduced to support it in deciding appellant's sentence.

Under *Sanders*, the prosecution's failure to prove the criminal activity required for factor (b) resulted in Eighth Amendment error because the jury could *not* "give aggravating weight to the same facts and circumstances" introduced under factor (b) under any other sentencing factor. This incident did not present the same facts and circumstances as the charged murders, i.e. "the circumstances of the crime(s)" made relevant

pursuant to section 190.3, subd. (a). Nor did it present the same facts and circumstances of appellant's prior convictions made relevant pursuant to section 190.3, subd. (c), or any of the other sentencing factors listed in section 190.3. Because the jury could not legitimately have considered anything at all about this offenses as aggravation in any capacity at the penalty phase, the admission of this factor (b) aggravator skewed the jurors' balancing of aggravating and mitigating factors in favor of death in violation of the Eighth Amendment. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 221.)

Evidence of the Uyetatsu incident was constitutionally irrelevant to the jury's decision whether appellant should live or die. Where, as in California, aggravating factors are "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment" (*Walton v. Arizona* (1990) 497 U.S. 693, 648), they must provide a principled basis for doing so. (*Arave v. Creech* (1993) 507 U.S. 463, 474.) Under the Eighth Amendment and the due process clause of the Fourteenth Amendment, an aggravating factor in a death penalty case must be "particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 192; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885 [due process prohibits death penalty decisions based on "aggravation" that is "totally irrelevant to the sentencing process"].) As a general matter, relevant evidence at the selection phase is limited to that which relates to the defendant's character or the circumstances of his crime. (*Zant v. Stephens*, *supra*, at p. 879.)

This category of generally relevant evidence is not without limits. (See, e.g., *Dawson v. Delaware* (1992) 503 U.S. 159, 165-167 [although defendant's membership in Aryan Brotherhood prison gang, which entertains "morally reprehensible" white racist beliefs, was suggestive of bad character, it was "totally irrelevant" to capital-sentencing]; *Godfrey v.*

Georgia (1980) 446 U.S. 420, 433, fn. 16 [although a circumstance of the crime, the fact that the murder was accomplished with a shotgun, which resulted in a "gruesome spectacle," was "constitutionally irrelevant" to the penalty decision]; *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308-1310, overruled on another ground in *Lambright v. Stewart* (9th Cir. 1999) 191 F.3d 1181, 1187 [evidence of non-violent sexual conduct, which included defendant's homosexuality and "abnormal sexual relations," was constitutionally irrelevant to sentencing decision].) To be constitutionally relevant, aggravating evidence must assist the jury in distinguishing "those who deserve capital punishment from those who do not." (*Arave v. Creech*, *supra*, 507 U.S. at p. 474.)

In addition, the constitutional relevance of the factor (b) aggravator must be assessed in terms of the Eighth Amendment requirement of heightened reliability, which is the keystone in making "the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "[H]eightened reliability controls the quality of the information given to the jury in the sentencing proceeding by assuring that the sentencer receives evidence that, in logic and law, bears on the selection of who, among those eligible for death, should die and who should live." (*United States v. Friend* (E.D. Va. 2000) 92 F.Supp.2d 534, 542.) Thus, as the federal court in *Friend* explained in the context of the federal death penalty statute:

> relevance and heightened reliability . . . are two sides of the same coin. Together, they assure the twin constitutional prerequisites of affording a rational basis for deciding that in a particular case death is the appropriate punishment and of providing measured guidance for making that determination. Those objectives can only be accomplished if the proposed aggravating factor raises an issue which (a) is of sufficient seriousness in the scale of societal values to be weighed in selecting who is to live or die; and (b) is imbued with a

> sufficient degree of logical and legal probity to permit the weighing process to produce a reliable outcome.

(*United States v. Friend, supra*, 92 F.Supp.2d at p. 543.) In other words, "an aggravating factor must have a substantial degree of gravity to be the sort of factor which is appropriate for consideration in deciding who should live and who should die." (*Id.* at p. 544.)

Pursuant to these principles, several federal courts have recognized that minor incidents of only *de minimus* violent or forceful criminal conduct are constitutionally irrelevant under the Eighth Amendment for purposes of capital sentencing. (See, e.g., *United States v. Grande* (E.D.Va. 2005) 353 F.Supp.2d 623, 634 [evidence of unadjudicated "high school fight" that occurred five years earlier and was wholly unrelated to charged murder was "unconstitutionally irrelevant to the determination of 'who should live and who should die'"]; *United States v. Gilbert* (D.Mass. 2000) 120 F.Supp.2d 147, 153 [conduct amounting to crime that did not result in significant injury was "of insufficient gravity to be relevant to whether the defendant here should live or die"]; *United States v. Friend, supra*, 92 F.Supp.2d at p. 545 [evidence that defendant and codefendant talked about killing potential witness was "not of sufficient relevance and reliability to assume the important role of an aggravating factor which, if proven, may be weighed as a factor to determine whether death is an appropriate penalty"].)[29]

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[29]These cases construed the federal death penalty statute, which is similar in many respects, though not identical, to California's scheme. It lists 16 aggravating factors that apply when a defendant has been convicted of a homicide that is eligible for capital punishment. (18 U.S.C. § 3592, subd. (c).) It also contains a "catch-all" clause that allows the jury to consider the existence of "any other aggravating factor for which notice has been given." (*Ibid.*) The intent of this non-statutory aggravating factor is to permit consideration of constitutionally relevant evidence regarding the defendant's character and the circumstances of the crime. (See, e.g., *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1106.) Thus, the cases (continued...)

Admission of evidence of the Uyetatsu incident in this case violated these same Eighth Amendment precepts. Regardless of the general constitutionality of section 190.3, factor (b) as appropriately focusing the jury on the defendant's violent criminality and thus his propensity for violence, when the evidence admitted under factor (b) fails to meet that ostensible purpose, there is Eighth Amendment error. That is precisely what happened here. The evidence that appellant threatened Deputy Uyetatsu introduced into the penalty deliberations evidence that was constitutionally irrelevant to the jury's life or death decision and thereby ran afoul of the Eighth and Fourteenth Amendments.

E. Introduction of the Evidence Requires Reversal

The jury's penalty decisions were unconstitutionally skewed by the introduction of invalid sentencing factors. Adding an invalid aggravating factor to "death's side of the scale," renders the penalty determination unreliable in violation of the Eighth Amendment. (See *Stringer* v. *Black* (1992) 503 U.S. 222, 232.) In *Brown v. Sanders*, the Supreme Court eliminated the distinction between weighing and non-weighing states for purposes of appellate review of capital cases. (*Brown v. Sanders, supra,* 546 U.S. at p. 220.) While prior cases had found that a state appellate court in a non-weighing state could uphold a sentence despite the presence of an invalid sentencing factor without concluding that the inclusion of the invalid factor was harmless error or reweighing the sentencing factors itself, in *Sanders* the Court found that the presence of an invalid factor should be treated the same in both weighing and non-weighing states. (*Ibid.*) Accordingly, since constitutional error has been established, this Court cannot uphold appellant's death sentences unless it finds the error was

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[29](...continued)
address whether certain conduct is constitutionally relevant aggravation under this "non-statutory" aggravating factor.

harmless beyond a reasonable doubt. (See e.g. *People v. Lewis, supra*, 43 Cal.4th at p. 522 [Applying *Sanders* and upholding conviction because any error caused by invalidated special circumstance findings was harmless "under any standard" and did not affect penalty verdict.] It cannot do so here.

As this Court has recognized, "other-crimes evidence" is a type of evidence which "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk* (1965) 63 Cal.2d 443, 450; *People v. Robertson, supra,* 33 Cal.3d at p. 54.) Here the prosecution told the jury that it could use the Uyetatsu incident to give appellant death. (20RT 3007.) The jury was instructed it could consider this crime as a factor in aggravation weighing towards imposition of the death penalty. Despite the nature of appellant's capital crimes, the presentation of the incident cannot be found harmless under any standard. Under California's death penalty scheme, the penalty phase jury makes no written findings as to factors in aggravation. (*People v. Lewis, supra,* 43 Cal.4th at p. 533.) Because there are no findings of fact, this Court cannot determine what unadjudicated crimes evidence any juror actually found proven beyond a reasonable doubt and what evidence was properly rejected. It thus has no basis to conclude that no juror based his or her penalty decision on any, some or all of the invalid or insufficiently proven sentencing factors. In such a situation, this Court must "presume that at least one did so. Otherwise, [the Court] would run an unacceptable risk of rejecting a potentially meritorious claim by gratuitously denying the existence of its factual predicate." (*People v. Clair* (1992) 2 Cal.4th 629, 680.)

Here, one of the main arguments the defense made in closing argument at penalty phase was that there had been no evidence that appellant had been a bad person in prison. (19RT 3035.) The evidence of

appellant's purported threat towards Deputy Uyetatsu substantially undercut that argument by suggesting that appellant did not get along with guards. There is thus a reasonable possibility that the jury's consideration of these unproven and invalid aggravating factors affected the penalty verdicts (*People* v. *Brown* (1988) 46 Cal.3d 432, 447), and such consideration cannot be found harmless beyond a reasonable doubt as not contributing to the sentence rendered. (*Chapman* v. *California* (1967) 386 U.S. 18, 24.) Accordingly, appellant's death sentences must be reversed.

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VII

CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the 1998, offense charged against appellant, section 190.2 contained 21 special circumstances, one of which, murder while engaged in a felony under subdivision (a)(17), contained 12 qualifying felonies.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Penal Code Section 190.3, Subdivision (a), Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 14CT 3593.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ["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 instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of Penal Code section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior

criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (14CT 3596 [CALJIC No. 8.88].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 536 U.S. 584, 504, and *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 14CT 3596. Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi,* and *Blakely* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142, 149; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn.

14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 819-821.) One justice of the United States Supreme Court, however, has found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, this justice has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment that he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) 134 S.Ct. 405, 410-411, 187 L.Ed.2d 449 (dis. opn. from denial of certiorari, Sotomayor, J.).) Appellant believes the Court should reconsider its view in light of this opinion.

The Court has also rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected 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

Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (14CT 3594, 3596), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even 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 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and applicaiton 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 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged

with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the 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.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (14CT 3594 [CALJIC No. 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth,

and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-590 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented substantial evidence regarding unadjudicated criminal activity allegedly committed by appellant. (18RT 2618-2708 [murder of Elandra Bunn] 15RT 2159-2228 [rape and sexual penetration of Maria Martinez]; 18RT 2605-2617 [sexual battery of Carla Whitfield], 18RT 2719-2727 [resisting an officer] 18RT 2764-2819 [criminal threats towards Natalie Uyematse].)

The United States Supreme Court's decisions in *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.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (14CT 3596.) The phrase "so substantial" is an impermissibly broad phrase that

does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) 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 clear to jurors that this is the overriding concern; 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), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant 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

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions 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; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was

prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

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.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 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 eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the

consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 14CT 3593) 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.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case because no evidence was presented to support them – specifically, factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"), factor (g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"), and factor (j) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"). (14CT 3593.) The trial court failed to omit those factors from the jury instructions (*ibid.*), likely confusing the jurors and preventing them from making a reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury 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. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.)

Appellant'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* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase 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, appellant urges the court to reconsider its failure to require intercase proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme violates the equal protection clause by providing significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. To the extent that there may be differences between capital

defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and have been found to be true beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) Additionally, a trial court must state on the record its specific reasons for choosing the term of imprisonment it may be imposing. (Cal. Rules of Court, rule 4.420(e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any statement of reasons to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. 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; *People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. 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* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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VIII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming arguendo that this Court concludes that none of the errors in this case, standing alone, requires reversal of appellant's convictions and death sentence, the cumulative effect of the errors nevertheless undermines any confidence in the integrity of the guilt and penalty phase verdicts, and warrants reversal of the judgment.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not, alone, be so prejudicial as to amount to a deprivation of due process may cumulatively produce a trial that is fundamentally unfair]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].) Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Thus, reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a

reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* to totality of errors when federal constitutional errors combined with other errors].)

In this case, the combined effect of the errors resulted in a proceeding that had none of the characteristics of the adversary process that are necessary to ensure the fairness, accuracy and reliability demanded by California law and by the Sixth, Eighth and Fourteenth Amendments. The court erred in allowing evidence of cold hit DNA statistics (see Argument I), in dismissing life-leaning jurors (see Argument III), in excluding evidence of third-party culpability (see Argument IV), in failing to adequately define fetus viability (see Argument V) and in admitting the evidence of the threat against the jail officer (see Argument VI). Moreover, there was insufficient evidence of the charged crimes with only evidence of the random match probability. (See Argument II.)

In sum, appellant was convicted of capital murder and sentenced to death without the prosecution's case ever being subjected to "the crucible of meaningful adversarial testing" (*United States v. Cronic* (1984) 466 U.S. 648, 656), or to the independent review that serves as a critical check on the danger of unconstitutionally arbitrary death sentences. (See *Pulley v. Harris* (1984) 465 U.S. 37, 51-53.) A death judgment based on such a record cannot stand.

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CONCLUSION

For all the foregoing reasons, the sentence and judgment of death must be reversed.

DATED: November 17, 2014

Respectfully submitted,

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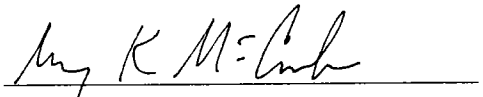
CERTIFICATE OF COUNSEL

(Cal. Rules of Court, rule 8.630(b)(2)

I, Mary K. McComb, am the Supervising Deputy State Public Defender assigned to represent appellant CHESTER DEWAYNE TURNER in this Appellant's Opening Brief. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 52604 words in length.

DATED: November 17, 2014



MARY K. MCCOMB
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DECLARATION OF SERVICE

People v. Chester Dwayne Turner Case No. S154459

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, CA 95814. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

/X/ placing the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **November 17, 2014,** as follows:

Blythe J. Leszkay
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As permitted by Policy 4 of the California Supreme Court's *Policies Regarding Cases Arising from Judgments of Death*, counsel intends to complete service on Petition by hand-delivering the document(s) within thirty calendar days, after which counsel will notify the Court in writing that service is complete.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. .

Date:November 17, 2014

Declarant