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.	Case No. S154459 (Los Angeles Sup. Ct. No. BA273283-01)

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

Honorable William R. Pounders, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this brief, appellant replies to contentions by the State that require an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in the opening brief. In particular, appellant does not present a reply on Argument VIII.

The failure to address any particular argument, sub-argument or allegation made by the state, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Grimes* (2015) 60 Cal.4th 729, 758, citing *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

I

THERE IS A SCIENTIFIC CONTROVERSY REGARDING DNA STATISTICS IN COLD HIT CASES AND A KELLY HEARING WAS REQUIRED

Appellant's conviction was based almost entirely upon evidence that his DNA profile matched that of the DNA profile found in crime scene samples. In Argument I of his opening brief, appellant showed that at the time of his trial, statisticians had not determined the appropriate method by which to calculate the match statistic when the DNA match was the result of a database trawl. It was therefore error to deny appellant's *Kelly*[1] motion. (AOB 36-85.) Appellant recognized that this Court in *People v. Nelson* (2008) 43 Cal.4th 1242 (hereafter "*Nelson*") held that the appropriate statistical method to calculate the trawl statistic was not subject to *Kelly* analysis, and that the random match probability (hereafter "RMP") was relevant and admissible, but appellant demonstrated that this Court must reconsider both these holdings. Appellant also showed that the trial court incorrectly held that the RMP was admissible because the match between his profile and the profile from the crime scene sample was subsequently confirmed by law enforcement DNA testing. Finally, appellant showed that because of the errors, appellant is entitled to a new trial.

Respondent answers that for eight of the ten DNA matches in this case, the understanding of the match does not depend upon the statistical interpretation of database matches because the matches in those eight cases were the result of conventional law enforcement investigation, and, as such, a *Kelly* analysis is not required. (RB 46-49.) Second, respondent maintains

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[1] *People v. Kelly* (1976) 17 Cal.3d 24.

that the RMP is scientifically accepted, that *Nelson* was correctly decided, and that RMP evidence was appropriately admitted without a *Kelly* hearing. (RB 49-61.) Third, respondent asserts that *Nelson* correctly held that the RMP is admissible as a measure of rarity, regardless of how the match was generated. (RB 61-15.) Fourth, respondent asserts that the trial court did not erroneously rely upon the subsequent profile match. (RB 65-70.) Finally, respondent argues that appellant's constitutional rights were not violated by the admission of the evidence and that any error was harmless. (RB 70-73.) For reasons explained below respondent is incorrect.

A. Because Appellant Was Initially Identified as the Consequence of a Database Trawl, the RMP Is a Misleading Statistic for All Subsequent Matches

Respondent asserts that appellant's *Kelly* argument only applies to two of the ten victims because "it appears that this 'database trawl' process was used with only two of the ten victims. The other eight victims were matched to appellant after the police focused their attention on him and decided to investigate other crimes possibly related to him." (RB 46-47.) "In other words, eight victims were identified through more traditional investigative methods and were not cold hits." (RB 47.) Respondent cites passages of the record suggesting that law enforcement submitted evidence of two crime scenes to CODIS, got initial profile matches connecting appellant to two cases, and only then, having identified appellant, looked for similar victims and similar homicides that had occurred in the area where appellant had lived or worked and concluded that 25 cases had the correct profile. (*Ibid.*) Then, according to respondent's account, law enforcement attempted to match the profiles of "those 25 cases to appellant by running them through CODIS." (*Ibid.*) Respondent concludes that "the

fact that the police had identified appellant as a possible suspect and were specifically looking for a match to him, rather than blindly searching the database, is a critical distinction and separates this case from a true cold hit case." (*Ibid.*)

For its account of how the investigation was conducted, respondent relies upon the statements of the prosecution that were made at a discovery hearing. (1RT 37.) The prosecutor was not testifying during this hearing, was not under oath, and these statements were not evidence. In fact there is no testimony on this issue in the record. Moreover, at trial the prosecution did not assert eight of the matches were not the result of a database trawl. The opposite is true. The prosecution in its response to appellant's motion to exclude the RMP evidence asserted only 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.) It never asserted that some of the matches were not in fact the result of a database trawl.

B. Respondent Mistakenly Asserts That the Issue Is the Product Rule

Respondent asserts that there is no *Kelly* issue because the *Kelly* test only pertains to a "new scientific technique," and the product rule, which is the basis for the RMP, is not a new scientific technique. (RB 49.) This misses appellant's point. The issue is not the product rule – which undisputably correctly measures the statistical significance of a random match. The issue is whether the product rule (and the RMP) correctly represents the probability that the match is coincidental in a database case where the match is not random. As appellant showed in his opening brief, the use of the product rule in the cold hit case is the application of the old

product rule to a totally new context. (AOB 63-68.) As the court of appeal has previously recognized, the acceptance of the product rule with one kind of DNA technology cannot be read to mean a broad endorsement of "all applications of the product rule." (*People v. Reeves* (2001) 91 Cal.App.4th 14, 39.) It makes no difference to a *Kelly* analysis that the product rule has been accepted in other contexts since the cold hit context is new.

Respondent also asserts that use of the RMP in the database context is simply a non-controversial "application of [an] already-accepted scientific methodology." (RB 50.) Respondent cites a number of cases where the courts of appeal have held that a certain technique was not new (RB 50), but does not address appellant's argument that under *People v. Stoll* (1989) 49 Cal.3d 1136; *People v. Venegas* (1998) 18 Cal.4th 47 [hereafter "*Venegas*"]; and *People v. Pizarro* (2003) 110 Cal.App.4th 530 that the application of the product rule in the trawl situation is a new scientific technique. (AOB 63-66.) Under those cases, a scientific technique is "new" if the application is new to science and law. (*People v. Stoll, supra,* 49 Cal.3d at p. 1156) Appellant showed that the statistical techniques relating to database searches is certainly new to science and new to the law. Respondent ignores this argument. Respondent's assertion that "there is certainly nothing new about the calculations of DNA statistical match probabilities for estimating the rarity or the RMP of crime scene profiles in the general population," (RB 51) misses this issue entirely. The RMP accurately measures the chance of a random match, which has been understood for years, but whether the RMP is the correct measure of the meaning of a match where the match is not random is very new and very controversial.

C. Respondent Mischaracterizes Appellant's Argument Relating to *Nelson*

In connection with its argument that *Nelson* was correctly decided, respondent asserts that appellant has misstated the holding of *Nelson*, criticizing appellant for stating that in *Nelson* this Court held for the first time that DNA statistics were exempt from *Kelly* analysis (RB 53), and asserting that the correct holding for the case is that "the use of the product rule in a cold hit case is not the application of a new scientific technique subject to a further *Kelly* (or *Kelly*-like) test." (*Ibid*, citing *Nelson*, 42 Cal.4th at pp. 1263-1264.) Respondent has taken appellant's statement out of context. In the first part of the sentence from which respondent quotes, appellant stated that this Court held in *Nelson* that "the rarity statistic was admissible." (AOB 61.) The rarity statistic is generated by the use of the product rule, which respondent refers to in its quotation from *Nelson*. Obviously, appellant correctly recognized that the Court in *Nelson* held that *Kelly* did not bar the admission of statistics based on the product rule. Appellant's whole argument was that this holding is incorrect. What respondent does not register is that this Court's failure to apply *Kelly* to expert testimony about DNA cold hit statistics was a radical departure from its previous case law in which this Court carefully policed the use of the product rule in new scientific techniques.

Respondent next asserts that *Nelson* correctly applied the holdings of *Venegas, supra*, 18 Cal.4th 47 and *People v. Soto* (1999) 21 Cal.4th 512 [hereafter "*Soto*"]. Respondent briefly summarizes the holding of *Venegas* without acknowledging that in *Venegas* this Court specifically held that the dispute about the use of the product rule was not immune from the *Kelly* test where there was a significantly new DNA technique at issue. (*Venegas,*

supra, 18 Cal.4th at pp. 82-83; see AOB 61.) Respondent briefly summarizes *Soto* without acknowledging that in that case it was clear that the dispute was about the appropriate use of the product rule. The scientists in that case did not disagree about what numbers the product rule yielded; rather, they disagreed about whether the product rule was "reliable, valid, and meaningful. . . . " in new circumstances. (*Soto*, *supra,* 21 Cal.4th at p. 538.) The issue in both those cases was the appropriate application of the product rule – rather than the product rule itself. Failing to recognize this point, respondent has shifted the issue away from whether measures of the rarity is the correct scientific way to represent the evidentiary value of a cold hit match (which is the real debate) to whether the product rule accurately represent rarity (about which there is no debate – but which is also beside the point).

Respondent correctly recognizes that this Court in *Nelson* relied upon the reasoning in *United States v. Jenkins* (D.C. 2005) 887 A.2d 1013 (hereafter "*Jenkins*") that the four statistical methods relating to the calculation of the significance of a cold hit match "answers a different question" and that the questions are correctly answered by the different techniques. (RB 55.) Respondent then reiterates without discussion, this Court's conclusion in *Nelson* that *Kelly* is limited to whether there is scientific agreement about the techniques used to answer the four questions, and repeats the *Nelson* holding that scientists have nothing to contribute to an understanding of which question properly frames the statistical issue in a cold hit case. (*Ibid.*) In the cold hit dispute, as appellant demonstrated in his opening brief (AOB 68-74) there is a lively dispute between statisticians who disagree about which analytic framework to use to accurately calculate the chance that the match that is the result of a database trawl is

coincidental. In other words, the scientific dispute is about which answer is the right one for the circumstances. Respondent simply accepts the *Nelson* characterization of this debate – without countering appellant's arguments. Respondent asserts that *Nelson* was correctly decided because other courts agree that "no *Kelly*-type hearing is required." (RB 55-56.) Respondent's citation of these cases adds nothing to the analysis because of course, if the *Nelson* reasoning is flawed, it is to no avail that other courts have made the same mistake.

Respondent maintains that appellant disagrees with *Nelson*'s conclusion that "the different statistical calculations available in a cold hit case are answering different questions . . . ." (RB 56.) Respondent has misunderstood the argument. Appellant has not argued that this Court in *Nelson* incorrectly found that the scientists in the debate understood that they are answering different questions. Appellant agrees that the scientists understand that they are answering different questions. Instead, appellant argues that *Nelson* was incorrect because it held that the disagreement between the scientists about which framework was the right one for understanding the significance of a non-random match was irrelevant because the question of what framework should be used is purely a legal one about which scientists should have no say.

Respondent points out that the scientists themselves have characterized the dispute between them as one of different "questions." (RB 56, citing Balding, *Errors and Misunderstandings in the Second NRC Report* (1997) 37 Jurimetrics J. 469, 473.) Moreover, respondent itself has found other scientists, including Dr. Bruce Budowle and his colleagues, who state that the questions address different issues. (RB 57, citing Budowle, B. Et al., *Clarification of Statistical Issues Related to the*

Operation of CODIS, National Forensic Science Technology Center, http://projects.nfstc.org/fse/pdfs/budowle.pdf [as of August 24, 2016] at 8-9 [hereafter "Budowle"].) Respondent notes that, in the opinion of Dr. Budowle and company, presenting the evidence of the database match statistic, instead of the RMP, would create a false impression and should not be admitted. (RB 59.) This observation just reinforces appellant's point. Statisticians continue to disagree about the best way to characterize cold hit matches. Some scientists think that the database match statistic is the right one; some think that it is the RMP. *Nelson* was incorrect in characterizing the disagreement as legal only.

Respondent maintains that appellant has incorrectly characterized this Court's focus on the accuracy of the answers to the different statistical questions. (RB 59.) Respondent has misconstrued the criticism. Appellant does not assert that the Court misunderstood that the statistics were correct answers to the question posed. Rather, appellant showed that the Court mis-stepped in concluding that correct answers to different statistical questions was all that was scientifically important to the debate about the admissibility of cold hit match statistics. What respondent fails to understand is that the debate between whether a statistic is the "right" one or the "best" one is a disagreement between statisticians and should be resolved by statisticians, not lawyers.

Respondent correctly recognizes that in this case (as in *Nelson*) the question is the relevance of the RMP in a cold hit case (RB 59), but fails to grapple with appellant's argument that when the relevance question is about the relevance of expert evidence based on a new scientific technique, the answer to that question is determined by whether there is scientific agreement about the reliability of the evidence— not simply by the

relevance of the evidence. As this Court explained in *People v. Leahy* (1994) 8 Cal.4th 587, 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.) As appellant pointed out, relevance, therefore, in the case of scientific evidence, is not simply a legal question, but is also a question raised and answered by the *Kelly* inquiry into the reliability of the scientific techniques that produced the evidence. (AOB 67-68.)

Respondent next asserts that "[t]he fact that scientists have written and debated about legal issues does not convert those legal issues into scientific ones." (RB 60.) Respondent quotes *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1148, for the proposition "*Kelly* does not apply to every dispute among experts, even strident, deep-seated ones. . . . Such disagreement does not trigger applications of the *Kelly* test; instead, what is required is the utilization of a new scientific technique." However, *Johnson* supports appellant's position, not respondent's. *Kelly* is triggered when there is a disagreement about a new scientific technique and the application of the product rule to cold hit statistics is a new scientific technique. This Court held that "[w]hat is and is not relevant is not appropriately decided by scientists and statisticians." (*Nelson*, *supra*, 43 Cal.4th at p. 1265, citing *Jenkins*, *supra*, 887 A.2d at p. 1025.) Under *Nelson*, the role of science is only to provide a menu of possible answers to different questions and science has no role in determining which answer most accurately represents the statistical significance of a match. This is not correct when a new

scientific technique is at issue, as with database match statistics. Obviously, if the numbers are not accurate, they are irrelevant and should not be used. But sometimes the numbers are accurate and still should not be used. It does not matter that a number is an exact answer if it is the exact answer to the wrong question.

D. *Nelson* Incorrectly Held That Rarity and Therefore the RMP Is Relevant in a Cold Hit Case

Respondent continues that *Nelson* correctly held that the RMP was relevant and admissible as a measure of "the rarity of a crime scene profile, regardless of how the appellant was linked to the profile." (RB 61, citing *Nelson, supra,* 43 Cal.4th at pp. 1266-1267.) In making this assertion, respondent, like the Court in *Nelson*, neglects the holding of *Venegas* that was at the core of appellant's argument. *Nelson* held that the rarity statistic is relevant, without regard to how the match was obtained, 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.) However, as appellant pointed out, in *Venegas* this Court held that match statistics are evidence for the issue: "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.)

The rarity statistic accurately answers the *Venegas* question in a case where there is no ascertainment bias. The rarity or frequency is the probability of a matching profile when the defendant is not the source. A very small frequency justifies rejection of the hypothesis that appellant is not the source of the DNA. In a case where the match is random, evidence of rarity makes sense because with a low frequency it would be surprising if

the defendant were the only one tested and matched. If the match is random and the crime scene profile is rare, it is probative that the defendant's DNA matches that profile. This provides evidence for the jury that the defendant is the actual source of the DNA and is relevant. Rarity and the RMP (understood as the probability of a coincidental match when the defendant is not the source) in a case without ascertainment bias is the same thing and thus the RMP is relevant and admissible.

However, in a cold hit case the match is not random – due to the database search. If sufficient numbers of samples in the database were examined before the match to the crime scene profile was found, even if no one in the database were the source of the crime scene DNA, it would not be surprising that someone in the database matched. This is because the process of searching the database increases the likelihood of a coincidental match. As such, when there is a database search, the rarity statistic is not an accurate answer to the *Venegas* question. In fact, it is highly misleading and understates the chances of a random match to the detriment of the defendant. As such, the RMP (as the rarity statistic) is not relevant.

Respondent notes that statistics in cases like appellant's, where many loci are tested, are typically "astronomical," meaning that the profile in the population is extremely rare. (RB 63.) This is certainly true and jurors are easily swayed by the enormity of the odds that the match is non-random for a rare profile. However, it is critical when jurors are so easily swayed by such numbers that they be accurate. Whereas the rarity of a profile in a population is a precise measure of the chances that the person chosen at random would have the same profile in a traditional case, rarity is not an accurate measure of this when the match is not random. The overwhelming nature of the odds in cold hit cases (where many loci are tested) makes it all

the more important that the statistical evidence be vigorously policed by a court to ensure its accuracy.

Respondent points to two scientific publications in which the authors state that the rarity statistic is "often" or "always" relevant. (RB 63-64, citing DNA Advisory Board, Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated From Pertinent Population Database(s) (2000) 2 Forensic Science Comm. No.3, <https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2000/dnastat.htm> [as of August 25, 2016] and Budowle at p.8.) Respondent contradicts itself. Having argued that the opinions of scientists are not relevant to the resolution of the legal issue, it cannot now cite the opinion of scientists who agree that the legal issue should be decided the way it likes.

Finally, respondent states that it would be "illogical" for this Court to exclude DNA evidence because appellant "was located in an offender database, which was expressly designed [by the legislature] to help solve cases like this one." (RB 64.) Respondent's point has nothing to do with logic but rather with expediency. However, when there is a continuing scientific dispute about which statistic accurately represents the chance that the match is random in a cold hit case, the evidence is simply not admissible under the law; it makes no difference that the legislature wishes it were otherwise.

E. The Trial Court's Reasoning Was Flawed

Appellant argued in his opening brief that the trial court's denial of the *Kelly* motion did not rely on the reasons articulated in *Nelson*, but rather on the grounds delineated in *People v. Johnson* (2006) 139 Cal.App.4th 1135, i.e., that the random match probability was admissible because the

fact that the initial match to appellant was the result of a database search was irrelevant. (AOB 79.) Respondent argues that appellant has misconstrued the trial court's ruling because the trial court's decision was not "based on replicating the profile match with a fresh sample from appellant" (RB 66) and that to the extent that the trial court's reasoning was based on subsequent replication that "the initial database search was irrelevant to the rarity of the profile, that reasoning was correct," (RB 67), just as *Johnson* held. (RB 67-68.)

Respondent is incorrect about the record. The trial court's reasoning was clearly based on the notion that the cold hit match pointed law enforcement in the right direction, and that law enforcement's use of a subsequent DNA test removed the effect of the initial cold hit match. To quote from the trial court's discussion about suspects uncovered through a cold hit match and traditional law enforcement investigation: "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, italics added.) In talking about the "follow up by law enforcement" the trial court was obviously referring to the follow-up done by law enforcement, which was to have the DNA match subsequently confirmed by other DNA tests. The trial court also stated that the cold hit match "just points the finger of suspicion" at appellant and, just as the information the informant gives that leads to evidence does not matter to the admissibility of the

evidence, so too the database match does not matter when other match evidence is developed. In context, the trial court was clearly referring to the later matches obtained by law enforcement.

Respondent is also wrong about *Johnson*. Respondent states that *Johnson* does not rely upon subsequent verification as grounds for its holding that the random match probability is admissible in a cold hit case. (RB 69.) This is not so. In *Johnson*, as appellant pointed out in his opening brief, the court of appeal avoided the statistical question relating to the impact of the search on the grounds that "the database search merely provides law enforcement with an *investigative tool*, not evidence of guilt." (*Id.* at p. 1150, italics added.) There was nothing new or scientific, according to the *Johnson* court, in law enforcement using databases to identify suspects, so there was no *Kelly* issue to be resolved. (*Ibid.*) *Johnson* held that *Kelly* was not applicable because the database, on analogy with an informant, was only used to "narrow the range of potential candidates." (*Id.* at p. 1153.) In his opening brief, appellant showed that subsequent confirmation of the cold hit results by another laboratory does not eliminate the problem of ascertainment bias. The trial Court and Johnson's reasoning are therefore incorrect.

F. Appellant's Constitutional Rights Were Violated by the Admission of Evidence of the RMP

In arguing that any error was harmless, respondent asserts that appellant conceded that the rarity statistic was admissible and the RMP was the same as the rarity statistic, which was admitted. (RB 70.) Respondent is incorrect for two reasons. First, as appellant has discussed above, the rarity statistic is not the same as the RMP in a cold hit case. The two numbers are only the same when the match is random, which it is not in a

cold hit case. As such, the rarity is not the same as the RMP. Second, appellant has not conceded that the rarity statistic is relevant. In Argument I of his brief, appellant argued that the rarity statistic is not admissible in a cold hit case because there is continuing scientific controversy about the appropriate statistic in a cold hit case and, equally was not relevant because it was misleading in such cases. In Argument II of his brief, appellant argued that even if rarity is admissible, the jury did not hear evidence about rarity – only about the RMP (which as noted is not the same as rarity in a cold hit case). This does not constitute a concession that the rarity statistic is admissible.

Respondent also argues that even if the evidence had been excluded after a *Kelly* hearing, any error was harmless because the crimes "had striking similarities in terms of the victims, the sexual assaults, the method killing, and the locations" and that, therefore, any error in admitting the match statistic is harmless. (RB 71.) However, without the DNA evidence, appellant was not tied to any of the victims, so the similarities between the crimes was not evidence that appellant committed the crimes unless the DNA evidence was also admitted. Hence, the DNA evidence was required in order for the similarities to provide evidence of appellant's participation in the crimes. Reversal is required under either *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818.

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II

SUBSTANTIAL EVIDENCE OF THE APPROPRIATE MATCH STATISTIC WAS NOT ADMITTED

In the opening brief, appellant showed that, even assuming that the rarity statistic is admissible and relevant, the jury did not hear evidence of the rarity statistic. Instead, the prosecution presented evidence solely of the RMP. Appellant showed that in a cold hit case the rarity statistic is not the same as the RMP, so that evidence of rarity is not evidence of the RMP. As such, there was no admissible evidence of the relevant match statistic before the jury and the convictions cannot stand. (AOB 86-93.)

Respondent first answers that there was evidence of "rarity," citing to statements from the prosecution's forensic expert, Gary Sims, in which he explained that DNA testing had the ability to separate out randomly chosen individuals, so that the profiles were "rare" (RB 74, citing 13RT 1928) or "very rare." (RB 74, citing 13RT 1940.) Respondent cited to similar testimony from defense expert Marc Taylor, in which Mr. Taylor testified that when you look at DNA you get "extraordinarily rare profiles." (RB 75, citing 16RT 2323.) Respondent asserts that based on this evidence the jury "would have understood that the RMP statistics that they heard were the same as the profile's rarity." (RB 75.)

This is not correct. Rarity is the expected frequency of a profile in the relevant population. (Kaye, D. *Rounding up the Usual Suspects: A Legal and Logical Analysis of DNA Trawling Cases* (2009) 87 N.C. L.Rev. 425, 436; *Jenkins*, *supra,* 887 A.3d at p. 1022.) What the expert testimony cited by respondent amounts to was that the crime scene profile was unusual, indeed very unusual, however, this is not the same thing as explaining to the jury how often the profile can be expected to occur in the

population. The experts were, in fact, testifying about the RMP and the allusions to a "rare profile" is not the same as an explanation of how often the profile occurs in the relevant population, which is the meaning of "rarity" in the DNA context.

Underlying respondent's argument that the experts' ill-defined mention of rare profiles is good enough to explain frequency is respondent's argument that *Nelson* held that "based on the information from the experts quoted above, there was no real difference [between rarity and RMP]" (RB 76), so that it makes no difference that rarity was not accurately defined for the jury. Respondent cites *People v. Xiong* (2013) 215 Cal.App.4th 1259, 1274 for this proposition and rejects appellant's argument that *Xiong* incorrectly interpreted *Nelson* as holding that the RMP is relevant in a database case. (*Ibid.*) In a footnote in his opening brief (AOB 89-90, fn. 22) appellant showed that *Nelson* clearly differentiated the RMP from rarity in the cold hit context. *Nelson* held that the rarity of a DNA profile is admissible in a cold hit case-- it did not confuse rarity with the RMP, as respondent would have it. As *Nelson* recognized, when a computerized database search is involved, a random match probability calculation will be off by a factor the size of the database: "[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 data bank. The result would be the expected frequency of the profile in a sample the size of the data bank and thus the random chance of finding a match in a sample of that size." (*Nelson*, at p. 1262.) That means that in a cold hit case, a product rule statistic will overstate the odds of a random match by a factor the size of the database. If a database has a million profiles, the product rule will overstate odds of a random match by a factor of one

million. The RMP is highly misleading in a cold hit case.

Ultimately, however, respondent's argument is that *Nelson,* although "unclear," stands for the proposition that even if the RMP is misleading, it is still admissible and probative of guilt because it "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." (RB 79, citing *Nelson*, at p. 1267.) This quote from *Nelson* is not an endorsement of the admissibility of the RMP in a cold hit case, but it is a restatement of its position that rarity, i.e., how often a profile occurs in a population, is admissible in a cold hit case.

Respondent states that appellant's arguments about the RMP go to weight not admissibility, and that the "RMP is simply a different way to express the rarity of the perpetrator's profile in the relevant population, and appellant's match to the profile 'tends logically, naturally, and by reasonable inference to establish [a] material fact[],' namely, identity." (RB 79, citing *People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1271, quoting *People v. Wilson, supra*, 38 Cal.4th at p. 1245.) The citation respondent relies upon from *Xiong* is actually a quotation from *People v. Wilson* (2006) 38 Cal.4th 1237. In *Wilson*, this Court accepted that the significance of a match is expressed as a number, the RMP, which represents the odds that a random person from the relevant population would have an identical match. (*Id.* at p. 1239 ["Experts calculate the odds or percentages – usually stated as one in some number – that a random person from the relevant population would have a similar match."]) The issue in *Wilson* was what the relevant population is where there was no evidence about the racial or ethnic identity of the perpetrator, other than evidence pointing to the defendant. (*Ibid.*) This Court held that evidence of the three most populous population groups

(Caucasions, African-Americans, and Hispanics) could be admitted. In so doing, this Court held that statistics relating to all three groups tend "'logically, naturally, and by reasonable inference'" to establish identity. (*Id.* at p. 1245.) This Court thus held that the objective in assessing the relevant "general population" is to represent "the probabilities of a *random* match in databases representing all possible perpetrators." (*Id.* at p. 1246, citing *Soto*, *supra*, 21 Cal.4th at p. 532, fn. 27, italics added.) This Court in *Wilson* did consider the use of RMP in a case where the match is non-random, and it certainly did not endorse a view that the RMP is admissible in such a case. To the extent that *Xiong* suggests otherwise it is mistaken.

Respondent's final point is that the RMP is so small in this case that even if incorrect, it is "'powerfully incriminating evidence,'" so that the RMP should have been admitted and the defendant required to show that the RMP was not accurate on cross-examination. (RB 79-80, citing *People v. Xiong*, *supra*, 38 Cal.App.4th at p. 1277.) This is simply a restatement of respondent's position that the statistics in a cold hit case are not subject to *Kelly*. In other words, in respondent's view the RMP, which is an incorrect measure of the statistical significance of the DNA match in a database, should be admitted, the defense should put on expert evidence of all the different criticisms of the RMP and then the jury left to sort out what weight to give the evidence. However, as appellant showed, there is continuing scientific controversy about the statistical understanding of the matches unearthed after a database search. Where there is such controversy, *Kelly* forbids jury's to take on the task of sorting through the controversy. Rather, *Kelly* demands that the evidence not be admitted until scientific consensus is reached.

In sum, appellant's jury did not hear evidence of rarity, only of the irrelevant RMP. As appellant pointed out in his opening brief, evidence of a DNA match means nothing without evidence of the statistical meaning of the match. (AOB 93.) Without appropriate statistics giving meaning to the DNA match, there was insubstantial evidence of guilt.

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III

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

In his opening brief, appellant argued that the trial court erroneously granted the prosecution's challenge for cause as to Prospective Juror No. 4, and Prospective Alternate Juror No. 1.[2] (AOB 95-112.) The trial court dismissed Prospective Juror No. 4, concluding that she "would not fairly impose the death penalty" (3RT 426), and Prospective Alternate Juror No. 1, apparently accepting the prosecutor's argument that this juror was substantially impaired in his ability to consider the death penalty (5RT 714). Appellant showed that the prosecution failed to carry its burden of proving that the excused jurors views would "prevent or substantially impair the performance of his [or her] duties as a juror" (*Wainwright v. Witt* (1985) 469 U.S. 412, 423), and that the trial court's decisions were an abuse of discretion. Appellant also showed that the deference accorded to a trial court's impressions of a prospective juror's ability to serve on a capital case is inappropriate in this case. Respondent asserts that the trial court properly granted the prosecution's motion to excuse the jurors for cause. (RB 81, 95, 98.) The record, however, does not support a finding that either juror was substantially impaired.

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[2] As explained in appellant's opening brief, there was confusion created in the record by referring to these prospective jurors in multiple ways. (AOB 95-97.) As he did in the opening brief, appellant refers to the erroneously excused prospective jurors as Prospective Juror No. 4 and Prospective Alternate Juror No. 1.

A. Prospective Juror No. 4

Respondent argues that Prospective Juror No. 4 gave conflicting or equivocal responses "at best," and that therefore the challenge was properly granted. (RB 94.) Respondent is incorrect and its argument is a failed attempt to manufacture "equivocation" where there is none. Moreover, because they are not supported by substantial evidence, respondent is incorrect that this Court must defer to the trial court's findings about demeanor.

Contrary to respondent's contention that Prospective Juror No. 4 "displayed equivocation" about imposing death (RB 94), the record shows that she clearly stated that she could impose the death penalty. Respondent cites to the juror's answer at 3RT 376 that she "would not vote for the death penalty" as evidence of Prospective Juror No. 4's equivocation. (RB 94.) However, at other places in the record the juror identified herself as "moderately in favor" of the death penalty (3CT 443), articulated a reason served by having a death penalty (3CT 444), and "strongly disagree[d]" with the statement that anyone who intentionally kills another person should never get the death penalty (3CT 447). She candidly and clearly indicated that she understood her role as a juror to listen to and consider all the evidence before deciding on the sentence (3CT 445); to consider the appropriate penalty only after the penalty phase was concluded and she was deliberating with her fellow jurors (3CT 446, 452), that she was open to imposing either of the two options after the conclusion of the penalty phase (3CT 443-444, 446), and understood the process having served on two juries in the past (3CT 440).

In citing only to the answer at 3RT 376, respondent has taken Prospective Juror No. 4's answer out of context. Elsewhere in the record,

she articulately explained her initial "no" response when the court asked her whether, "depending on the aggravating and mitigating circumstances in the penalty phase" she could "actually vote for death" in this multiple murder case in which one of the murders was during the course of a rape.[3] (3RT 375-376.) Prospective Juror No. 4 explained that she would have to first "listen to everything" before making such a decision and that it would be "a hard decision to say now." (3RT 376.) Her answer, in context, was not equivocal. Rather, the answer demonstrated that she could not say, at *this point*, whether she would impose death in *this case*. Such an answer does not disqualify a juror. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 21 [a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him or her].)

Indeed, at the beginning of the section of the transcript cited by respondent (RB 94, citing 3RT 376), Prospective Juror No. 4 forthrightly explained that she would listen to everything. So, after informing the court that she might know one of the witnesses, she stated that in keeping with her role as a juror and abiding by her oath, she "would listen to the other evidence [and] take it, of course, into consideration like everything else."

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[3] The trial court's question to Prospective Juror No. 4 made reference to the court's "question on page 9" regarding the special circumstances of "multiple murder and also the one allegation of murder during the course of rape as a special circumstance." (3RT 375.) The reference to page 9 presumably refers to the questionnaire which, at page 9, asks the prospective juror whether he or she "could impose the death penalty" in a case where, as here, "the murders alleged . . . involve the special circumstances of multiple murder." (3CT 445.) The query on page 9 of the questionnaire, however, did not include a reference to the special circumstance of murder during the course of a rape.

(3RT 373.) Listening to all the evidence and then deliberating with one's fellow jurors is precisely the role of the juror. (See *People v. Pearson*, *supra*, 53 Cal.4th at p. 332 ["the role of a capital case juror is not to 'stand behind' either penalty but to assess the evidence, weigh the aggravating and mitigating circumstances, deliberate with the other jurors, and choose the appropriate penalty"].)

Noting that the prosecution referred to Prospective Juror No. 4 as "reluctant" in its argument, respondent cites such reluctance as a ground for removing the juror for cause. (RB 94-95.) Sentencing someone to death is a sober responsibility and Prospective Juror No. 4 squarely let the trial court know that deciding to put someone to death is a hard decision – she stated it would be "quite a burden" on the prosecution to prove that appellant should be executed. (3RT 414.) However, difficulty with sentencing someone to die does not prevent or substantially impair the performance of a juror's duties (*People v. Avila* (2006) 38 Cal.4th 491, 530, referencing *Wainwright v. Witt*, *supra*, 469 U.S. 412), and it did not do so in this case. Prospective Juror No. 4 was the exact kind of juror the justice system wants, one who would have given appellant the fair cross-section to which he was constitutionally entitled – a juror able to impose the death penalty if warranted, while still being thoughtful, mindful of the meaning and magnitude of what was being asked of her, and unwilling to take lightly the serious decision of whether the evidence that would be presented might warrant a decision to end another's life. (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423 ["the quest is for jurors who will conscientiously apply the law and find the facts. . . . [as] [t]hat is what an 'impartial' jury consists of"].)

As noted in appellant's opening brief, even in the face of the prosecutor's repeated questions honing in on the personalized nature of the decision to impose the death penalty, Prospective Juror No. 4 remained steadfast that she would listen to all of the evidence and could and would follow the law. (See, e.g., 3RT 413 [in response to the prosecutor's question whether she could see 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," Prospective Juror No. 4 answered "yes"].) She agreed with the prosecutor that deciding to kill someone would be hard, understood it was a moral decision, and when further beseeched by the prosecutor agreed that if given the option of life she would "most likely" choose life over death. (3RT 414.) She did not state she would choose that option even if she decided the evidence supported imposing a death sentence and at no time did she indicate she would not choose death if, as she informed the court and the parties, appellant "deserved to die" for his crimes. (3RT 413-414.) What this juror's statements suggesting reluctance showed was that she could impose a death sentence when warranted by the evidence and that she understood the magnitude of being asked to take another's life. (See, e.g., 3RT 414 [understood that verdict of life or death was a moral decision; putting someone to death would be a hard decision].)

Her statements of so-called "reluctance," as a whole, do not translate to views that prevent or substantially impair her ability to perform a juror's duties in accordance with the court's instructions and the juror's oath, especially where the same juror indicated multiple times that she could impose a death sentence. (See *People v. Stewart* (2004) 33 Cal.4th 425, 446 [error to excuse for cause juror whose personal opposition toward the

death penalty may predispose juror to assign greater than average weight to the mitigating factors unless the juror's views preclude juror from engaging in the weighing process and returning a capital verdict]; *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [same].)

Respondent asserts that because there was equivocation the trial court's determination is binding on this Court. (RB 95.) As shown above, respondent is incorrect that there was equivocation because in context Prospective Juror No. 4's statements were neither inconsistent nor ambiguous. As such, deference to the trial court's assessment of the juror's demeanor is not warranted. (*People v. Duenas*, *supra*, 55 Cal.4th at p. 10; *People v. Pearson*, *supra*, 53 Cal.4th at pp. 330, 333.) However, even if this Court concludes that Prospective Juror No. 4's statements were ambiguous or inconsistent, it is improper to defer to the trial court's findings because the trial court's findings are not supported by substantial evidence. (*People v. Duenas*, *supra*, 55 Cal.4th at p. 10 [trial court's determination as to prospective juror's true state of mind is binding on appellate court only if supported by substantial evidence].)

Respondent notes the trial court's comments about demeanor, asserting that these deserve deference. (RB 95.) This is mistaken because the trial court's observations about the juror's demeanor, i.e., that her voice was low and that she was "tightly drawn" (3RT 425) related to this juror's statements in regards to the magnitude of, and appropriate difficulty in, sentencing someone to die, and not to an inability to impose death, which is the inquiry required by *Witt*. Indeed, the prosecutor referred to these very difficulties in arguing that Prospective Juror No. 4 should be excused as she would be substantially impaired because she indicated that it would be a "hard" and "difficult choice" to sentence someone to die. (3RT 425-426.)

As noted, difficulty with sentencing someone to die does not prevent or substantially impair the performance of a juror's duties. The state 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*, *supra*, 448 U.S. at pp. 50-51; see also *People v. Riccardi* (2012) 54 Cal.4th 758, 782 [juror not disqualifiable under *Witherspoon-Witt* for fear that being on a death jury would be difficult or uncomfortable unless juror indicates inability to impose death even if the evidence warranted it]; *People v. Avila*, *supra*, 38 Cal.4th at p. 530.)

Respondent argues further that Prospective Juror No. 4 did not voice disagreement with the prosecutor's comment during voir dire that she (the juror) showed "some reluctance" when answering the judge's questions about the death penalty. (RB 95.) Prospective Juror No. 4 did, however, state that she could impose the death penalty, was open to imposing the death penalty, would base her decision on all of the evidence, and that sentencing someone to death is hard. While the prosecutor may want jurors to offer, unsolicited, comments that are not in response to a question, the law does not call for or require such comments and respondent offers no authority for its premise. Respondent also faults defense counsel for not disagreeing that the juror was reluctant. (*Ibid.*) This is immaterial. As shown, in context, the juror's behavior showed only that she took any responsibility as a death penalty juror very seriously, not that she was disqualified. It is not surprising, therefore, that defense counsel would not comment.

Prospective Juror No. 4 clearly and consistently demonstrated that she could and would impose the death penalty, would and could be fair and

impartial to both sides, and would follow the law and her oath as a juror.[4] The trial court's decision to excuse her for cause was error.

B. Prospective Alternate Juror No. 1

Prospective Alternate Juror No. 1 was clear about his ability to be a fair and impartial juror and his willingness to impose a death sentence if that was what the evidence called for (10CT 2392; 5RT 686), despite that he was against the death penalty and his personal view was to "lean towards life" (5RT 685-686). This juror was consistent, forthright, and candid in his statements. He informed the parties and the court that he was against the death penalty (10CT 2380, 2382) and could not articulate a purpose served by having the death penalty (10CT 2383). Respondent is correct that this juror was "relatively consistent in indicating that he was opposed to the death penalty and would not impose it." (RB 96.) However, where respondent goes wrong in its argument that Prospective Alternate Juror No. 1 was substantially impaired (RB 87), is in its failure to understand that the record shows that he would have set aside those views and impose the death penalty if warranted.

In fact, the record shows that Prospective Alternate Juror No. 1's personal view and opinion about the death penalty and the finality of the sentence came from a concern that something might occur after the trial,

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[4] Further evidence of Prospective Juror No. 4's ability to understand and fulfill her role as a juror was demonstrated during a colloquy between the juror and the court. Prospective Juror No. 4 had indicated that being a female, she would have difficulty setting aside "sympathy" for a female murder victim. (3CT 449.) The trial court correctly told Prospective Juror No. 4 that having sympathy is not wrong, but that she could not let her sympathy bias her against the defense. (3RT 377.) Prospective Juror No. 4 was forthright and candid in her answer– she had sympathy for the victims but would "go by the law and the evidence." (3RT 377.)

such as an error, overturning the case. (10CT 2383-2384.) As such, this response did not warrant excusing him for cause. As this court held in *People v. Stewart*, *supra*, 33 Cal.4th at p. 449, a juror who indicates he is against the death penalty because he does not believe in irreversible penalties reflects a concern regarding the risk of error in the criminal justice process, and is not disqualified.

Respondent characterizes Prospective Alternate Juror No. 1's answers as equivocal. (RB 97.) The record as a whole refutes this conclusion. Indeed, despite this juror's concerns, he indicated more than once that he was an appropriate juror for this case; he could be fair and impartial for both the prosecution and the defense (10CT 2392); would and could perform his duty as a juror in this case despite not being in favor of the death penalty (10CT 2384); was willing and capable of fulfilling his role as a juror, regardless of his personal views (10CT 2385); would vote guilty and find the special circumstances true if the evidence warranted it, realized the case would then have a penalty phase where death was one of the two potential punishments (10CT 2382); and would not always vote against the death penalty no matter what evidence was presented at the penalty phase (10CT 2382). He well distinguished between his personal views and his ability to perform his duties as a juror on this case. (5RT 685-686.) When asked specifically whether he would prefer not to sit as a juror in this case, and if so, why, he wrote that he would prefer not to be a juror because the crime location was close to where he lived (10CT 2391); he did not state that his reason for preferring not to be a juror at appellant's trial was due to his personal views opposing the death penalty.

Prospective Alternate Juror No. 1 was clear that he could follow the court's rules and instructions and sentence someone to death if the evidence

warranted it. (10CT 2382, 2384-2385; 5RT 686.) When asked whether he could impose the death penalty in a case such as this, where the "murders involve the special circumstances of multiple murder," Prospective Alternate Juror No. 1 answered "yes." (10CT 2384.) In her argument, the prosecutor misstated the record when she contended that this juror should be excused for cause because his opposition to the death penalty was "grounded in religious and moral views." (5RT 714.) Prospective Alternate Juror No. 1 specifically stated that his opinion about the death penalty was due to some cases being later overturned. (10CT 2384.) He also stated that he accepted the anti-death penalty view of his religious organization, but added that despite his views he could do what is required of a juror (10CT 2385), that is, perform his duty and be fair and impartial to both sides (10CT 2384; 2392). Indeed, when asked whether his opposition to the death penalty was grounded in religious and moral reasons, Prospective Alternate Juror No. 1 said only "somewhat." (5RT 706.) As noted above, however, when using his own words, and not those as distorted by the prosecutor, this juror indicated clearly and unequivocally that his views came from concern about cases later overturned.

Respondent asserts that appellant mistakenly argued that the prosecution improperly created hesitation in the juror through its questioning about whether Prospective Alternate Juror No. 1 would be uncomfortable in announcing a death verdict in front of appellant's family, noting this Court's holdings that this kind of questioning is acceptable. (RB 97-98, citing *People v. Lynch* (2010) 50 Cal.4th 603, 674.) This kind of questioning is not acceptable and this Court's holding in *Lynch* should be reconsidered. A juror is not required to be unmoved by the emotion of the condemned's family when a death verdict is announced. Allowing

overzealous prosecutors with aggressive techniques to purge their juries of those who approach the decision whether to sentence someone to death with the care the federal Constitution requires further, and unconstitutionally, distorts the state's capital sentencing process. (*Uttecht v. Brown* (2007) 551 U.S. 1, 6-8.) In any case, Prospective Alternate Juror No. 1's answers did not disqualify him from sitting on appellant's jury. Discomfort with imposing a death sentence is not the standard for determining whether a potential juror should be excused for cause. Unless one's views would lead them to ignore the law or violate their oaths, the state may not exclude jurors who acknowledge "discomfort" with, or state that he or she would be affected by, sentencing someone to die. (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 782 [juror not disqualifiable under *Witherspoon-Witt* for fear that being on a death jury would be difficult or uncomfortable unless juror indicates inability to impose death even if the evidence warranted it].) The trial court's grant of the prosecution's motion is not fairly supported by the record and therefore the trial court's decision to excuse him was error.

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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

Appellant alleged in his opening brief that the trial court abused its discretion and denied appellant his constitutional right to present a defense when it precluded introduction of evidence from which the jury could infer that a third-party may have been involved in the offense. Specifically, the trial court erroneously and prejudicially excluded testimony that a partial shoe print found on victim Regina Washington's shirt and body had been compared to a print of the shoes of Anthony Ray Williams and Williams's shoes could not be eliminated as the source of the print. Respondent argues that the trial court did not abuse its discretion and that appellant was not prejudiced by exclusion of the shoe print comparison testimony. Respondent's argument should be rejected by this Court.

As set forth in the opening brief (AOB 114-115), the trial court essentially found that the excluded comparison was not relevant because the reason the comparison was made was "hearsay." Without introducing the evidence that led law enforcement to compare Williams's shoe print to the partial print found at the crime scene, the trial court found no basis to admit the result of the comparison itself. (8RT 1222.) Respondent contends the trial court's conclusion was proper, and that the evidence did not show any link between Williams and the killing of Washington, but neither respondent nor the trial court are correct.

Respondent argues that the excluded testimony did not give rise to a reasonable doubt that appellant was not guilty of Washington's murder and was "meaningless." (RB 102.) Contrary to respondent's argument, the

excluded evidence would not only have suggested that a third person left his print at the crime scene (RB 102), but on the victim's body while she was alive. As such, the evidence did tend to support a finding that appellant either did not kill Washington, or if he did, that he did not act alone.

To the extent respondent and the trial court found no reasonable doubt would arise without the admission of improper hearsay, they have misconstrued the importance of the excluded evidence. Although such a doubt might have been stronger if evidence also was admitted to show *why* law enforcement thought the print might have belonged to Williams, even without such evidence, the testimony regarding the attempted comparison still was relevant. Together with the testimony that was admitted, the excluded testimony would have established, at a minimum, that 1) a partial shoe print was found on Washington's clothes and her body (8RT 1204-1206; People's Exhibit No. 47); 2) Washington was alive when the print was made because the shoe left an impression on her skin through her shirt (8RT 1207-1208; People's Exhibit No. 48); 3) the quality and size of the partial print prevented any determination regarding the source of the print (8RT 1226); 4) law enforcement did not ask the criminalist to compare appellant's shoes with the shoe print; but 4) the criminalist did compare a third party's [ie. Williams's] shoes with the print; and 5) those shoes could not be eliminated as having made the print (8RT 1221).

Based on this admissible evidence alone, and without any hearsay evidence whatsoever, the defense could have argued that it was reasonably possible that someone other than appellant had killed Washington and her fetus. The defense also could have argued that it was reasonably possible that appellant did not act alone during the crime. These arguments would have been sufficient to raise a reasonable doubt that appellant was not guilty

of the murder of Washington and her fetus, or that the prosecution had failed to prove its theory that appellant acted alone.

The evidence also provided a sufficient link between Williams and the crime to require its admission. While respondent asserts that appellant has erroneously conflated the inability to eliminate Williams's print with an actual match to his print (RB 103), it overlooks that the evidence was relevant even in the absence of testimony establishing that the print could be matched to a third party. The shoe print on the victim's clothes and body was left there while she was still alive, showing that whoever left the print stepped on the victim as she lay on the ground. There was no evidence the victim had been moved during the crime and thus, the person who left the print had to have been present while the crime was being committed. This is more than sufficient to establish that the person who made the print had an opportunity to commit the offense, as it also is circumstantial evidence linking him to the actual perpetration of the crime. (*People v. Hall* (1986) 41 Cal.3d 826, 833 [evidence 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."].) The evidence here showed more than the evidence this Court found inadmissible in *People v. Page* (2008) 44 Cal.4th 1, 35-26, 39 (excluding evidence that the police had failed to investigate two other suspects, one of whom was seen with the child victim two weeks prior to the crime and spent more time with children than adults, and one of whom was arrested for masturbating in public near the apartments where the

victim lived two days after the crime)[5] or in *People v. Sandoval* (1992) 4 Cal.4th 155, 176 (excluding evidence that raised the possibility that third parties had a motive to kill the victims).

Respondent also argues that even if the excluded evidence was probative, it was still properly excluded pursuant to Evidence Code section 352. Pursuant to section 352, the trial court must determine whether the probative value of the proffered evidence is substantially outweighed by the risk of undue delay, prejudice, or confusion. As argued in the opening brief, however, the trial court did not conduct the required balancing test to exclude evidence pursuant to that section, and made no findings in that regard. Respondent attempts to gloss over the trial court's omission by simply asserting that the trial court recognized that introduction of the evidence would be confusing and unnecessarily waste time "under the rubric of relevance and section 352." (RB 102-103.) Respondent follows this assertion by quoting the trial court's statement that the evidence would not be relevant without the introduction of inadmissible hearsay. (RB 103.) Appellant has addressed the fallacy of the court's hearsay ruling in the opening brief and above.

Regardless, the probative value of the evidence giving rise to a reasonable doubt of appellant's guilt was not substantially outweighed by

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[5] Respondent mischaracterizes the third party evidence excluded in *Page* as evidence "that police had investigated two other suspicious men in [the] area of [the] crime." (RB 103.) Instead the evidence the defense sought to introduce in *Page* was that the police had *not* investigated the two men, and thus was far more tenuous than the evidence at issue here. (*Page, supra*, 44 Cal.4th at p. 38 ["As noted above, defendant alternatively asserts the evidence suggesting that the police failed to investigate other suspects was admissible as third-party culpability evidence . . . ."].)

the risk of undue delay or confusion. Respondent fails to explain why it would confuse the jury to learn that a shoe print found on the victim's clothes and body was compared to a third party's shoes shortly after the crime, and that person may have been the one that left the shoe print, given that they did learn that appellant's shoes were not so compared due to the passage of time between the crime and his identification as a suspect. (8RT 1225-1229.)

Similarly, the time that would have been required for the criminalist to testify about the comparison was minimal, especially in light of the prosecution's decision to present evidence about the existence of the shoe print in the first place. Indeed, there was no showing on the record as to how much time the extremely limited additional testimony of the criminalist would have consumed. Respondent's argument about the consumption of time is misplaced, as it is based on the time that it would have taken to include an attempt "to explain [Willams's] involvement," (RB 103), which the court had held would not be permitted because it was based on hearsay. The defense did not request the introduction of any explanatory or hearsay evidence and the amount of time needed to present that evidence was thus irrelevant to the 352 determination.

The trial court erred and abused its discretion by excluding evidence of third-party culpability. As set forth in the opening brief, the error also violated appellant's right to present a defense under 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. Respondent contends no constitutional violations occurred because the evidence was properly excluded under state evidentiary rules. (RB 105.) However,

appellant has shown that the evidence was not properly excluded under state law, and thus respondent's argument is unavailing.

The exclusion of evidence that someone other than appellant may have had violent physical contact with the victim just before or during the crime cannot be deemed harmless under any standard of prejudice. The evidence linking appellant specifically to Washington's death was based solely on a purported match of appellant's DNA to DNA found on and in the victim's body. As argued in the opening brief (AOB 122-124), the DNA evidence against Washington was suspect. Respondent does not address that argument here. The DNA evidence however, created the false impression that only appellant could have been the source of the DNA at the crime scene. Had the shoe print evidence been admitted, it would have raised the possibility that the DNA evidence did not necessarily demonstrate appellant's guilt beyond a reasonable doubt and that another man could have been responsible for the crime.

Accordingly, the exclusion of the evidence was not harmless under either the *Chapman* standard for constitutional violations (*Chapman v. California* (1967) 386 U.S. 18, 24), or the *Watson* standard for errors of state law. (*People v. Watson* (1956) 46 Ca1.2d 818, 836.) Appellant's convictions and his death sentence must be reversed.

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V

THE INSTRUCTION ON FETUS VIABILITY WAS REVERSIBLE ERROR

A. The Instruction Failed to Adequately Define Viability

In his opening brief, appellant argued that the trial court committed prejudicial error regarding the murder of Regina Washington's fetus when it instructed the jury that "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; see AOB 126-134.) The trial court's instruction was a modified version of CALJIC No. 8.10, which at the time of appellant's crime read, in relevant part, that "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." (CALJIC No. 8.10 (1988 5th Ed.)) Appellant argued that the modified instruction prejudicially lessened the prosecution's burden of proof on the charge of murder of a fetus because it substantially lowered the viability threshold as commonly understood and accepted. Specifically, the instruction permitted the jury to find viability, an element of the offense at the time of the crime, on no more than a possibility that the fetus might survive, when viability required a better than even chance the fetus could survive independently. (AOB 126, 129-132.)

Respondent answers that appellant's argument is without merit because the trial court's modified instruction correctly defined "viability" and that, in any event, no prejudice could have accrued to appellant, even if the trial court's instruction was error, because the evidence conclusively established that the fetus was viable. (RB 110-114.) Respondent is wrong in all respects.

Respondent argues that the instruction in this case correctly defined the term "viable" as it existed at the time of the crime, even though it did not track the language of CALJIC 8.10, the applicable standard jury instruction. Respondent takes issue with appellant's reliance on *People v. Davis* (1994) 7 Cal.4th 797, 813, because the instruction found to be erroneous in *Davis* was not the same as the instruction read in the present case. (RB112.) However, even though the two instructions contained different language, both had the same erroneous effect on the jury. This Court found the modified version of CALJIC No. 8.10 given in *Davis* lowered the viability threshold as defined by case law at the time. Contrary to respondent's argument, the instruction given at appellant's trial similarly lowered the viability threshold.

The trial court in *Davis*, like the trial court here, modified CALJIC No. 8.10. The court instructed the *Davis* jury that a fetus is viable when it has achieved "the capability for independent existence," a term the instruction went on to define as "when it is possible for the fetus to survive the trauma of birth, although with artificial medical aid." (*Davis*, *supra*, 7 Cal.4th at p. 801, 813-814.) This Court found that the instruction erroneously suggested that viability could be found when there is no more than a "possibility of survival," when viability actually meant there was "better than even chance– a probability– that a fetus will survive" for a discernable time. (*Id.* at p. 814.)

Respondent suggests that all variations and qualifiers of the term "capability" are equal. (See RB 110, 112.) Thus, although it acknowledges that after *Roe v. Wade* (1973) 410 U.S. 113, 163, California courts defined viable as including the term "normally capable," respondent nonetheless claims that other courts merely "followed suit" when they defined viability

differently, including definitions that matched the very language found insufficient in *Davis, supra,* 7 Cal.4th 797. (See RB 110, citing *People v. Apodaca* (1978) 76 Cal.App.3d 479, 489 ["A fetus is viable when it has achieved the capability for independent existence; as we have indicated, a fetus is deemed viable when it is possible for it to survive the trauma of birth, although with artificial medical aid."].)

While the instruction read in this case did not include the express language "when it is *possible* for [the fetus] to survive . . . ," which was expressly disapproved in the *Davis* case, the trial court here also erroneously modified the standard instruction and, in doing so, removed a crucial clarifying word. Instead of instructing the jury that a fetus is viable when it is "normally capable" of survival outside the womb, the court eliminated the word "normally." To find a fetus "capable" of independent existence is not the same as finding it "normally capable"of that existence. "Normally capable" means that *absent abnormal or unusual circumstances*, the fetus would be capable of survival. Without the word "normally" qualifying "capable," the jury was essentially told it could find the fetus viable if there was *any* chance it was capable of survival, no matter how rare or unlikely that chance was. Thus, respondent is incorrect when it asserts that the terms "normally capable" and "capability" both convey the idea that there must be a "probability" that the fetus will survive. (See RB 112.) As explained in *Davis*, the law at the time required more than just a chance or possibility of survival, it required probability that the fetus could exist outside the womb, which the instruction in this case did not require.

Respondent also suggests that the instruction in this case actually imposed a higher burden on the prosecution because it required a finding that the fetus had the capability to "maintain independent existence."

Respondent argues that this language "suggests a focus on the specific fetus that was killed, rather than a 'normal' fetus like it." (RB 113.) Respondent does not explain, and appellant cannot discern, how the words "maintain independent existence" create any greater focus on the individual fetus than CALJIC 8.10, which asks the jury to determine if the fetus "has attained such form and development of organs as to be normally capable of living outside of the uterus." Further, whether or not the word "maintain" adequately informed the jury that it had to find the fetus could sustain life beyond a mere fleeting moment (see RB 113), its inclusion did nothing to correct the error caused by the court's omission of the word "normally." It was still likely that the jury believed it could find all the elements met where there was only the remotest possibility the fetus could "maintain" existence independently.

To pass constitutional muster, the jury in appellant's case should have been instructed that viability means there was a likelihood of the fetus's survival. The instruction as given suggests that viability exists even when the evidence shows no more than a *possibility* of survival outside the uterus. Contrary to respondent's argument, the instruction lowered the viability threshold, and thereby permitted a conviction for murder of a fetus upon proof of less than beyond a reasonable doubt. (*Davis*, *supra*, 7 Cal.4th at p. 813.)

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

Although not acknowledging error, respondent contends that the error did not rise to constitutional dimensions and thus, that this Court need only determine whether there was prejudice pursuant to the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818), and not the more

stringent standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24. Respondent is incorrect. Fetus viability was an element of the offense at the time of the crime, and an instruction relieving the prosecution of the burden of proving each element beyond a reasonable doubt runs afoul of the right to a jury trial under the Sixth Amendment and 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* (1989) 491 U.S. 263, 265.) To the extent respondent relies on *Davis, supra,* 7 Cal.4th 797 (RB 114), in which this Court applied the *Watson* test to a similar instructional error, it overlooks that since *Davis*, the United States Supreme Court has made clear that misinstruction, just like the omission of a necessary element of an offense, is constitutional error. (*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.)

Regardless of whether *Chapman* or *Watson* applies, however, appellant's conviction for the murder of Washington's fetus must be reversed. As required for reversal under *Watson*, there is a reasonable probability that the jury would have reached a result more favorable to appellant absent the instructional error. Respondent contends that there was no harm to appellant because the prosecution's evidence conclusively established the viability of the fetus, and because there was no evidence from which the jury could conclude in favor of appellant on the question of viability. (RB, p. 114.) Respondent overstates the prosecution's evidence in this case as it was by no means conclusive as to the element of viability. Indeed, there was no testimony regarding *the likelihood* that the fetus would survive.

While respondent relies on the testimony of medical examiner Lisa Scheinen, that testimony was not based on her own autopsy of the fetus or of Washington, but instead on an autopsy conducted by another examiner. The doctor who conducted the autopsy, however did not make any findings regarding the fetus's viability, nor its chances for survival outside the uterus. Dr. Scheinen testified that the doctor who conducted the autopsy "doesn't really say anything specific about whether the baby could have survived . . . ." (12RT 1822.) Dr. Scheinen also did not express any opinion herself as to whether this specific fetus was, in fact, viable, other than to say the fetus had "a chance" of survival. (*Ibid.*) Instead, she testified only that, based on its weight and the length of gestation, the fetus was within the "range" or "ballpark" of viability as established by the World Health Organization. (12RT 1822-1823.) Based on this information, Dr. Scheinen testified that a fetus with those numbers has a *chance* for life outside the womb. (12RT 1822). There was absolutely no evidence or testimony going to the specific point at issue here, which was whether a fetus that was within this ballpark range for viability had "a better than even chance" of survival outside the womb. Without such evidence, this Court cannot find the evidence on this point to be conclusive, and no juror could even infer that the fetus probably would have survived independently had it not been killed.

For these reasons, respondent's assertion that the evidence in this case was "similarly" strong as that presented in *People v. Apodaca* (1978) 76 Cal.App.3d 479, 487-488, or *People v. R.P. Smith* (1987) 188 Cal.App.3d 1495, 1515-1516, must be rejected. Initially, both of these cases were decided before this Court's opinion in *Davis* made clear that more than just a possibility of survival is required for a finding of viability.

Thus, even if the evidence in those cases were identical to the evidence in the present case, which it was not, such evidence did not necessarily "conclusively" establish viability. Further, as this Court held in *Apodaca*, "whether a fetus is viable at a given time is a question of fact that is dependent upon the peculiar circumstances of each case." *Apodaca*, *supra*, 76 Cal.App.3d at p. 489. Thus, similarities in the evidence presented in other cases where no prejudice was found would not demonstrate a similar lack of prejudice in the present case.

Even so, unlike in this case, the evidence of viability presented in both *Apodaca* and *R.P. Smith* actually was conclusive under the definition of viability assumed in those cases. In *Apodaca*, for example, the prosecution's pathologist first gave a "scholarly and knowledgeable" discussion of fetus viability and "then emphatically expressed the opinion that the fetus was viable when it was slain." (*Apodaca, supra*, 76 Cal.App.3d at p. 488.) The doctor then substantiated his opinion with well-accepted medical reasons, including body measurements. (*Ibid.*) In *Smith*, a neonatologist testified that there was an 85 percent chance the fetus could have survived independently, and then backed up that conclusion with general statistics regarding viability. (*Smith, supra,* 188 Cal.App.3d at p. 1516.) In stark contrast to the evidence here, in both *Apodaca* and *Smith*, an expert testified that each fetus was actually viable. In *Apodaca*, the expert's opinion was "emphatically" conclusive, and in *Smith*, the expert testified that there was an 85 percent chance of survival, also clearly establishing viability. In the present case, the expert merely stated that looking at the age of the fetus alone would indicate it had a chance of survival, and there was no evidence about how large or slight that chance might be.

For these reasons, and those presented in the opening brief, the instructional error was prejudicial and appellant's conviction should be reversed.

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

In his opening brief, appellant alleged that the evidence introduced at the penalty phase to establish that appellant had committed a criminal threat towards jail Deputy Uyetatsu was insufficient to prove the elements of section 422 beyond a reasonable doubt.[6] Respondent argues that the evidence was sufficient to establish that appellant committed the crime. As will be shown below, respondent is incorrect and the evidence was not sufficient.[7]

A. The Evidence Was Insufficient to Show an Immediate Prospect of the Execution of the Threat

Respondent argues that appellant's statement to Antonio M. conveyed a sufficient gravity and prospect that it would be carried out to satisfy the third element of section 422. Respondent relies only on the testimony of Antonio M. that appellant was upset at Uyestatsu when he made the statement, and that Antonio M. thought appellant would carry out

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[6] In the opening brief, appellant focused on two specific elements of the criminal statute and argued the evidence as to those elements was not sufficient to sustain the prosecution's burden of proof. (AOB 139-143.) Together with this reply brief, appellant has filed a motion for leave to file a supplemental brief that addresses the insufficiency of the evidence to establish another element of section 422, the requirement that appellant made the alleged statement with the specific intent that it be taken as a threat. The present reply brief will address only those arguments made in Appellant's Opening Brief.

[7] Respondent apparently acknowledges that this issue is cognizable on appeal and has proceeded to address only the merits of appellant's claim. Accordingly, appellant will do the same.

the threat. (RB 119.) Respondent, however, glosses over the specific evidence presented by Antonio M., as well as the source of that evidence.

A violation of Section 422 is not based solely on the words used, but "the surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat," (*People v. Bolin* (1998) 18 Cal.4th 297, 339-340), and such threats must be "judged in their context." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137, citing *Bolin, supra*, 18 Cal.4th at p. 339-340.) Here, the circumstances do not establish the threat was genuine. The only direct evidence, as respondent implicitly concedes, that the threat satisfied the third element of section 422 came from another jail inmate, Antonio M. Respondent has pointed to no cases however, in which a jailhouse informant's testimony that he believed a threat made by another inmate against a third party would be carried out constitutes sufficient, solid evidence that the threat was real and imminent. There was no evidence that Antonio M. had any expertise in distinguishing real threats from hyperbole, or that he would be qualified to make such a determination in any event.

In determining whether conditional, vague, or ambiguous language constitutes a violation of section 422, the court may "consider 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.) But conversely, the absence of circumstances that would be expected to accompany a threat may serve to dispel the claim that a communication was a criminal threat. (See *In re George T.* (2004) 33 Cal.4th 620, 637-38 [citing cases finding no criminal threat in the absence of history of threatening behavior toward victim by defendant, menacing gestures or show of force accompanying threat, or conduct such as attempted physical contact to show imminence of threat].)

Antonio M. testified that he thought appellant would carry out the threat because: 1) when he made the statement to Antonio M., appellant was very upset about how Uyetatsu treated him in jail (19RT 2800); 2) it appeared to Antonio M. that appellant didn't like women because he asked to change channels when other inmates were watching t.v. shows featuring women (19RT 2803, 2805); and 3) because of the nature of the charges pending against appellant (*ibid*). None of these circumstances, however, are sufficient singly or together to support a finding beyond a reasonable doubt that appellant's threat was imminent or real.

While appellant may have been upset at Uyetatsu, that alone is not sufficient because virtually all menacing statements are made when the speaker is "very upset" at the person he is menacing. Section 422 "'was not enacted to punish emotional outbursts, [and] targets only those who try to instill fear in others.'" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 805, quoting *People v. Felix* (2001) 92 Cal.App.4th 905, 913, 112.) The statute "does not punish such things as 'mere angry utterances or ranting soliloquies, however violent.'" (*Ibid*, quoting *Ryan D., supra,* 100 Cal.App.4th at 861.) Antonio M.'s testimony established nothing more than that appellant had an emotional outburst, and made an angry, violent utterance, a statement that is not punishable as a criminal threat. Other than appellant's "upset," there was no evidence that appellant's mannerisms, affect, and actions when he made the threat conveyed the requisite gravitas. To the extent that Antonio M. felt the threat was serious and real because he believed appellant disliked women and because appellant was charged with violent crimes against women, those are circumstances that had no connection to the manner in which the statement was made, nor to any threatening actions by appellant after the statement. Those factors at most,

suggest appellant *could* carry out the threatened act, but add nothing to whether it was likely appellant *would* carry it out.

Further, there was no evidence of statements or actions by appellant that "would be expected to accompany a threat," such as evidence that he committed violent acts while making the statement (see e.g., *People v. Butler* (2000) 85 Cal.App.4th 745, 754-755, [defendant grabbed the victim while making threatening statements]); or that his statement was accompanied by menacing gestures (see e.g., *People v. Franz* (2001) 88 Cal.App.4th 1426 [defendant made shushing sound while he looked directly at two witnesses and then ran his finger across his throat as they spoke to an officer].) There was no evidence appellant had a history of violence against or terrorizing other jailers (see e.g., *Butler, supra,* 85 Cal.App.4th at p. 754-755) or Uyetatsu herself (see e.g., *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431–1432 [noting defendant's lengthy history of not only threatening but also physically assaulting the victim].) In contrast, appellant had no history of serious misconduct in the jail, let alone violence towards his jailers. In fact, the opposite was true. (19RT 2846.)

It was clear from his hostile reactions on cross-examination, (see e.g. 19RT 2815-2817), that Antonio M. strongly disliked appellant, not because appellant was potentially violent or threatening, but because appellant had killed women and bragged about how he would be a celebrity due to his crimes. (19RT 2811, 2814-2815, 2819.) Indeed, Antonio M.'s testimony established that appellant had a tendency to brag about what would happen if he were convicted, and thus demonstrated that, instead of containing any genuine threat, appellant's statement about Uyetastu was no more than boastful posturing.

Respondent also claims that the convincing nature of the threat was proven by the great risk Antonio M. faced by passing a note about it to another jail officer. (RB 119.) The evidence did not establish, however, that Antonio M. himself felt any risk in passing the note, in fact, he denied feeling any concern over that act. (19RT 2802.) Although Antonio M. told McMorrow he was looking out for the officers, his motives were doubtful, given his extreme dislike of appellant.

Finally, respondent points to evidence that appellant, prior to making the statement, had treated Uyetatsu differently than other deputies in the jail. McMorrow described how appellant was friendly and talkative around other jailers but would grow silent when Uyetatsu entered the area. (19RT 2770.) He observed that appellant would raise his arms, stand against the door in an "intimidating" manner, and stare at Uyetatsu. (19RT 2771.) Uyetatsu herself felt appellant's behavior conveyed "utter disgust" towards her. (19RT 2384.) There was no evidence however, that this behavior had anything to do with appellant's purported threat, nor was there any temporal link between his statement and these behaviors. Even assuming appellant was "disgusted" by Uyetatsu and stared at her in a hostile manner rather than engaging her in small talk, those actions are not sufficient to elevate his statement to Antonio M. from an angry outburst into a genuine, serious threat of violence.

Respondent's arguments also ignore that, while jail staff took steps to keep Uyetatsu away from appellant just in case appellant's statements were serious, their belief that appellant's statements *did not* amount to criminal threat was so strong that they didn't even write a full report, let alone refer the matter to the District Attorney to determine if a crime had been committed. They even destroyed the note documenting the purported

threat. (19RT 2776-2777; 2779-2780.) Such cavalier treatment of physical evidence documenting an alleged crime is in direct contradiction of the claim that the statement conveyed a serious and imminent threat.

B. The Evidence Was Insufficient to Show Deputy Uyetatsu Was in a Sustained State of Fear After Learning of Appellant's Comment to Inmate Antonio M.

There also was no solid evidence to establish the fourth element of a section 422 offense, that the intended victim was in sustained fear due to the threatening statement. Appellant's statement was communicated to Deputy Uyetatsu via another deputy at the jail who had learned that appellant made the statement to Antonio M. Respondent argues that Uyetatsu's fear was both "reasonable" and "real," and that thus, her fear was established by "objective" and "subjective" evidence. (RB 120-121.) Respondent points to appellant's large size and the intimidating way he stood when Uyetatsu was present, the pending charges against him and that he continued to refuse her orders even though it meant a loss of privileges. (*Ibid.*) Respondent also points to Deputy Uyetatsu's testimony that she believed it was possible that appellant could kill her, and that he would do so if given the opportunity. (RB 21.)

None of these things, however, permissibly lead to a reasonable inference that appellant would kill a jail deputy, and in fact prove that, no matter how much he may have disliked Uyetatsu, appellant did not manifest those feelings in any other hint of verbal or physical violence towards her personally. Most importantly, there was no evidence that Uyetatsu was in sustained fear of appellant, even though she testified at length about the matter at the penalty phase. Tellingly, the prosecutor never even asked Uyetatsu if she was afraid when she learned of appellant's statement to Antonio M. When the prosecutor asked how she felt when she found out

appellant had said he would try to kill her, she unemotionally answered "I felt like it was possible that he has the ability, I'm sure, and if given the proper opportunity, he would probably take it." (19RT 2836.) The prosecutor asked no other questions about her purported "sustained fear" and nothing in her testimony came close to showing she was actually in fear.

Appellant could not help but present as a large man, and thus it would be patently unfair to consider his physical stature as satisfying an element of a criminal offense, as respondent suggests.[8] Similarly, his purported stance when in Uyetatsu's presence was perhaps "intimidating," but intimidation by itself is insufficient to connote a threat of force or violence. There was no evidence that appellant's stance was accompanied by any menacing gesture, verbal threats or any other activity from which the jury could find a show of force. Indeed, Deputy Uyetatsu herself did not link appellant's demeanor to a violent state of mind, volatility or even anger, but expressly characterized it as a showing of "utter disgust," because she was a female. (19RT 2384.) It did not cause her any fear, but instead she "perceived [him] as somebody that feels they're above you based on human behavior classes." (19RT 2835.)

While Uyetatsu was aware that appellant was charged with the serial murder of prostitutes on the streets of Los Angeles, she testified that she did not have any feelings whatsoever based on the charges against him and that she treated him exactly how she treated all other inmates, despite those charges. (19RT 2841.) Respondent also points to appellant's continued

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[8] Criminalizing behavior based on the offender's physical status would likely run afoul of the Eighth Amendment. (See e.g., *Robinson v. California* (1962) 370 U.S. 660, 667.)

insubordination towards Uyetatsu despite the consequences against him, but fails to explain how appellant's record of extremely minor infractions and refusal to follow orders regarding meals showed that Uyetatsu's purported fear of violence against her was either reasonable or real. Indeed the evidence shows that appellant did nothing to cause Uyetatsu to fear him and that she was in fact, not afraid.

For all these reasons, the evidence was not sufficient to prove the third and fourth elements of a criminal threat, and thus is insufficient to establish the offense underlying appellant's alleged uncharged criminal conduct.

Respondent argues that appellant's related argument that introduction of the threat evidence violated his constitutional rights by injecting irrelevant matters into the penalty decision should be rejected because the evidence was sufficient. (RB., at p. 122.) But as appellant has shown, the evidence was not sufficient to establish appellant violated section 422. Given that appellant's actions at most amounted to an emotional outburst, respondent's claim that his behavior was precisely the type of behavior for which factor(b) was designed must be rejected.

C. Introduction of the Uyetatsu Incident Was Not Harmless

Respondent argues that introduction of the purported threat against Uyetatsu was harmless because of appellant's underlying crimes and the introduction of multiple other unadjudicated offenses pursuant to factor (b), of which the threat was the most minor. Respondent additionally argues that, even if the evidence was insufficient to establish a violation of section 422, it may have been enough to establish an attempted criminal threat. (RB 124.) Respondent's argument is not persuasive, however because there

is a reasonable possibility that introduction of the Uyetatsu incident affected the jury's decision to impose a death sentence.

Although appellant's underlying offenses and the other unadjudicated crimes were more serious in nature and involved actual, as opposed to just threatened, violent behavior, the Uyetatsu incident stood alone as evidence of appellant's behavior in custody and thus suggested that appellant might pose a future danger if he was sentenced to life in prison rather than death. The defense argued in closing argument at the penalty phase that there had been no evidence that appellant had been a bad person in prison. (19RT 3035.) The prosecutor specifically quoted the Uyetatsu threat and argued it was significant in showing appellant lacked remorse. (19RT 3007-3008.)

Respondent next argues that even if the evidence was insufficient to establish the elements of 422, it was sufficient to establish an attempted criminal threat. Respondent overlooks that, even though the jury was not instructed on the elements of section 422, it *was* specifically instructed which unadjudicated crimes had to be found beyond a reasonable doubt and that "[a] juror may not consider any evidence of any other criminal acts or activities as an aggravating circumstance." (14CT 3594, CALJIC 8.87.) That instruction specifically listed, inter alia, the criminal act of "Criminal Threats against Deputy Natalie Uyetastu" but does not mention attempted threats or indeed any other attempted criminal act. Thus, the jury was expressly prohibited from finding or considering whether appellant committed an attempted threat.

Moreover, respondent has not shown that the evidence was in fact sufficient to establish the elements of an attempted criminal threat beyond a reasonable doubt. Respondent argues that an attempted threat could be

shown even if the element of sustained fear was not proven. As shown in the opening brief and above, however, the evidence was not sufficient to show either that the threat was genuine and imminent, or that Uyetastu was in a state of sustained fear after she learned of appellant's statement. Although in *People v. Toledo*, this Court did recognize the crime of an attempted violation of section 422, it also clearly circumscribed the facts giving rise to the inchoate offense to those cases where "a defendant takes *all* steps necessary to perpetrate the completed crime of criminal threat . . . . but only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*People v. Toledo* (2001) 26 Cal.4th 221, 231.) While this Court posited that an attempt could be shown, for example, where the victim was not actually in sustained fear but reasonably should have been (*ibid.*), it stressed that all other elements of the primary offense had to be established, including that defendant harbored the requisite specific intent. (*Ibid.*) Respondent has not pointed to any evidence that appellant acted with the specific intent required by the statute, and indeed there is none.[9]

For all the reasons stated above, the evidence was not sufficient to prove that appellant committed either a completed or attempted criminal threat, and thus was insufficient to establish the offense underlying appellant's alleged uncharged criminal conduct. There is a reasonable possibility that the jury's consideration of this unproven and invalid aggravating factor affected the penalty verdicts (*People* v. *Brown* (1988) 46 Cal.3d 432, 447), and such consideration cannot be found harmless beyond

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[9] As set forth above, appellant challenges the sufficiency of the evidence as to the intent element in his supplemental opening brief.

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

Appellant has argued that California's capital sentencing scheme violates the United States Constitution. (AOB 150-166.) Respondent generally argues, which appellant acknowledged, that this Court has upheld the statute and CALJIC instructions against similar challenges. Respondent argues that appellant has not presented any argument to compel this Court to reconsider any of the challenged issues. (RB 126-134.) Appellant maintains, as he argued in his opening brief, that this Court should reconsider appellant's constitutional challenges to California's death penalty statute and CALJIC instructions as interpreted by this Court and as applied at appellant's trial, as violating the United States Constitution.[10]

After appellant filed his opening brief, and after the State filed its respondent's brief, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed.

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[10] Appellant reiterates that should this Court decide to reconsider any of the claims or subclaims in this argument that are presented pursuant to this Court's directive in *People v. Schmeck* (2005) 37 Cal.4th 240, that appellant be permitted to present supplemental briefing. (AOB 150.)

(*Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 624] [hereafter "*Hurst*"].)[11] *Hurst* supports appellant's request in Argument C.1 and C.3 of this claim in his opening brief that this Court reconsider its rulings that 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), does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106), and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275). (See AOB at 152-155, 156-158; see also, RB at 127-129 [State argues that there is no constitutional requirement that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt].)

A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, must Be Found by a Jury Beyond a Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p.

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[11] Appellant's argument here does not alter his claim in the opening brief, but provides additional authority for sections C.1 and C.3 of this argument in his opening brief. To the extent this Court considers this not to be true, appellant asks this Court to deem this argument a supplemental brief. Appellant has no objection to a supplemental brief by the Attorney General if this Court believes it necessary.

589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst*, *supra*, at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst*, *supra*, at p. 622, citing Fla. Stat. § 921.141(3).) The

Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid.*)[12]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury.

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[12] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla.Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra*, 136 S.Ct. at p. 622.)

(*Hurst, supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death.*" (*Hurst, supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[13] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi, supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* by Not Requiring That the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard

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[13] See *id.* at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id.* at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136

S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[14]

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The

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[14] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].)

Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[15]

C. This Court's Interpretation of the California Death Penalty Statute in *People v. Brown* Supports the Conclusion That the Jury's Weighing Determination Is a Factfinding Necessary to Impose a Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id.* at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating

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[15] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously 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, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___ [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

> factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id.* at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id.* at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id.* at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes

omitted.)[16]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing

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[16] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the sentencing instruction.

process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown, supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown, supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown, supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He *may* impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id.*, subd. (3).)

(*Brown, supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances

outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of section 190.3.[17] The requirement that the jury must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this

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[17] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

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

prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider its Prior Rulings That the Weighing Determination Is Not a Factfinding Under *Ring* and Therefore Does Not Require Proof Beyond a Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are

two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[18] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

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[18] The *Apprendi*/*Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del., Aug. 2, 2016, No. 39) 2016 WL 4224252 [hereafter "*Rauf*"] supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf, supra*, at *1 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at *18.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[19] One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Id.* at *2; see *id.* at *39 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot

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[19] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf, supra*, at *1-2 (*per curiam* opn.) [addressing Questions 1-2] and at *37-38 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at *2 (*per curiam* opn.) [addressing Question 3] and at *39 (conc. opn. of Holland, J.)).

> sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Ibid.*) The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this

finding be made, by a jury and beyond a reasonable doubt. As appellant's jury was not required to make this finding, appellant's death sentence must be reversed.

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CONCLUSION

For the foregoing reasons and those stated in the opening brief, appellant's convictions and sentence of death must be reversed.

DATED: November 16, 2016

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

Attorney for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I am the State Public Defender and represent appellant, CHESTER DEWAYNE TURNER, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 21,190 words in length.

Dated: November 16, 2016.

Mary K. McComb

DECLARATION OF SERVICE

Case Name: **People v. Chester Turner**
Case Number: **Supreme Court Case No. S154459**
Los Angeles County Superior Court No. BA273283-01

I, **Marsha Gomez**, 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, California 95814. I served a copy of the following document(s):

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I declare under penalty of perjury that the foregoing is true and correct. Signed on **November 16, 2016**, at Sacramento, California.

Marsha Gomez