

COPY SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

\_\_\_\_\_)  
 PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 Plaintiff and Respondent, )  
 )  
 v. )  
 )  
 FLOYD DANIEL SMITH )  
 )  
 Defendant and Appellant. )  
 )  
 \_\_\_\_\_)

(San Bernardino County  
Sup. Ct. No. FWV08607

SUPREME COURT  
FILED

MAR 22 2017

Jorge Navarrete Clerk  
Deputy

APPELLANT'S SUPPLEMENTAL OPENING BRIEF  
Appeal from the Judgment of the Superior Court  
of the State of California for the County of San Bernardino

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DEATH PENALTY



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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. S065233
	)	
v.	)	
	)	(San Bernardino
	)	County Superior
FLOYD DANIEL SMITH,	)	Ct. No.
	)	FWV09607)
	)	
Defendant and Appellant	)	

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**APPELLANT’S SUPPLEMENTAL OPENING BRIEF**

**XI.**

**THE PRIOR-MURDER SPECIAL-CIRCUMSTANCE  
VERDICT SHOULD BE REVERSED DUE TO A LACK  
OF SUFFICIENT EVIDENCE.**

**A. Introduction**

To prove the special circumstance allegation that defendant Floyd Daniel Smith was previously convicted of murder, the prosecutor introduced two documentary exhibits, and nothing else. The prosecutor presented no testimony and offered no argument to assist the jury in finding evidence in the exhibits of a prior murder conviction.

Upon examination of the two exhibits, it is apparent that no such evidence exists. First, the documentary exhibits were not properly certified

as true and correct copies of the originals, thereby making the credibility of the exhibits highly questionable. Second, although the exhibits referred to a party with the same name as the defendant, the exhibits do not concern the Smith in this case. Third, and perhaps most obvious, the exhibits do not even mention a murder conviction.

Accordingly, based on the two documentary exhibits – the only evidence before the jury – no rational jury could have found beyond a reasonable doubt that Mr. Smith was previously convicted of murder. The prior-murder special-circumstance verdict should be reversed due to a lack of sufficient evidence.

#### **B. Background**

On July 15, 1997, the jury found Mr. Smith guilty of the first degree murder of Joshua Rexford and also found true the special circumstance allegation that the murder was committed while lying in wait. (2CT 465, 466.) On July 21, 1997, the court held a separate proceeding to allow the jury to consider the special circumstance allegation that Mr. Smith was previously convicted of murder. (17RT 5564.)

After the prosecutor and defense counsel waived opening statements, the prosecutor moved into evidence exhibit 24 (3SCT3 787-793) and exhibit 63 (4SCT3 1167-1183). Defense counsel did not object to the exhibits, and the court admitted them. (17RT 5566-5567.)<sup>1</sup>

Exhibits 24 and 63, which total 24 pages (3SCT3 787-793; 4SCT3 1167-1183), are described in detail in section C below.

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<sup>1</sup> The exhibits are bound in the Clerk's Third Supplemental Transcript ("SCT3"). Exhibit 24 is in volume 3 at 3SCT3 787-793, and exhibit 63 is in volume 4 at 4SCT3 1167-1183.

The prosecution and the defense rested without calling any witnesses. (17RT 5566.) Both made brief comments to the jury, with neither indicating where evidence of a prior murder conviction might be found in the two exhibits. (17RT 5567.)

The court instructed the jurors with CALJIC No. 8.82 [Special Circumstances -- Murder With Prior Conviction of Murder]. (17RT 5568-5569.) In addition, the court told the jurors twice, that to decide the special circumstance question, their job was to review the two exhibits. (17RT 5570, 5573.)

The jurors deliberated less than a half hour before finding the special circumstance allegation true. (17RT 5574-5575; 2CT 486.)

**C. Exhibits 24 and 63**

**1. Exhibit 24**

Exhibit 24 is seven pages, consisting of a one-page cover letter, dated March 3, 1995, and six attached pages. (3SCT3 787-793.) The subject of the letter is “Floyd Daniel Smith, Jr.,” YA No. 44591, Sup. Ct. No. CR-22000. It is addressed to the San Bernardino Sheriff’s Office, to the attention of Scott Franks, Detective. The letter is signed by Kimberley L. Dornback for Patricia A. Hagan, Supervisor, Master Files, Department of the Youth Authority, State of California. (3SCT3 787.) The following initials appear on the letter’s lower left side: “PAH:kld.” (*Ibid.*) The letter reads:

Attached are documents showing the commitment under which we held the above named subject (as prescribed in Section 969b of the Penal Code) which you recently requested. The commitment lists the name of F. Peasley DPD, as counsel for the defendant. Also attached are Order of Discharge, fingerprints, and rap sheet. No photo available.

This is to certify that I, the undersigned, am the official custodian of all records of all wards committed by the Youth Authority, and that the attached documents are true and correct copies of the records in my custody.

(3SCT3 787.)

Page 788 is a duplicate of 4SCT3 1180, described below.

Page 789 is a July 24, 1992 "Order of Discharge" from the Department of the Youth Authority, Riverside County Superior Court, YA No. 44591, regarding ward, Floyd Daniel Smith, Jr., 1414 N. Riverside Ave., Apt. 125, Rialto, CA 92376. The order states: "Reason: Honorable Discharge No Violation." And it provides: "This Certifies That Floyd Daniel Smith Jr. is hereby discharged from the Youth Authority under Honorable Conditions." The discharge is "By Order of the Youthful Offender Parole Board."

Page 790 is a fingerprint form purporting to show the fingerprints for Floyd Daniel Smith. The form contains a signature of the "person fingerprinted." The following is noted on the form: Date of Birth: 07/20/67. Date Arrested or Received: 1/10/85. Sex: M. Race: Blk. Hgt: 5'11". Wgt: 158. Eyes: Brn. Hair: Blk. Place of Birth: Banning, CA. Your No. 44591. Charge: PC 187/12022.5 Murder, First Degree, Use of Firearm. Final Disposition: CYA Commitment – Riverside County Superior Court. Social Security No. 522-33-9078.

Page 791 appears to be an FBI fingerprint form. It shows the following: Occupation: Student. Residence of Person Fingerprinted: 479 E. Indian School Lane, Banning, CA. Scars: 1/8" scar between eyes, 1/2" scar right chin. Skin tone: dark. The form has a date stamp for Jan. 17, 1985.

Page 792 appears to be a computer printout to the attention of K Dornback. The printout includes the following notes: Restricted – Do Not Use for Employment, Licensing or Certification Purposes. Floyd Daniel Smith: DOB 7-20-1967. Sex: M. Rac: Black. Hgt:511. Wgt:158. Eye: bro. Hai/blk. POB/CA. Soc/522339078. Inn/CYA-Y044591. Smt/sc R Leg. Mds/sc Between Eyes. Occ/student. Custody/CYA. 1-10-85 Caya Norwalk. Cnt:01. #Y44591. 187 PC – Murder: First Degree – Used Firearm Sen From:Riverside Co; 1-22-91 Dispo:paroled from CYA: Recvd By:capa Youth Authority; 7-24-92 Dispo:discharged.

Page 793 appears to be exhibit 24's cover page, reflecting court exhibit number 24 and grand jury exhibit number 4.

## **2. Exhibit 63**

Exhibit 63 purports to be a certified copy of a Riverside County Superior Court criminal case file concerning “Floyd Daniel Smith.” (4SCT3 1166-1183.)

Page 1166 indicates that the exhibit's number is 63.

Page 1167 contains a purported certification, which reads as follows:

“Each document to which this certificate is attached is certified to be a full, true and correct copy of the original on file and of record in my office.”

(4SCT3 1167.) The previous sentence is followed by a stamped name in cursive: *Arthur A. Sims.* (*Ibid.*) The stamped name is followed by: Arthur A. Sims, Clerk, Superior/Municipal Courts, County of Riverside, State of California. Dated: 6-6-95. (*Ibid.*) Next to the sentence purporting to certify each document is a stamp for Superior/Municipal Courts, Riverside County California. Two notations on page 1167 indicate that the certification must be in red to be a certified copy.

Pages 1168-1170 contain the Information in People v. Floyd Daniel Smith, Riverside County Superior Court, Case No. 22000, filed April 9, 1984. In counts I through V, the Information alleges, respectively, attempted robbery, murder under section 187, a second count of attempted robbery, kidnapping, and oral copulation.

Pages 1171-1174 are largely unreadable. Each page has a notation in the lower left corner that reads: "Court Original." (This suggests that the four pages in the possession of the court and the jury were similarly unreadable and were not relied on by the jury.) Pages 1173-1174 appear to be a complaint filed in Case No. 22000 on March 29, 1984.

Page 1175 appears to be an index of proceedings in People v. Floyd Daniel Smith, Municipal Court of Mt. San Jacinto Judicial District, Riverside County, No. 84-5578.

Page 1176 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, substantially unreadable (including the date), though there is no Court Original notation. At the top center of the form is a box entitled, "Violation of Section(s) (Counts & Degree)." The specific section(s), counts and degree are unreadable.

Page 1177 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, in People v. Floyd Daniel Smith, CR-22000. It covers the June 18, 1984 arraignment on the Information. The form shows that the defendant pled not guilty and denied the special allegations. At the top center of the form is a box showing the violations alleged in the Information: "Violation of Section(s) (Counts & Degree): 211/213 (12022.5 PC) P.C. (Cts I & III) 187 P.C. (Ct II) 209(b) (12022.5 PC) PC (Ct IV) 288a© (12022.3(a) PC) P.C. (Ct V)."



Page 1178 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, in People v. Floyd Daniel Smith, CR-22000. It covers the July 13, 1984 "further proceedings." At the top center of the form is a box showing the violations alleged in the Information: "Violation of Section(s) (Counts & Degree): 211 PC (att) PC (12022.5 PC) (Cts I, III) 187 PC (Ct II) 209(b) PC (12022.5 PC) (Ct IV) 288a(c)) PC (12022.5 PC (Ct V)." The form notes that the not guilty plea to count II was withdrawn, a guilty plea to count II was entered, the court fixed the degree of offense at first degree, and the remaining counts and special allegations were set for dismissal at the pronouncement of judgment on August 3, 1984.

Page 1179 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, in People v. Floyd Daniel Smith, CR-22000. It covers the August 3, 1984 Hearing on Report of Probation Officer and Pronouncement of Judgment re: Conviction. At the top center of the form is a box that refers to the violations alleged in the Information: "Violation of Section(s) (Counts & Degree): 211 PC (att) (12022.5 PC) (Cts I, III) 187 PC (1 deg) (12022.5 PC) (Ct II) 209(b) PC (12022.5 PC) (Ct IV) 288a(c)) PC (12022.5(a) (Ct V)." A box on the form is checked to indicate the following: "Defendant states there is no legal cause why judgment should not be pronounced." The form further notes as follows:

**IT IS ORDERED:** Defendant placed pursuant to 707.2 W&IC. Defendant remanded to custody of the Sheriff. Sheriff is directed to deliver defendant into custody of the California Youth Authority. Defendant to be housed at Juvenile Hall pending transportation to California Youth Authority.

Page 1180 is a Riverside County Superior Court form, Minutes of Superior Court - Criminal, in People v. Floyd Daniel Smith, CR-22000. It

covers the December 4, 1984 Hearing on Report of Probation Officer and Pronouncement of Judgment re: Conviction. At the top center of the form is a box that refers to the violations alleged in the Information: "Violation of Section(s) (Counts & Degree): *211 PC (Att) (12022.5 PC) (Ct I) (Ct III); 187 PC (12022.5 PC) (1st deg) (Ct II); 209(b) PC (12022.5 PC) (Ct IV); 288a©) PC (12022.3(a) PC (Ct V).*" (The italicized words above are handwritten.) A box on the form is checked to indicate the following: "Defendant states there is no legal cause why judgment should not be pronounced." The form further notes as follows:

IT IS ORDERED: Credit to be given for *425* days served:  
*Local - 223; PC 4019 - 111; State institution - 91.*  
Defendant committed to the California Youth Authority, and the Sheriff is directed to deliver said defendant to such reception facility *for a period of time prescribed by law. (25 years to life plus two years).* Plaintiff's motion to dismiss Counts *I, III, IV, & V.* Court determines that defendant is not presently financially able to pay costs of appointed counsel. Factual basis found. *Enhancement as to count I.*

(The italicized words above are handwritten.) Although there are boxes on the form to indicate whether plaintiff's motion to dismiss was granted or denied, no box is checked.

Page 1181 is a Riverside County Superior Court form, Minutes of Superior Court, in People v. Floyd Daniel Smith, CR-22000. It is signed by Judge Howard M. Dabney and dated January 15, 1985. The form is entitled "Correction of Court Order." It shows that the court corrected its order nunc pro tunc to December 4, 1984, by deleting behavioral credits of 11 days. The form notes that the defendant is ordered to pay restitution.

Page 1182 is a Riverside County Superior Court form, Minutes of Superior Court, in *People v. Floyd Daniel Smith*, CR-22000. It is dated May 18, 1993, and it reads as follows:

The Defendant having been honorably discharged from the California Youth Authority: IT IS ORDERED: Pursuant to the authority of section 1772 W&IC that defendant's plea be withdrawn, a plea of not guilty entered and the entire matter dismissed nunc pro tunc as of [blank] (People vs. Navarro, 7 C. 3d 248.)

Page 1183 is the cover page to a preliminary examination transcript in *People v. Floyd Daniel Smith*, Case No. 22000.

**D. Applicable Law**

The law governing sufficiency of the evidence applies to special circumstance findings. (*People v. Jennings* (2010) 50 Cal.4th 616, 638.) In reviewing a claim for sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the verdict to determine whether any rational jury could have found the essential elements of the special circumstance beyond a reasonable doubt. The court reviews the entire record to determine whether it discloses sufficient evidence supporting the verdict. Such evidence must be reasonable, credible, and of solid value. The court does not reweigh the evidence. Instead it presumes in support of the verdict the existence of every fact the jury reasonably could deduce from the evidence. If the circumstances reasonably justify the verdict, reversal is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*Id.* at pp. 638-639; *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [under Fourteenth Amendment's Due Process Clause, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”]; *People v. Staten* (2000) 24 Cal.4th 434, 460 [identical standard to *Jackson* applies under California Constitution].)

Although the test for sufficient evidence is not whether the evidence establishes guilt beyond a reasonable doubt, it must be kept in mind that the prosecution’s “burden is a heavy one: ‘To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence.’” (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139, quoting *People v. Hall* (1964) 62 Cal.2d 104, 112.)

Furthermore, because this is an appeal of a death sentence, this Court has an obligation to scrutinize the law and the facts more closely to determine whether they make Mr. Smith death eligible. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn.); see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 749 [“this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency”]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329, fn.2 [“*Woodson*’s concern for assuring heightened reliability in the capital sentencing determination ‘is as firmly established as any in our Eighth Amendment jurisprudence’”]; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885 [“the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error”].)

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**E. Upon Viewing Exhibits 24 and 63 in the Light Most Favorable to the Verdict, No Rational Jury Could Have Found Beyond a Reasonable Doubt That Mr. Smith Was Previously Convicted of Murder.**

- 1. The jury could rely only on the evidence admitted during the separate proceeding, which was limited to exhibits 24 and 63.**

Preliminarily, it is important to resolve just what evidence the jury was allowed to consider in deciding the special circumstance allegation. Although the prosecutor told the jurors in his brief argument that they could rely on evidence from the guilt phase (17RT 5567), the prosecutor was mistaken. The jury could rely only on evidence admitted during the special circumstance proceeding to determine whether Mr. Smith was previously convicted of murder.

“Section 190.1 provides that, when a death penalty case involves a prior murder conviction special-circumstance allegation, the truth of that allegation shall be determined in a separate proceeding following a finding of first degree murder by the trier of fact. (*Id.*, subd. (b).)” (*People v. Farnam* (2002) 28 Cal.4th 107, 145; see also *People v. Bivert* (2011) 52 Cal.4th 96, 108 [Penal Code section 190.1 “requires the truth of a prior-murder special-circumstance allegation to be determined in a separate proceeding following the guilt phase”]; *People v. Hinton* (2006) 37 Cal.4th 839, 873 [prior murder special circumstance proved in “separate proceeding”]; CJER, Death Penalty Benchguide: Pretrial and Guilt Phase (2011) § 98.54, p. 98-52 [“When the special circumstance is a prior first or second degree murder conviction, a separate trial is necessary. Pen C § 190.1(b)”]; *id.* at § 98.70, p. 98-60 [“A prior murder conviction is the one special circumstance that must be tried separately from the guilt phase”].)

Consequently, the determination of the truth of the prior-murder special-circumstance allegation “shall be made by the trier of fact on the evidence presented . . . at the hearing held pursuant to Subdivision (b) of Section 190.1.” (Pen. Code, § 190.4, subd. (a).)

Although the CALJIC instruction given by the court – CALJIC No. 8.82 – did not expressly limit the jury to the evidence admitted during the special circumstance stage, the court referred the jurors only to exhibits 24 and 63 to decide the truth of the special circumstance allegation: “Your job is to decide whether, *from looking at these documents*, whether he was previously convicted of murder or not. That’s your job. That’s the special circumstance that’s alleged in this phase of the proceedings.” (17RT 5570, italics added.) Later, the court reiterated to the jury: “[S]ee if the *records* show that he was convicted of that murder. That is your job.” (17RT 5573, italics added.)

CALCRIM No. 750, which pertains to the prior-murder special-circumstance proceeding, forbids a jury from considering any evidence from the guilt phase of the trial. The instruction provides in part as follows: “In deciding whether the People have proved this special circumstance, consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.” (CALCRIM No. 750, Special Circumstances: Prior Murder Conviction (Pen. Code, § 190.2(a)(2)) – Trial on Prior Murder (Pen. Code, § 190.1(a) & (b)).)

Penal Code section 190.1, cited by CALCRIM No. 750 as its authority, is unchanged since it became effective November 8, 1978. (See Historical Derivation, 2 Deering’s Ann. Pen. Code (2008 ed.) foll. § 190.1, p. 43.) Therefore, CALCRIM No. 750 accurately states the law existing at the time of Mr. Smith’s July 21, 1997 trial, when juries could only consider

evidence from the special circumstance proceeding itself. (17RT 5564; Cal. Rules of Court, rule 2.1050(a) [CALCRIM instructions are “official instructions” for use in California courts]; rule 2.1050(b) [“The Judicial Council endorses these (CALCRIM) instructions for use and makes every effort to ensure that they accurately state existing law”].)

Consequently, the prosecutor was incorrect in telling the jurors that they could rely on evidence from the guilt phase to determine the truth of the special circumstance allegation. The jury could base its verdict only on the evidence admitted during the special circumstance proceeding, which included exhibits 24 and 63, and nothing else.

**2. Relying only on the exhibits, no rational jury could have been reasonably persuaded to a near certainty that the defendant was previously convicted of murder.**

A careful review of exhibits 24 and 63 supports three critical findings. First, the exhibits were not properly certified. Second, the exhibits do not identify the defendant in this case. Third, the exhibits do not even mention a prior murder conviction.

**a. The exhibits were not properly certified.**

Because the exhibits were not properly certified, they lack credibility as true and correct of the originals. (*People v. Jennings, supra*, 50 Cal.4th at p. 638 [sufficient evidence]; *People v. Marshall* (1997) 15 Cal.4th 1, 31 [“Evidence is substantial if it is reasonable, credible, and of solid value”].) Therefore, they preclude a confident determination that the defendant was previously convicted of murder. (*People v. Thompson* (1980) 27 Cal.3d 303, 324 [to justify criminal conviction, trier of fact must “have reasonably rejected all that undermines confidence”].)

The certification to exhibit 24 is in the letter signed by “Kimberley L. Dornback for Patricia A. Hagen, Supervisor, Master Files.” (3SCT3 787.) The letter has the following initials on the lower left side: “PAH:kld.” (3SCT3 787.) Thus, it appears that Ms. Dornback was a secretary for “Patricia A. Hagen, Supervisor, Master Files.” If Ms. Dornback had the authority to certify copies, then there would be no need for her to sign *for* Ms. Hagen. Moreover, if she had the authority to certify copies, Ms. Dornback would have signed the certification *for* herself. But as the letter provides, “the official custodian of all records of all wards committed to the Youth Authority” was Ms. Hagen, not Ms. Dornback. (3SCT3 787.) Thus, Ms. Dornback had no authority to certify the documents attached to the letter as true and correct copies. Without a legitimate certification, no reasonable jury would rely on exhibit 24 as consisting of true and correct and therefore credible copies of the originals. Exhibit 24 fails to constitute substantial evidence.

Exhibit 63 was also not properly certified as its certificate does not have an original signature. (4SCT3 1167.) Instead, the certificate has a rubber-stamped name in cursive, so it looks like a name typed with a Mistral font, *Arthur A. Sims*. (*Ibid.*) According to the certificate, Arthur A. Sims was the Clerk of the Riverside County Superior/Municipal Courts. (*Ibid.*)

Because exhibit 63's certificate lacks an original signature, there is no evidence that anyone from the Clerk's Office, for example, a deputy clerk, took responsibility for comparing the copies to the originals and determining that they were true and correct copies of the originals. (See Gov. Code, § 7 [power granted to public officer may be exercised by deputy].) Obviously, Mr. Sims does not compare every copy to the original



on file in his office, not in a county the size of Riverside County, so a rubber stamp with his name does not disclose the name of the person, if any, who actually compared the copies to the originals. The need here for an original signature of a responsible party is underscored by the fact that at least four of the pages in exhibit 63 are unreadable. (4SCT3 1171-1174.) Hence, absent an original signature, exhibit 63 was not properly certified, and no reasonable jury would have confidence in the exhibit as containing true, correct and credible copies. (4SCT3 1167.) Exhibit 63 fails to constitute substantial evidence.

**b. The exhibits do not identify the defendant.**

As indicated, exhibits 24 and 63 were the only evidence admitted during the special circumstance proceeding. Moreover, the prosecutor made no attempt to explain to the jury, whether by way of testimony or argument, how the person mentioned in the exhibits was connected to this case. In any event, after examining the exhibits, no reasonable jury would have sufficient confidence in them to conclude that the exhibits identified the defendant. (*People v. Thompson, supra*, 27 Cal.3d 303, 324.)

According to exhibit 24, the Youth Authority had custody of a “Floyd Daniel Smith, Jr.” for about seven and a half years. (3SCT3 788-789.) Nevertheless, the Youth Authority’s letter indicated that no photo of the “named subject” was included in the Penal Code section 969b packet because none was “available.” (3SCT3 787.)<sup>2</sup>

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<sup>2</sup> A photo and fingerprints are taken when an arrestee is booked. (Pen. Code, § 7(21).) And a photo and fingerprints are routinely included in a Penal Code section 969b packet. (See, e.g., *People v. Delgado* (2008) 43 Cal.4th 1059, 1064; *People v. Gibson* (2015) 239 Cal.App.4th 1151, 1155; *People v. Moreno* (2011) 192 Cal.App.4th 692, 707-708; *People v. Ulloa* (continued...)

The Youth Authority included fingerprints in the packet. (3SCT3 790.) But it offered no explanation why it was unable to provide an easily-obtained photo of an inmate who had been in its custody for seven and a half years, while at the same time it was able to include his fingerprints. Any reasonable jury would require this explanation before accepting at face value the letter's assertion that no photo was available.

Therefore, any reasonable jury, charged with the awesome duty of applying the strictest standard of proof, beyond a reasonable doubt (17RT 5568), would not have confidence that the Youth Authority's packet, which lacked a readily-acquired photo, pertained to the defendant in this case, and not another Mr. Smith. The jury's skepticism would be especially justified given that an affirmative answer to the special-circumstance allegation would make the defendant death-eligible. (Pen. Code, § 190.2, subd. (a)(2).) Consequently, the absence of a photo undermined confidence in the exhibits, making them insufficient evidence of identity. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [conviction lacks evidentiary support where record fails to disclose "substantial evidence that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt"].)

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<sup>2</sup>(...continued)

(2009) 175 Cal.App.4th 405, 409; *People v. Luna* (2008) 113 Cal.App.4th 395, 397; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1017; but see *People v. Martinez* (2000) 22 Cal.4th 106, 112 [neither photo nor fingerprints included in packet].)