IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S054489
Plaintiff and respondent,	)	
v.	)	
KEITH ZON DOOLIN,	)	
Defendant and appellant.	)	

Appellant's Opening Brief

Automatic Appeal From A Judgment Of Death Of The Superior Court
Of The State Of California, County Of Fresno
Honorable James Quaschnick, Judge
No. 554289-9

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STATEMENT OF THE CASE

A complaint filed on October 20, 1995 charged defendant Keith Zon Doolin with 2 counts of murder and 2 counts of attempted murder. (CT 1.)

An amended complaint filed on January 4, 1996 added 2 counts of attempted murder. (CT 304.)

Following a preliminary hearing, an information filed on February 1, 1996 charged defendant with two counts of murder (Pen. Code, §

Following a preliminary hearing, an information filed on February 1, 1996, charged defendant Keith Zon Doolin with two counts of murder (Pen. Code, § 187) and four counts of attempted murder (Pen. Code, § 664/187). (CT 307.) The counts were charged in chronological order:

Count 1: Attempted murder of Alice Alva on November 3, 1994.

Count 2: Attempted murder of Debbie Cruz on December 29, 1994.

Count 3: Attempted murder of Marlene Mendibles on July 29, 1995.

Count 4: Murder of Inez Cantu Espinoza on July 29, 1995.

Count 5: Attempted murder of Stephanie Kachman on August 11, 1995.

Count 6: Murder of Peggy Tucker on September 19, 1995.

As to the murder counts, the information charged the multiple-murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) and an enhancement for personal use of a firearm (Pen. Code, § 12022.5) (CT 307.) As to the attempted murder counts, it was alleged that defendant personally used a firearm and personally inflicted great bodily injury upon each victim (Pen. Code, § 12022.7). (CT 307.)

Trial began in March, 1996. (RT 314.) Hardship voir dire occurred on March 19 and 20. (RT 314-394.) The selection of the jury took two and one-half days, from March 25 to March 27. (RT 408.)

On May 7, 1996, the jury found defendant guilty as charged on all counts. (CT 656-662.)

The penalty phase began the next week and was concluded in one day. (CT 663.) Defendant's attorney called one witness. (RT 4736-4754.) The case was argued on Monday, May 20. The next day, May 21, 1996, the jury returned a death sentence. (CT 671.)

On June 18, 1996, the judge denied the motion for new trial, affirmed the death sentence, and imposed a prison term of 56 years plus death. (CT 769-771.)

STATEMENT OF THE FACTS

A. The Appointment of Counsel.

The story of this trial begins with the appointment of counsel. The superior court first appointed the Fresno County Public Defender to represent defendant. (CT 15.) The Public Defender twice moved to continue the preliminary hearing in order to prepare, both times with the consent of the defendant. (RT 51-52.) At the same time, the Public Defender sought and received a $5,000 advance from the County's General Fund for Penal Code section 987.9 expenditures. (Supp. CT 10.)

However, on January 2, 1996, the prosecution filed an amended complaint adding two new victims, one of whom was a former client of the Public Defender, and the Public Defender moved to withdraw based on a conflict of interest. (CT 24.)[1]

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[1] Before bowing out, the Public Defender had incurred $2,272.88 in costs for investigative services performed by Gold Group Investigations. After declaring the conflict, the Public Defender submitted an accounting and returned the unused $2,727.12 balance to Fresno County's General Fund. (Supp. CT 10.)

On January 4, 1996, the court appointed private attorney Rudy Petilla. (Supp. CT 1.) Beginning in October 1994, Fresno County paid private attorneys appointed to capital cases a lump sum, payable in installments, that covered both attorney's fees and costs. This method was called "total case compensation." (RT 4931.) Under this system, counsel first conducted an "Initial Case Review," a process to be completed in 10 hours or less (Supp. CT 7), then filled out a pre-printed form entitled "Proposal Setting Compensation," requesting "total case compensation" in the amount of $40,000, $60,000 or $80,000, according to a three-tier classification system. (Supp. CT 1.) To complete the Proposal Setting Compensation, counsel was required to itemize in detail projected costs for investigation and experts contemplated by Penal Code Section 987.9. All such costs ("PC 987.9 trust fund expenditures") were to be paid by the attorney from the total case compensation requested. (Supp. CT 1.) By executing and filing the Proposal Setting Compensation, the attorney agreed to accept appointment upon approval of the Capital Case Review Committee and the court. (Supp. CT 2.)

A week after his appointment, Petilla submitted the Proposal

Setting Compensation form, and in it requested total case compensation of $80,000, which was Category 3, the highest level. In his proposal, Petilla projected Penal Code section 987.9 expenditures of $60,000, including $40,000 for investigation and $20,000 for expert witnesses. Petilla agreed to take the balance ($20,000) as his fee. (Supp. CT 1-2.)

On January 17, 1996, the court accepted counsel's proposal, appointed Petilla to represent defendant and set his total compensation at $80, 000. In handwritten notations on the fee agreement itself, the court twice emphasized that *all* Penal Code section 987.9 expenditures were to be paid out of the $80,000 compensation. The order of appointment was filed on January 18, 1996. (Supp. CT 1-2.)

On the very same day, and only two weeks after being appointed, Attorney Petilla began the preliminary hearing. The next day, he submitted a claim for an installment payment of $20,000. (Supp. CT 5.) On March 7, two months after being appointed to defend a death-penalty case involving six victims of six separate crimes, counsel announced he was ready for trial. The next day he submitted a claim for his next installment payment of $20,000. (Supp. CT 7.)

At the end of the trial, when Petilla submitted his final accounting,

it was revealed that Petilla's fee was not $20,000, as he initially projected, but $71,323. (Supp. CT 17-18.) And, his expenditure for investigation and experts was not $60,000, as projected, but less than $9,000. (Supp. CT 17-18.)

B. The Guilt Phase Trial.

1. The Prosecution Case

a. The Shooting Of Alice Alva On November 3, 1994.

Alice Alva, a 40-year-old prostitute addicted to heroin and cocaine, was walking the streets near Parkway Drive and Olive Street in the early evening of November 3, 1994. (RT 1068.) A man driving a light tan mini-truck, either a Nissan or a Toyota, pulled up next to her and asked if she was dating. He offered her $30 for sex. (RT 1070.)

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Alva got into the truck and directed the man to a cul de sac behind a nearby restaurant. (RT 1071.) When they arrived, the man turned off the truck. Alva kicked off her shoes. When she turned to him to ask for the money, she saw a gun in his hand. (RT 1073.) The gun rested in his lap, pointing at Alva. (RT 1074.) The man said, "I'm going to fuck you all night." Frightened, Alva agreed to do what he wanted, but said she first had to go to the bathroom. (RT 1074.) The man warned her not to try "anything stupid" because she would not be the first girl he "shot and killed." (RT 1075.)

Once outside the truck Alva ran away. (RT 1076.) The man fired three or four rounds at her. She was struck once in the right leg. (RT 1076.) She fell to the ground, looking back at the man standing next to the driver's side door holding the gun. (RT 1077.) The man walked towards her; Alva feigned death. (RT 1077.) The man stood over her for 10 seconds then returned to his truck and drove away. (RT 1078.) She heard the truck "grabbing gears" as it sped off. (RT 1079.)

Alva had been struck once in the back of the right calf; the bullet fractured her tibia. (RT 1092-1093.) The bullet was never removed

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because it was surrounded by bone and removal might have caused the bone to fracture. (RT 1098, 3324.)

Timothy Hahn was the first police officer on the scene of the Alva shooting at 2:09 a.m. (RT 1135-1136.) According to Hahn, Alva described the shooter as a "white male approximately five-seven, weight approximately 185 pounds, with brown, short hair, a moustache, and a heavy muscular build" with the age in the mid-twenties. (RT 1139.) Hahn found three shell casings about ten feet from the curb and ten to fifteen feet from Alva's body. (RT 1140.) The shell casings were .25 caliber. (RT 1142; ex. 7.)

In contrast to Alva, who claimed the crime scene was lit by street lights, Hahn said the scene was "very dark" and there were "no actual street lights." (RT 1152.)

Alva's second description of the suspect changed from her first. Now, she described him as a white male, in his mid-twenties, with very short brown hair, about her height or shorter, with a stocky, muscular build. (RT 1082.) Nearly a year after the shooting, Alva was shown a photo lineup and identified defendant as the man. (RT 1083.) At the time she identified him, Alva was serving a term in county jail for

prostitution and being under the influence of drugs. (RT 1084.)

Alva identified a photo of defendant's truck as the truck that she got into that night. (RT 1084.) She said the gun the man had was silver and not a revolver. (RT 1086.) She identified a gun in court as similar to the gun the man used. (RT 1086; ex. 5.)

Alva identified defendant in court as her assailant. (RT 1102.) She claimed that she had not seen any photos of defendant in the newspapers before she was shown the photo lineup. (RT 1103.)

On cross-examination, it was revealed that Alva did not know defendant before the attack (RT 1110), the assailant had a "military-type" haircut, cut very short to the scalp (RT 1111), the truck was light tan, *not* white, and that she had been using drugs on the day of the assault (RT 1112).

She was taken out of jail on October 23, 1995, to talk to the police about the shooting, and then returned to jail until November 16, when she completed her term. (RT 1119.) She heard of defendant's arrest before October 23, but had not seen any pictures of him in the newspapers or on television. (RT 1121.) However, she had heard a description of him before she viewed the photographs. (RT 1124.)

Before she was arrested, she had given a license plate number to the police that had been furnished to her by a friend, also a prostitute, who claimed that she had been assaulted in the same manner as Alva. (RT 1125.) This friend managed to get out of the vehicle and run away. She took down the license plate number as she ran. (RT 1125.) The police told Alva they checked the number and there was no vehicle registered under that number. (RT 1125.)

b. The Shooting Of Debbie Cruz On December 29, 1994.

Debbie Cruz was working as a prostitute when she was assaulted on December 29, 1994. (RT 1200.) She was addicted to heroin and cocaine at that time. At trial, she was on methadone and had taken a dose of methadone the morning of her testimony. (RT 1199.)

The man who assaulted her approached her near First and Belmont Streets in Fresno at about midnight. (RT 1201.) Cruz was high on a "speedball" (a mixture of heroin and cocaine) and was drinking alcohol. (RT 1228.) She and the man agreed on a sex act for $30. (RT

1204.) Cruz got into the man's truck and directed him to a certain location. (RT 1204.) The man did not like the spot so Cruz took him to another spot, in an alley near Fresno and Clay Streets. (RT 204.)

After he parked, Cruz asked what he wanted, then told him she would go no further until she got the money. (RT 1207-1208.) The man said he wanted her to pull down her pants before he paid. Cruz pulled her pants down below her knees. The man turned as if to reach for his wallet but instead pulled out a gun and pointed it at her. (RT 1208.) He held the gun in his left hand; he shot her immediately, without saying anything. (RT 1209.) The bullet entered Cruz's left hip, passed through her abdomen and perforated the small intestine. (RT 1157.) Cruz opened the door and fell out. She struggled to pull up her pants as she ran towards the back of the truck, yelling for help as she ran. (RT 1210.)

The truck started to move in reverse, then suddenly "peeled off" towards Fresno Street. (RT 1211.) Cruz made it to the porch of a house where she collapsed, feeling short of breath and unable to talk. (RT 1212.) Teresa Perez, who lived at 2311 East Clay, heard someone banging on her door at about 12:30 a.m. on December 29. (RT 1173.)

She saw Cruz "standing" on her porch asking for help. Perez called the police. (RT 1175.)

Fresno police officer Jack Gordon was dispatched to 2311 East Clay at 12:49 a.m. regarding a shooting victim. (RT 1180.) Cruz was on the porch of the house. She said a "john" shot her. (RT 1180-1181.) It appeared Cruz had been shot by a small caliber weapon; Gordon did not see any blood on the porch. (RT 1183.) A police evidence technician investigated the crime scene and found a drop of blood on the porch and a spot of blood on Cruz's pants. (RT 1189.) Cruz was in too much pain to describe the man who attacked her. (RT 1184.) The next day, however, Cruz said the man was "29 to 30" years old and weighed 260 pounds. (RT 1231.)

At trial, two years later, Cruz was able to describe the gun, the vehicle, and the shooter with much greater specificity. The gun was small and looked "silver." (RT 1213.) The vehicle was a "beige or off beige" Mazda or Toyota, with bucket seats and a beige or "tannish" interior. (RT 1214.) The transmission was "standard;" Cruz saw the man "grinding" the gears with his right hand. (RT 1215.) The shooter no longer weighed 260 pounds, but was instead a man of medium build,

with hair short ("half inch or shorter" (RT 1234)) in the back, "military style." (RT 1215.) He had bald spots on both sides of his forehead and a high hairline. (RT 1216.)

In August 1995, a month before defendant's arrest, Detective Robert Schiotis spoke to Cruz about her case. On December 29, 1995, the police contacted Cruz again and told her they had a man in custody they suspected of shooting prostitutes and they wanted her to see if she could identify him in a photo line-up. (RT 1234-1235.) Cruz identified a photo of defendant. (RT 1219; Ex. 13.) Cruz then identified defendant in court as her attacker. (RT 1220.)

However, on cross-examination, Cruz admitted that she had seen pictures of defendant on television on about October 21, 1995, following his arrest. (RT 1231.) Cruz then recanted that testimony and claimed that she did not see any pictures of defendant until *after* she was shown the photo lineup in December 1995. (RT 1231.)

c. The Shooting Of Marlene Mendibles On July 29, 1995.

Marlene Mendibles, a prostitute, was walking alone on Maple Avenue on July 29, 1995, at about 1:00 a.m. (RT 1269.) A man in a small truck pulled alongside and asked her if she wanted a ride; he then asked if she "dated." (RT 1270-1272.) Mendibles got into the car. (RT 1273.) The driver made a turn in the first block, then pulled over. He turned and told Mendibles to take off her clothes or he would shoot her. (RT 1273.) He reached his right hand over to his left side and produced a "shiny gun." (RT 1273.) Mendibles said she would walk and started to get out of the truck. (RT 1274.)

The man warned her, "I will," meaning that he would shoot her. (RT 1276.) Mendibles was standing outside the truck when she heard a pop. (RT 1276.) The man started to drive away. (RT 1276.) She said, "I bet you remember me"; the man said, "I bet you remember me, too." (RT 1276.) Mendibles then fell to the ground and started crawling towards the road. (RT 1277.)

Mendibles described her assailant as a man with an "oval" shaped head, round, dark eyes, light skin, and a big forehead with short hair. (RT 1281.) He was wearing a t-shirt and shorts and seemed to be very dirty. (RT 1282.) She looked at numerous photos of suspects in

August 1995 but did not identify anyone. (RT 1280.)

In October 1995, the police showed her another photo line-up. (RT 1282.) This time, Mendibles identified defendant. (RT 1283.)

She described the truck as small, "off white or dirty white," with red letters on the back that spelled out "Toyota." (RT 1285.) The "o" and "y" were faded, but she saw the entire word "Toyota" as the truck drove away from her. (RT 1302.)

Detective Albert Murietta investigated the crime scene. He noticed distinct tire impressions in the dirt. (RT 1326.) Murietta was unable to speak to Mendibles until July 31, after she was out of surgery, and then only briefly. (RT 1332.) He returned on August 10 with several photo lineups; Mendibles did not identify anyone. Defendant's photo was not included because he was not a suspect at that time. (RT 1334.) Mendibles told Murietta the truck was a small foreign pickup, with a dirty exterior. (RT 1335.) The interior was a faded blue. (RT 1335.) She also told the police she saw the letters "O" and "Y" on the tailgate as the man drove away. (RT 1335.) She described the gun as a "large, silver" one. (RT 1347.)

d. The Death Of Inez Cantu Espinoza On July 29, 1995.

Alice Trippel heard a gunshot at about 4:20 a.m. on July 29, 1995, outside her house near the intersection of Harvard and Clark Avenue. (RT 1377-1379.) She frequently hears gunshots in the neighborhood and did not call the police. (RT 1380.) Carmen Ramos, who lives on Harvard Street, also heard screams at about 4:30 a.m. (RT 1412-1413.) The next morning Alice Trippel left for the store, entering an alley bordering her house. (RT 1380.) She met a neighbor who informed her there was a dead body in the alley. (RT 1381.) At 11:15 a.m., Fresno Police Officer Ronald Shamp was dispatched to the alley. (RT 1390.) The victim appeared to be a Hispanic female; there were shell casings and a beer can near her head. (RT 1392.)

Detective Robert Schiotis arrived later to investigate the crime. (RT 1394.) The victim's body was still at the scene. The victim was lying on her back towards her left side, with her right leg up and bent at the knee. (RT 1396.) After the body was moved, Schiotis saw a gunshot entry wound in the right side of her back above her pocket.

(RT 1398.) He also saw a large caliber bullet (exhibit 31) between her skin and shorts, with a smaller bullet fragment (exhibit 31) next to it. (RT 1399.)

Nearby, he found an unwrapped condom (exhibit 33) on the ground and a spent .45 caliber casing (exhibit 32). (RT 1402.) Tire tracks appeared next to the victim's body. (RT 1402.)

The victim was identified as Inez Espinoza. (RT 1386.) Her daughter said Espinoza was addicted to heroin and worked as a prostitute. (RT 1387.) She last saw her mother on the night of July 28, 1995; when her mother did not return the next day, the daughter called the police. (RT 1388.)

Nikki Aldava, a friend of Espinoza's, was with Espinoza on the night of July 28 until about 3:00 or 4:00 a.m. on July 29. (RT 1516.) She and Espinoza had been with a Mexican man, whose name she did not remember. The man was interested in Espinoza, but when Espinoza left, Aldava rode around with the man for half and hour to an hour. (RT 1522-1523.) They had left Espinoza for about 30 minutes when the man decided to drive around looking for her, but they did not find Espinoza. (RT 1525.) The man drove a small, dark-colored car. (RT 1520.)

e. The Shooting Of Stephanie Kachman On August 11, 1995.

On August 11, 1995, at about 3 a.m., Stephanie Kachman was working as a prostitute on Belmont Avenue near North Van Ness. (RT 1544.) A truck slowed to a stop next to her; she leaned in and asked the driver if he wanted to date. (RT 1546.) He said yes and she got in. (RT 1546.) Before this she had heard of the prostitute shootings in Fresno, but the man in the truck did not match the description of the attacker that other prostitutes were giving, and it never crossed Kachman's mind that this might be the man. (RT 1568.) They ended up parking in an alley near Van Ness and Mildreda. (RT 1548.) A noise drew Kachman's attention to her right; when she turned back to look at the man, he had a gun pointed at her. (RT 1548.) The man held the gun in his left hand, pointed at her head. (RT 1549.) He told her to take off her clothes. (RT 1549.)

She agreed but said she needed to get out of the truck to do it because she had hurt her leg. The man got out, too, put the gun on the passenger seat, and pulled out a condom. (RT 1550.) They engaged in

sexual intercourse outside the truck, but when the man lost his balance and stumbled away from the door, Kachman ran out of the alley. (RT 1551.) She heard the truck coming after her, its gears shifting very loudly. (RT 1551.) The man began shooting at her. (RT 1552.) A bullet hit her and the man sped away. (RT 1553.)[2]

Kachman described the truck as white with a black plastic bed liner in the back. (RT 1556.) The inside was "very, very" clean, black, seats light blue and grey with white speckles and stripes. (RT 1577, 1556.) The truck appeared to be a newer model and was low to the ground. (RT 1578, 1594.) In court, she described her assailant as short, stocky, heavy around the jaw, husky in the chest, with thin hair. (RT 1554.)

However, Fresno Police Officer Art Rodriguez, one of two officers to respond to the crime scene, testified that Kachman described her attacker as a Hispanic man, short, stocky, with a very thin mustache and black hair, and wearing a light blue shirt and light blue shorts. (RT

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[2] A condom was found at the scene and collected by the police. (RT 1602.) However, nothing in the record indicates whether the condom was examined for the presence of semen or other bodily fluids that could have been subjected to DNA testing.

1593-1595.) She said his name was "Joe" and he used a medium-size chrome gun, possibly a semi-automatic. (RT 1595.)

Kachman reportedly gave a different description to Detective Murietta. (RT 1600.) Following her surgery, Kachman told Murietta the shooter was a white male, with a large forehead, thinning and receding hairline, 5'7" or 5'8", stocky build, wearing blue shorts and a blue shirt. (RT 1603.) She looked at over 2,000 photos on August 25, 1995, and picked out one that she described as "very close to the individual if it was not the individual." (RT 1606; ex. L.)[3] Kachman reviewed more photos on October 18, 1995, and identified defendant as her attacker. (RT 1567, 1608.)

f. The Death of Peggy Tucker on September 19, 1995.

Rick Arreola was a friend of Peggy Tucker's and had dated her for about one and one-half years. (RT 1710-1711.) He knew that she

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[3] According to the police, the man Kachman identified in August was in custody on the night *Marlene Mendibles* was assaulted; there is no evidence whether he was in custody when *Kachman* was assaulted. (RT 1607.)

worked as a prostitute. (RT 1711.) Arreola himself had been convicted of a misdemeanor in July 1984. (RT 1736.) On the night of September 18, 1995, they were staying at the Gables Motel on Church and Golden State. They left the motel around midnight, after watching the news. (RT 1711.) Tucker was working as a prostitute that night; she was standing near the Triangle Motel, across the street from Arreola. (RT 1713.) A "beige" or "champagne-colored" Lincoln Town Car stopped next to her. (RT 1716, 1722.) Tucker looked inside, then got into the car. The car drove a couple of blocks then turned right on Railroad Avenue. (RT 1716.)

Arreola waited for Tucker to return. (RT 1718.) Later, Arreola saw the Lincoln Town Car again, this time going north on Golden State. (RT 1719-1720.) The interior dome light was on as the car passed Arreola; inside, he saw the driver, alone. (RT 1721.) The driver was "round-faced" and "clean-cut." (RT 1723.) He was a white man in his late twenties or early thirties. (RT 1724.) His hair was "short," "clean-cut" and "brownish." (RT 1725.) Arreola identified the photograph of defendant in a photo lineup as one who looked "quite a bit" like the man driving the Lincoln, although the face looked heavier and the hair was

different. (RT 1725-1726; 1729.) In court, Arreola identified defendant as the driver. (RT 1738.)

At the preliminary hearing on January 16, 1986, Arreola stated he could not identify anyone in the photographic lineup. (RT 1733.) At the preliminary hearing, Arreola was asked, "When you were shown a photo lineup, you were not able to identify anyone?" Arreola replied, "Right, because of the differences." (CT 217.) At trial, Arreola claimed he did not remember saying that and insisted that he picked out person number 5, the defendant. (RT 1733.)

Arreola told the police that the license number of the Lincoln was 2EAV and the last three numbers were 289 or 389. (RT 1724.)

g. The Physical Evidence.

(1) The Absence of Human Blood in Defendant's Car and Truck.

Although some of the victims were shot while sitting inside the vehicle, no human blood was found in either vehicle. (RT 2454-2455, 2644.)

(2) Absence of Animal Hair on Victim's Clothing.

The police criminalist found a substantial amount of dog hair in defendant's pickup truck. (RT 2571.) However, there is no evidence that any animal hair was found on the victims.

(3) Tire Tread Evidence.

Photographs of tire tracks observed at some of the crime scenes were photographed. Stephen O'Clair, a criminalist at the Department of

Justice's Fresno Regional Laboratory, inked defendant's tires and then rolled the tires over paper to obtain impressions of the treads. (RT 2457.) He then made a transparency of the impressions and laid the transparency over the photographs of the tire tracks from the crime scene for comparison. (RT 2457.)

O'Clair concluded that defendant's tires had the "same design and so forth" as the evidence tracks but defendant's tires had more wear on them. (RT 24612.) Further, the *left rear tire* of defendant's truck did not match the tracks left at the Mendibles and Espinoza crime scenes. (RT 2462.) He could not say that defendant's tires left the tracks observed at the scene because he found *no* individual characteristics to match the crime-scene tire impressions. (RT 2573.) [4]

O'Clair also compared impressions from Donna Larsen's (defendant's mother) Lincoln Town Car to the tire impressions left at the Tucker and Cruz crime scenes. (RT 2465.) The Lincoln tires did *not* match the crime scene tracks. (RT 2466.)

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[4] Defendant's truck had three tires that were the same: Goodyear Invicta GL, P19570R14 M and S (mud and snow). The right rear tire was similar but bore a "90-H" marking instead o the "M and S." (RT 2460.) This tire appeared to be newer than the other three. (RT 2460.)

(4) Firearm Identification.

Investigators found seven Federal .45 caliber shell casings at the Kachman crime scene. (RT 1630, 1594, 1623.) Criminalist Stephen O'Clair concluded that all seven casings were fired from the same gun, based on microscopic scratches and impressions left by the firing pin and breech block mechanisms. (RT 2511.)

One spent .45 caliber bullet was found in the clothes of victim Inez Espinoza. (RT 1399.) A bullet fragment was found next to it, and on the ground nearby the police found a .45 caliber shell casing. (RT 1400-1402.) There were no bullets in the body. (RT 1460.)

On August 15, 1995, O'Clair concluded that the Espinoza and Kachman casings were fired from the same gun. (RT 2511.) On August 25, 1995, O'Clair gave the police a list of the possible manufacturers and models that could have fired these casings. (RT 2512.) The Star brand Firestar .45 was on this list. (RT 2512-2514.)

On September 25, 1995, O'Clair compared the bullet fragments and copper jacket recovered from the Tucker autopsy. (RT 2518.) He concluded, based upon the land and groove impressions, the land width,

and the directional twist, that the Tucker bullets could have been fired from the same gun that fired the Espinoza bullets, but he could not make a positive identification. (RT 2518.)

Marlene Mendibles appeared to have been shot with a large caliber bullet. (RT 2228.) The bullet was embedded in her body and not removed due to medical reasons. (RT 2232.)

Firearm registration records showed that defendant purchased two Firestar .45 caliber handguns in March 1995. (RT 2380-2383.) One had the serial number 2061980; the other had the serial number 2061981. He purchased at the same time two in-pants holsters for the guns. (RT 2384.) The Firestar .45 is a small, pocket-size gun with a short, four-inch barrel. (RT 2380.)

O'Clair compared bullets and casings from the Tucker, Espinoza, and Kachman crimes to test firings from both of the defendant's Firestar .45s. (RT 2524.) O'Clair concluded that the bullets were fired from the Firestar with the serial number 2061981. (RT 2524.)

O'Clair also compared the three, .25 caliber shell casings found at the Alice Alva crime scene with test firings from the Lorcin .25 caliber belonging to defendant's sister, Shana Doolin. (RT 2526.) Shana had

the gun in her possession while she lived with defendant on West Clinton Avenue in Fresno from April 1994 to August 1995. (RT 2293.) Shana moved to Stockton in September 1995 and took the gun with her. (RT 2294, 2299.)

O'Clair concluded that the Alva bullets could have been fired from this gun, but he could not make a positive identification. (RT 2531.) At trial, he said the bullets were "probably" fired from the Lorcin .25 caliber. (RT 2531.)

At the request of the prosecution, private criminalist Charles Morton also analyzed the ballistics evidence. (RT 3335.)[5] Morton reached conclusions similar to O'Clair's. The seven casings from the Kachman shooting and the one casing recovered from the Espinoza crime scene were all fired from the Firestar .45, serial number 2061981. (RT 3339.) The copper-jacketed bullet found at the Espinoza scene was also fired from the same Firestar .45. (RT 3340.) The bullet fragments

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[5] Morton testified on Wednesday, April 24, 1996, after the defense had begun its own case. (RT 3330.) Defense counsel stipulated to permitting the prosecution to re-open its case to admit evidence of the DNA testing. (RT 2447.) Over defense objection, the prosecution also put on the testimony of Charles Morton. (RT 3330.)

from the Tucker scene were fired from the Firestar .45. (RT 3341.) Finally, Morton concluded that the three shell casings found at the Alva scene could have come from the Lorcin .25, but there were insufficient individual characteristics in the casings to conclude that they positively came from the Lorcin. (RT 3342.)

(5) DNA Evidence.

Rodney Andrus, an employee of the Department of Justice, performed DNA testing on evidence from the Espinoza crime scene. (RT 3385.) He used the PCR DQ-Alpha system, which identifies six different alleles. (RT 3423.)[6]

His testing focused entirely of evidence taken from the Espinoza crime scene. The evidence consisted of fingernail scrapings from the left and right hands, a vaginal swab, and a condom found near the body.

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[6] A genotype consists of two alleles at a particular DNA region or locus. (*People v. Pizarro* (2003) 110 Cal.App.4th 530, 547, fn.4.)

(RT 3440.) He detected semen in each of these items. (RT 3445.)

The semen from the right hand scrapings was from more than one individual; it contained the 3, 4, and 2 alleles. (RT 3447.) Andrus said the 3 and 4 alleles were "primary," and there was a "lesser concentration" of the 2 allele. (RT 3448.) He concluded that this showed the genotype 3,4 was in the semen. (RT 3448.) The left hand scrapings showed alleles 3 and 4. (RT 3448.) Once again, Andrus said this was the genotype 3,4. (RT 3448.)

The vaginal swab showed alleles 3,4 and 1.2. (RT 3449.) Again, Andrus believed that the 3 and 4 alleles were the "major components" and thus they represented the gennotype 3,4. He believed the 1.2 allele came from someone else, possibly the victim herself. (RT 3448-3349.)

Espinoza was a genotype 1.2, 3, so she could not contribute the 4 allele. (RT 3449.) Defendant was a genotype 3,4. (RT 3450.) Thus, defendant could not be eliminated as the donor of the semen found in the fingernails and the vagina. (RT 3450.) But, defendant was eliminated as the donor of the semen in the condom. (RT 3456.)

The 3,4 combination is in 7 percent of the Negro population, 10 percent of the Caucasian, and 20 percent of the Hispanic. (RT 3454.)

2. The Defense Case.

a. The Reliability Of Eyewitness Identification Is Affected By Many Factors.

Dr. Alan Hedberg, a psychologist who is also an expert in the fallibility of eyewitness identification, was the first witness for the defense. (RT 2664.) According to Dr. Hedberg, research studies consistently show that memory is a "dynamic" process, meaning that the memory of an event is not simply a snap-shot of what occurred, but an on-going process. (RT 2666.) Gaps in the perception of the actual event are filled in by information learned later about the event, such that a person who witnesses an event begins to believe that he or she actually saw things, which in fact were learned after the event. (RT 2666.)

The reliability of the memory of an event is adversely affected by the use of drugs and alcohol. A person who is under the influence of drugs or alcohol is less likely to accurately remember what she saw. (RT 2269.) Further, when the eyewitness is a victim of a crime, and there is a gun used in the crime, the witness tends to focus on the

weapon and not on the person holding it. (RT 2670.)

And, research shows that once a witness identifies a person in a photograph, they tend to identify the same person each time they are subsequently called on to identify that person. (RT 2678.)

b. Defendant Did Not Have Possession Of The Alleged Murder Weapon When Peggy Tucker Was Shot On September 19, 1995.

Bill Moses, defendant's cousin, borrowed the Firestar .45 (with the serial number ending in 01) from defendant on September 1, 1995. (RT 2754.) He remembers the day because it was his father's birthday. (RT 2754.) Moses acknowledged that he told Detective Rose that he came into possession of the Firestar .45 at a later date (two or three weeks before the arrest of defendant on October 18), but explained that his memory was affected by medication (Interferon) that he was taking for Hepatitis C. (RT 2754-2757, 2762.) Moses also borrowed Shana Doolin's Lorcin .25 in July 1995 and kept it until August 18, 1995. (RT 2759.)

Bill Moses drives a white pick-up truck. (RT 2807.) It has a

tinted rear window. (RT 2808.)

Michelle Moses, Bill's wife, said they visited the defendant's house three to five times between May and October 1995. (RT 2817.) She also saw Shana and Donna regularly from April through September that year, about three times a week, and usually at Bill's parent's home. (RT 2818.) Michelle was absolutely positive the Firestar .45 came to them on September 1, 1995 because it was her father-in-law's birthday. (RT 2819.) Michelle confirmed that her husband Bill had memory problems from using the drug Interferon. He could not remember the chronological order of things, he would misplace items. (RT 2822.)

c. Defendant Does Not Fit The Recognized Profile Of A Serial Killer.

Dr. Howard Bruce Terrell evaluated defendant before trial, shortly after his arrest. (RT 2967.) He found no evidence of mental illness. (RT 2967.) Dr. Terrell noted that defendant did not fit into any of the typical behavior types commonly associated with murderers. Defendant was not a sadist, had no history of anti-social personality disorder, was

not a drug addict or alcoholic, was not psychotic, and was not a paid murderer. (RT 2967-2972.) According to Terrell, defendant did not fit the profile of a serial killer. (RT 2974.)

On cross-examination, Dr. Terrell acknowledged that he did not see a 1992 police report in which Dana Daggs accused defendant of raping her. (RT 2976.) He did not see Dana Daggs's 1995 statements that defendant told her he disliked prostitutes, thought they were "sleazy" and should be removed from this "earth." (RT 2977.) He did not know that Dana Daggs claimed that defendant was like "two people," that he acted one way around his family and completely differently when he was with her or other people. (RT 2978.)

Dr. Terrell was unaware of Denise Hamblen's claim that defendant placed pornographic magazines above her head when he made love to her. (RT 2980.) He was unaware that prostitute April Chavez identified defendant as a man who approached her twice for sex. (RT 2980.)

d. A Witness Saw A Car, Not A Truck, At The Scene Of The Mendibles Shooting.

Tyrone Kursh witnessed the shooting of Marlene Mendibles on July 29, 1995. (RT 3007.) He saw a woman kicking up dust saying she had been shot; Kursh went inside to tell his grandmother to call the police. (RT 3009.) Kursh then ran back outside where he saw a car circling around the area where the woman had been shot. (RT 3009.) He saw a man get out of the car and look around, then get back into the car and drive away. The car was not a truck, but a Monte Carlo or a Regal. (RT 3010.)

e. Defendant Denied Committing The Crimes.

Defendant worked several jobs after high school, most recently as a truck driver. (RT 3547.) He had never been arrested before this case arose. (RT 3547.)

According to the receipt, defendant purchased the matching pair of Firestar .45s on March 4, 1995. (RT 3549.) He told Detective

Schiotis that a .45 caliber handgun was in a drawer in the living room table. (RT 3552.) Later, when the police told him there were boxes of ammunition for two Firestars, defendant said the other gun was in a box in the bed headboard. (RT 3552.) The police came back later and said the gun was not there; defendant then remembered he had loaned the gun to his cousin Bill Moses at least a month or more earlier. (RT 3554.) He recalled that Moses wanted a compact weapon for his wife to carry. (RT 3553.)

Defendant said his truck did not have a blue interior, as described by some witnesses, but a dark brown dashboard with white and tan checkered seats. (RT 3597.) There was a sunroof but the rear window was not tinted. (RT 3595, 3806.) There were no letters on the tailgate. (RT 3597.) The word "Toyota" was not on the tailgate, nor was there an "O" or a "Y" on the tailgate. (RT 3807.) Further, the front driver's side fender is black while the rest of the truck is white. (RT 3806.)

The Lorcin .25 caliber was not his gun. His sister Shana purchased it herself at a gun show. (RT 3598.)

On cross-examination, defendant denied ever soliciting a prostitute for sex, or saying that prostitutes were sleazy and should be

"removed" from the earth. (RT 3603-3604.) He said he never used beer or cocaine. (RT 3605-3606.) He denied mistreating former girlfriend Denise Hamblen. (RT 3607.) He denied that solicited sexual partners in a magazine, that he carried firearms in his car, or swearing to Sherry Saar. (RT 3613.) He denied raping Dana Daggs and said he had never had sexual relations with her. (RT 3616-3618.)

f. Defendant Was Elsewhere When The Crimes Were Committed.

Defendant put on evidence that he was with other people at the time the victims were assaulted.

(1) November 3, 1994.

Defendant testified he was in Watsonville with family friend Jim Bacon on November 3, 1994. (RT 3557.) Bacon also testified and corroborated that defendant was in Watsonville with him. Bacon, a friend of the family since 1985 (RT 2751, 3144), recalled that on

November 1, 1994, defendant called and asked if he could stay with Bacon in Watsonville for awhile because his mother was "bugging him." (RT 3145.) Bacon agreed. On November 4, 1994, Bacon and defendant drove to Salinas. (RT 3146.) Bacon remembered the date because he was shipping roses to a cousin that day. (RT 3146.)

(2) December 29, 1994.

Defendant testified he was in Wasco, California at his grandmother's house with some of his family on December 29, 1994. (RT 3556.) Donna Larsen was called as a witness by the State in its rebuttal case and was questioned about this date. (RT 4074.) Larsen had written a memorandum for the Attorney Petilla regarding her memory of defendant's whereabouts on the dates of the charged crimes. (RT 4072; Ex. S.) In this memorandum, she wrote that on December 28, 1994, she was in Wasco, California, with defendant, her husband Charlie, and Charlie's mother Clara Larsen. (RT 4074.) Larsen noted in the memorandum that Clara Larsen had a doctor's appointment on December 28, that Larsen accompanied her to the appointment, and then

everyone "stayed over " to "work on the property," meaning Clara Larsen's house in Wasco. (RT 4075.) In her testimony, Larsen clarified that she meant they stayed until the following Saturday (which was December 31) before returning to Fresno and defendant was with them the entire time. (RT 4075-4076.)

Clara Larsen's medical records, introduced by the State, showed that her medical appointment was actually on December 27, 1994, not December 28. (RT 4078.)

(3) July 29, 1995.

Marlene Mendibles shot at about 1:00 a.m. on July 29, 1995. A few hours later, Inez Espinoza was shot and killed.

Defendant said he was in Watsonville, at the home of family friend Jim Bacon, on July 28. According to defendant, he left Jim Bacon's home in Watsonville on Friday, July 28, 1995, at about 11 a.m. and arrived in Fresno in the early afternoon. (RT 3558.) Bacon concurred; he testified he had just had surgery and defendant came to his house to help him. (RT 3149.) Defendant stayed until July 28, 1995, when he

drove back to Fresno with two motorcycles and moped in the back of his truck. (RT 3151.)

In Fresno, Shana Doolin, Donna Larsen, and Charlie Larsen (Donna's husband) were all packing their belongings to move to Stockton that weekend. When he arrived home, defendant pitched in to help with the packing. (RT 3560.) He worked all day, until about midnight, when he went to sleep for a few hours. (RT 3561.) He awoke at 3:00 a.m. (RT 3557.)

David Daggs was also helping with the packing on July 28. Daggs believed defendant arrived late in the afternoon or in the early evening, and he recalled that he stayed until about 11:30 p.m. (RT 3028-3030.)

Early the next day, defendant arrived at David Daggs's house at around 3:30 a.m. with two motorcycles and a moped in the back of his truck. (RT 3030-3031.) Defendant and Daggs had made plans for defendant to store these motorcycles at Daggs house, and had agreed to unload them from defendant's truck early on Saturday, before Daggs left his job. (RT 3030.) Daggs delivered the *Fresno Bee* newspaper and had to meet someone at 5:00 a.m. that day. He estimated they finished unloading the motorcycles between 4:30 and 5:00 a.m. (RT 3032.)

(4) August 11, 1995.

Defendant said he was with his mother this day, helping her to clean the house because she was putting it up for sale. (RT 3566.) Donna Larsen recalled that on August 11defendant was helping her prepare her classroom for the new school year. (RT 2718.) On cross-examination, she recalled that defendant was home all night and did not leave the house on the night of August 10. (RT 2908.)[6]

(5) September 19, 1995.

Defendant said he was at home sleeping when this crime occurred. (RT 3575.) Donna Larsen testified that defendant was helping her clean her house, to ready it for a showing to a real estate agent, on September 18. (RT 2716.) They worked into the evening. Defendant went out at around 11:00 p.m. to get ice cream and returned in about 30 minutes; she recalled that Jay Leno was doing his

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[6] The evidence suggested that Kachman was shot at around 3:00 a.m. on August 11, 1995. (RT 1552.)

monologue on the Tonight Show when defendant returned. (RT 2718.) They continued cleaning the house into the early morning of September 19. (RT 2717.)

3. Rebuttal.

Florence (April) Chavez was shown a photo lineup (exhibit 19) by the police in October 1995. (RT 3812.) She identified defendant as a man who had approached her for sex on two occasions while she was working as a prostitute between July and September 1995. (RT 3813-3814.) She said defendant was driving a small white truck. He asked her if she was dating; when she said yes, he told her to get in. (RT 3814.) Chavez, however, refused to get in his truck because she got a "funny" feeling. She felt he was too persistent. (RT 3814.) She identified defendant in court as the man. (RT 3815.) On both occasions he approached her between midnight and 1 a.m. (RT 3816.)

The police came upon Chavez indirectly. Fresno police officer Charles Mart was interviewing Stephanie Perez, a cross-dresser who told the police that she had been assaulted by a man driving a white truck.

(RT 3823.) Because the description of the assailant sounded similar to defendant, Officer Mart brought the photo line-up to Perez. (RT 3823.) Perez did not identify defendant or anyone else in the line-up as her assailant. (RT 3823.) April Chavez lived with Perez; after Officer Mart showed the photos to Perez, he showed them to Chavez. (RT 3819.)

Justus Swigert knew defendant socially. He had seen defendant drink beer and had seen defendant inebriated to the point where he spent the night at Swigert's house. (RT 3866.) Defendant once told Swigert that he used cocaine. (RT 3867.) According to Swigert, defendant always carried a gun. (RT 3866.) Defendant had a rifle, a shotgun, and handguns. (RT 3868.)

Swigert's mother, Marjorie Galloway, saw defendant at her house quite frequently in 1991-1992, when her son and defendant were friends. (RT 3827.) Defendant told her that his mother was a doctor. (RT 3828.) She saw defendant drink beer. (RT 3829.) On a couple of occasions he was so drunk that she made him stay the night instead of driving home. (RT 3829.) He usually carried a gym bag that had guns in it. (RT 3829.) Galloway claimed that defendant told her he did not like "loose" girls; he called them "whores" and "sluts" because they

"used" people. (RT 3830.)

On cross-examination by defendant's counsel, Galloway admitted she was angry at defendant because he sold her son Justus a stolen gun and Justus was later arrested by the police for possessing stolen property. (RT 3843.) The charges were dropped but Galloway blamed defendant for the incident. (RT 3844.)

Sherry Saar knew the Galloways and defendant. She saw defendant at the Galloway's house and socialized with him on a couple of occasions. (RT 3847.) Defendant told her he did not like his mother. (RT 3848.) Defendant called to ask her out for a date; when Saar declined, defendant called her a "bitch" and said if she was going to "fucking wash her hair" she should tell him. (RT 3850.)

Saar confirmed that Marjorie Galloway was angry at defendant over the stolen gun incident. (RT 3854.) Galloway was the person who told the police that Saar knew defendant. (RT 3851.)

Christina Bills, 19 years old, had visited defendant's apartment more than once. (RT 3881.) Bills had been in the apartment when people were drinking beer and wine coolers and smoking marijuana. (RT 3883.) However, she did not see defendant doing any of those

things. (RT 3883.)

In her opinion, defendant was a liar. (RT 3883.) He told her that he was "really wealthy" but drove around in a "junky old truck" because he did not want women to love him for his money. (RT 3884.) Defendant also claimed to be in the Mafia. (RT 3884.) She noted that defendant always carried guns with him, usually in a duffel bag. (RT 3884.)

Bills believed defendant was disrespectful to his girlfriend, Denise Hamblen. He was "pretty bossy." (RT 3885.) Further, defendant was open about his sexual desires and sexual activities he engaged in. However, when pressed for details, Bills could only remember one time that defendant said ice cubes were good "sexual toys." (RT 3885.)

Denise Hamblen, 23 years old, was defendant's former girlfriend. (RT 3896.) They lived together for a month and a half at the Casa del Rey apartments in Fresno. (RT 3897, 3921.) The first time they made love, defendant was very inconsiderate. She told him that she was a virgin but he was very "forceful" with her. (RT 3898.) He kept going after she told him to stop. She was screaming so he put his hand over her mouth. (RT 3898.) On another occasion, defendant put ice cubes

in her vagina; she told him it was painful but he did not stop. (RT 3902.) Another time, defendant had sex with her on the bathroom floor. Hamblen said it was hurting her back but defendant did not stop. (RT 3902.) He did not use condoms. He put soap on his penis before sex and told her this would kill the sperm. (RT 3903. Hamblen complained that the soap burned her but defendant continued the practice. (RT 3903.) They engaged in oral copulation frequently. (RT 3904.) Sometimes when they had sex, defendant would put a picture of naked women above the headboard and look at it. (RT 3905.)

While they lived together, defendant took Hamblen's paycheck and deposited it into his own bank account. (RT 3906.) He never gave her any of the money back. (RT 3906.) He did not allow her to answer the telephone or the door. He went out with friends and would not permit her to come with them. (RT 3907.) He struck her on the face once. (RT 3908.) It was painful; Hamblen cried. (RT 3908.)

When Hamblen was ill, defendant refused to let her go to the doctor. (RT 3910.) He said they could not afford the medical bills. (RT 3910.) She went to the hospital anyway and had to hitchhike home. (RT 3910.) She was told she had a severe kidney infection. (RT 3910.)

She was given a "couple of pills." (RT 3910.) Defendant took the pills from her and flushed then down the toilet. He said he had called his mother who told him the pills were not good for Hamblen. (RT 3911.)

Dana Daggs, 23 years old, was also a former girlfriend of defendant's. (RT 3940.) She criticized defendant for being insensitive to her wishes during sexual relations. (RT 3942.) When defendant saw prostitutes he remarked they were dirty. He said, "They shouldn't be here; someone should remove them." (RT 3943.) They had sex together in motel rooms. Before they had sex, defendant put down towels so no stain would be left; he insisted they shower afterwards, and he wiped down the walls. (RT 3946.)

In 1992, Daggs believed she was pregnant. Defendant told her to sign a statement saying the child was not his. She agreed to do so. (Exhibit 145; RT 3948.) Daggs never thought that defendant was the father. (RT 3951.)

In November 1992, defendant and Daggs were no longer dating but saw each other occasionally for sex. (RT 3952.) On one occasion when defendant called her Daggs said she did not wish to have sex; defendant replied that was fine. He offered to let her use his apartment

to shower because Daggs was temporarily homeless. (RT 3953.)

A few minutes after she got into the shower, defendant entered. (RT 3954.) Daggs again said she did not wish to have sex. But defendant pinned her against the wall and had sex with her against her will. (RT 3954.) She reported the incident to the police 7 or 8 hours later. (RT 3958.) She went to the hospital and underwent a rape examination. (RT 3959.)

A secretary in the district attorney's sexual assault unit reviewed the records of Daggs's complaint. (RT 3999.) The records showed that the police recommended filing charges against defendant for the forcible rape of Daggs, but the district attorney declined to prosecute because there was an on-going sexual relationship between Daggs and defendant. (RT 3999.)

Judy Luna, a Fresno police officer, responded to the scene of the Mendibles shooting at Calwa Park. (RT 3983.) The park was not well lit; she used her spotlight to illuminate the area. (RT 3984.) She interviewed Tyrone Kursh, who told her he heard a gunshot coming from a vehicle. (RT 3984.) He said the car was a Monte Carlo or a Regal. A white man got out of the car, then a white woman got out of

the passenger side. (RT 3985.) The man got back into the car and drove away. (RT 3985.) The gunshot occurred before the man and woman got out of the car. (RT 3986.) Kursh immediately ran and told his cousin, James Maze, what had happened and both of them ran back to the scene. (RT 3987.)

Detective Albert Murietta also interviewed Kursh. (RT 4010.) Officer Luna brought Kursh to Murietta's attention. Luna told Murietta she thought Kursh was either confused or hiding information. (RT 4010.) After listening to Kursh's account, Murietta concluded that Kursh's statement was not truthful. (RT 4011.) Murietta thought that Kursh could not have seen what he said he saw from the position he said he was in. Murietta said the view would have been obstructed and the light very poor. (RT 4012-4013.) Murietta recalled that he said to Kursh, "You really didn't see anyone," and Kursh nodded yes. (RT 4014.)

James Maze told Murietta he was with Kursh at the time. Maze heard a gunshot but it was too dark to see a car or people. (RT 4017.)

John Reynolds, an investigator for the district attorney's office, attempted to interview Donna Larsen and Jim Bacon. Both of them told

him that defendant's attorney told them not to speak to Reynolds. (RT 4042-4044.)

Reynolds spoke to Bill Moses. Moses said he got the Firestar .45 from defendant in the middle of September 1995, after the 17th, and probably on the 21st. (RT 4045.) Moses told Reynolds his memory was bad due to the Interferon. (RT 4061.) Further, Moses said defendant did not drink or do drugs, was a "family man" who "kept his nose clean," and would never use prostitutes because he was "tight" with his money. (RT 4063.)

According to Reynolds, who drove these distances in his car, it was 1.5 miles from David Daggs's house to the spot where Espinoza was killed. (RT 4048.) It was 5.4 miles from the scene of the Espinoza homicide to defendant's house and took Reynolds 7 minutes 20 seconds to travel it. (RT 4049.)

The prosecution recalled Donna Larsen and presented her with medical records showing that Clara Larsen's medical appointment was on December 27, 1994, not December 28 as Larsen had said on direct examination in the defense case. (RT 4078.)

C. The Penalty Phase Trial.

1. The Prosecution Case

Dana Peterson, the nurse who performed the sexual assault examination upon Dana Daggs, reported in her notes that Daggs told her that "her ex-boyfriend, Keith, raped her while she was in the shower." (RT 4690.) The physical examination showed a whitish fluid in the vagina that could have been sperm. (RT 4685.) The hospital records showed the fluid contained motile and non-motile sperm cells. (RT 4688.) Daggs had a fresh bruise on her right leg. (RT 4685.)

An expert in wound ballistics at the California Department of Justice testified that the Hydroshock casings found at one of the crime scenes contained "hollow point" bullets that are designed to expand on impact, causing the wound to get bigger as the bullet passes through the body. (RT 4706.)

Angel Cantu is the 16-year-old daughter of Inez Espinoza. (RT 4725.) In addition, to Angel, Espinoza was survived by her mother, two sisters, a brother, and three children, ages 9, 6, and 3. (RT 4726.)

Nina Mandrell, the sister of Peggy Tucker, said that Tucker was survived by three sisters, a brother, and a husband and two children. (RT 4732.) Mandrell was very close to her sister and was deeply affected by hear death. (RT 4735.)

2. The Defense Case

Allan Hedberg, a clinical psychologist, interviewed defendant and administered a number of psychological tests over a 8 and ½ hours the week before the penalty trial began. (RT 4737.) The tests showed a normal profile for someone defendant's age. Dr. Hedberg saw no evidence of psychosis, psychopathy, or sociopathy. (RT 4740.) The tests showed that defendant was "slightly paranoid" and liked to portray himself to others in a favorable way. He was highly dependent upon others for self-esteem and emotional strength, and there were some feelings of resentment left over from childhood. (RT 4742.) However, none of this reached the level of mental illness. (RT 4740.)

Defendant told Dr. Hedberg he had 4 stepfathers, two of whom were abusive. The second father was "abusive, critical, [and] sarcastic."

(RT 4745.) Defendant reported no physical abuse, but Dr. Hedberg said there was emotional and verbal abuse. (RT 4745.) Another husband was also verbally and emotionally abusive. (RT 4745.)

A school teacher rapped defendant's knuckles when he was young for not doing his work well enough, but Dr. Hedberg said defendant had a learning disability. (RT 4746.)

Dr. Hedberg did not speak to anyone about defendant and did not review any records; he simply interviewed him and administered the tests. (RT 4752.) Based on this limited evaluation, Dr. Hedberg concluded that defendant did not suffer from mental illness and was not a danger to other people. (RT 4751.)

Defendant's counsel introduced some of defendant's school records. (RT 4754.) Counsel also read a into a evidence a rule violation that defendant suffered in jail for failing to awaken in time for the morning count. (RT 4763.) This was defendant's only rule violation in jail. (RT 4763.)

ARGUMENT

CONFLICT OF INTEREST: INTRODUCTION

Defendant's counsel was appointed by the superior court. In his contract with the County of Fresno, counsel agreed to be paid $80,000 to defend Keith Doolin, and out of this $80,000 counsel would pay himself and all other defense costs, including investigators and experts. The terms of the contract expressly stated that Penal Code section 987.9 costs "are **included** in the authorized case compensation . . . ." (Supp. CT 2 (emphasis in original).) The judge who approved the contract underscored this condition, writing in hand on the written form itself, "All attorney and expert costs included within Category 3 authorization." (Supp. CT 2.)

The contract paid Petilla in six installments: (1) 15 percent when appointment was accepted, (2) 25 percent when the preliminary hearing was completed, (3) 10 percent upon confirmation of a trial date, (4) 15 percent at the conclusion of the People's case, (5) 15 percent at the conclusion of trial, and (6) 20 percent after final sentencing and the

submission of a final accounting of Penal Code section 987.9 disbursements. (Supp. CT 5-6.)

The contract has two noteworthy features. First, every dollar not spent on Penal Code section 987.9 costs does not go back to the county, but instead goes to counsel himself.

Second, payment under the contract is front-loaded, with 50 percent of the compensation to be paid before trial – 15 percent upon appointment, 25 percent upon completion of the preliminary hearing, and 10 percent upon confirmation of the trial date. The faster counsel moved the case to preliminary hearing and trial setting, the faster he got paid.

This contract between Fresno County and Attorney Petilla created an inherent and irreconcilable conflict of interest. The contract creates a financial disincentive for counsel to employ investigators and experts, or to spend any money on ancillary defense services, because every dollar *not* paid to investigators or experts increases the attorney's fee.

In the resulting tug-of-war between counsel's personal financial interests and defendant's right to counsel, defendant lost. At the outset of the case, when counsel estimated the costs of defense to determine

the amount of compensation he would receive, counsel stated under oath that his Penal Code section 987.9 costs would be $60,000. (Supp. CT 2.) When all was said and done, however, Petilla spent less than $9,000 on section 987.9 costs; the balance of the contract payment ($71,323) went to him. (Supp. CT 17-18.)

Reversal is required on a number of grounds: (1) the contract between Fresno County and appointed counsel violated a judicially-declared rule of criminal procedure that prohibits such contracts (*People v. Barboza* (1981) 29 Cal.3d 375); (2) the conflict of interest created by the contract deprived defendant of the effective assistance of counsel under Article I, section 15 of the California Constitution; (3) the conflict of interest deprived defendant of the effective assistance of counsel and due process under the Sixth and Fourteenth Amendments to the United States Constitution; (4) the conflict denied defendant and the People of California the right to a reliable verdict in a death penalty case under the Eighth Amendment, and (5) the contract violates the Equal Protection Clause of the Fourteenth Amendment.

I. THE FRESNO FLAT-FEE COMPENSATION METHOD, UNDER WHICH DEFENDANT'S ATTORNEY RECEIVED A LUMP SUM TO PAY HIS FEES AND *ALL* OTHER COSTS OF DEFENSE, CREATED AN INHERENT AND IRRECONCILABLE CONFLICT OF INTEREST AND VIOLATED A JUDICIALLY-DECLARED RULE OF PROCEDURE REGULATING THE COMPENSATION OF COUNSEL IN CRIMINAL CASES.

The Fresno County fee arrangement in capital cases creates a direct link between money spent on ancillary defense costs, such as investigation and expert witnesses, and the amount of the fee the attorney ultimately gains. Under California law, such a contract is impermissible and requires reversal of the judgment. (*People v. Barboza* (1981) 29 Cal.3d 375, 379.)

In *Barboza*, two brothers were charged with assault. They were jointly represented by an attorney from the Public Defender's office. Madera County had a contract with a public defender whereby the Public Defender's office was paid $104,000 per year, of which $15,000 was deposited in a reserve account maintained for the purpose of paying outside defense counsel who were appointed in cases where the Public Defender was disqualified due to a conflict of interest. At the

conclusion of each fiscal year, the Public Defender was entitled to any balance remaining in the reserve account, but liable for any deficit. This Court unanimously held, "as a 'judicially declared rule of criminal procedure,' that contracts of the type herein presented contain inherent and irreconcilable conflicts of interest." (*Id.* at p. 381 (quoting *People v. Rhodes* (1974) 12 Cal.3d 180, 186.) "In this case, . . . the terms of the contract itself do not permit the usual reliance on the attorney's ethical responsibilities to protect the interests both of the criminal defendants and the judicial system." (*People v. Barboza, supra,* 29 Cal. 3d at p. 378.) The Court reversed the judgments and ordered new trials for both defendants. (*Ibid.*)

In reaching its holding, the Court noted that "pursuant to the contract, the fewer outside attorneys that were engaged, the more money was available for the operation of the public defender's office." (*Ibid.*) "The direct consequence of this arrangement was a financial disincentive for the public defender either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of other counsel." (*Ibid.*) Moreover, this Court explained that the contract "expressly places the public defender in a situation in which, potentially,

his financial interests – both personal and professional – oppose the interests of certain of his client-defendants." (*Id.* at p. 380.)

Notably, the *Barboza* court reversed *without* finding (1) an actual conflict between two co-defendants, (2) an adverse effect on counsel's performance due to the inherent conflict created by the contract, or (3) outcome-determinative prejudice. (*People v. Barboza*, *supra*, 29 Cal.3d at p. 381.) The court addressed only the defendants' contention that the contract impermissibly created a financial disincentive for the public defender to find and declare conflicts, without reaching defendants' second claim "that such actual conflicts of interest between these defendants existed as would require reversal even in the absence of the contract in question." (*Ibid.*) The Court declined to recite the underlying facts "other than to note generally that the conflicting evidence at trial related to a physical attack on the victim outside a Madera bar during the evening of February 14, 1978," and that the alternative contention that there was insufficient evidence to support the verdicts was "clearly unmeritorious." (*Id.*, at p. 377.)

Barboza controls this case. Here, as in *Barboza*, counsel's income is "directly affected" by his determination whether certain

investigation is necessary. In *Barboza*, there was a financial disincentive to investigate potential conflicts. Here, there is a financial disincentive to investigate potential defenses. Under the Fresno County system, the total fee paid to counsel was based in large part upon counsel's estimate of 987.9 investigative and expert costs. (Supp. CT 1-2.) As in *Barboza*, the contract created an inherent and immediate conflict of interest: the less money counsel spent on ancillary defense services, the more money went into his pocket.

The Fourth District Court of Appeal recently recognized the conflict that arises from such a zero-sum relation between attorney fees and ancillary defense expenditures. In *Tran v. Superior Court* (2001) 92 Cal.App.4th 1149, the Orange County Superior Court denied funding for ancillary defense services to a demonstrably indigent defendant on the ground that counsel retained by defendant's family had "adequate resources from the fee agreement to pay for the ancillary services." The Court of Appeal concluded that the superior court's ruling impinged upon defendant's right to counsel of his choice. The court noted that "staying on the case puts [counsel] in a conflicted position. She has a duty to defend Tran competently and vigorously, but every dollar paid

for ancillary services is a dollar taken from the fee for her services. In that sense, the case is analogous to *People v. Barboza* (1981) 29 Cal. 3d 375." (*Id.* at p. 1157.)

By allowing counsel to retain that portion of the total case compensation allotted for but not actually expended on ancillary services, the Fresno County contract put Attorney Petilla in the same position. As with Madera County's contract in *People v. Barboza*, "[t]he contract here expressly places [counsel] in a situation in which, potentially, his financial interests – both personal and professional – oppose the interests of certain of his client-defendants." (*People v. Barboza*, *supra*, 29 Cal.3d at p. 380.) Under *Barboza*, reversal is therefore warranted as a matter of law.

II. THE FEE AGREEMENT CREATED A CONFLICT OF INTEREST THAT VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE CALIFORNIA CONSTITUTION.

The Fresno County contract with Attorney Petilla created a conflict of interest that violates the right to counsel under the California Constitution. "'Included in the right to effective assistance of counsel is "a correlative right to representation that is free from conflicts of interest." [Citations.]'" (*People v. Clark* (1993) 5 Cal.4th 950, 994 (quoting *People v. Bonin* (1989) 47 Cal.3d 808, 834).) "We have repeatedly recognized that such conflicts 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his [or her] responsibilities to another client or a third person or by his [or her] own interests. [Citation.].'" (*People v. Clark, supra*, 5 Cal.4th at p. 994.)

The California standard of review in conflict cases is "somewhat more rigorous" than the federal standard. (*Id.* at p. 995 (quoting *People v. Mroczko* (1983) 35 Cal.3d 86, 104).) Under federal law, the standard for obtaining relief depends upon whether the defendant objected to the

conflict at trial. Reversal is automatic where the defendant objects at trial but the court continues the trial over the objection. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 488.) On the other hand, a defendant who did not object at trial must show that an actual conflict adversely affected his lawyer's performance. (*People v. Clark, supra*, 5 Cal.4th at p. 995; see *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348.)

Under California law, however, "'even a potential conflict may require reversal if the record supports "an informed speculation" that appellant's right to effective representation was prejudicially affected. Proof of "an actual conflict" is not required.'" (*People v. Clark, supra*, 5 Cal.4th at p. 995 (quoting *People v. Cox* (1991) 53 Cal.3d 618, 654).)

And, as the Court explained in *People v. Easley* (1988) 46 Cal.3d 712, 725, "[i]t is important to recognize that 'adverse effect on counsel's performance under [*Cuyler v. Sullivan, supra*, 446 U.S. at pages 348 and 350], is not the same as 'prejudice' in the sense in which we often use that term. When, for example, we review a 'traditional' claim of ineffective assistance of counsel (i.e., one involving asserted inadequate performance as opposed to 'conflicted' performance, we require the defendant to show a reasonable probability that the *result*

(i.e., the disposition) would have been different. . . . As we suggested in *Mroczko, supra, Sullivan* requires an inquiry into whether the record shows that counsel 'pulled his punches,' i.e., failed to represent defendant as vigorously as he might have had there been no conflict."

Here, there is ample evidence that the financial conflict caused counsel to "pull his punches." The record shows: (1) counsel went to trial unprepared, (2) counsel failed to consult necessary experts, (3) counsel failed to interview witnesses, (4) counsel failed to investigate defendant's background and social history, and (5) as a result presented a limited penalty phase defense that offered little mitigating evidence.

As noted above, Petilla's contract with Fresno County provided that half the total compensation (or $40,000) would be paid in three installments by the date of the trial confirmation. On March 7, 1996, Attorney Petilla agreed to a trial date of March 18, even though he had been appointed only two months earlier. (RT 251-252.) A review of the 987.9 invoices shows that by March 7 Petilla had done very little to prepare for trial, and he did very little more when the case actually went to trial on March 18.

In January, Petilla claimed (in his "Proposal Setting

Compensation") that interviewing "known witnesses" would require 400 hours of investigator time, or 2 ½ months at 40 hours per week. (Supp. CT 1.) In the same document Petilla said the "Background (lifetime) investigation of Defendant for penalty phase social study report" would cost $15,000. (*Ibid.*) He said, "extensive psychiatric and social study costs will be incurred." (Supp. CT 3.) Assuming that someone was paid $50 per hour to perform such services, the penalty phase background study would have taken 300 hours, or nearly two months, to complete.

Counsel also identified a need for consultation with a ballistics expert, a "a blood analysis expert," and a psychiatrist. (Supp. CT 1-3.) Yet as of March 7, when counsel declared he was ready for trial, almost none of this work had been begun, much less completed:

- The invoices of Jeff Gunn, the investigator, show that he had spent 13.25 hours on the case in February and .25 hours in March before March 7. (Supp. CT 26-27, 22.) Even as of the first day of trial, Jeff Gunn had spoken to only a few witnesses: defendant, Donna Larsen, and Bill and Michelle Moses. (Supp. CT 26-27, 22.) Aside from Donna Larsen, as of March 18, Jeff Gunn had not spoken to a

single witness who at trial would testify in support of defendant's alibi defense. According to Gunn's invoices, he did not prepare reports on the two main alibi witnesses, Jim Bacon and David Daggs, until April 10, 2 weeks *after* opening statements and 2 days before the defense case began. (Supp. CT 30.)

- The "extensive psychiatric and social study" that Petilla deemed necessary at the outset of the case was never done. A psychiatrist, Dr. Howard Terrell, spent 1 hour with defendant and 4 hours reviewing documents in February. (Supp. CT 36.) There is no record of any billing for a "social study report."

- No "blood analysis" was performed. Indeed, it was not until *after defendant was convicted* that Petilla sought to do definitive DNA testing of semen found under one of the victim's fingernails. (RT 4613-4615.)

- The ballistics evidence, which Petilla recognized as the "most damning" evidence, was not examined by an expert until March 14, 4 days before trial began. (Supp. CT 33.)

- Petilla never consulted an expert on tire treads, even though the prosecution had furnished him with reports from its tire tread expert,

Stephen O'Clair, before trial.

- Allan Hedberg, who testified for the defense as an expert on the limitations of eye witness testimony, did no work on this aspect of the case until April 12, the day he testified. (Supp. CT 34.)

- Hedberg also testified as a mental health expert in the penalty phase. The penalty phase trial began on May 16 but according to his invoice, Hedberg did not begin his mental health work-up until May 10, and the tests he had defendant take were not completed until May 13. (Supp. CT 39.)

- The prosecution's notice of aggravating evidence included evidence of defendant's "aggressive conduct with respect to Dana Daggs and Denise Hamblen and Faith Ruacho and April Chavez." (CT 425.) According to Gunn's invoices, he did not contact even one of these witnesses.

- At trial, Dana Daggs testified that defendant forcibly raped her. (RT 3954.) Although Daggs was examined by a nurse after the alleged rape, and vaginal smears were taken that showed the presence of semen, Petilla never sought to test this evidence confidentially to determine if the semen was defendant's.

Thus, when Petilla said he was ready for trial on March 7 he did not know:

- what the DNA testing would show,
- whether the incriminating conclusions reached by the prosecution's firearm expert were valid,
- whether the same expert's tire tread conclusions were valid, or
- what his own alibi witnesses would say on the stand.

Moreover, Petilla had done no work on the penalty phase and could not possibly have known what the penalty phase defense would be. Nor did his investigator contact the prosecution's disclosed penalty phase witnesses. His mental health expert did not conclude his penalty-phase mental health evaluation until 3 days before the penalty trial.

Given the lack of preparation, it is shocking, but not surprising, that Petilla admitted in court that neither he nor his investigator had interviewed any of the 16 witnesses on his penalty phase witness list. (RT 4626.) It is professional incompetence to fail to investigate a defendant's background in a capital case. (*Wiggins v. Smith* (2003) ___ U.S. ___, 123 S.Ct. 2527; *Williams v. Taylor* (2000) 529 U.S. 362, 395-396; *Strickland v. Washington* (1984) 466 U.S. 668, 688.)

Although defendant need not establish *Strickland*-type ineffective assistance to prevail on a conflict-of-interest claim (*People v. Easley, supra,* 46 Cal.3d at p. 725), it is plain to see here that counsel's performance fell far below professional standards for capital cases.

The financial disincentive to investigate that is inherent in the Fresno County "total case compensation" system created, at the very least, a "potential" conflict of interest. Under California law, "'even a potential conflict may require reversal if the record supports "an informed speculation" that appellant's right to effective representation was prejudicially affected. Proof of "an actual conflict" is not required.'" (*People v. Clark, supra*, 5 Cal.4th at p. 995 (citations omitted).) Reversal is required if the record shows that "counsel 'pulled his punches,' i.e., failed to represent defendant as vigorously as he might have had there been no conflict." (*People v. Easley, supra,* 46 Cal.3d at p. 725.) The record here shows that – and more – and therefore reversal of the conviction and sentence is required under the California Constitution.

III. THE FRESNO COUNTY PAYMENT SCHEME DENIED DEFENDANT DUE PROCESS, THE RIGHT TO PRESENT A DEFENSE AND TO CONFRONT WITNESSES, THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT TO A RELIABLE GUILT AND PENALTY DETERMINATION IN A CAPITAL CASE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The conflict inherent in the Fresno County compensation scheme also requires reversal under the United States Constitution. Defendant's counsel operated under an actual conflict of interest that adversely affected his representation of the defendant. For this reason, the conflict denied defendant due process under the Fourteenth Amendment, the right to counsel under the Sixth and Fourteenth Amendments, and to a reliable verdict in the guilt and penalty phases of a capital case under the Eighth Amendment.

A. The Standard Of Review.

In general, ineffective assistance of counsel claims are analyzed under the *Strickland* test, which has two parts. "First, the defendant must show that counsel's performance was deficient . . . Second, the defendant must show that the deficient performance prejudiced his defense. This requires a showing that counsel's errors were so serious as to deprive defendant of a fair trial." (*Strickland v. Washington* (1984) 466 U.S. 668, 878.) When a claim of ineffective assistance of counsel is based on a conflict of interest, however, a defendant need not prove prejudice. Instead, prejudice is presumed if it is shown that (1) counsel labored under an "actual conflict of interest" and (2) the conflict "affected the adequacy of his performance." (*Mickens v.* Taylor (2002) 535 U.S. 162, 171 ("a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief")(citing *Cuyler v. Sullivan, supra,* 446 U.S. 335, 347).)[7] Both prongs of the *Cuyler*

[7] The Ninth Circuit explained in *United States v. Hearst* (9th Cir. 1980) 638 F.2d 1190, 1194, that "an actual, as opposed to a potential, conflict [is] one

conflict of interest test are met here.

First, as to the existence of a conflict: In *Barboza*, this Court ruled that a county's fee agreement with the public defender that created a financial disincentive to investigate potential conflicts in and of itself created a conflict of interest. (*Barboza v. Superior Court, supra,* 29 Cal.3d at p. 378.) Here, as in *Barboza*, the fee agreement "expressly places the [attorney] in a situation in which, potentially, his financial interests – both personal and professional – oppose the interests of certain of his client-defendants." (*Id.* at p. 380.) Thus, an actual conflict of interest exists.

Next, defendant must show that the conflict "affected counsel's performance." (*Mickens v. Taylor* (2002) 535 U.S. 162, 171 (emphasis in original).) There is no single standard to measure whether a conflict of

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which in fact adversely affects the lawyer's performance. But the requirement that the petitioner show this adverse effect is not the same as the requirement . . . that the petitioner show that counsel's incompetent assistance resulted in actual prejudice. For example, overwhelming evidence of guilt might . . . make almost impossible a showing that a relatively minor error resulted in actual prejudice. But such evidence would be completely irrelevant to an inquiry whether the same error, if caused by an actual conflict of interest, showed an adverse effect on counsel's performance."

interest affected counsel's performance.

The Ninth Circuit has described the test in different ways. Thus, an adverse effect in the *Cuyler* sense "must be one that significantly worsens counsel's representation of the client before the court or in negotiations with the government." (*United States v. Mett* (9th Cir. 1995) 65 F.3d 1531, 1535.) A defendant must show "that some effect on counsel's handling of particular aspects of the trial was likely." (*United States v. Miskinis* (9th Cir. 1992) 966 F.2d 1265, 1268.) "[T]he showing must be that counsel was influenced in his basic strategic decisions" by the conflict. (*United States v. Shwayder* (9th Cir. 2002) 312 F.3d 1109, 1118.) A Second Circuit decision holds that "a defendant must demonstrate that some plausible alternative was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." (*United States v. Feyrer* (2nd Cir. 2003) 333 F.3d 110, 116 (quoting *United States v. Schwartz* (2nd Cir. 2000) 283 F.3d 76, 92).) The First and Third Circuits have reached similar conclusions. (*United States v. Gambino* (3d Cir. 1988) 864 F.2d 1064, 1071, cert. denied, 492 U.S. 906, citing *United States v. Fahey* (1st Cir. 1985) 769 F.2d 829, 836.).)

Whatever the precise test may be, it is clear that the determination of whether counsel's performance was affected by the conflict is based upon the totality of the circumstances surrounding counsel's representation of the client, and not upon counsel's own belief that the conflict did not influence him. "[E]xistence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict." (*Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1452.) "Human self-perception regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it." (*United States v. Shwayder, supra,* 312 F.3d at p. 1119.)

B. The Conflict Affected Counsel's Handling Of The Case.

There are many instances in which it appears likely that the conflict influenced counsel's decisions. Perhaps one or two of these decisions could be explained as tactical choices. But some (notably the

failure to investigate and present a penalty phase defense) simply cannot be the product of a reasonable tactical choice. Further, the sheer number of instances where counsel did not use investigators or experts makes it unlikely that each of those choices was tactical. And, given that every dollar counsel did not spend on investigation and experts went directly to counsel himself, it appears more than likely that the conflict had a serious effect on counsel's performance.

The situation would be completely different if counsel had retained only the $20,000 originally projected as his fee, either spending the balance on authorized 987.9 services or returning the monies to the county. In that case, there would at best be only a potential conflict, and it could not said that counsel's performance was affected by the conflict. However, the facts here show that counsel gained substantial profit by choosing to forego investigation into potential defenses, including a background investigation of the defendant that is required in capital cases. Counsel's conversion of those approved 987.9 funds for his own personal use constitutes an actual conflict of interest, i.e., a conflict that adversely affected defendant's representation.

Thus, in this section defendant will show that the financial conflict

created by the Fresno County fee arrangement influenced counsel's preparation for trial and his strategic decisions to forego certain defenses.

1. Counsel Increased His Personal Profit By Failing To Perform The Investigation And Obtain The Experts That Had Been Specifically Authorized And Funded By The Superior Court.

When Attorney Petilla executed the Proposal Setting Compensation, he identified under penalty of perjury specific services necessary to "properly prepare the defense in this case." (Supp. CT 1.) For preparation of the guilt phase trial, he projected expenses of $35,000: this included 400 additional hours of investigation to interview known witnesses ($10,000, at a rate of $25 per hour), further investigation to locate and interview unknown witnesses who stated in television news broadcasts that defendant was the wrong man ($5,000, or 200 hours), investigation and surveillance of other parties having access to the suspect firearms and vehicles ($5,000, or 200 hours), investigation as to other potential suspects ($5,000, or 200 hours), and

experts in ballistics, blood (DNA) analysis and/or blood spatter experts ($10,000). (Supp. CT 1-2.)

For the penalty phase, Petilla projected ancillary defense expenses of $25,000[8]: $15,000 (or 600 hours) for investigation into appellant's background and life history, the results of which investigation would be needed by a penalty phase expert preparing a social study report; and $10,000 for the services of that penalty phase psychiatrist and/or social worker. (Supp. CT 1-2.)

Ultimately, however, counsel elected not to explore those defenses and instead spent only $2,786.65 for investigation, amounting to less than 100 hours of investigation plus expenses. (Supp. CT 18, RT 4935.) Even adding to that the approximately 90 hours of investigation[9] conducted during the two and a half months that the Public Defender was counsel of record, this expenditure does not begin

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8 Although trial counsel cited $50,000 as the average cost of necessary psychiatric and social study experts, based upon an estimate provided at the most recent Capital Case Defense Seminar co-sponsored annually by the California Attorneys for Criminal Justice and the California Public Defenders Association, he "hoped that zealous advocacy will go hand in hand with entrepreneurial [sic] responsibility." (Supp. CT 3.)

9 $2,278 at $25 an hour.

to approach the 400 hours projected simply for interviews of witnesses identified as of the January 1996 Proposal Setting Compensation, much less the 1000 hours total projected for guilt phase investigation, or the 1600 hours projected for all defense investigation. Invoices submitted by counsel show the investigator interviewed of, or attempted to interview, only 29 potential witnesses. (Supp. CT 22-23, 26-27, 30-31.) At trial, 89 witnesses testified.

2. The Investigation And Experts Actually Paid For By Counsel Were Inadequate For Proper Case Preparation and Defense.

The defense of any criminal charge, much less a capital charge, requires a thorough investigation of the facts. In a capital case, counsel is also required to conduct an investigation of the accused's background and social history. Consultation with, and use of, experts at trial is so important that an indigent defendant must be provided adequate funds for that purpose. In holding that the right to counsel includes the right to the use of experts "that will assist counsel in preparing a defense," the court in *Torres v. Municipal Court* stated,

> We start with the basic premise that there can be no justice where the type of trial that a person has depends upon the financial means of such person. By statute the federal courts are required to appoint expert witnesses for the defense if the witness is necessary to an adequate defense. However, we note that the federal statute was passed as a result of equal protection problems that had arisen.
>
> Although there is no statute that specifically covers the appointment of an expert for the defense other than for the purposes of an insanity plea there can be no question that equal protection demands that in a proper factual situation a court must appoint an expert that is needed to assist an indigent defendant in his defense.

(*Torres v. Municipal Court* (1975) 50 Cal.App.3d 778, 783-785, citations omitted.)

In *People v. Gunnerson*, the court stated, "The Sixth Amendment right to counsel is a meaningless gesture if counsel for an indigent defendant is denied the use of working tools essential to the establishment of what would appear to be a tenable or possible defense." (*People v. Gunnerson* (1977) 74 Cal.App.3d 370, 379.) "Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that

determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." (*Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1226, cert. denied, *Woodford v. Caro* (1999) 527 U.S. 1049.)

Counsel in his Proposal Setting Compensation initially identified some of the investigation and experts necessary to the proper representation of defendant. Counsel's estimation of the necessary investigation and experts cannot be said to have been overly ambitious: the courts have established minimum standards for constitutionally adequate representation.

Counsel must conduct a thorough investigation sufficient to make informed decisions as to the proper defense of his client, before exercising tactical discretion to elect between various defense strategies. (*Wiggins v. Smith*, *supra*, ___ U.S. ___; *Sanders v. Ratelle, supra,* 21 F.3d at p.1456; see also, *Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006, 1014 ("Attorneys have considerable latitude to make strategic decisions . . . *once they have gathered sufficient evidence upon which to base their tactical choices*"), (emphasis in original).) In a capital case, the failure to investigate a defendant's social history and evidence

of mental defect constitutes deficient performance: "[T]o perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'" (*Mayfield v. Woodford, supra*, 270 F.3d at p. 927, quoting *Williams v. Taylor, supra,* 529 U.S. at pp. 393, 399; see *Wiggins v. Smith, supra,* ___ U.S. ___.) Furthermore, "counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health," including facts that the experts do not request. (*Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, citing *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1116, cert. denied, 528 U.S. 1105.)

In the penalty phase of this case, counsel expended *none* of the $40,000 authorized for investigation. Counsel called no witnesses other than psychologist Allan Hedberg. On May 13, the eve of the penalty trial, counsel disclosed his penalty phase witness list, which consisted of his guilt phase witness list with the addition of 16 names furnished by defendant personally. (RT 4619.) Counsel admitted that he had not spoken to *any* of the 16 newly disclosed witnesses; he admitted he knew

only what defendant had told him the witnesses would say. (RT 4625.) Counsel indicated that he might speak to the witnesses by phone, as he would be obtaining their telephone numbers. (RT 4626.)

It appears counsel attempted to shift responsibility to defendant for penalty phase investigation. This is impermissible. The Ninth Circuit has recently reiterated that counsel may not defer to a client's uninformed judgment as to the preparation of the defense:

> [E]ven when we have placed emphasis on the client's desires, we have required that the client make an "informed and knowing" decision not to present mitigating evidence. *Jeffries v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1193; see also *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 847 (holding that counsel has duty to "try to educate or dissuade" the defendant about the consequences of actions). It is, of course, difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists. See *Landrigan v. Stewart* (9th Cir. 2001) 272 F.3d 1221, 1228 ("If the investigation had been more thorough, [defendant] would have had more information from which he could make an intelligent decision about whether he wanted some mitigating evidence presented.").

(*Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1089.)

Counsel in the present case could not expect defendant to make an intelligent determination as to whether any of the character witnesses should testify, without counsel's informed advice.

In his Proposal Setting Compensation, counsel projected expenses of $10,000 for "extensive psychiatric and social study costs" and warned the court that these costs typically averaged $50,000. (Supp. CT 3.) Ultimately, however, counsel waited until defendant had been convicted of capital murder before he brought in Dr. Hedberg to administer assessment tests that took 8.5 hours, at a cost of $1,220, plus $780 for court preparation, time and testimony. (Supp. CT 39-40.)

The lateness of this evaluation means that when counsel conducted voir dire as to penalty issues during jury selection, he did so without the benefit of meaningful psychological testing, gambling that the guilt phase verdict would obviate the need for a penalty phase expert on mental health. As a result, counsel was unprepared to question prospective jurors whether mental issues might impact their penalty deliberations. Judging from his questions in voir dire, it appears counsel had decided upon a penalty phase defense before undertaking any penalty phase investigation: "[I]f we went to the penalty phase and I

gave you evidence that my client here has no record, worked as a truck driver, then quit that to take care of his mom because his mom became disabled, that wouldn't matter to you that because it has nothing to do with the case?" (RT 617-618.)

The conflict of interest also adversely affected the guilt phase. Once again, what counsel actually did fell far short of what he had declared under oath to be necessary to defend his client. For example, counsel retained psychiatrist Howard Terrell at a cost of $2,157.50, for a limited evaluation of defendant that included only 1.75 hours with defendant himself. (Supp. CT 36.) Dr. Terrell testified in the guilt phase that defendant had no history of anti-social personality disorder and did not fit the "profile" of a serial killer or a murderer (RT 2970-2971, 2974.) Although the balance of Dr. Terrell's billable hours were itemized as review of documents, this review did not include review of pertinent police reports and evidence of prior uncharged misconduct. This lack of preparation was relentlessly (albeit impermissibly) exploited by the prosecutor on cross-examination. The prosecutor demolished Dr. Terrell's credibility by repeatedly confronting him with evidence that the doctor had not accounted for in his evaluation. (RT 2976-2980.)

Notwithstanding savings of $37,213 from original cost projections for investigation and $5,842.50 in mental health experts, counsel also chose not to retain experts needed to controvert the findings of prosecution experts or at least to prepare for their cross-examination in the guilt phase. (Supp. CT 18.)

For example, counsel failed to order a comprehensive review of the prosecution expert's conclusion that the firearms used in the killings belonged to defendant. Counsel had projected a need for two ballistics experts, the second as a backup in the event that the first merely confirmed the prosecution's assessment, because "[s]o far, [the] ballistics evidence is the most damning." (Supp. CT 3.) Once the total case compensation was approved, counsel retained only one such expert, James Warner. (Supp. CT 18, 33.) On April 12, 1996, in opposing the prosecution motion to have the ballistics evidence sent to a second expert, counsel represented to the court that he had retained two ballistics experts, Barnett and Warner. (RT 2656.) Counsel stated that Warner had been retained solely to provide information for cross-examination, and had not furnished an opinion as to the ballistics comparison. (RT 2657.) However, Warner's invoice indicates only a

brief examination of expended ammunition evidence and the cost of returning that evidence, for a total of $532. (Supp. CT 33.) For a savings of $4,468, then, counsel elected to do without the services of an expert to retest "the most damning" evidence of the prosecution case.

Moreover, although counsel projected costs of $5,000 for an expert to conduct blood analysis, trial counsel did not retain any expert for DNA analysis of genetic material. (Supp. CT 2-3, 18.) The prosecution introduced evidence that defendant could not be eliminated as a donor of semen present in the vaginal swab and fingernail scrapings from Espinoza. (RT 3450-3452.) Both the vaginal swab and fingernail scrapings exhibited a genotype 3,4 and genotype 1.2. (RT 3449.) Defendant is a type 3,4. (RT 3450.) In the April 22, 1996, hearing on the admissibility of the DNA evidence, counsel sought to exclude the inconclusive result as to the Espinoza vaginal swab and fingernail scrapings as unreliable, in view of the failure to conduct RFLP testing in addition to PCR testing. (RT 3310.)[10]

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[10] RFLP (restriction fragment length polymorphism) testing has a greater power of discrimination than the DQ-Alpha testing performed by the State and could have conclusively determined if the semen belonged to defendant. (RT 3297.)

When asked why he did not seek to have defense experts test the evidence, counsel replied: "Because my – my – my information was that if they did this testing it would not be my – it would not be my client. He would be eliminated." (RT 3227.) Of course, that is precisely the reason to do the testing, not to forego it.

Further, counsel did not test the semen collected from Dana Daggs in 1992 after she alleged that defendant had raped her. This allegation of prior uncharged criminal conduct was used against defendant in both the guilt and penalty phases. Again, defendant denied having intercourse with Daggs, but counsel made no effort to corroborate that denial with physical evidence. (RT 3618, 3746.)

Counsel retained no experts of his own in the field of tire tread analysis, despite the tire tread evidence found in the areas of the Mendibles, Cruz, Tucker and Espinoza shootings. (RT 2462, 2464.) Counsel had also sought to introduce evidence that a pickup truck belonging to Bill Moses had been present at the scene of one of the shootings. Yet counsel was unable to respond to the prosecution argument that its criminalist had conclusively excluded the tires of Moses' truck as the source of the impressions found there. (RT 2443.)

What little investigation counsel authorized was inadequate even as to the guilt phase trial. For example, alibi and character witness Jim Bacon was interviewed for barely twenty minutes, according to counsel's final accounting. (Supp. CT 23.) Because Bacon testified that defendant was with him in Watsonville from November 2 through 4, 1994, his credibility was crucial to the defense as to Count 1. (RT 3147.) When initially called to the stand, Bacon was unprepared, stating that he had not been aware he was to testify, and did not have the papers that corroborated his explanation of how he could remember the remote event. (RT 2752.) Counsel had evidently not had his investigator obtain a copy of Bacon's personal papers reflecting his activities over the course of defendant's visit.

Similarly, as to defendant's alibi on Count 2, counsel failed to have his investigator obtain medical records for Clara Larsen for the end of December 1994. The defense presented the testimony of family members to the effect that defendant had been with the family in Wasco, California, his grandmother's home, from December 27 to 30, bolstered primarily by the claim that Clara Larsen had a December 28 doctor's appointment to which Donna Doolin and defendant had taken her. The

medical records, presented by the prosecution in rebuttal, showed that Clara Larsen's appointment had been instead on December 27, leaving sufficient time for defendant to return to Fresno. (RT 4978.)

Counsel also failed to investigate Donna Doolin's claim that she was in Fresno attending a conference November 4 through 6, 1994; her employment records showed that she was in Sacramento, not in Fresno on those dates. (RT 4153.) Counsel's failure to investigate left defendant's witnesses ill-equipped to deal with either direct or cross-examination. Even if these errors were harmless, they nonetheless constitute evidence of a lapse in representation under *United States v. Hearst*, *supra*, 638 F.2d 1190.

C. This Case Is Distinguishable From Recent Financial Conflict Cases Decided By The Ninth Circuit.

The disparity between the services counsel initially projected to justify his total case compensation and the services ultimately obtained, and the corresponding increase in counsel's fee, serve to distinguish the present case from *Mayfield v. Woodford* (9th Cir. 2001) (en banc) 270

F.3d 915, 927, and *Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064.

The petitioner in *Rich v. Calderon* "claims that his trial counsel labored under an 'economic conflict' of interest because of pressures put on him by Shasta County funding authorities. The result of these pressures, Rich claims, was twofold: (1) his counsel was 'chilled' from obtaining experts "untainted" by a confession that was ultimately suppressed; and (2) an investigator was not hired to look into jailhouse conditions and their impact on Rich." (*Id.*, at p. 1069.) However, the court concluded that the conflict was speculative and not real: "Rich's trial counsel provided an affidavit discussing the financial pressures he perceived at the time, which does not even suggest that he gave in to those pressures in any way that produced demonstrable harm of any kind to Rich's defense." (*Ibid.*)

Similarly, in *Mayfield v. Woodford*, petitioner asserted that counsel's "concern that he not be perceived by the San Bernardino bar or bench as requesting too much funding prevented [counsel] from effectively representing Mayfield." (*Mayfield v. Woodford*, *supra*, 270 F.3d at p. 924.) Again, this alleged conflict is entirely speculative.

The conflict in the present case is very different: it is inherent in

the very terms of the compensation and is not based upon a speculative fear that the authorities administering an otherwise conflict-free compensation scheme *might* be operating in bad faith, such that legitimate requests for 987.9 funding *might* be ill-received, and that the anticipated disapproval by such authorities *might* result in fewer appointments in the future.

This case is also distinguishable from *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, cert. denied, *Williams v. California* (1988) 488 U.S. 900. In *Williams*, defendant contended simply that "the fact that payment for any investigation or psychiatric services could have come from counsel's pocket forced counsel to choose between Williams' interest and his own." (*Williams v. Calderon*, *supra*, 52 F.3d at p. 1473.) The court acknowledged that a conflict of interest may arise under *Cuyler* when the attorney's financial interests are pitted against the client's interests. (*Williams v. Calderon, supra,* 52 F.3d at p. 1473 (citing *United States v. Hearst, supra,* 638 F.2d 1190 (attorney's book contract created conflict) & *Buenaono v. Singletary* (11th Cir. 1992) 963 F.2d 1433, 1438-1439 (same).) However, the court found no conflict in *Williams*: "All Williams alleges is the same theoretical conflict

that exists between an attorney's personal fisc and his client's interests in any pro bono or underfunded appointment case." (*Williams v. Calderon, supra,* 52 F.3d at p. 1473.) Essentially, the court held that an attorney is not required to put his or her personal financial resources at the client's disposal. (*Ibid.*)

This case is different; it is not a "pro bono or underfunded appointment case." (*Ibid.*) Unlike the theoretical and speculative conflict at issue in *Williams*, Fresno's system specifically incorporates Penal Code section 987.9 expenses in setting counsel's total case compensation, and expressly provides that all 987.9 expenditures are to be paid from the total case compensation so set. The total case compensation thus was a direct function of both projected 987.9 expenditures as well as counsel's own attorney fees. Once the total case compensation was approved, counsel was under no obligation to refund unused 987.9 monies.[11]

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[11] Counsel's compensation in *Williams* had not been impacted by 987.9 expenditures or projections; rather ancillary defense services under the compensation scheme there in issue required independent funding by the court. In fact, Williams complained post-conviction that trial counsel had failed to seek the funding for which Williams was eligible pursuant to section 987.9, and that counsel had instead made only informal inquiries as to the court's budget for

Accordingly, the Ninth Circuit's ruling was premised on the fact that nothing about appointed counsel's compensation would have prevented him from making application to the court pursuant to 987.9 for the purpose of funding ancillary defense services. In *Williams*, then, there remained a clear delineation between the appointed attorney's own fee, on the one hand, and funding for ancillary defense services, on the other, just as section 987.9 contemplates. Although Williams's counsel could not be required to devote his own personal fee to the funding of ancillary defense services, neither would counsel have been prevented from seeking funding for such necessary services under section 987.9. The attorney fee remained fixed and constant irrespective of the attorney's decision as to whether to 987.9 services should be sought. Accordingly, there was no financial disincentive to doing so.

Conversely, in the Fresno County system (as in *Barboza)* the "total case compensation" obscures the traditional distinction between attorney fee and client trust account: counsel himself noted in his attachment to the Proposal Setting Compensation that an appointed

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such funds. (*Id.*, at p. 1469; *Williams v. Vasquez* (E.D. Cal. 1993) 817 F.Supp. 1443, 1472; *People v. Williams* (1988) 44 Cal.3d 883, 917 fn. 11.)

attorney's "net compensation is uncertain" in any given case under the Fresno system, with the chance of attorney fee windfalls in some cases counterbalancing the risk of inadequate fees in others, "over the long haul." (Supp. CT 4.) The fact that the total case compensation, once approved, was not reduced where 987.9 expenditures fell short of approved projections meant that counsel's attorney fee would vary in inverse relation with the 987.9 funds actually expended. In a given case, an attorney might "get lucky," as counsel in this case put it (Supp. CT 4), by foregoing certain of the approved ancillary defense expenditures. The Fresno County system leaves it to the discretion of counsel to allocate the total case compensation, once disbursed, between his variable fee and the proper representation of his client.

Under such a system, the conflict between appointed counsel's interest in maximizing his fee and defendant's interest in necessary ancillary defense services is real, not possible or speculative. The Fresno County system puts the defense attorney, rather than the court, in the role of allocating funds. The conflict inherent in allowing counsel to profit personally by a decision to withhold such funds adversely affected this particular defendant – trial counsel gained thousands of

dollars in fees as a direct result of his decision not to spend section 987.9 funds already disbursed by the court.

D. The Conflict Of Interest Requires Reversal Of Both The Judgment Of Guilt And The Death Sentence.

Each decision to withhold funding for necessary ancillary defense services represented a choice by counsel, a choice that not coincidentally increased his fee. This direct financial conflict thus "actually affected the adequacy of [counsel's] representation" in both the guilt and penalty trials. Thus, reversal of the judgment of guilt and the death sentence is required. (*Cuyler v. Sullivan, supra,* 446 U.S. 335, 348.)

IV. THE FRESNO COUNTY PAYMENT SCHEME DENIED DEFENDANT AND ALL CRIMINAL DEFENDANTS NOT REPRESENTED BY THE COUNTY PUBLIC DEFENDER EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fresno County system for compensation of private appointed counsel effectively imposed disabilities upon the class of criminal defendants whom the Public Defender is disqualified from representing due to a conflict of interest, by creating yet another conflict, this one between the personal financial interests of replacement counsel and the defendant's interest in effective representation, including the right to the assistance of experts and investigation that will assist counsel in preparing a defense. Under the Fresno County system, a subset of criminal defendants is forced to exchange the professional conflict of interest of the Public Defender for the personal financial conflict of interest of their private appointed counsel.

Penal Code section 987.9 includes a requirement that "[a]t the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section." (Pen. Code, § 987.9, subd. (b).) Implicit in the accounting

requirement is the duty to return 987.9 funds authorized but not spent; were it otherwise, section 987.9(b) would be meaningless.[12]

Accordingly, the Public Defender in the present case made a full accounting of its expenditures against the initial advance of $5,000, and returned the unused balance. (Supp. CT 9-10.) The Fresno County system for private appointed counsel, on the other hand, allowed counsel to retain the 987.9 funds at the conclusion of the case. By so doing, Fresno County imposed the burden of financially-conflicted counsel solely on that class of indigent criminal defendants who could not be represented by the Public Defender. Thus, the Fresno County system violates the Equal Protection Clause, both on its face and as applied here.

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12 In interpreting legislative enactments, "[w]here a statute is susceptible of two constructions, one leading to mischief or absurdity, and the other consistent with justice and common sense, the latter must be adopted." (*Lampley v. Alvares* (1975) 50 Cal.App.3d 124, 128-129; see also, *Stanley v. Justice Court* (1976) 55 Cal.App.3d 244, 253; *Barber v. Blue* (1966) 65 Cal.2d 185, 188 ("we indulge in a presumption that constitutional and legislative provisions were not intended to produce unreasonable results.").)

A. The Classification Is Subject To Strict Scrutiny, Because It Impairs The Fundamental Right To Counsel.

Under the traditional two-tier test of equal protection, a discriminatory legislative classification that impairs fundamental rights will be subjected to strict scrutiny by the courts. Accordingly, the state must bear the heavy burden of proving both that it has a compelling interest which justifies the classification and that the discrimination is narrowly tailored to promote that interest. (*People v. Olivas* (1976) 17 Cal.3d 236; *Attorney General of New York v. Soto- Lopez* (1986) 476 U.S. 898, 904.) "[T]he courts have been particularly careful to inspect classifications relating to the criminal process." (*In re Armstrong* (1981) 126 Cal.App.3d 565, 569.) A criminal accused's right to counsel is fundamental by any measure; the right to counsel free of conflict is essential to that right. (See, e.g., *Cuyler v. Sullivan*, *supra*, 446 U.S. 335.)

The Sixth Amendment requires the appointment of counsel for indigent defendants. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) The right to counsel is impaired where counsel's loyalties are divided due to

a conflict of interest. (*Cuyler v. Sullivan*, *supra*, 446 U.S. 335.) The right to counsel includes the right to the use of any experts necessary to assist counsel in preparing a defense. (*In re Ketchel* (1968) 68 Cal.2d 397, 398; *Torres v. Municipal Court*, *supra*, 50 Cal.App.3d 778; *Ake v. Oklahoma* (1985) 470 U.S. 68, 76-77; *Mason v. State of Arizona* (9th Cir. 1974) 504 F.2d 1345, 1351.) "It follows, therefore, that if expert or investigative help is necessary to the defense pending the preliminary hearing, due process requires the state to provide the service to indigents." (*Anderson v. Justice Court* (1979) 99 Cal.App.3d 398, 401-402.) Such services are also an integral component of the right to counsel. (*People v. Frierson* (1979) 25 Cal.3d 142, 162-164.) "[W]e emphasize that an indigent defendant has specific statutory rights to certain court-ordered defense services at county expense; that an indigent defendant has a constitutional right to other defense services, at county expense, as a necessary corollary of the right to effective assistance of counsel; that such rights must be enforced, and a court's order directing payment for such services must be obeyed, even if a county has no specifically appropriated funds for those purposes." (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 313.)

Penal Code section 987.9 codifies the right to funds for preparation of a defense and the mechanism by which such funds may be sought in capital cases, specifying that in ruling on the reasonableness of the request, "the court shall be guided by the need to provide a complete and full defense for the defendant." (Pen. Code, § 987.9, subd. (a).) Given the federal constitutional mandate, "[e]ven in the absence of [Penal Code] section 987.9, . . . counties would be responsible for providing ancillary services under the constitutional guarantees of due process under the Fourteenth Amendment and the Sixth Amendment right to counsel." (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815.) Under the statute and the constitutional principles it embodies, it is the necessity of such services to constitutionally adequate representation that governs the funding decision, not the financial interests of counsel or the appointing municipality.

The right impaired by the Fresno County classification is the right to conflict-free counsel. Because of the conflict, all of counsel's decisions are suspect, irrespective of whether any trial court would have been legally bound to approve funding for the particular services counsel

failed to procure here.

By placing a cap on the amount of money that can be spent in a capital case, the Fresno County system seeks to preserve the financial resources of the County. This is a legitimate interest but the scheme set in place to accomplish it is seriously flawed and is not "narrowly tailored" to achieve its purpose. There are alternatives to the Fresno County scheme that would prevent unnecessary and excessive spending on capital cases but at the same time not build in a conflict of interest between counsel's financial interests and the interests of his client in a full and thorough investigation and defense. Thus, attorney's fees could be fixed, depending upon the apparent complexity of the case, and a separate fund could be set aside for 987.9 costs. The amount of the 987.9 fund could be set at a certain amount, based on the County's experience with capital cases, with the provision that costs above this amount would have to be supported by a showing of good cause. In this way, many of the goals of the Fresno County Total Case Compensation system are preserved – a cap on expenditures, the lessening of administrative oversight by using a fixed-fee system, readily-accessible funds for prompt payment of ancillary services – without the

inherent conflict present in the system used in this case.

"Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime." (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 431, quoting *United States v. See* (9th Cir. 1974) 505 F.2d 845, 853, fn. 13, and *Powell v. Alabama* (1932) 287 U.S. 45, 71.) Here, the balance was not struck; the Fresno County fee-payment scheme for appointed counsel created an inherent conflict of interest.

B. Whatever The Level of Scrutiny, The Fresno Classification Fails To Pass Constitutional Muster.

Even where no fundamental right is implicated, the less stringent rational basis test "though limited, is not toothless." (*Young v. Haines* (1986) 41 Cal.3d 883, 900.) "A classification scheme is invalid if it does not meet the constitutional demand of rationality." (*Ibid.*) "The state may not . . . arbitrarily accord privileges to or impose disabilities upon one class unless some rational distinction between those included in and

those excluded from the class exists." (*In re Gary W.* (1971) 5 Cal.3d 296, 303.) "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. ... But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made." (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 308-309, internal citations omitted (holding that New Jersey statute requiring indigent criminal appellants confined to state institutions repay cost of transcript on appeal.)

The Court similarly stated, "This requirement is lacking where, as in the instant case, the State has subjected indigent defendants to such discriminatory conditions of repayment. This case, to be sure, differs from *Rinaldi* in that here all indigent defendants are treated alike. But to impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice, no less than in *Rinaldi*, a discrimination which the Equal Protection Clause proscribes." (*James v. Strange* (1972) 407 U.S. 128, 140-141 (invalidating Kansas

statute that allowed state to recover in subsequent civil proceedings legal defense fees expended for the benefit of indigent defendants and that deprived these defendants of the protective exemptions afforded other judgment debtors).) The right impaired by the discriminatory classification in *James* was not the right to competent counsel, but rather the right to protective exemptions afforded other debtors in otherwise valid proceedings to recover costs.

Although advance disbursement of 987.9 funds serves a legitimate governmental interest in prompt compensation of experts necessary to the defense of an indigent accused, no purpose is served by a system allowing attorney fees to fluctuate in direct proportion to the attorney's withholding of those 987.9 funds. The Fresno County system cannot be justified on the ground that, as counsel stated in his Proposal Setting Compensation, "we will all win some and lose some, financially speaking, but will be reasonably compensated over the long haul." (CT Supp. 4.) The failure to set attorney fees at a level independent of 987.9 savings merely emboldens attorneys acting in bad faith to "win" more often that the needs of his clients warrants, and casts suspicion on counsel exercising their professional judgment in good faith, all to the

detriment of the defendant and his relationship with counsel. Such a system unnecessarily and unjustly enriches counsel at the expense of either defendant, as the intended beneficiary of the 987.9 funds, or the municipality to which the unspent 987.9 funds would otherwise revert.

Cases such as *Mason v. Arizona*, *supra*, 504 F.2d 1345 which have discerned no equal protection violation in a trial court's denial of 987.9 funding do not indicate a contrary result. In *Mason*, the court rejected appellant's contention that the trial court's refusal to appoint a special investigator or to authorize additional funds for investigative services denied him equality of treatment with indigent defendants represented by the Maricopa County Public Defender's office. The Ninth Circuit in *Mason* found it essential to the equal protection guaranty that appellant have "an equivalent and fundamentally fair substitute for the normally available investigative services of the Public Defender's investigative staff." (*Id.*, at p. 1354, footnotes and internal citations omitted.) The rational basis test could be satisfied by the allowance of investigative funds according to " the need as revealed by the facts and circumstances of each case." (*Id.*, at p. 1352.)

In the present case, and under the Fresno County system

generally, the allowance of funds for ancillary defense services was subject not only to judicial review of the reasonableness of the request, but also to the discretion of counsel operating under personal financial disincentives to fund such services. The characterization of such funds as "987.9 *trust* fund expenditures" (Supp. CT 1) is of no significance where counsel is permitted to convert the unspent balance into his attorney fee (Supp. CT 18), and still be paid the total case compensation in full. (Supp. CT 16.) Because the flat fee scheme cannot even pass the rational basis test, defendant's conviction and sentence must be reversed.

V. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING THE DEFENSE REQUEST FOR SECOND COUNSEL.

A. The Proceedings Below.

On February 28, 1996, trial counsel filed a written request for the appointment of second counsel. (Supp. CT 5773A.) In support of the motion, counsel noted: (i) the District Attorney was seeking the death penalty; (ii) the charges were factually complicated, involving six victims in six different incidents; (iii) sophisticated forensic issues were involved, including ballistics, "blood evidence," psychology, and a possible insanity defense; (iv) the witnesses had changed their description of the perpetrator over time and each incident involved intricate circumstantial evidence; and, (v) the trial was set to begin in three weeks, on March 18. (Supp. CT 5773A.)

Judge Stephen Kane, the same judge who had earlier reviewed and approved counsel's Proposal Setting Compensation, denied the motion. (CT 349; Supp. CT 2.) Judge Kane gave no specific reasons; he stated

simply, "The court having reviewed and considered defendant's affidavit requesting appointment of co-counsel in this case, said request for appointment of co-counsel is hereby denied for lack of cause." (CT 349.)

The issue of second counsel arose again during trial. On March 28, 1996, the first day of trial following jury selection, trial counsel apologized for being unprepared, noting that this was the first time under the new fee system that second counsel had not been appointed on a capital case. (RT 1005.)

B. The Standard of Review.

"Death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime." (*Keenan v. Superior Court*,

supra, 31 Cal.3d at pp. 430-431, internal citations omitted.) The United States Supreme Court has repeatedly expressed the same opinion. (See, e.g., *Ford v. Wainwright* (1986) 477 U.S. 399, 411 (plurality opinion) ("This especial concern [for reliability in capital proceedings] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Gardner v. Florida* (1977) 430 U.S. 349, 357 (plurality opinion); *Woodson v.. North Carolina* (1976) 428 U.S. 280, 305 (plurality opinion); *Furman v. Georgia* (1972) 408 U.S. 238, 289 (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.").

No doubt in part because of this heightened concern for reliability, as well as because death penalty cases are typically more complex than non-capital cases, and always involve two trials in one – a guilt and penalty phase – the American Bar Association task force assigned to study the death penalty recommends that "two qualified trial attorneys should be assigned to represent the defendant." (*ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 2.1 (1990).)

Indeed, the right to have co-counsel in a capital case has existed since the earliest codification of California statutes and appears to be based upon pre-existing federal law. The federal provisions for appointment of second counsel in capital cases have existed since 1970 and exist not just because capital cases are necessarily more complex, but because of the irreversible nature of the penalty (*U.S. v. Shepherd* (6th Cir. 1978) 576 F.2d 719, 729; *U.S. v. Watson* (4th Cir. 1973) 496 F.2d 1125, 1130 [Murray J. dissenting])

The legislative intent evinced in section 987.9 — that a court be guided by the defendant's need for a complete and full defense — "requires that the trial court apply a higher standard than bare adequacy to a defendant's request for additional counsel. If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need, . . . a presumption arises that a second attorney is required." (*Keenan v. Superior Court, supra,* 31 Cal.3d at p.434.)

In *Keenan*, defendant's attorney was appointed seven weeks prior to his scheduled trial date; defendant's motion for a continuance was

denied. In the declarations accompanying his motion for additional counsel, defendant's counsel stated he needed to interview 120 witnesses, he anticipated extensive scientific and psychiatric testimony, and that defendant was charged in 5 other pending criminal cases, evidence of which the prosecution intended to offer at his murder trial. Counsel said he intended to make numerous pretrial motions as part of the defense effort and thought that review of some of these motions might be necessary. He asserted that only the assistance of another qualified attorney would be useful in this aspect of preparation. (*Keenan v. Superior Court, supra*, 31 Cal.3d at pp. 432-433.) This Court held that under those facts, the superior court abused its discretion in denying the request for second counsel.

C. The Court Erred In Denying The *Keenan* Motion.

The facts here are no different than in *Keenan*, but Keenan got two attorneys and defendant here did not. Here, as in *Keenan*, the prosecution intended to present evidence of six crimes (here they were all charged crimes) and counsel had only a short time to prepare for trial

(here, eight weeks; in *Keenan*, seven weeks). Both *Keenan* and this case were capital cases that required counsel to prepare for two trials – the guilt phase and the penalty phase. Both *Keenan* and this case involved substantial scientific evidence.

The superior court had the discretion to appoint or not appoint second counsel. But that "discretion, of course, must be 'guided by legal principles and policies appropriate to the particular matter at issue.'" (*Keenan v. Superior Court, supra,* 31 Cal.3d at p. 430, quoting *People v. Russel* (1968) 69 Cal.2d 187, 195, and *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815.) In assessing the need for second counsel, "the court must focus on the complexity of the issues involved, keeping in mind the critical role that pretrial preparation may play in the eventual outcome of the prosecution." (*Keenan v. Superior Court, supra,* 31 Cal.3d at p. 432.) And, one might add, in ruling on a *Keenan* motion, the court must look to *Keenan* itself.

Here, where the facts are largely indistinguishable from those that *Keenan* held mandated the appointment of second counsel, the superior court's denial of the motion must be viewed as an abuse of discretion. Each of the key factors present in *Keenan* is present here: numerous

crimes, scientific issues, a lack of time for one attorney to prepare adequately, and the death penalty. Plainly there was a genuine need for second counsel; the court erred in denying the motion.

Further, counsel expressly alerted the trial court that the initial failure to appoint second counsel was impairing defendant's right to counsel. Counsel admitted that he was unprepared, specifically relating this to a lack of attorney assistance. (RT 1005.)

The District of Columbia Court of Appeals has held that when counsel makes statements to the trial court indicative of ineffective assistance, the trial court must fully explore the facts to determine if counsel should be replaced or second counsel appointed. (*Pierce v. United States* (D.D.C. 1978) 402 A.2d 1237, 1244-1245.) In view of the complexity of the case, the severity of the consequences for defendant, and the mounting evidence of counsel's inability to competently represent his client, the trial court abused its discretion by (a) failing to investigate the need for second counsel, and (b) failing to appoint second counsel.

D. The Trial Court's Refusal To Appoint Second Counsel Resulted In A Fundamental Violation Of Defendant's Due Process Rights As Well As His Sixth Amendment Right To The Effective Assistance Of Counsel.

There are two distinct ways in which a defendant can be deprived of the effective assistance of counsel. First, counsel can perform in an ineffective manner. Second, a trial court can act, or fail to act, in a way that deprives a defendant of the effective assistance of counsel. The latter occurred here.

The Sixth Amendment to the United States Constitution provides that criminal defendants are entitled to the effective assistance of counsel at all critical stages of the proceedings against them. (*United States v. Gouveia* (1984) 467 U.S. 180, 187 (1984); *Coleman v. Alabama* (1970) 399 U.S. 1, 9-10.) Given the fundamental role played by defense counsel in ensuring a reliable result, the right to counsel is not satisfied by the mere appointment of counsel. (*Strickland v. Washington, supra,* 466 U.S. at 685.) Instead, the Sixth Amendment requires counsel "who plays the role necessary to ensure that the trial is fair." (*Id.* at p. 685.)

There are two general ways in which counsel can fail to play this

critical role. First, counsel can make an error -- or a series of errors -- and thereby "fail[] to render 'adequate legal assistance.'" (*Id.* at p. 686.) The Court has termed this type of failure as "actual ineffectiveness." (*Ibid.*)

Alternatively, state interference can itself violate a defendant's right to the effective assistance of counsel by rulings which interfere with the ability of counsel to respond to the state's case or conduct a defense. (*Ibid.*; accord *Geders v. United States* (1976) 425 U.S. 80 (defendant denied right to effective counsel where trial court precluded him from consulting with counsel during an overnight recess in trial); *Herring v. New York* (1975) 422 U.S. 853 (defendant denied right to effective counsel where trial court refused to allow his counsel to make closing argument in bench trial).)

The "state interference" strand of the Court's Sixth Amendment jurisprudence recognizes that the right to counsel is not satisfied by appointing even diligent counsel when the circumstances of the appointment, or other actions taken by the court, impair counsel's ability to effectively represent the defendant. The right to counsel "is not discharged by an assignment [of counsel] at such a time **or under such**

circumstances as to preclude the giving of effective aid in the preparation and trial of the case." (*Powell v. Alabama, supra,* 287 U.S. 45, 71 (emphasis added).)

The Ninth Circuit has recognized some of the varied instances in which a trial court can prevent counsel from rendering effective assistance of counsel. The general rule from these cases is that the defendant has been denied his right to effective assistance of counsel whenever a trial court's rulings fundamentally interfere with the ability of counsel to contest the state's case or present a defense. (*Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1237. "The actions of the trial court may cause the ineffectiveness of counsel's assistance." (*Bradbury v. Wainwright* (5th Cir. 1983) 658 F.2d 1083, 1087.)

In sum, under certain circumstances the actions of a trial court may deprive a defendant of the effective assistance of counsel. Here, by denying the motion for second counsel, the superior court effectively denied defendant the assistance of counsel. Given the complexity of the case and the short time that appointed counsel had to prepare, there was simply no way that defendant could be effectively represented by a single attorney.

The question then becomes whether defendant must show outcome-determinative prejudice in order to gain a fair trial. The Supreme Court of the United States has articulated two different standards of prejudice for assessing ineffective assistance of counsel claims. In cases of "actual ineffectiveness" -- where defense counsel has performed in a negligent manner -- the defendant generally must show "that the deficient performance prejudiced the defense." (*Strickland v. Washington, supra*, 466 U.S. at p. 687; accord *Perry v. Leeke* (1989) 488 U.S. 272, 279.) This requires the defendant to show that but for counsel's errors there is a "reasonable probability" that the result of the proceeding would have been different. (*Strickland v. Washington, supra,*466 U.S. at pp.688, 693.) The "reasonable probability" standard merely requires defendants to show "a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

However, the standard applied in cases involving "state interference" with counsel's performance is "a different matter." (*Perry v. Leeke, supra*, 488 U.S. at p. 279.) State interference with defense counsel's ability to represent a criminal defendant "is not subject to the kind of prejudice analysis that is appropriate in determining whether the

quality of a lawyer's performance itself has been constitutionally ineffective." (*Id.* at p. 280.) Thus, in cases involving state interference, the Court generally has not applied a harmless error test. (See, e.g., *Geders v. United States, supra*, 425 U.S. 80; *Herring v. New York, supra*, 422 U.S. 853.) As the Eleventh Circuit Court of Appeals has concluded, the *Strickland* harmless error standard does not "apply to situations where the state, the court, or the criminal justice system denies a defendant the effective assistance of counsel." (*Crutchfield v. Wainwright* (11th Cir. 1986) 803 F.2d 1103, 1108.) Judge Trott has explained the rationale behind this distinction, noting that when a trial court interferes with the defendant's right to counsel under the Sixth Amendment, "[t]he record is too tainted" to permit harmless error analysis. (*Sheppard v. Rees, supra*, 909 F.2d at 1237.)

Although these cases adopt a standard of reversal per se for state-induced ineffective assistance of counsel claims, the record here provides ample grounds to show that the failure to appoint second counsel actually denied defendant the adversarial testing of the charges contemplated required by the Sixth Amendment. It is abundantly clear that counsel was unprepared for both the guilt and penalty phases of the

trial, and failed to undertake even a rudimentary investigation of the case. The defense witnesses were unprepared, counsel went to trial without knowledge of critical facts, and there was not a semblance of the social history background investigation that is constitutionally required in a death penalty case. Under these circumstances, defendant was denied due process under the Fourteenth Amendment, the right to counsel under the Sixth Amendment, and a reliable guilt and penalty phase determination under the Eighth Amendment. Reversal of the both the conviction and sentence is required.

VI. THE TRIAL COURT DENIED DEFENDANT HIS RIGHT TO SELF-REPRESENTATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Proceedings Below.

Upon the denial of his June 18, 1996, *Marsden* motion, defendant moved for leave to represent himself. Initially, defendant also sought "an assistant to prepare a motion for new trial, motion for reduction of sentence." (RT 4954.) The court warned defendant, "If you're going to represent yourself, the court is not going to appoint an assistant because by appointing an assistant is doing exactly [sic] what you wanted done in the beginning is to relieve Mr. Petilla on a *Marsden* motion and get another attorney appointed." (RT 4955.) Defendant persisted in his motion for self-representation: "No Your Honor. I'm not perceiving that as – what I was asking is to relieve Mr. Petilla, act on my own, but also, um, come forth – I'm allowed to have an assistant to prepare a motion for new trial and for –." (RT 4955.) The court once again denied the motion for an assistant to help in the motion for new trial. (RT 4955.)

The court then initiated an inquiry as to the substance of the new trial motion defendant would bring, if permitted to represent himself. (RT 4955.) Specifically, the court asked what new evidence defendant anticipated bringing to the court's attention in support of his motion. (RT 4955.) Defendant acknowledged that he did not presently have such new evidence, but maintained that if granted the continuance, "I can assure the court that, yes, there are still things that need to be done that could be presented to the court in fact or, yes, new evidence." (RT 4956.) The court also asked how defendant intended to argue the reduction of the death verdict, and for other potential grounds for the new trial motion. (RT 4957.) Defendant cited factors in mitigation such as his lack of a prior criminal record, his work history and possible testimony from character witnesses. (RT 4958.)

In the midst of this line of questioning, counsel informed the court, "Your Honor, I think that the only inquiry would be whether he's competent to act as his own attorney." (RT 4956.) The court then shifted the inquiry to defendant's educational background, noting that defendant had not graduated from high school and only recently achieved his GED, and characterizing defendant as a "slow learner"

based on the evidence adduced in the penalty phase. (RT 4956-4957.)

The court denied the motion:

> [T]he court feels that you are not adequate to represent yourself, that is, the evidence during the course of the trial was that you did not finish high school, that – and that by itself is not the reason, but you were described as being a slow learner and that you had problems in school. And the court is not going to grant you a continuance in order for you to prepare to represent yourself. Therefore, the court is going to deny your motion to represent yourself.

(RT 4959.)

B. The Standard of Review.

The Sixth Amendment is singular among constitutional rights in that its express guaranty of the right to counsel implicitly guarantees its opposite – the right to refuse that assistance and to represent oneself. "[T]he Sixth Amendment right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.'" (*Faretta v. California* (1975) 422 U.S. 806, 814 (citing *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 279); see also *Adams v. Carroll*

(9th Cir. 1989) 875 F.2d 1441, 1443.) The Court has explained:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. . . . An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

(*Faretta v. California*, *supra*, 422 U.S. at pp. 820-821.)

Where a competent defendant unequivocally makes a knowing and intelligent waiver of counsel within a reasonable time before trial, a trial court has no choice but to grant the motion for self-representation. (*People v.* Dent (2003) 30 Cal.4th 213, 217.) *Faretta* error is reversible per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 fn. 8.) A competent but untimely waiver of counsel is committed to the sound

discretion of the trial court. (*People v. Windham* (1977) 19 Cal.3d 121, 124.)

C. The Trial Court Erred In Finding Defendant Was Not "Adequate" to Represent Himself.

The standard for evaluating a defendant's competence to waive the right to counsel is no higher than the standard of competence to stand trial. (*Godinez v. Moran* (1993) 509 U.S. 389, 400.) The court made no finding that defendant was incompetent under this standard; indeed, the court never reached the issue.

Instead, the court focused on defendant's education and prior legal background. Such factors are immaterial: whether or not a defendant seeking self-representation has technical knowledge of the applicable law, or is as well equipped as counsel to advance his case, is irrelevant to the validity of the waiver. (*Faretta v. California, supra,* 422 U.S. at p. 835; *People v. Dent, supra,* 30 Cal.4th at p. 217.) However inartful in his answers, defendant was no less capable of a valid waiver than the appellant in *Adams v. Carroll, supra,* 875 F.2d

1441, who had only a ninth-grade education.

D. Defendant's Request Was Unequivocal.

Although defendant brought his *Faretta* motion as an alternative to his *Marsden* motion and indicated that his preference was to have appointed counsel other than his current attorney, Sixth Amendment jurisprudence does not prohibit an accused from attempting to thus meaningfully exercise his right to counsel before resorting to self-representation. Defendant's waiver was no more conditional than that of the defendant in *Faretta*, who "three times moved for the appointment of a lawyer other than the public defender" and whose stated reason for his motion for self-representation was his anticipated dissatisfaction with public defenders, whom he believed were already too burdened with cases to adequately represent him. (*Faretta v. California*, *supra*, 422 U.S. at p. 811, fn. 5.) Likewise, in *United States v. Hernandez* (9th Cir. 2000) 203 F.3d 614, the defendant asked that the court relieve his appointed counsel, and only after that request was denied did he seek to represent himself: "Well, I mean, if you can't change him, I'd like to

represent myself, with an interpreter, if you don't want to assign [another attorney]." (*Id.* at 617.) The court specifically distinguished a conditional request from an equivocal one which could properly be denied: "The fact that Hernandez's request may have been conditional – that is, the fact that he requested to represent himself only because the court was unwilling to grant his request for new counsel – is not evidence that the request was equivocal. (*Id.* at pp. 621-622; *People v. Dent, supra,* 30 Cal.4th at pp. 219-220; *People v. Michaels* (2002) 28 Cal.4th 486, 524 ("nothing equivocal in a request that counsel be removed and, if not removed, that the defendant wants to represent himself").)

Defendant's motion was no more equivocal than the motions at issue in *Adams v. Carroll, supra*, 875 F.2d 1441. In that case, the Ninth Circuit reversed the judgment of conviction where the trial court had denied a motion for self-representation likewise paired with a motion for substitute counsel:

> Here, Adams made his preference clear from the start: He wanted to represent himself if the only alternative was representation by Carroll. Although his two self-representation requests were sandwiched around a request for

> counsel, this was not evidence of vacillation. To the contrary, each of these requests stemmed from one consistent position: Adams first requested to represent himself when his relationship with Carroll broke down. He later requested counsel, but with the express qualification that he did not want Carroll. When Carroll was reappointed, Adams again asked to represent himself. Throughout the period before trial, Adams repeatedly indicated his desire to represent himself if the only alternative was the appointment of Carroll. While his requests no doubt were *conditional*, they were not equivocal.

(*Id.* at pp. 1444-1445 (footnote omitted); accord, *United States v. Robinson* (9th Cir. 1990) 913 F.2d 712, 714.)

Adams had emphasized to the trial court, "Just like I have said before, *I have never wanted to be pro per in this case*, I am not a lawyer, I am a ninth grade dropout, but I have enough knowledge about the law since I have been pro per to know what have [sic] been done in this case, all my rights have been violated. The lawyer wouldn't do anything, Mr. Carroll wouldn't do anything." (*Adams v. Carroll*, *supra*, 875 F.2d at p. 1442 (emphasis added).) The defendant here was no more equivocal in his motion for self-representation. Whether or not the defendant had the legal knowledge to effectively represent himself, his

efforts to persuade the court that he did indicated that his intention to do so was genuine and firmly held.

In addition to the defendant's manner of invoking the right of self-representation, the response of the trial court and of counsel are also significant in determining whether the request was equivocal when made. (*United States v. Hernandez*, *supra*, 203 F.3d at p. 621 (citing *Reese v. Nix* (8th Cir. 1991) 942 F.2d 1276, 1280-82.) As in *Hernandez*, the trial court's response to defendant's request strongly supports the conclusion that it was unequivocal. The court acknowledged the unambiguous character of the request by quizzing defendant as to his plans for conducting the defense, and as to the learning difficulties testified to earlier during the defense case at penalty phase. Trial counsel likewise understood defendant's request to be unequivocal. Not only had he himself suggested in the April 3 *Marsden* hearing that defendant move to represent himself, but on this occasion he urged the court to focus its inquiry on the lesser standard of competence rather than defendant's legal bases for his anticipated motions.

It is true that California courts have disapproved what has been termed "the *Faretta* game," in which a defendant "juggl[es] his *Faretta*

rights with his right to counsel interspersed with *Marsden* motions" in a demonstrably calculated attempt to delay the trial proceedings. (*People v. Williams* (1990) 220 Cal.App.3d 1165, 1170.) However, no such gamesmanship is evident here.

In *People v. Williams*, the defendant had initially retained counsel, then successfully sought to proceed pro se. He obtained numerous continuances of the trial date. Upon the commencement of trial, he relinquished his pro se status and the case was continued first for the appointment of counsel and then for defense preparation, and then for substitution of counsel (due to current counsel's medical condition). After substitution of counsel and on the day of trial, defendant brought a *Marsden* motion and upon its denial said he was "forced" to bring a *Faretta* motion. (*Ibid.*; see also *People v. Marshall* (1997) 15 Cal.4th 1 (upholding denial of *Faretta* motion brought on day of trial where (1) trial court found motion to be part of ruse by defendant to secure dismissal of public defender only to abandon pro se status in order to have one Ray Newman ultimately appointed as counsel, (2) defendant had previously obtained and then relinquished pro se status, (3) defendant's motion was brought as means to forestall an imminent court

order that he furnish blood and saliva samples, (4) defendant was believed to be faking psychiatric symptoms for purpose of competency hearing, and (5) defendant in making the request stated that if he was going to die, he would die on his own terms and therefore wanted to dispense with counsel).)

In such a case, the *Faretta* motion is properly considered equivocal because the record as a whole indicates that defendant's ultimate purpose and intent was to delay the proceeding rather than to actually represent himself.

Here, however, there is no such evidence of bad faith. Defendant's responses to the court's questioning demonstrated that he was attempting in good faith to engage in the preparation of his defense, with or without the assistance of counsel.

E. Defendant's Request Was Not Untimely Under The Circumstances.

This Court has held that the timeliness requirement "should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice." (*People v. Windham*, supra, 19 Cal.3d at p. 128, fn. 5 (emphasis in original).) That a defendant moving for self-representation would require a continuance of unspecified duration to prepare his defense does not, without more, render a motion untimely. (*People v. White* (1992) 9 Cal.App.4th 1062.) Although the necessity of a continuance may be considered as circumstantial evidence of improper purpose, "[t]he inquiry, however, does not stop there. The court must also examine the events preceding the motion, to determine whether they are consistent with a good faith assertion of the *Faretta* right and whether the defendant could reasonably be expected to have made the motion at an earlier time." (*Fritz v. Spalding* (9th Cir. 1982) 683 F.2d

782, 784-785.) A trial court's "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." (*Morris v. Slappy* (1983) 461 U.S. 1, 11-12, citation omitted.)

A motion for self-representation brought after the commencement of trial should be granted if the totality of the circumstances warrant such a finding: "When the lateness of the request and even the necessity of a continuance can be reasonably justified, the request should be granted." (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.) The "reasonable time" requirement imposed by California courts is not a bright-line standard; rather, in determining whether the requirement has been satisfied, the court looks to the defendant's purpose. (*Id.* at p. 128, fn. 5 ("We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice").)

The federal rule "differs little as a practical matter from the standard we set out in *Windham*, *supra*, 19 Cal.3d 121, except that we place the burden on the defendant to explain his delay when he makes

the motion as late as defendant did here. (*People v. Burton* (1989) 48 Cal.3d 843, 845.) A request for self-representation made after the commencement of trial may be timely under the circumstances, and denial of the request may constitute reversible error despite the relatively late stage of the proceedings. (See, e.g., *People v. Tyner* (1977) 76 Cal.App.3d 352.)

In the present case, defendant's request to represent himself came after he had been convicted and sentenced to death. By this time, the court was well-aware that defendant's appointed counsel had not been equal to the task of defending a man accused of a capital crime. As noted above, the trial court judge had personal knowledge that defense counsel's performance fell below the minimum standards of effective assistance of counsel guaranteed by the Constitution. The trial court knew that counsel had not interviewed penalty phase witnesses, had presented only minimal mitigation evidence, had failed to ask for a hearing before Donna Larsen's testimony to decide the admissibility of the impeachment evidence, had failed to use (or even consult a tire tread expert), had failed to adequately prepare his expert, Dr. Terrell, for cross-examination, and had made a belated request for DNA testing.

Surely this was enough to present a "colorable claim" of the inadequacy of counsel, sufficient to warrant the appointment of new counsel, and certainly sufficient for the court to order a short delay in the post-trial proceedings to allow defendant the final opportunity to present his case to the court.

The motion for the two-week continuance was brought in good faith. There is no record here of a defendant seeking to delay the proceedings solely for the purpose of delay. And, with the guilt and penalty trials having been concluded, there would have been no inconvenience or other adverse effect upon the jury or witnesses, and no other participants in the proceedings could legitimately complain of undue delay, given that the six-count, multiple-victim case had proceeded from information to trial in a few months. In view of these circumstances, defendant's motion was not untimely.

The court erred in denying the *Faretta* motion.

VII. BY PERMITTING EXTRINSIC EVIDENCE AND CROSS-EXAMINATION REGARDING BAD CHARACTER EVIDENCE AND DEFENDANT'S PRIOR UNCHARGED ACTS, THE TRIAL COURT DENIED DEFENDANT A FAIR TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

A. The Proceedings Below.

1. Testimony of Marcus Gray.

Gray testified that he was the officer who supervised the October 18, 1995 search by Fresno police of defendant's residence. (RT 1855.) Overruling a defense objection as to relevance, the court permitted Gray to describe a video titled "Pro Sniper" which police found in the residence, and which contained instructions on sniper work and gun positioning. (RT 1860.) Gray went on testify that police also found issues of Soldier of Fortune magazine and other gun magazines. (RT 1865.) Body armor, ski masks and military clothing were found in defendant's room. (RT 1864.) In the garage were a variety of rifles and shotguns, in addition to a number of handguns of different caliber. (RT

1867, 1866.) Gray further testified that there was a radio scanner and an obituary page from the September 8, 1995 edition of the Fresno Bee in the living room. (RT 1861.)[13] Gray also noted that police found pornographic magazines, video tapes and material for ordering pornography, as well as information regarding mail-order brides. (RT 1865; see exhibit 60A-Z.)

2. The Direct Examination of Dr. Terrell.

Outside the presence of the jury, the prosecution objected under Evidence Code section 352 to the proffered testimony of psychiatrist Howard Terrell that the perpetrator of the charged crimes was likely a sociopath and, based on his examination, defendant was not a sociopath. (RT 2779.) The court conducted a hearing pursuant to Evidence Code section 402, at which Dr. Terrell testified that the types of crimes charged were typically the work of sociopaths, and that defendant was neither a sociopath nor insane. (RT 2779.) As Dr.

[13] Nearly one month after the Kachman attempt and 10 days prior to the Tucker homicide.

Terrell had previously testified as an expert for the prosecutor on prior occasions, his qualifications went unchallenged. (RT 2962.)

The prosecution objected to Terrell's testimony. (RT 2954.) The court overruled the objection. The court held that an expert opinion that defendant was not disposed to commit sex offenses was admissible under Evidence Code section 1102, under *People v. Stoll* (1989) 49 Cal.3d 1136 and *People v. Jones* (1952) 42 Cal.2d 219. (RT 2955.) The prosecutor then inquired if he could cross-examine Terrell before the jury as he had in the 402 hearing. (RT 2956.) The court ruled, "if you had a basis for the questions that you ask, the Court is going to allow you to ask those questions." (RT 2956.)

Testifying before the jury, Dr. Terrell described his evaluation of defendant as based upon a post-arrest meeting with defendant in jail and upon police reports provided by counsel. In defendant, Dr. Terrell "found a man who showed no evidence that I could see of mental disorder, either in my examination of him or my review of the documents that I have available." (RT 2967.) Terrell observed no evidence of psychosis, schizophrenia, manic depression, drug addiction or personality disorders, or of less obvious disorders such as antisocial

personality disorder or sadism. (RT 2968.)

Terrell testified that "[f]or most murder[er]s it's a one-time thing," citing as examples crimes of passion, mercy killings, and drug- or alcohol-fueled killings, whereas "[t]he person who commits more than one murder is a different individual in general than the person who just does one out of passion or out of drunkenness or what have you." (RT 2969-2970.) In evaluating defendant and the reports of the charged offenses, Terrell observed no indication of such motivations. (RT 2970.)

In contrast to this profile of a one-time killer, Terrell described the different motivations and profile of a serial killer: "One type of murder we see is the sadist or even the sexual sadist. This is the people who love to inflict pain suffered by another individual. They love to see other people cry. They love to see other people in misery. They love to see other people die. The sexual sadist tends to like to do that while having sex. They like to beat the other person, rape that person, kill that person afterwards." (RT 2970.)

Terrell also cited the example of the anti-social personality as another type of serial killer, which he characterized as "chronic career

criminals since the time they're children," such as criminal street gang members, who kill to eliminate witnesses to their crimes. (RT 2971, 2972.) Hired hit men and psychotic murderers "who hear voices talking to them . . . telling them they need to save the world by killing" and who kill as the result of a severe mental disorder were further profiles of serial killers. (RT 2972-2973.)

Terrell testified that his examination of defendant indicated no evidence of any mental disorder, anti-social personality disorder, or sadism. (RT 2967, 2968.) He further saw no evidence of gang affiliation, murder for hire, or substance addiction that would fit the profiles he described. (RT 2972, 2970-2971, 2974.)

3. The Cross-Examination of Dr. Terrell.

On cross-examination, the prosecution inquired whether Dr. Terrell was aware of a number of specific instances of conduct by defendant (e.g., reportedly disliked prostitutes, had sex with girlfriends in hotels and said this was what prostitutes do, showed photographs of people he had allegedly killed, engaged in rough sex, and a number of

other instances). (RT 2945-2951.) Further, the prosecutor described a broad range of hearsay reports not in evidence, which Dr. Terrell had not reviewed. The prosecution described Dana Daggs's rape allegation and asked if Terrell had seen it, whereupon defense counsel stated for the record, "we'll represent to the Court it's not among those reports. Those reports are only what's charged in this case." (RT 2976.) Terrell confirmed this. (RT 2977.) The prosecutor persisted, asking about a second report by Dana Daggs to the effect that defendant "disliked" prostitutes. Again, defense counsel stated, "we'll represent to the Court that none of those reports are submitted." (RT 2977.)

Neither the prosecutor nor the judge responded to the defense offer to stipulate. (RT 2977.) The prosecutor went on to inquire about and describe additional hearsay accounts of uncharged acts and behaviors attributed to defendant. These included the following:

Reports relating to guns:

> Were you provided reports of any observation that the defendant would carry in a duffel bag multiple guns in vehicles that he would drive?" (RT 2978; see also, 2983.)

Reports relating to pornography and non-criminal sexual behavior:

> Were you given any information that the defendant would – had

contacted pornographic magazine and placed his name or advertised his name or registered himself for sexual conduct in the magazine? (RT 2980.)

Were you given any information that the defendant would place a pornographic magazine above the head of Denise Hamblen when he would have sex with her? (RT 2980.)

Were you provided reports of any statements that the defendant would bring towels with him to motels or hotels to place beneath the place where he would have sex with females? (RT 2978.)

Reports characterizing defendant as "weird":

Were you given a report of a statement of any witness who reported that the defendant seemed a little strange and weird and would do whatever he wanted to and didn't care what other people thought about him? (RT 2982.)

Reports relating to defendant's attitudes about women:

Were you given any report of statements by a witness that observed that the defendant always talked down about women? (RT 2982.)

Were you given any report of any statement of any witness that when the witness declined a date with the defendant, that he called her a bitch and – and several other things? (RT 2982.)

Were you given any report of any statement by the defendant that he had no respect for women because of his mother? (RT 2982.)

Reports relating to defendant's lack of openness with his family about his personal life:

Were you provided any information of statements by this individual, Dana Daggs, who knew the defendant for a number of

years, that he was different. He led two different lives, one when around his family as compared to when he was not around his family? (RT 2979.)

Were you provided any information by way of report that a female companion of the defendant's named Denise Hamblen reported that she would – that the defendant would have her hide when the defendant's mother would come to visit at the place where they lived? (RT 2980.)

Reports that defendant had expressed disapproval of prostitutes:

Were you provided a police report from 1995 of a statement of an individual named Dana Daggs in which she reported the defendant making statements about his dislike of prostitutes? (RT 2977.)

Were you provided any information regarding statements made by the defendant regarding prostitutes that they were dirty, sleazy, and cheap? (RT 2977.)

Were you provided any report which informed you of statements by the defendant about prostitutes that someone should remove them from the earth or from this world? (RT 2977.)

Reports suggesting that defendant was interested in prostitutes:

Were you provided any report of conduct by the defendant where with a -- that involved taking a female companion to hotels for sex and commenting that this is what prostitutes do? (RT 2977.)

Were you informed of any statements regarding the defendant driving in an area where prostitutes would frequent, for example, Ashlan and Blackstone, and pointing them out and having a female companion, that she – or comparing her to the prostitutes? (RT 2979.)

Reports of contacts involving prostitutes:

Were you given provided any report that the defendant on October 20th of 1995 was identified by a prostitute not a victim in this case as a male who had approached her on at least 2 occasions soliciting sex from her? (RT 2980.)

Were you provided any information that – that prostitute April Chavez did not have a date with him because of his insistence or his attitude which caused her to decide otherwise? (RT 2980.)

Were you provided any information that this prostitute reported the defendant as driving a small white pickup? (RT 2980-2981.)

Reports relating to occasions of alcohol consumption or intoxication:

Were you given any report that in any way informed you of the defendant's use of intoxicants? (RT 2981.)

Were you given any report that reported the defendant to consume alcoholic beverages to the point of becoming intoxicated? (RT 2981.)

Were you given any report of any statement of observation of the defendant to even be present when controlled substances were used? (RT 2981-2982.)

Reports relating to forcible sex without weapons:

Among the police reports that were provided to you, was there a police report provided to you from 1992 wherein a female by the name of Dana Daggs reported a forcible rape by the defendant? (RT 2976.)

Were you provided with any reports of statements of the defendant hitting or grabbing roughly female companions when he would have sex? (RT 2978.)

Reports of unsubstantiated boasting of killings by defendant:

> Were you provided any information that the defendant would show photographs of people that, both men and females, he claimed to have killed? (RT 2978.)

4. Prosecution Rebuttal Evidence of Specific Incidents.

Before resting its case, the defense requested a 402 hearing as to evidence offered by the prosecution to rebut the testimony of Dr. Terrell, and objected under Evidence Code section 352 to the testimony of April Chavez, Dana Daggs, Margie Galloway, Sherry Saar, Christina Bills, Justus Swigert and Denise Hamblen. (RT 3801.) Defense counsel further argued that the prosecution's cross-examination of Dr. Terrell had exceeded the scope of the direct examination. (RT 3802.)

The prosecutor maintained that the defense had opened the door to both the cross-examination and to extrinsic evidence of those specific acts on rebuttal. (RT 3803.) The court overruled the defense objection and denied the request for a further hearing on the proffered rebuttal evidence. (RT 3805.) The prosecution proceeded to present these witnesses, and others to testify to specific prior acts, bad character

evidence, and attitudes attributed to the defendant.

The court erred. The court failed to assess correctly the relevance of this evidence and failed to conduct any analysis under Evidence Code sections 1101-1102. The failure to perform such analysis is more than an abuse of discretion. And, to the extent the court did perform such analysis, the admission of the evidence was an abuse of discretion.

a. Drug and Alcohol Use.

Margie Galloway testified that defendant was frequently at her home during the period from 1992 to 1994, as the friend of her son, Justus Swigert. (RT 3827.) Galloway testified that she had seen defendant drink beer, and had seen him drunk on two occasions. (RT 3829.)

Justus Swigert testified that he was a friend of defendant and personally observed defendant drink beer and that defendant was once so drunk that he spent the night with Justus. (RT 3866.) Swigert also testified that defendant told him he had used cocaine. (RT 3867.)

Christina Bills testified that she had been present in defendant's apartment when beer, wine coolers and marijuana were being consumed. (RT 3883.) She was unable to recall whether defendant personally used any marijuana. (RT 3887.)

b. Possession of Firearms.

Galloway testified that defendant had carried a gym bag with guns

in it. (RT 3829.) She indicated on cross-examination that she remained angry with defendant because her son Justus had purchased a stolen gun from defendant, which subsequently led to police involvement. (RT 3843.)

Swigert stated that defendant usually had a gun in his possession, and that defendant had a rifle, shotgun and handguns in his apartment. (RT 3866, 3868.)

Bills also saw defendant in possession of a bag containing guns on occasion. (RT 3884.) Bills opined that defendant was a liar and cited as an example defendant's claim that he was meeting a Mafioso he knew and that "the less she knew, the better." (RT 3884.)

c. Non-Criminal Behavior Regarding Specific Women.

Sherry Saar testified that defendant once became upset when she asked about his mother, telling her that he did not like his mother. (RT 3848-3849.) Saar and defendant dated at the end of 1991 and beginning of 1992. (RT 3857.) Saar complained that defendant had called her a

"bitch" once, when she turned down his invitation for a date. (RT 3850.)

Bills also testified that defendant once said he did not respect his mother, and that she felt defendant was bossy and disrespectful toward Denise Hamblen. (RT 3885.) Bills testified that defendant had said that ice cubes were good sexual toys. (RT 3885.)

Dana Daggs testified that she had a sexual relationship with defendant, whom she described as insufficiently sensitive to her wishes during sex. (RT 3942.) When they had sex in motel rooms, defendant would lay towels down so as to leave no stains; after sex, they would shower. Before checking out of the motel, defendant would wipe the walls. (RT 3946.)

Denise Hamblen testified that had been defendant's live-in girlfriend for an indeterminate period of time, ranging from a month and a half to up to two years. (RT 3897, 3920, 3921.) Hamblen furnished an account of defendant's sexual habits, testifying that defendant soaped his penis before sex as an attempt at birth control, and that he disregarded her objection that the soap caused a burning sensation. (RT 3903.) Hamblen further testified that defendant put his penis in her

mouth, and put posters of naked women over his headboard. (RT 3904-3905.) Hamblen also stated that defendant advertised himself in a pornographic magazine, and that she was present when someone called defendant in response to the ad. (RT 3905.)

Hamblen detailed other complaints about her relationship with defendant. When her parents kicked her out of their home, defendant agreed to take her in, but told her he could not support them both financially on his earnings from Orchard Supply Hardware, and told her she too would have to find a job. (RT 3913-3914, 3912.) When she was employed, defendant deposited her paycheck into his bank account. (RT 3906.) Defendant went out socially with others but did not allow Hamblen to accompany them. Defendant also would not allow Hamblen to answer the phone or the door of his apartment. (RT 3907.) Hamblen once sought medical attention despite defendant's objections regarding the possible cost, and had to hitchhike home from the hospital. (RT 3910.) On her return, defendant asked her about her medicine, then after consulting his mother on the subject, threw out the medicine saying it was not good for her. (RT 3911.)

d. Attitudes Toward Prostitutes and "Loose" Women.

Daggs described being with defendant when he saw prostitutes on the public streets; defendant commented on these occasions that prostitutes were dirty and that "they shouldn't be here; someone should remove them." (RT 3943.)

Galloway testified that defendant disliked girls who were "loose," "whores," or "sluts," on the ground that they were "users." (RT 3830.)

e. Solicitation of Prostitutes While Driving White Truck.

The prosecution called Florence (a.k.a. April) Chavez, a prostitute who testified that she recognized defendant as a man who had solicited her services on two occasions between July and September, 1995. (RT 3814.) On both occasions, she recalls that it was between 12 and 1 a.m., and that defendant was driving a small white truck. She testified that she declined his offer because she felt he was too persistent, and that she felt funny. (RT 3813-3814.)

The prosecution also called Charles Mart, a Fresno police officer who confirmed that on October 20, 1995, Chavez identified defendant from a photo lineup. (RT 3820.) Mart testified that he contacted Chavez in regards to a sodomy report by Stephanie Perez, a transvestite who reported having been assaulted by a man in a white pickup truck. (RT 3823.)

f. Uncharged Criminal Acts Not Attributable To Defendant.

Dennis Montejano, a Fresno police officer, testified that on November 28, 1991, he responded to a report by Dana Daggs of an attempted arson. (RT 3936.) On the apartment balcony, Montejano found a beer can holding what he characterized as a burned-out wick. (RT 3938.) Montejano did not identify any evidence linking defendant to the beer can, nor did he indicate whether examination of the beer can or wick suggested they had been used together as an incendiary device.

g. Physical Force Against Sexual Partners.

Hamblen testified that defendant was inconsiderate the first time the two had sex, that he was very forceful despite her being a virgin, and that he did not stop when she asked. Hamblen said defendant put his hand over her mouth to silence her. (RT 3898.) Hamblen also described another incident in which defendant had sex with her on the bathroom floor over her objection. (RT 3902.) Hamblen testified that on a separate occasion defendant hit her once with his hand. (RT 3908.)

Daggs testified that at one point during her relationship with defendant, while she was homeless, defendant invited her to come use his shower. She accepted, only to have defendant join her in the shower and force himself on her. (RT 3953-3954.) She reported this to the police several hours later. (RT 3958.) She never received a response from police to her many follow-up inquiries. (RT 3974.)

5. Jury Instructions Relating To Character Evidence.

The court gave the jury two instructions on character evidence, CALJIC No. 2.40 and CALJIC No. 2.42. The former told the jury, in part, that "[g]ood character for the traits involved in the commission of the crime[s] charged may be sufficient by itself to raise a reasonable doubt as to the guilt of a defendant. It may be reasoned that a person of good character as to such traits would not be likely to commit the crime[s] of which the defendant is charged. However, evidence of good character for such traits may be refuted or rebutted by evidence of bad character for these traits." (CT 568.) The latter instruction, CALJIC No. 2.42, told the jury that questions on cross-examination regarding reports of bad character "may be considered only for the purpose of determining the weight to be given to the opinion of the witness or to [his] [her] testimony as to the good reputation of the defendant." (CT 569.)

B. Standard of Review.

"Relevant evidence" means testimony or physical objects, including evidence bearing on the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of an action. (Evid. Code, § 210; *People v. Scheid* (1997) 16 Cal.4th 1.) A court has no discretion to admit irrelevant evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) Evidence that produces only speculative inferences is irrelevant. (*People v. De La Plane* (1979) 88 Cal.App.3d 223, 242.) Whether or not evidence is relevant is a decision within the trial court's discretion. (*People v. Von Villas* (1992) 10 Cal.App.4th 201, 249.) However, a trial court abuses its discretion in admitting evidence when it can be shown under all the circumstances that it exceeded the bounds of reason. (*People v. De Jesus* (1995) 38 Cal.App.4th 1, 32.)

The admission of bad character evidence may rise to the level of a due process violation. In *Michelson v. United States* (1948) 335 U.S. 469, the Supreme Court explained:

> Courts that follow the common-law tradition almost

> unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(*Id.*, at pp. 475-476, fns. omitted.)

At least two courts have held admission of such evidence to violate federal due process. In *Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337, two unrelated counts were joined in one trial. One count was murder; the other was possession of a firearm by a convicted felon. As to the lesser, felon-in-possession count, the court admitted evidence of the defendant's prior conviction. However, nothing limited the jury's consideration of that evidence to that particular offense. The

federal Court of Appeal on collateral review held that admission of the prior improperly allowed the jury to convict the defendant on the murder count based at least in part on inferences likely drawn from the prior bad act. The court found that this violated due process: "We agree with the district court that the evidence admitted in Panzavecchia's state court trial was prejudicial and in violation of the due process clause of the fourteenth amendment. We therefore affirm the order of the district court." (*Id.*, at p. 338.)

Likewise, in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the Ninth Circuit found a due process violation in the use of character evidence to prove disposition. The court reasoned:

> Evidence is considered irrelevant if it fails to make any fact of consequence more or less probable. Irrelevant evidence may merely be a waste of time, may confuse the jury, or may cause serious prejudice to the defense. . . . The contested evidence in this case can loosely be termed "other acts" evidence. "Other acts" evidence may be relevant to a fact of consequence, or it may be relevant only insofar as it proves the character of the defendant in order to show action in conformity therewith, in which case it is a form of character evidence.

(*Id.* at p. 1380.)

Such "character evidence is not only impermissible under the

theory of evidence codified in the California rules of evidence . . . but is contrary to firmly established principles of Anglo-American jurisprudence." (*Ibid.*, citations omitted.)

Reversal is mandated where the reviewing court is "unable to conclude beyond a reasonable doubt that the [erroneously admitted character evidence] . . . did not contribute to the jury's conviction." (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1385, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

C. The Non-Criminal Specific Acts Evidence Had No Relevance To Any Material Fact In Dispute.

The court below failed to make any analysis of the relevance of the evidence introduced by the prosecutor. Specifically, defendant's possession of pornography, mail-order bride materials, and gun-culture magazines and paraphernalia was not relevant to any issue at trial. It did not reflect upon character, but prejudiced defendant by making him appear deviant. The Ninth Circuit's decision in *Guam v. Shymanovitz* (1998) 157 F.3d 1154 is instructive on the relevance of such evidence.

In *Shymanovitz*, the court reversed the defendant's conviction for unlawful sexual activity with minors based on the wrongful admission into evidence of pornography and sexual paraphernalia that the average person could view as "deviant." The trial court in that case had permitted a police officer, Winnie Blas, to describe the materials in detail and admitted certain of the items directly into evidence. Blas testified that at Shymanovitz' house:

> She seized, among other things, the following: condoms, a box of surgical gloves, a tube of K-Y Jelly, some children's underwear, a calendar, and six sexually-explicit magazines. Of the six magazines, four were entitled "Stroke"; one was entitled "After Midnight"; and one was entitled "Playboy." Officer Blas testified in great detail, over defense counsel's objections, as to the contents of the four issues of "Stroke"; she told the jury that they contained photos of men masturbating; performing auto-fellatio; ejaculating; using sex toys; wearing "leather equipment"; paddling one another; and having oral and anal sex. She also described two articles from the "Stroke" magazines, which had been the subject of the motion in limine. The articles consisted of presumably fictional tales and described two couples engaging in sexual conduct: the first, a father and son; the second, a priest and a young boy.

(*Id.* at p. 1155.)

The reviewing court based its finding of reversible error on the irrelevance of the evidence, not merely on its unduly prejudicial

effect:

> The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy . . . Specifically, in this case, neither the defendant's possession of the "Stroke" magazines, nor of any of the articles contained therein, was probative of whether the touching of the alleged victims' genitals was intentional or whether the touching actually was or could be construed as being for sexual purposes. At the very most, Shymanovitz's possession of the sexually-explicit magazines tended to show that he had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys, and not that he actually engaged in, or even had a propensity to engage in, any sexual conduct of any kind.

(*Guam v. Shymanovitz*, *supra*, 157 F. 3d 1154, 1158, citation omitted.)

In the present case, the issue was the identity of the killer, not the mens rea with which he acted. Defendant's interest in pornography was wholly irrelevant to the issues in dispute because defendant consistently maintained that he was not the individual who had targeted the six prostitute victims; he never claimed he knew the victims but had no sexual interest in them.

Nor was there evidence that the pornography in defendant's possession suggested a transgressive, deviant, criminal fantasist or even

distinctive sexual interest on his part. More generic than the man-boy fiction in Shymanovitz' possession, defendant's magazines apparently bore no relation to the elements or even the bare facts of the crimes alleged: nothing in the record suggests that the pornography depicted violence, let alone gun violence, against women or prostitutes, or that such acts were suggested, described or depicted in the Soldier of Fortune magazines.

Thus, the items seized or discovered in the search of defendant's residence, the anecdotal evidence of defendant's interest in pornography and of his sexual habits, attitudes and interests was improperly admitted, because they are not relevant. The prosecution was not permitted to offer such evidence on any speculative theory of relevance. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-683.)

The evidence of defendant's firearms collection and paramilitary paraphernalia were no more relevant than in *McKinney v. Rees*, *supra*, 993 F.2d 1378. In that case, the defendant was charged with the murder of his mother, whose throat was slit using a knife of indeterminate features. The trial court erroneously admitted evidence that Michael McKinney had possessed two double-edged, dagger-type knives, which

could have inflicted the type of wounds suffered by Mrs. McKinney. Prosecution witnesses further testified that:

> McKinney was proud of his "knife collection," that on occasion he strapped a knife to his body while wearing camouflage pants, and that he used a knife to scratch the words "Death is His" on the door to his closet in his dormitory room. The prosecutor questioned McKinney about his "fascination" with knives, and about whether he enjoyed looking at, talking about, and possessing knives.

(*Id.* at p. 1380.) However, nothing about the specific acts evidence meaningfully distinguished defendant from the general public or any of the potential alternative suspects. (*Ibid.*)

In the present case, defendant's fascination with guns and possession of guns other than the murder weapons is similarly irrelevant to show any fact of consequence.

Similarly, evidence that defendant placed his penis in his girlfriend's mouth, or that he possessed pornography, or that he expressed disapproval of prostitutes while nonetheless retaining an interest in prostitutes does not serve to distinguish him from significant numbers of men. Nor is the possession of mail-order bride materials or the act of advertising in a pornographic magazine uncommon.

As such, the use of this evidence against defendant in this trial

violated his First Amendment and Second Amendment rights under the United States Constitution. In *Delaware v. Dawson* (1992) 503 U.S. 159, the United States Supreme Court found in a capital sentencing case that the admission into evidence of the fact that the defendant was a member of the Aryan Brotherhood when such membership was irrelevant to any issue being decided in that proceeding violated his First Amendment right to association. (503 U.S. at p. 160.) Similarly, the First Amendment proscribes the use against the defendant of liaisons he is constitutionally entitled to pursue.

Evidence that defendant consumed alcohol or even controlled substances is also irrelevant and inadmissible. When intemperance is not in issue it is improper to introduce evidence of habitual alcohol consumption of the witness or defendant. (*Springer v. Reimers* (1970) 4 Cal.App.3d 325.) Improperly admitted evidence of a defendant's past drug use was found highly prejudicial and cause for reversal in *People v. Valentine* (1988) 207 Cal.App.3d 697, 705-706, even though a limiting instruction was given.

In the case of *People v. Stanley* (1962) 206 Cal.App.2d 795, 799 the court ruled that evidence of drinking habits was inadmissible even to

impeach a witness, finding that "[t]he authorities establish that drunkenness on occasions prior and subsequent to the one involved in the case does not amount to competent impeachment evidence." (*Id.* at p. 797.) The only admissible evidence would be whether the witness was drinking on the day in question. (*Id.* at p. 799.) Similarly, as to narcotics, their use remote in time from the offense at issue for impeachment purposes is not allowed. (*People v. Ashford* (1968) 265 Cal.App.2d 673, 679.) This so is because such remote in time use is not relevant to establish that a witness's perception, recollection or recall for the event in question was thereby affected, and a witness cannot be impeached by specific acts of misconduct other than a felony conviction. (*Id.,* at p. 679; *People v. Buono* (1961) 191 Cal.App.2d 203, 229-233; see also, *People v. Pargo* (1966) 241 Cal.App.2d 594.)

The testimony of Dr. Terrell did not render the evidence of alcohol intoxication relevant. The defense psychiatrist testified only that an addicted one-time killer, as distinct from serial murderers, might kill in a state of intoxication, and that his review had not indicated that such a factor was part of defendant's psychological profile. In fact, there was no evidence in the record suggesting that alcohol played any role in the

charged offenses, or that the perpetrator appeared to be intoxicated. The prosecution also failed to distinguish mere use from addiction or other pathological disorder, or alternatively, to demonstrate a cognizable connection between social consumption by a 19- or 20-year old male and evidence of mental disorder generally. Accordingly, the evidence of defendant's use gave rise to only speculative inferences, such that it was irrelevant to establish any material fact.

In sum, there was *nothing* in the "bad character" evidence presented by the prosecution that was relevant to Dr. Terrell's opinion.

D. Even If Relevant, Section 1102 Of The Evidence Code Prohibits The Admission Of Specific Acts To Prove Bad Character.

Evidence Code section 1102 provides, "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence

adduced by the defendant under subdivision (a)." Here, once defendant offered Dr. Terrell's opinion that defendant was not disposed to commit the charged crimes, section 1102 allowed the prosecution to present relevant "opinion . . . or reputation" evidence of defendant's bad character, but *not* to present specific instances of conduct. (*People v. Felix* (1999) 70 Cal.App.4th 426, 431.)

In *Felix*, the reviewing court deemed it error to admit evidence of defendant's prior conviction for possession of heroin and cocaine for sale to rebut defense character witnesses who testified that defendant used only heroin, to their knowledge:

> Section 1101 generally excludes evidence of character or a trait of character to prove a person's conduct on a specified occasion. (§ 1101, subd. (a).) Section 1102 creates an exception to this rule in criminal cases for evidence "in the form of an opinion or . . . reputation," but not specific instances of conduct. (See *People v. Wagner, supra*, 13 Cal. 3d at pp. 618-619.) Defendant's conviction for possessing heroin and cocaine for sale constituted evidence of a specific act.

(*Id.* at p. 431.)

The *Felix* court expressly rejected the prosecution's contention that California Constitution article I, section 28(d) effectively abrogated Section 1102's foundational limitation on the use of specific acts

evidence:

> The . . . 'Truth-in-Evidence' provision expressly preserves . . . section[] . . . 1103. The retention of section 1103 also means the retention of section 1101. . . . . An interpretation of the 'Truth-in-Evidence' provision that retains section 1103 but eliminates 1101 is contradictory. Section 1103 cannot exist as an exception to a nonexistent rule. . . . More importantly, section 1101 has survived because in 1986, after the electorate added article I, section 28(d) to the state Constitution, the Legislature reenacted that statute by a two-thirds vote in both the Assembly and Senate." . . . Thus, section 1101 is still viable and excludes relevant character evidence except as specified in it. One exception mentioned in section 1101 is "as provided in . . . Section[] 1102." (§ 1101, subd. (a).) Since section 1101 expressly refers to section 1102 as an exception to it, the latter statute also survives intact. Section 1102 only permits character evidence in the form of an opinion or reputation. By admitting defendant's prior conviction as rebuttal evidence under this section, the trial court erred.

(*People v. Felix*, *supra*, 70 Cal.App.4th at p. 432, quoting *People v. Perkins* (1984) 159 Cal.App.3d 646, 650.)

Here, the trial court totally failed to consider the mandates of Evidence Code sections 1101 and 1102 and permitted the wholesale admission of inadmissible evidence. Such wholesale failure to assess the evidence indicates the court filed to exercise its discretion.

Furthermore, the nature and scope of the character evidence offered by a defendant places corresponding limits on the permissible

nature and scope of the prosecution's rebuttal. "Such rebuttal evidence . . . must be specific and 'must relate directly to a particular incident or character trait defendant offers in his own behalf.'" (*People v. Raley* (1992) 2 Cal.4th 870, 912, quoting *People v. Bacigalupo* (1991) 1 Cal.4th 103, 141.) Even cross-examination of defense character witnesses must be scrupulously limited in scope.

In *People v. Eli* (1967) 66 Cal.2d 63, defendant's character witnesses testified to his good reputation for being a law-abiding citizen and a non-violent person. On cross-examination they were asked if they had heard of specific acts reportedly committed by defendant. They had not. (Id. at p. 77.) The Court held that at least two of the questions put to the witnesses were improper: whether the witnesses had heard (1) that the defendant had once forced his girl friend to watch him masturbate, or (2) that defendant had been involved in a plot to assault and rape a girl. An objection to the latter was sustained, "but the jury heard the query, one in a cumulative series designed to reflect upon defendant's reputation." (*Id.* at p. 79.) The Court recognized that "[t]he repulsive nature of the act, if indeed it occurred, is certain to affect opinion of the defendant. But the issue is reputation in the community,

and it is highly unlikely that a sex act committed in privacy would become a topic of general community comment unless legal action had resulted therefrom." (*Ibid.*) The Court held that it was the responsibility of the trial court to determine outside the presence of the jury whether there was an actual event that formed the basis of the questions, and moreover whether the event reported was such as "would probably result in some comment among acquaintances if not injury to defendant's reputation." (*Ibid.*, quoting *Michelson v. United States*, *supra*, 335 U.S. at p. 481.)

In the present case, the defendant offered character evidence more limited in scope than in *People v. Eli*, *supra* , 66 Cal.2d 63. The substance of Dr. Terrell's testimony was that defendant did not fit any recognized profile of a serial killer, not that defendant was a blameless, entirely non-violent person. Dr. Terrell testified that his opinion was based in part of the conclusion that defendant was not a chronic career criminal, not on any assumption that defendant had never committed a crime. He testified that defendant was not a sadist or sexual sadist, not that he believed defendant had never been violent. Yet at the 402 hearing the court failed to assess how the evidence proffered by the prosecution

related to Dr. Terrell's actual opinions.

Accordingly, the scope of cross-examination should have been limited to the actual evidentiary and diagnostic foundations of his opinion, absent evidence that the types of information the prosecution sought to admit would be relevant to the psychiatrist's opinion. Although the prosecution was free to argue that his review was so limited as to be meaningless, it was not permitted to use that limited review as a means of introducing extrinsic specific acts evidence not relevant to the review actually performed or the trait of character specifically at issue.

The scope of rebuttal evidence should have been similarly limited. The prosecution could have introduced an expert of its own to offer a contrary diagnostic opinion, or even evidence that defendant had a reputations for being a chronic career criminal, or for suffering psychotic delusions, or for sadism. It had no justification under section 1102, however, to introduce evidence of specific incidents or evidence suggesting merely generalized bad character.

E. The Prior Crimes Evidence Was Not Admissible Under Section 1101(b) Of The Evidence Code.

Evidence of other crimes is admissible only when it falls within an exception to the general rule of exclusion contained within subsection (b), which provides that nothing in subdivision (a)'s exclusion of propensity evidence "prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such act." (Evid. Code, ¶ 1101, subd. (b).) When such an exception is urged, its applicability must be "scrutinized with great care" and all doubts about its connection to the crime charged must be resolved in the accused's favor. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724 ("admission of other crimes evidence cannot be justified merely by asserting an admissible purpose"); see also, *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 136-137.) "Evidence of uncharged offenses is so prejudicial that its admission

requires extremely careful analysis. . . . Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have substantial probative value." (*People v. Balcom* (1994) 7 Cal.4th 414, 422 (quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) This evidence may be admitted only if it (1) tends logically, naturally and by reasonable inference to prove the issue on which it is offered; (2) is offered on a material issue that will ultimately prove to be disputed; and (3) is not merely cumulative with respect to other evidence that the prosecution may use to prove the same issue. (*Ibid.*)

To satisfy the requirement of materiality, the facts sought to be proved by other crimes evidence must be either ultimate facts in the proceedings, e.g., identity of the perpetrator, or an element of the offense such as intent, or intermediate facts "from which an ultimate fact may be presumed or inferred." (*People v. Thomas* (1987) 20 Cal.3d 457, 464.) "In ruling upon the admissibility of evidence of evidence of uncharged acts, therefore, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose."

(*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406.) Where, as here, the other crimes evidence establishes only propensity for misconduct, rather than any material fact at issue, it is inadmissible.

In the present case, the prior crimes evidence consisted of the allegations that defendant used strong-arm force to either initiate or continue intercourse with a girlfriend in an ongoing sexual relationship. In addition, the jury heard the prosecution claim to Dr. Terrell that there existed a report of defendant boasted of killing unidentified men and women. Testimony regarding the attempted arson and the assault on Stephanie Perez , though presented to the jury, did not link defendant to either of those acts by anything other than implication and was thus inadmissible.

1. The Prior Crimes Evidence Was Inadmissible To Show Identity Or Intent, Because It Was Insufficiently Similar To The Charged Offenses.

"Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged

crimes are *sufficiently similar to support a rational inference* of identity, common design or plan, or intent." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) In order to establish the existence of a common design or plan, while the plan itself need not be unusual or distinctive, there must nevertheless be common features between the charged and uncharged offenses that indicate the existence of a plan, and not merely a series of spontaneous acts. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394.) Further, to permit the introduction of evidence of uncharged offenses for the purpose of demonstrating a common design or plan by the defendant, the evidence of the uncharged alleged misconduct "must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Id.* at p. 423, fn. 2, quoting 2 Wigmore, *Evidence* (Chadbourn rev. ed. 1979) § 304, p. 249.)

In *People v. Harvey* (1984) 163 Cal.App.3d 90, for example, in a prosecution for first degree murder and attempted murder, the prosecution presented evidence that six months earlier, the defendant had committed an armed robbery. The evidence was apparently

presented to bolster the prosecution' s theory that the murder was committed while the defendant was attempting to rob the victim. The court of appeal ruled that such evidence should not have been admitted, despite several points of similarity in the two crimes; the court held that these were insufficient to yield a distinctive combination that would permit an inference of identity between the perpetrators of the two crimes. Here, in contrast to the allegations by Daggs and Hamblen, the charged offenses involved serious bodily injury, inflicted by means of a handgun, in anonymous encounters with prostitutes in a vehicle or outdoors. None of the survivors described physical force other than the use of the firearm. Thus, there is virtually no similarity between the charged and uncharged acts.

The *Ewoldt* court concluded that the degree of similarity between uncharged crimes and the current offense need not be so great where the evidence was offered on the issue of intent, rather than identity or common design. However, to be admissible for such purpose, the defendant's intent must actually be in issue. As in *People v. Balcom*, *supra*, 7 Cal.4th 414, intent is not a material issue in dispute in this case, as it is clear from the undisputed commission of the act that the intent of

the shooter was to kill. Moreover, even if intent to kill were disputed, none of the prior crimes evidence would be probative on this point: assuming the jury credited the accounts of Daggs and Hamblen, there still was no evidence that defendant harbored an intent to kill either woman.

"Where evidence of defendant's intent in a prior criminal episode is introduced to prove that he harbored a similar intent in the currently charged crime, the desired inference is only as strong as the crimes are similar." (*People v. Harvey*, *supra*, 163 Cal.App.3d at p. 104, citation omitted.) The prosecution in *People v. Harvey* had argued that in addition to identity, the prior offense was admissible to show the defendant's intent to rob the homicide victim, and that where evidence of a prior crime is introduced to prove intent as opposed to identity, it is not always necessary to show that the prior and current crimes were substantially similar. (*Ibid.*) The court rejected this contention, holding that while similarities between two offenses need not always be "signatorally distinctive" in such a case, as the number of shared marks decreases, the distinctiveness of the shared marks must increase in order for the evidence to be admissible. (*Id.* at pp. 100-101.) No such

similarity or distinctiveness of shared marks is present in the case at bar.

2. The Prior Crimes Share No Causal Nexus With The Charged Offenses That Would Be Relevant To Show Motive.

"Prior dissimilar crimes" may be relevant and, if substantially probative, admissible to show "the intermediate fact of motive." (*People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23.) However, this is permitted only because motive, for 1101(b) purposes, is strictly construed: "'Similarity of offenses [is] not necessary to establish this theory of relevance' for the evident reason that the motive for the charged crime arises simply from the commission of the prior offense. The existence of a motive requires a nexus between the prior crime and the current one, but such linkage is not dependent on comparison and weighing of the similar and dissimilar characteristics of the past and present crimes." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018 (citing *People v. Thompson*, *supra*, 27 Cal.3d 303, 319, fn. 23).) In *People v. Daniels* (1991) 52 Cal.3d 815, for example, evidence of

defendant's prior robbery was properly admitted in a prosecution alleging that defendant murdered the police officers whose actions to thwart that robbery rendered defendant a paraplegic. (*People v. Daniels*, *supra*, 52 Cal.3d 815.) The crux of the motive theory of admissibility is the causal relationship between the prior offense and the charged offense.

Conversely, in *People v. Scheer*, *supra*, 68 Cal.App.4th 1009, the court found that the trial court erred in admitting evidence that, on a prior occasion, the defendant had fled police following his failure to stop at a red light, where the current prosecution charged that defendant had fled civilian eyewitnesses after an injury-collision between his vehicle and another: although in both the current and prior offenses the defendant had demonstrated a consistent desire to avoid potential consequences of his poor driving, "commission of the prior . . . offense does not provide a motive, i.e., incentive for appellant to commit the current crime." (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1020 (citing *People v. Daniels*, *supra*, 52 Cal.3d at p. 857 and *People v. De La Plane*, *supra*, 88 Cal.App.3d 223, 245-246.) Similarly in *People v. Bigelow* (1984) 37 Cal.3d 731, 747-749, the court deemed inadmissible evidence of prior

robberies, which had been introduced on the theory that defendants in an unrelated robbery-kidnap-murder prosecution were "motivated" by a desire to live off of other people's money.

In the present case, the charged offenses and uncharged prior acts might support an inference that defendant operated under a consistent desire for sex notwithstanding the conditions or objections interposed by his partner. However, the prior domestic incidents themselves, if true, furnished defendant with no incentive to commit the charged offenses. Accordingly, the prior crimes evidence does not meet the restrictive criteria for evidence of motive.

F. Any Impeachment Value Of Prior Crimes Evidence Was Substantially Outweighed By Its Undue Prejudice.

Not only is evidence of other crimes subjected to a high degree of scrutiny as to its relevance as to a material issue other than evil propensity, but it is further subject to the undue prejudice safeguard of Evidence Code section 352, which authorizes exclusion of otherwise

admissible evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352, subd. (b).) Consequently, even where relevant under a permissible 1101(b) theory, evidence of uncharged offenses must often be excluded because of its "inflammatory impact." (*People v. Alcala* (1984) 36 Cal.3d 604, 631.)

Assuming, arguendo, that the evidence was relevant in some manner, the court did not even consider that the limited probative value of the evidence was substantially outweighed by the undue prejudice to defendant. Although prior crimes of moral turpitude may be relevant to impeach the credibility of a witness, this Court has been careful to distinguish the issue of prejudice to a witness from the more delicate constitutional question of unfair prejudice to a testifying defendant. Permitting such impeachment of a witness, the Court noted: "This was not a case in which the prosecution sought to impeach an accused witness with evidence of her prior crimes. Hence, there was no danger that the prior crimes evidence would create unfair prejudice on the issue of guilt or innocence." (*People v. Wheeler* (1992) 4 Cal.4th 284, 297, fn.

9.)

In ruling on the admissibility of prior crimes evidence otherwise admissible to impeach a testifying defendant, the trial court must:

> [D]ischarge its statutory duty . . . by weighing the statement's potential for prejudice against its probative value and concluding that the latter was not 'substantially outweighed' by the former.
>
> Appellate courts have repeatedly said that trial courts must discharge that duty on the record so that appellate courts have "the record necessary for meaningful review of any ensuing claim of abuse of discretion; an additional reason is . . . to 'promote judicial deliberation before judicial action.'

(*People v. Lankford* (1989) 210 Cal.App.3d 227, 241, quoting *People* v. *Green* (1980) 27 Cal.3d 1, 24.) The court made no such record in this case.

The Supreme Court in *People v. Wheeler*, *supra*, 4 Cal.4th 284, recognized the particular problems that prior acts other than felony convictions present under section 352:

> When exercising its discretion under Evidence Code section 352, a court must always take into account, as applicable, those factors traditionally deemed pertinent in this area. But additional considerations may apply when evidence other than felony convictions is offered for impeachment. In general, a misdemeanor – or any other conduct not amounting to a felony – is a less forceful indicator of immoral character or dishonesty than is a

> felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation, which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.

(*Id.* at pp. 296-297, citations omitted.)

People v. Bittaker (1989) 48 Cal.3d 1046 illustrates the "problems of proof." In that case, the Court endorsed the trial court's decision to prohibit impeachment of the testifying victim with evidence that she had made false charges of sexual molestation against two other men:

> The value of the evidence as impeachment depends upon proof that the prior charges were false. This would in effect force the parties to present evidence concerning two long-past sexual incidents which never reached the point of formal charges. Such a proceeding would consume considerable time, and divert the attention of the jury from the case at hand.

(*Id.* at p. 1097.)

If the testifying witness denies the incident, the incident is relevant only if the opposing party can show that the incident in fact occurred. Absent an actual felony conviction, the opposing party must present live witnesses to prove the incident did in fact happen.

What happens then is a trial within a trial, on the collateral issue of whether the incident did happen, which is relevant only on the credibility of this witness.

The trial court in the present case appeared to give little or no consideration to these questions of proof and prejudice, summarily denying the defense objection pursuant to section 352, and denying its request for a hearing pursuant to section 402 outside the presence of the jury. (RT 3801-3805.) Accordingly, it failed to consider the strong likelihood that the jury would be inflamed by the allegations of Daggs and Hamblen, when the allegations themselves were lacking in corroboration, credibility and substantiation. Daggs' own brother attested to her lack of credibility and her reputation as a liar, and her allegations were rejected for prosecution by the District Attorney. Hamblen's own parents evicted her from their home for unspecified reasons, and Hamblen neither reported the alleged use of force nor otherwise acted upon it as significant. Accordingly, their probative value was minimal. But the prejudice was large. As noted in *People v. Eli*,

supra, 66 Cal.2d at 79, "the repulsive nature of the act, if indeed it occurred, is certain to affect opinion of the defendant."

G. The Erroneous Admission Of The Specific Acts Evidence Was Not Harmless Error Under *Watson* Or *Chapman*.

As in *Guam v. Shymanovitz*, *supra*, 157 F. 3d 1154, and *McKinney v. Rees, supra*, 993 F.2d 1378, the prejudicial effect of evidence of non-criminal possession of pornography, weapons other than the murder weapon, and assorted subculture paraphernalia suggested that defendant was sexually and socially deviant and therefore a probably violent sexual predator. That type of propensity inference was particularly harmful given the sexualized character of the killer's relationship with the shooting victims. The evidence of the defendant's alcohol consumption increased the likelihood that the jury would perceive defendant as a delinquent and therefore more likely to act on his deviant impulses. Against this background, the prior crimes evidence testified to by

Daggs and Hamblen would resonate more chillingly with the jury, despite the credibility problems afflicting both witnesses. The cumulative effect of the specific acts evidence was to portray defendant as socially deviant and transgressive, and in the case of the prior crimes evidence, sexually violent and assaultive, such that the jury was likely to be inflamed against the defendant, but also to conclude that defendant had a disposition to delinquency, at best, if not generalized violence and sexual sadism, at worst.

The prosecution compounded this prejudicial effect by explicitly linking it to Dr. Terrell's expert testimony without establishing any scientific or clinical foundation for the specific acts' relevance to the psychiatrist's opinion. By linking the specific acts evidence to Dr. Terrell's testimony, the prosecution sought to vest it with scientific legitimacy; but by refraining from asking whether such prior acts would be relevant to his psychiatric opinion, the prosecution implicitly acknowledged the lack of such relevance. The prosecution instead presented evidence of specific acts calculated to suggest not the existence of a mental disorder or to otherwise counter the narrowly tailored conclusions of the

expert, but rather a speculative propensity for behavior the jury would find "weird," in the prosecutor's formulation. (RT 2982.)

Moreover, in previewing the evidence through cross-examination of Dr. Terrell, the prosecution exaggerated and mischaracterized the specific acts evidence to come. These distortions of the specific acts evidence in the cross-examination left the jury with the inference that defendant had in fact boasted of killing others, that he had expressed a desire that prostitutes be removed "from this earth" rather than from a specific public place, and that his fastidiousness in motel rooms was motivated by a guilty impulse to destroy physical evidence.

That defendant might disapprove of prostitutes suggested nothing that would distinguish him from, for example, the Legislators who voted to enact Penal Code section 647, subdivision (b). Such evidence therefore has no probative value, in the absence of proof that defendant expressed his disapproval in violent or murderous terms. The prosecutor attempted to characterize the defendant's attitude in such an apocalyptic fashion during cross-examination of Dr. Terrell, stating that the reports

withheld from Terrell would indicate defendant thought prostitutes should be removed from this earth. However, Dana Daggs could only indicate that defendant thought someone should remove them because they shouldn't be "here," meaning on the streets of Fresno. The prosecutor's embellishment of Daggs's account played into Dr. Terrell's testimony regarding the psychotic murderer who acts on a delusion of a higher calling to rid the world of a particular scourge or evil via killing. (RT 2972-2973.)

Similarly, the prosecutor's specific and unwarranted allusion to defendant customarily wiping away "fingerprints" (RT 2978), when Daggs ultimately described only the act of cleaning rather than defendant's subjective motivation, suggested more than a mere preoccupation with cleanliness in a tawdry motel room: the prosecutor's characterization insinuated concealment or destruction of evidence, in effect conditioning the jury to see this irrelevant conduct as pathological and suggestive of criminal conscience.

Thus, the court erred in permitting the cross-examination of Dr. Terrell as to specific instances of defendant's conduct, and

similarly erred in admitting such evidence in rebuttal. The error was prejudicial and requires reversal. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California, supra,* 386 U.S. at p. 24.)

Indeed, the court's refusal to grant a hearing, as well as its plainly erroneous rulings with respect to this evidence is such a flagrant disregard of California law as to amount to an arbitrary denial of defendant's rights under state law. In such a case, the Due Process Clause of the Fourteenth Amendment is violated on that ground alone. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

VIII. A SERIES OF EVIDENTIARY ERRORS RENDERED THE TRIAL FUNDAMENTALLY UNFAIR AND VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

A. The Court Erred In Granting, Over Objection, The Prosecution Request To Have A Defense Witness, Donna Larsen, Invoke The Fifth Amendment Privilege In Front Of The Jury, And This Error Violated Defendant's Right To A Fair Trial Under The Fourteenth Amendment.

1. The Proceedings Below.

The defense called Donna Larsen, defendants's mother, in its case. Counsel examined her briefly regarding defendant's whereabouts on two nights: September 18 and August 11, 1995. (RT 2714-2721.) Larsen testified that on the night of September 18, defendant was helping her clean her house to prepare for a viewing by real estate agents. She remembered the day because she met her real estate agent, Bertie Brown, on September 19 and

signed an agency agreement with Brown that day. (RT 2716.) Bertie Brown confirmed that she met with Larsen on September 19, at Brown's office, and they signed the agency agreement that day. (RT 2710-2711.) Brown thought she visited the Larsen house on September 20 or 21. (RT 2711.)

According to Larsen, on September 18, defendant was in the house until about 11:00 p.m., when he went out to get ice cream. (RT 2718.) He returned a half hour later; Larsen recalled that Jay Leno was in the monologue portion of his nightly television show when defendant got home. (RT 2718.) Larsen and defendant then cleaned the house for the rest of the night. (RT 2718.)[15]

On August 11, defendant was with Larsen all day. (RT 2719.) During the day, defendant helped Larsen set up her classroom (she was teaching at the time), and after, they went shopping until late at night. (Rt 2719-2720.) Larsen also testified that defendant's pick-up truck was not running on August 11. (RT

[15] A witness who lived near the spot where Peggy Tucker's body was found said she heard a gunshot and a woman screaming at 4 minutes before midnight on September 18. (RT 1664-1666.) Peggy Tucker's friend, Rick Arreola, last saw Tucker "[a]nywhere between 12:00 o'clock, about 11:30, a quarter to 12:00" on September 18. (RT 1711.)

2721.)[16]

At the conclusion of the direct examination of Larsen, the prosecutor sought a hearing outside the presence of the jury. In this hearing, the prosecutor renewed his motion to impeach Donna Larsen with evidence that Larsen had (1) presented herself as a registered nursing by altering her daughter's nursing license and (2) removed a computer from her classroom and then returned it a few days later after a person had reported seeing her removed it. (RT 2722-2725.) The prosecutor admitted he could not prove that Larsen knew that someone had reported seeing her remove the computer. (RT 2728.)

In response, defendant's attorney claimed that the prosecutor had agreed before trial not to use this impeachment evidence. (RT 2726.) Attorney Petilla explained that he "detrimentally relied" upon this promise in calling Donna Larsen as a witness. (RT 2726.) However, a review of the reporter's

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[16] Stephanie Kachman was shot around 3:00 a.m. on August 11. (RT 1544.) Larsen testified that she was with defendant during the day of August 11, but she said nothing about 3:00 a.m. or the early morning hours before dawn in general.

transcript showed only that Attorney Petilla objected to the impeachment before trial and the court deferred a ruling until Larsen was called to testify. (RT 2734.) The court agreed to hold the hearing and rule on the objection before Larsen testified. (RT 2734.) Attorney Petilla continued to object; he claimed that there was another discussion about the Larsen impeachment and in that discussion the prosecutor stated that he was "not going to use it." (RT 2735.) The court refused to allow Attorney Petilla time to locate that discussion in the record and permitted the prosecutor "to impeach the witness on those issues." (RT 2728, 2737.)

At this point, Larsen's attorney, Harry Drandell, appeared and informed the court that he represented Donna Larsen with respect to an investigation by the Department of Consumer of Affairs regarding Larsen's representations that she was a registered nurse. (RT 2739.) Attorney Drandell said that as to that issue Larsen would invoke her Fifth Amendment privilege against self-incrimination and refuse to answer any questions. (RT 2740.) Attorney Petilla then requested that Larsen's assertion of the Fifth Amendment take place outside the presence of the jury. (RT

2740.) The court denied that request, stating: "The Court is going to deny the motion. You deliberately brought her in here and asked her questions, and now the District Attorney wants to ask her questions and impeach her, and now you want it all done outside the presence of the jury." (RT 2740.)

With the jury present, the prosecutor then asked Donna Larsen a series of questions to which she asserted her Fifth Amendment privilege. For example, the prosecutor asked:

- "Have you ever purposely tried to mislead people?"
- "Have you ever been dishonest?"
- "In April or May of 1995, did you submit a false photocopy of a nursing license to a Mr. Matesso at the Duncan Polytechnical High School?"

All told, Larsen asserted the Fifth Amendment seven times before her attorney objected to the line of questioning completely. (RT 2741-2743.)

Although the court sustained the objection, the prosecutor ignored the court's ruling and asked,

- "Have you written letters, for instance, in October of

1995 to a man named Gary Kirby, area coordinator, regional occupation program in which you held yourself out to be a registered nurse?"

Another objection was sustained. (RT 2743.) Once again the prosecutor ignored the ruling and asked,

- "In May of – as early as May of 1993 did you write to a John Lockey of that same office holding yourself out as a registered nurse?"

Another objection was sustained and the court finally directed the prosecutor to move on. (RT 2743.)

The prosecutor then asked a series of questions suggesting that Donna Larsen had stolen computer equipment from Duncan Polytechnical High School. (RT 2744-2746.) Larsen denied this. 9RT 2744.) In the midst of his examination, the prosecutor also asked the court to "direct[] the witness to answer the question" (to which she had asserted the Fifth Amendment) and twice asked the court to strike Larsen's testimony on the ground that he could not cross-examine her. (RT 2741, 2746.) The second request prompted the court to excuse the jury a second time for a hearing

outside their presence. (RT 2746.)

In this hearing, the prosecutor reiterated that Larsen's assertion of the Fifth Amendment deprived him of the right to cross-examination. (RT 2747.) Attorney Petilla pointed out that the prosecutor agreed not to interrogate Larsen about specific acts of dishonesty if she admitted she lied and asserted that Larsen had admitted that when, in response to the question "Have you ever lied?", she responded, "I suppose all of us have." (RT 2747, 2741.) The court found that Larsen did not admit lying but was being evasive. (RT 2747.)

Attorney Petilla then asked to examine Larsen on re-direct. (RT 2748.) The court denied this request, holding there could be no re-direct because the prosecutor had been prevented from cross-examining Larsen. (RT 2748.) In fact, the prosecutor had cross-examined Larsen on the suggestion that she had stolen computers from the school (she did not assert the Fifth Amendment as to those questions), and nothing prevented the prosecutor from cross-examining Larsen on the substance of her testimony: the whereabouts of defendant on September 18 and

August 11, 1995. Nevertheless, the court stated it would take the prosecutor's motion to strike Larsen's testimony under submission and excused Larsen for the time being. Later that day, the court denied the motion and informed the prosecutor he could "cross-examine her on other issues." (RT 2784.)

The cross-examination of Donna Larsen was continued the next day. (RT 2874.) In this examination, Larsen added that defendant was home the night of August 10 and she remembered he went to bed around 11:00 p.m. or 11:30 p.m. (RT 2904.)

2. The Court Erred In Forcing Donna Larsen To Assert The Fifth Amendment In Front Of The Jury.

No valid purpose was served by requiring Larsen to reassert her privilege in the presence of the jury. "Where, as here, it is apparent that the witness would have offered no testimony in response to questions posed, it is not improper for the trial court to determine that fact in advance and excuse the witness." (*People v. Cornejo* (1979) 92 Cal.App.3d 637, 659.) "In such instance, to

require the renewal of the invocation of the privilege before the jury would merely amount to a meaningless ritual." (*People v. Johnson* (1974) 39 Cal.App.3d 749, 760.) The lack of any purpose to such a ritual is especially apparent in this case. The only conceivable reason for requiring Larsen to invoke her privilege in the jury's presence would have been to inform them that Larsen would neither admit nor deny the charges that she engaged in a dishonest practice. The trial court seemed to think that forcing Larsen to assert the Fifth Amendment was proper impeachment and it would be unfair to allow her to assert the privilege outside the presence of the jury. (RT 2740.)

There is no unfairness in this procedure. First, it is improper for the jury to draw inferences from the assertion of a privilege. (Evid. Code, ¶ 913, subd. (a).) Second, nothing prevented the prosecutor from proving Larsen's allegedly dishonest conduct with extrinsic evidence. (*People v. Wheeler*, *supra,*4 Cal.4th 284.)

Thus, requiring Larsen to invoke her privilege in the jury's presence served no proper purpose. Rather, the only apparent purpose to invoking the privilege before the jury would have been

to call Larsen's credibility into question, that is, to allow the jury to infer that her testimony was unreliable *for the very reason that* she was invoking her testimonial privilege. As this Court has held, however, to draw such an inference is prohibited by Evidence Code section 913, subdivision (a). (*People v. Mincey* (1992) 2 Cal.4th 408, 441; *People v. Frierson* (1991) 53 Cal.3d 730, 743.)[17]

The reason for this rule is well stated in *Bowles* v. *United States* (1970) 439 F.2d 536. In *Bowles* the trial judge refused to permit the defendant to call a witness to the stand after he had ascertained out of the presence of the jury that the witness would refuse to answer questions put to him by invoking the Fifth Amendment. In approving such procedure, the reviewing court stated that the rule prohibiting the jury from drawing any inferences from a witness' invocation of the privilege against self-incrimination

[17] Evidence Code section 913, subdivision (a) prohibits the trial court and counsel from commenting on a witness's assertion of a privilege. It further provides that "the trier of fact may not draw any inference [from the assertion of a privilege] as to the credibility of the witness or as to any matter at issue in the proceeding." And Evidence Code section 913, subdivision (b) requires the court, at the request of an adversely affected party, to instruct the jury that it may not draw any inferences from the exercise of a privilege as to the credibility of a witness or as to any matter at issue in the proceeding. Such an instruction was given here. (CT 566.)

"is grounded not only in the constitutional notion that guilt may not be inferred ... but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations. The jury may think it high courtroom drama of probative significance when a witness 'takes the Fifth.' In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination. An obvious corollary to these precepts is the rule that a witness should not be put on the stand for the purpose of having him exercise his privilege before the jury. This would only invite the jury to make an improper inference." (*Id.* at pp. 541-542 [citations omitted].)

The prosecutor here milked the "high drama" for all it was worth. Seven times he forced Larsen to invoke her privilege, and twice moved to strike her testimony on the ground he could not cross-examine her. Of course, all of this was nonsense, since Larsen's denial or admission that she falsely passed herself off as registered nurse was almost irrelevant. Whether this actually

occurred was the relevant evidence, *but this evidence the prosecutor never produced.*

Thus, the court erred in forcing Donna Larsen to assert the Fifth Amendment privilege in front of the jury. No proper purpose was served, and the prosecutor took full and unfair advantage of the situation forcing Larsen to assert the privilege time and again. As will be discussed below, the error is prejudicial.

B. The Court Abused Its Discretion In Permitting The Prosecutor To Question Donna Larsen About The Removal Of The Computer From The High School; Evidence Of This Conduct Would Not Have Been Admissible Under *Wheeler* And The Questioning About It Was Improper.

The prosecutor also sought to question Donna Larsen about taking a computer from Duncan Polytechnical High School in May 1995. (RT 2724.) According to the prosecutor, a witness saw Larsen and another person (apparently her husband) take a computer from the school where Larsen was working and load it into their car. The witness reported this to the school authorities and a few days later Larsen returned the computer to the school at 6:00 a.m. (RT 2724.) There was no evidence that this conduct resulted in a criminal conviction, criminal investigation, school investigation, or even a reprimand from the school authorities. Yet the prosecutor suggested that Larsen intended to steal the computer and returned it when she realized someone saw her take it. (RT 2727.) He reached this conclusion in spite of the fact that he did not know whether Larsen was even aware that someone had

reported the incident to the school; "I haven't gotten that far in the investigation," he admitted. (RT 2728.)

The court permitted the prosecutor "to impeach the witness on those issues." (RT 2728.) The court erred.

Evidence Code section 1100 allows the use of specific acts to attack the character of a witness unless otherwise prohibited by law. Evidence Code section 787 states that evidence of specific instances of conduct are inadmissible to prove a trait of character to support or attack the credibility of a witness. However, this rule was eliminated with the passage of Proposition 8 in 1982. (*People v. Wheeler, supra,* 4 Cal.4th 284, 292.) "The voters have expressly removed most statutory restrictions on the admission of relevant credibility evidence in criminal cases. . . . Hence, they have decreed at the least that in proper cases, nonfelony conduct involving moral turpitude should be admissible to impeach a criminal witness." (*Id.* at p. 295.)

Thus, Article I, section 28, subdivision (d) of the California Constitution requires admission of *all* relevant evidence unless exclusion is allowed or required by statutory rule of evidence

relating to privilege, hearsay, or Evidence Code section 352, 782, or 1103. (*Id.* at p. 292.) Although *Wheeler* involved conduct underlying a misdemeanor conviction for a crime of moral turpitude, conduct may involve moral turpitude, and thus be relevant to credibility, even if it is not a crime or does not result in a conviction. "Whether the trial court admits evidence of past misconduct should be determined solely on the basis that the conduct evinces moral turpitude. The label is not important [i.e., what type of statutorily defined offense, if any, the conduct constitutes] – the conduct is." (*People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90.) *Wheeler* holds that Proposition 8 "makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor." (*Id.* at pp. 296-297 & fn. 7.)

Here, the offer of proof made by the prosecutor does not even establish that Larsen was engaged in an act of moral turpitude. There is no evidence that she was not authorized to remove the computer, either expressly or impliedly. There is no evidence that she intended to steal the computer. The notion that Larsen was

committing a crime is sheer speculation.

Even assuming that one could infer from this scant record that a crime was being committed, other considerations argue against its use as impeachment. As noted in *Wheeler*:

> Problems of proof, unfair surprise, and moral turpitude are minimized when felony convictions are the sole proffered basis for impeachment. A felony conviction reliably establishes that the witness committed corresponding criminal acts; a party or witness is unlikely to be surprised by use of felony convictions for impeachment; and the court must determine moral turpitude solely from the "least adjudicated elements" of the conviction. [Citation.] But section 28(d) makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor. Indeed, *misdemeanor convictions* are subject to a hearsay objection when offered to prove the witness committed the underlying crimes. (See, *post,* at pp. 297-300.) Thus, impeaching misconduct now may, and sometimes must, be proven by direct evidence of the acts committed. These acts might not even constitute criminal offenses. Under such circumstances, fairness, efficiency, and moral turpitude become more complicated issues. Courts may take these facts into account when deciding under Evidence Code section 352 whether to admit evidence other than felony convictions for impeachment.

(*People v. Wheeler, supra,* 4 Cal.4th at p. 297, fn.7.)

Here, the trial court failed to consciously weigh these factors, all of which stand in favor of exclusion of the evidence, against the slight probative value the evidence held. Indeed, there is no suggestion in the record the court engaged in any weighing of the prejudice against probative value, as required by Evidence Code section 352.

The court erred in permitting the prosecutor to question Larsen about his incident because it would have been error to permit the prosecutor to introduce evidence of the incident. The prosecutor never even attempted to do so, however, which illustrates that the value of this incident to the prosecutor lie in its effect of intimidating the witness and making her *appear* dishonest in the eyes of the jury.

The court erred in permitting these questions. The error was prejudicial, as explained below.

C. Prosecutorial Misconduct In Questioning Donna Larsen Violated Defendant's Rights To Due Process Under The Fifth And Fourteenth Amendments To The United States Constitution.

As noted above, the prosecutor twice violated the court's rulings by attempting to force Donna Larsen to assert her Fifth Amendment privilege before the jury. Larsen asserted the Fifth Amendment seven times before her attorney objected to the line of questioning completely. (RT 2741-2743.)

The court sustained the objection but the prosecutor ignored the court's ruling and asked,

- "Have you written letters, for instance, in October of 1995 to a man named Gary Kirby, area coordinator, regional occupation program in which you held yourself out to be a registered nurse?"

Another objection was made and once again sustained. (RT 2743.) Yet once again the prosecutor ignored the ruling and asked,

- "In May of – as early as May of 1993 did you write to a John Lockey of that same office holding yourself out as a registered nurse?"

Another objection was sustained and the court finally directed the prosecutor to move on. (RT 2743.)

In general, the prosecutor commits misconduct when he or she uses "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820 [citations and quotations omitted].) In particular, it is misconduct to disobey a clear court order of which the prosecutor has personal knowledge. It is not only professional misconduct, it is contempt of court. (Code Civ. Proc., §1209, subd. (a)(5); see *Pounders v. Watson* (1997) 521 U.S. 982, 989-990 [criminal defense attorney held in contempt for violating a trial court ruling].)

Although prosecutorial misconduct does *not* depend upon proof of intentional bad faith (*People v. Hill* (1998) 17 Cal.4th 800), it is difficult to view the misconduct here as anything other than a deliberate attempt to sway the jury by improper means. Here, the prosecutor sought to undermine Donna Larsen's credibility by forcing her to assert the testimonial privilege, even though he knew (or should have known) that the law prohibited the

jury from drawing that inference. (See *People v. Bonin* (1988) 46 Cal.3d 659, 689 [misconduct to intentionally elicit inadmissible testimony].)

Under California law, misconduct is prejudicial when "it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments." (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) Prosecutorial misconduct can rise to the level of federal constitutional error when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; see also *In re Ferguson* (1971) 5 Cal.3d 525, 531.) The unchecked lawlessness on the part of the prosecutors cannot be excused. "Our justice system will crumble should those, in whose hands are entrusted its preservation and sanctity, betray its fundamental values and principles." (*Morrow v. Superior Court* (1990) 30 Cal.App.4th 1252, 1261.)

D. Prosecutorial Misconduct In Closing Argument Denied Defendant A Fair Trial And Violated Due Process Under The Fourteenth Amendment.

During his closing argument in the guilt phase, the prosecutor told the jury that it was a matter of "common knowledge" that defendant's attorney cries during his argument and the jury should disregard it when it happened. (RT 4454-4454.) The prosecutor stated:

> Now, there are, as I mentioned earlier, there are some things of common knowledge that we're permitted to address at the time of argument. And there is one more of those things I want to talk to you about. A matter of general or common knowledge is that at the time of final argument Mr. Petilla cries, so when that happens . . . .

(RT 4455.) At this point defense counsel objected. The court overruled the objection. (RT 4455.) The prosecutor continued:

> When that happens, I want you to understand that it's nothing unique to this case.

(RT 4455.)

The prosecutor committed misconduct in two ways: first, he referred to "facts" outside the record; second, he used those extra-

record "facts" to impugn defense counsel's integrity.

As noted above, the prosecutor commits misconduct when he or she uses "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza, supra,* 3 Cal.4th 806, 820 [citations and quotations omitted].) Thus, it is misconduct to refer to facts not in the record. (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213.) "[This court has for a number of years repeatedly warned 'that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.'" (*Ibid.*, quoting *People v. Kirks* (1952) 39 Cal.2d 719, 724.)

Further, it is misconduct to attack the integrity of defense attorneys: "Included within the deceptive or reprehensible methods we have held to constitute prosecutorial misconduct are personal attacks on the integrity of opposing counsel." (*People v. Espinoza, supra*, 3 Cal.4th at p. 820.) Thus, in *People v. Bain* (1971) 5 Cal.3d 839, the Supreme Court reversed a conviction for forcible rape where the prosecutor made the unsupported claim in closing argument that defense counsel "fabricated" the defense.

(*Id.* at p. 847-849.) The Supreme Court noted in *Bain* that "[s]imilar misconduct has been held in other cases to require reversal . . . ." (*Id.* at p. 849-850; see also *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075 (conviction reversed; Court holds "[i]t is improper for the prosecutor to imply that defense counsel has fabricated evidence or to otherwise malign defense counsel's character").)

Here, the prosecutor stated it was "common knowledge" that Attorney Petilla cried during closing argument. (RT 4455.) A fact is not common knowledge simply because one asserts it to be so. There is no evidence whatsoever that Attorney Petilla regularly cried during closing argument. It was misconduct to tell the jury that this was a fact.

The more pernicious effect of this misconduct, however, was the implication that Attorney Petilla was a dishonest charlatan, an attorney without integrity, who would resort to theatrical gestures to sway a jury. It is unethical for a prosecutor to seek an advantage in a criminal trial by telling the jury that the defendant's attorney is dishonest, unethical, or is fabricating a defense. (*People*

v. Espinoza, supra, 3 Cal.4th at p. 820.) Thus, the court erred in overruling the objection to the prosecutor's misconduct.

E. Cumulative Error Rendered The Trial Fundamentally Unfair And Violated Defendant's Right To Due Process Under The Fourteenth Amendment To The United States Constitution.

The cumulative effect of several errors created a trial that was fundamentally unfair and denied defendant the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Each of these errors went to the credibility of the defense witnesses and the defendant himself. Because the defense hinged upon the jury believing defendant's testimony that he did not commit the charged crimes, the error went to the heart of the case, and is therefore prejudicial.

IX. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF UNRELIABLE DNA ANALYSIS AND VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND A RELIABLE GUILT AND PENALTY PHASE DETERMINATION UNDER THE EIGHTH AMENDMENT.

A. Introduction.

At trial, the State introduced evidence of DNA testing. The testing showed that alleles matching defendant's were found in semen on Inez Espinoza, and although the testing could not determine conclusively that the semen belonged to defendant, it did establish that he could not be ruled out as a possible donor. (RT 3451.) Further, the State introduced statistical evidence that the genotype found in the semen (and in defendant) occurred in approximately 10 percent of the Caucasian population and 20 percent of the Hispanic population. (RT 3450.) Based on this, the prosecutor told the jury that the DNA evidence "points the finger at the defendant." (RT 4387.)

The court erred in admitting this evidence.

At issue here is (1) whether the *interpretation* of the test results, based upon the "dot-intensity analysis" was a novel scientific procedure and, (2) if so, whether the State established by a preponderance of the evidence that "dot-intensity analysis" had gained general acceptance in the relevant scientific community.

A hearing was held outside the presence of the jury to determine if the DNA testing was admissible under *People v. Kelly* (1976) 17 Cal.3d 24. "Under *Kelly*, the court must consider the following: first, that the method is reliable, i.e., has gained general acceptance in the relevant scientific community; second, that the witness is an expert qualified to give an opinion on the subject; and third, that the correct scientific procedures were followed in the particular case." (*People v. Henderson* (2003) 107 Cal.App.4th 769, 776.) The court below held that the PCR DQ-Alpha method was admissible under *Kelly*. It relied on *People v. Morganti* (1996) 43 Cal.App.4th 48, which approved the PCR DQ-Alpha method.

However, the prosecution did not reveal in the *Kelly* hearing that its expert relied on "dot-intensity analysis" to *interpret* the

results of the DQ-Alpha test. The prosecution put forth no evidence to show that this method had gained general acceptance in the DNA-testing community, and the court made no finding that this method of interpretation was an accepted scientific procedure.

B. The Proceedings Below.

1. The *Kelly* Hearing.

On April 22, the twenty-second day of trial, the prosecution sought leave to present evidence of DNA testing on genetic material found at the Espinoza crime scene. (RT 3320.) The court held a hearing under *People v. Kelly, supra,* 17 Cal.3d 24 to determine if evidence of the DNA testing would be admissible at trial. (RT 3230.) At the time of the hearing, the State's expert, Rodney Andrus (an employee of the California Department of Justice) had preliminary test results that had not been subjected to confirmation. (RT 3224.) Defense counsel objected that a hearing could not be held until the final results were confirmed. The State claimed that

the actual results were irrelevant to the *Kelly* hearing. (RT 3249-3251.) The Court agreed. (RT 3251.)

However, the prosecutor stated the testing (i) excluded defendant as the source of sperm found in the condom collected from the crime scene, and (ii) did not exclude defendant as the source of the sperm found in the vaginal swab and fingernail scrapings collected from Espinoza's body. (RT 3222-3223.) However, in the hearing itself, owing to his belief that the actual test results were irrelevant to the question of whether the scientific procedure at issue was admissible under *Kelly*, the prosecutor never elicited from Andrus what results were obtained or precisely how Andrus reached this conclusions.

In the hearing, Andrus testified that he used the PCR DQ-Alpha testing. (RT 3253, 3255.) "PCR" stands for polymerase chain reaction. (RT 3254.) In this procedure, a small amount of DNA material may be amplified into larger quantities that can be subjected to testing. (RT 3260.) DQ-Alpha is a form of PCR testing that tests a single genetic marker. (RT 3280; see *People v. Henderson, supra,*107 Cal.App.4th 769, 777 (discusses the three

subtypes of PCR testing: DQ-Alpha, which tests one marker; Polymarker, which tests five genetic markers; and, STR, which tests three or more generic markers).) Andrus described the testing procedure in some detail and claimed the PCR DQ-Alpha method was widely accepted in the scientific community. (RT 3281.) A second State witness, Edwin Scruggs, also testified that the PCR DQ-Alpha test was widely accepted in the scientific community. (RT 3304.)

On cross-examination, Andrus admitted that in the case of mixed sample, that is, where two or more persons contributed genetic material to the evidence sample, the DQ-Alpha test could not distinguish between the donors. (RT 3299.) In such a case, "additional testing would help because they can look at by different method what is the genetic makeup of those two individuals, and if they're different, then you separate them." (RT 3299.) Andrus suggested that PCR Polymarker testing would be helpful in this case and that it would take "a couple of weeks" to complete. (RT 3296.) An even more discriminating test method, RFLP, would take "a considerable amount of time." (RT 3295.) Andrus did not

discuss "dot-intensity analysis" in this hearing.

Defense counsel objected to the admission of the DNA evidence that, according to Andrus, did not rule out defendant as a possible donor. (RT 3310.) Counsel argued that because the test could conclusively include defendant, the results would confuse the jury and prejudice the defendant. (RT 3310.) The court overruled the objection and admitted the evidence, ruling that all three prongs of the *Kelly* test had been met, and that the evidence was admissible under Evidence Code section 352. (RT 3312.)

2. Andrus's Trial Testimony.

In the presence of the jury, Andrus testified that the DQ-Alpha marker was polymorphic, meaning it had multiple forms. (RT 3411.) He explained that "PCR" was a process for amplifying small amounts of DNA material into large amounts that could be subjected to testing. (RT 3415.) The four primary alleles of the DQ-Alpha marker are 1, 2, 3, and 4. (RT 3423.) The 1 allele has subtypes, known as 1.1, 1.2, and 1.3. (RT 3423.)

Andrus found semen in samples taken from four places: a condom found near Espinoza's body, scrapings from her right fingernail, scrapings from her left fingernail, and on a vaginal swab. (RT 34404.) Andrus used a process known as "differential extraction" on the evidence samples to separate the sperm cells from the non-sperm cells. (RT 3442.) This process is not always entirely successful; some times the sperm cells break down and release into the non-sperm fraction, and vice versa. (RT 3444.)

He tested a sample of Espinoza's blood and concluded she was a genotype 1.2,3.[18] (RT 3449.) He tested a sample of defendant's blood and concluded he was a genotype 3,4. (RT 3450.)

The sperm found inside the condom was a genotype 2,3. (RT 3457.) Because defendant did not have the 2 allele, he was positively eliminated as the donor of the sperm in the condom. (RT 3456.)

Testing of the right fingernail sample showed the presence of

[18] A genotype consists of 2 alleles, one inherited from each parent. This combination may be homozygous, meaning the alleles are the same (e.g., 4,4 or 3,3) or heterozygous, meaning the alleles are different (e.g., 1.2, 3).

three alleles: 2, 3, and 4. (RT 3447.) Andrus testified that in this sample, "[t]he sperm DNA was a combination of DNA from more than one individual. The primary alleles represented were a 3,4. And there was a lesser concentration of a 2 allele or a 2 factor, if you wish." (RT 3447.) Andrus said the presence of three alleles meant there could be several genotypes present. "There is actually three different alleles if you remember the strip over there. And an individual – one individual can be just a 2,2 as well as one individual could be a 4,4. Another individual can be a 3, [3,4], 4 or a [2,3] 3, or 2,4." (RT 3447.)[19]

Despite this, based on the dot-intensity analysis, Andrus concluded that the right fingernail sample in fact showed only two genotypes: a 3,4 and a 2 with the partner unknown. He explained: "But because of the way this was represented in the testing on that test strip, the greater concentration in a relatively equal balance was the 3 and 4 alleles, meaning they're the primary contribution and that this [the 2 Allele] is an added contribution from some other

[19] The transcript is unclear on this point. It appears, however, that Andrus testified that six possible genotypes can be formed by the presence of alleles 2,3, and 4. These are: 2,2; 2,3; 2,4; 3,3; 3,4; and 4,4.

source." (RT 3448.)

The test of the left fingernail sample showed the 3 and 4 alleles. From this, Andrus concluded the genotype 3,4 was present. (RT 3448.)

The test of the vaginal swab showed three alleles: 1.2, 3, and 4. (RT 3448.) Once again, Andrus concluded that the "primary" alleles were the 3,4 and the "minor" component was the 1.2. (RT 3448.) Thus, he concluded that the genotype 3,4 was present along with the allele 1.2, which he theorized came from the victim.

Andrus further testified that genotype 3, 4 occurs in 10 percent of the white population and 20 percent of the Hispanic population, including females and pre-pubertal males. (RT 3454, 3459.)

In closing argument, the prosecution characterized the DNA evidence as "compelling"evidence of defendant's guilt. (RT 4387.) The prosecutor told the jury that the DNA "points the finger at the defendant." (RT 4387.) 'The defendant," argued the prosecutor, "may have left some bodily secretions behind." (RT 4385.) The prosecutor explained, "There was sperm actually in the fingernail

scrapings from both hands of Inez Espinoza and also from the vaginal sampling. And you learned that when these were analyzed, that there was typing information – there was a genetic marker, this DQ-Alpha marker that was of the same type that the defendant has." (RT 4386.)

The prosecutor acknowledged that this same "genetic marker" occurred in 10 percent of the Caucasian population. (RT 4386.) However, he argued that more than half of the people in that 10 percent group could not possibly have left the semen at the crime scene:

> You know from your common sense and because Mr. Andrus [the DNA expert] reminded us of it when he was here, that girls don't have sperm, so that ruled out a lot of people that are in that ten percent population of the Caucasian population world [sic]. You know also that this didn't come from prepubertal boys. That rules out a few more people. You also know it didn't come from this worldwide Caucasian population that has this marker who weren't in Fresno that night. So I'd submit to you that besides being ten percent of the Caucasian population of the world, it's a lot skinnier of a population than that.

(RT 4386-4387.)

The prosecutor discounted the possibility that the semen could have come from someone other than the killer. He explained, based on the testimony of those who saw Espinoza in the hours before her death, that she was not working the streets earlier in the evening, but socializing with friends, and therefore the semen undoubtedly came from the last man she saw that night. (RT 4387.) The prosecutor told the jury:

> Now, it might be suggested to you that Inez Espinoza, she was a prostitute and seminal fluid could be from somebody else even if it is his type. But she could only [sic] from things you know from her daughter and from Nikki Aldava, she could only be out working a short time after she was also seen by Nikki Aldava. And you have to stop and remember that we're not –we're not – I don't know if it's – we're talking about a very brief period of time where she could have been working, where this could have been happening. You know she was Nikki Aldava [sic], and they were driving around and no evidence she was working at that time and no evidence from her daughter she was working earlier in the evening when she was at home before she went out.

(RT 4387.) Thus, the State's theory of the case was that (i) the semen in Espinoza was left there by her killer and (ii) the semen came from defendant.

C. The Standard of Review.

In *People v. Kelly, supra,* 17 Cal.3d 24, this Court established its three-pronged standard for the admissibility of scientific evidence. First, the procedures used must be reliable, as evidenced by their general acceptance by scientists in the relevant field. Second, the witness presenting the evidence must be properly qualified as an expert. Third, the evidence must establish that the correct and accepted scientific procedure was in fact followed in the particular case. (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30.) "When identification is chiefly founded upon an opinion which is derived from utilization of an unproven process or technique, the court must be particularly careful to scrutinize the general acceptance of the technique." (*Id.* at p. 32, citation omitted.)

The party seeking to admit the evidence bears the burden of proving compliance with each prong of the *Kelly* standard. "[T]he judge should exclude the expert testimony unless the proponent convinces the judge by a preponderance of the evidence that the

principle or technique in question meets the *Kelly* standards of acceptance. If after the hearing it is unclear to the judge whether the required scientific consensus has developed, the judge should exclude the expert evidence." (*People v. Venegas* (1998) 18 Cal.4th 47, 85.) First-prong *Kelly* determinations are reviewed de novo, whereas the trial court's findings as to the second and third prongs are subject to the more deferential abuse of discretion standard. (*Ibid.*)

D. The Prosecution Failed To Establish That Its DQ-Alpha Test Was Reliable To Identify The Multiple Genotypes Present In A Mixed Genetic Sample.

The trial court erred in accepting the prosecution's contention that *People v. Morganti, supra*, 43 Cal.App.4th 643 fully resolved the threshold question of DQ-Alpha's general acceptance in the scientific community. (RT 3222, 3312.) Although a trial court may properly rely upon a published appellate decision affirming a finding of general scientific acceptance of a particular scientific technique, "the published decision does not

serve as precedent when there is proof of a 'material scientific distinction' between the methodology approved by the published case and that used in the case before the court; materially distinct procedures must pass first-prong scrutiny independently." (*People v. Pizarro* (2003) 110 Cal.App.4th 530, 557, quoting *People v. Venegas*, *supra*, 18 Cal.4th at p. 54.)

"Courts therefore must be aware that acceptance of a general scientific principle or procedure does not automatically confer a passive surrogate acceptance on every technical method for implementing or *interpreting* that principle or procedure." (*Id.* at p. 616.)

In *People v. Morganti*, *supra*, 43 Cal.App.4th 643, the Court of Appeal described the testing method as follows:

> PCR is "a molecular biology technical procedure for exploiting genetic differences in DNA," whereby small pieces of DNA are copied or amplified. The technique is employed when the DNA sample available is too small and/or degraded to perform a more common type of DNA analysis known as RFLP.
>
> The PCR analysis performed in this case was used to amplify a specific gene known as the DQ alpha. The DQ alpha gene codes for proteins found on the surface of the white blood cell and is known to have

> alternate genetic forms, i.e., the gene does not look the same in all people. Six variations (or alleles) have been identified and labeled as 1.1, 1.2, 1.3, 2, 3 and 4. Because alleles are inherited in pairs, one from each parent, there are twenty-one possible combinations which are referred to as genotypes.
>
> In the forensic setting, PCR analysis of DQ alpha involves three general steps. First, DNA is extracted from the nucleus of cells present in an unknown bloodstain. Second, the DQ Alpha is replicated or amplified by a process which involves combining the DNA with a commercially available solution or "cocktail" and then subjecting the solution to a series of controlled temperature cycles. Finally, the amplified gene is typed in order to identify the alleles present in the amplified DNA.

(*Id.* at p. 662, fn. omitted.) Ultimately the Court of Appeal was satisfied that "the scientific technique of PCR analysis of the DQ alpha gene is generally accepted in the relevant scientific community," such that its use in that case was admissible. (*People v. Morganti*, *supra*, 43 Cal.App.4th at p. 669.)

However *Morganti* is readily distinguishable from the present case. In *Morganti*, there was no evidence, genetic or otherwise, that the evidence sample was mixed, i.e. contained genetic material from more than one person. There, the DQ-Alpha test functioned solely to eliminate the victim and co-defendant as

possible sources of the alleles found in a single bloodstain, and to identify Morganti as someone whose alleles were consistent with those present. (*People v. Morganti*, *supra*, 43 Cal.App.4th at p. 662.) There was no evidence that this bloodstain included genetic material from more than one individual. The bloodstain challenged by Morganti was on the door chain of the victim's residence at the motel he managed; the victim was found inside the unit, stabbed 26 times. "The PCR results in this case established that Paterson and the victim were not compatible with being sources of bloodstains found on the door chain at the crime scene, but that Morganti did have the same traits as the evidentiary specimen." (*Id.* at p. 669.)

Mixed genetic samples present a different issue than the one presented in *Morganti.* The problems inherent in mixed genetic samples were recently recognized in *People v. Pizarro.* Although the court in *Pizarro* ruled specifically on the admissibility of RFLP test results, it relied in part on analogous problems in DQ-Alpha testing to hold that the intensity-analysis method for distinguishing between different donors was unreliable, subjective, and not

generally accepted within the scientific community. "DQ-Alpha testing kits were designed solely to determine the presence or absence of certain alleles." (*People v. Pizarro*, *supra*, 110 Cal.App.4th at p. 619, quoting with approval from *State v. Harvey* (1997) 151 N.J. 117, Handler, J. dissenting.) The more complex process of identifying individual genotypes, or genetic pairs of alleles, constitutes an "unavoidably subjective" practice when dealing with mixed samples. (*Ibid.*)

In the present case, the evidence was uncontroverted that the genetic material found on Espinoza's body came from multiple individuals other than Espinoza herself. (RT 3447.) Espinoza was a street prostitute, and the killing occurred at approximately 4:30 a.m. (RT 1413), shortly after she left the company of a girlfriend and a man with whom she had been socializing. (RT 1516, 1522-1525.) It is possible, if not likely, that Espinoza had multiple male sexual partners within a day or two of her death. This supposition is corroborated by the presence of three different alleles in the evidence samples – 2 and 3 and 4 from Espinoza's right fingernail scraping, and 1.2 and 3 and 4 from Espinoza's vaginal swab.

Unlike the situation in *People v. Morganti*, then, "we are presented with a critical issue specific to cases in which discernment of the perpetrator's alleles is more complicated because *the perpetrator's DNA is mixed with (contaminated by) another person's DNA.*" (*People v. Pizarro*, *supra*, 110 Cal.App.4th at p. 583 (emphasis in original).) Although the court in *Pizarro* dealt specifically with RFLP testing, the more discerning method of DNA analysis not attempted in the present case, its analysis of issues presented by mixed genetic evidence is equally applicable to DQ-Alpha typing because with both methods, a mixed sample reveals a number of allele types (represented as dots in the DQ-Alpha kit, or as bands in RFLP gel electrophoresis). "Because every person possesses two alleles at each locus, the presence of fewer than four bands in the mixture means one or more bands is probably masked by (superimposed on or coalesced with) another band." (*Id.* at p. 585.)

Of the 21 different genotypes possible at a DQ-Alpha locus, the alleles present in the mixed right fingernail sample could potentially form six different genotypes: 2,2; 2,3; 2,4; 3,3; 3,4; and

4,4. The three alleles present in the vaginal swab also had the potential to be six different genotypes: 1.2, 1.2; 1.2, 3; 1.2,4; 3,3; 3,4; and 4,4. Even the two alleles present in the left fingernail sample had the potential to be different genotype: 3,3; 3,4; or 4,4. The only way Andrus could conclude that the 3 and 4 alleles were in fact the genotype 3,4 was to rely on the relative intensity of the dots which to him indicated a greater" or "lesser concentration" of the alleles. (RT 3447-3448.) To Andrus, the greater concentration of the 3 and 4 alleles meant they were the genotype 3,4 and the lesser concentration of the other alleles meant they came from a different source. (RT 3447.) But this method of interpreting the DQ-Alpha results has never been approved in any published case and was not even brought to the attention of the superior court in the *Kelley* hearing below. Further, this method has been criticized as unreliable. (*People v. Pizarro, supra*, 110 Cal.App.4th at p. 546.)

Nor does the fact that Andrus used differential extraction prior to typing the alleles furnish any basis for narrowing the range of alternative perpetrator profiles. Differential extraction "relies on

the different resistances of sperm nuclei and epithelial cell nuclei to breaking open." (*People v. Pizarro, supra,* 110 Cal.App.4th at p. 583.) The extraction thus separates sperm nuclei from epithelial nuclei, but does not further sort sperm nuclei according to their individual source/donor. If the differential extraction process were successful, Andrus' finding of an allele of type 1.2 post-extraction would increase the number of possible perpetrator profiles significantly, as the presence of that allele could no longer be explained by Andrus's assumption that Espinoza's epithelial cells were the source of that allele. Thus, the 1.2 allele could have come from one of her customers or the perpetrator himself. Thus, although the presence of alleles 3 and 4 meant that defendant could not be excluded, the method used to identify a unique perpetrator genotype, to the exclusion of all the other alternatives, was never found to be reliable by this court, or any other court.

E. The Trial Court Compounded Its Error By Admitting Prejudicial Evidence Of The Statistical Frequency Of Defendant's Genotype In Population Subgroups.

In *People v. Pizarro*, *supra*, 110 Cal.App.4th at p. 593, the court noted with approval the testimony of a defense expert as to the appropriate method of calculating match probability: where the difficulties inherent in a mixture present multiple possible perpetrator profiles, "it is incorrect to account for [the statistical frequency of] only one possibility as the FBI did in this case. If only the defendant's profile is used to calculate the perpetrator's profile, an assumption is being made that the defendant is the perpetrator." Thus, the statistical frequency in the population of the genotypes posited by the prosecution was misleading, as it failed to adequately account for the possibility of alternative combinations of genotypes warranted by the alleles present in the evidence.

Furthermore, even assuming that the prosecution expert had correctly typed the perpetrator, his focus on particular ethnic

subgroups was improper. "The profile frequency was not relevant to prove the rarity of the perpetrator's profile in the perpetrator's population unless the frequency was based on the *perpetrator's profile* and the *perpetrator's population.*" (*People v. Pizarro*, *supra*, 110 Cal.App.4th at p. 544.) "These foundational preliminary facts regarding the perpetrator's traits must be established by independent proof. In other words, the description of the perpetrator – whether genetic or physical – must be based on evidence of the *perpetrator's* traits." (Ibid.)

That Andrus gave corresponding statistical data for alternate ethnic subgroups does not vitiate the error. In *Pizarro*, the court rejected comparably camouflaged subgroup evidence: "Although presentation of a range of ethnic frequencies may in fact accurately provide the range of all possible frequencies, we see three problems with this practice. First, in the absence of sufficient evidence of the perpetrator's ethnicity, *any* particular ethnic frequency is irrelevant." (*People v. Pizarro*, *supra*, 110 Cal.App.4th at p. 632.) Frequency within any of the ethnic subgroups was irrelevant absent proof of the perpetrator's

ethnicity. As in *Pizarro*, there were no eyewitnesses to furnish a physical or ethnic description of any suspect seen at the Espinoza crime scene or with Espinoza prior to her death. Moreover, there is insufficient evidence to conclude that the perpetrator of the Espinoza shooting was the same ethnicity as defendant or those in the other alleged crimes. The *Pizarro* court further explained: "the improper mention of ethnicity unfairly and unjustifiably encourages the jurors to focus on ethnicity and race – specifically the ethnicity and race of the defendant, the only suspect before them." (*Ibid.*) And finally, such frequency evidence permits the jury to hear "unjustifiably damaging evidence because the various ethnic frequencies create a range extending from the most conservative and beneficial to the defendant to the most rare and damning to the defendant." (*Ibid.*)

Moreover, much as the ethnic frequency evidence generated a presumption that the perpetrator was of the same ethnicity as the defendant, the prosecution's focus on genotype 3, 4 generated a presumption that the perpetrator was the same genotype as the defendant. Even if the evidence had supported the prosecution's

theory of three males having genotypes 3, 4, and 2 and 1.2, to the exclusion of all alternatives, the statistical testimony was nonetheless improperly influenced by a subtle presumption of defendant's guilt. Andrus stated only the frequency of genotype 3, 4, to the exclusion of the genotypes 2 and 1.2 he posited. But the frequency of that genotype would be relevant only if the perpetrator was the source of the 3, 4 sperm, rather than the 2 or the 1.2. Andrus stated no basis for such a conclusion. Nor was there any evidence in the record to support such a conclusion, other than a tautological inference that because the defendant was of genotype 3, 4, the perpetrator likewise must also have been. The focus on the 3, 4 genotype therefore appears to have been based on a presumption of defendant's guilt.

F. The Error Is Prejudicial.

Jurors are particularly susceptible to uncritical acceptance of scientific evidence in cases involving DNA analysis. (*People v. Venegas, supra,* 18 Cal.4th 47, 80-81.) "The greater the disparity

between the perpetrator's true frequency and the range's most damaging extreme, the greater the prejudice the defendant will suffer from mention of that extreme." (*People v. Pizarro*, *supra*, 110 Cal.App.4th at pp. 632-633.)

As characterized by the prosecution in closing argument, the improperly admitted DNA evidence was "compelling" in its prejudicial effect. Without foundation, the prosecution whittled the long list of likely genotypes down to a configuration of three, the sole configuration that included defendant's genotype. From that arbitrarily chosen genetic scenario, it then further eliminated the two not shared by defendant. The prosecution then invited the jury to assume that defendant and the perpetrator of the Espinoza murder shared the same ethnicity, when the perpetrator's ethnicity, like his genotype, could not reliably be determined. By assuming that the perpetrator shared the same 3, 4 genotype as the defendant, the prosecution bolstered the less than conclusive ballistics evidence, and impeachable eyewitness identifications; this created the illusion of a reliable triangulation leading by process of elimination to a conclusion that defendant was the only possible perpetrator, when

in fact the preliminary facts underlying the "compelling" genetic evidence consisted of legally impermissible *presumptions* that defendant was the perpetrator. Without the court as gatekeeper, the jury thus concluded not only that the defendant's .45 was that used by the perpetrator, but also that the perpetrator and defendant were genetically one and the same.

X. THE COURT ABUSED ITS DISCRETION AND VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, RIGHT TO RELIABLE CAPITAL SENTENCING UNDER THE EIGHTH AMENDMENT, AND RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT, WHEN IT REFUSED TO GRANT A CONTINUANCE BEFORE THE PENALTY PHASE TRIAL TO ALLOW DEFENSE COUNSEL TIME TO PREPARE.

A. The Proceedings Below.

The jury returned a guilty verdict on Tuesday, May 7, 1996. (RT 4598.) On the following Monday, May 13, defense counsel filed a motion to continue the penalty phase trial to July 1, 1996. (CT 538.) Defense counsel gave two reasons:

> 1. Pursuant to the notice requirements of Penal Code section 190.3, the prosecutor gave defense counsel notice of intent to introduce aggravating evidence in support of the death penalty. The notice was received by defense counsel in the afternoon of May 10, 1996, and the necessary discovery has not been received. We will need discovery of 'Evidence with respect to the test firings of hydra shock cartridges,' 'Dana Daggs: Evidence with respect to sexual assault exam and samples taken,' 'Victim impact evidence,' 'Further evidence with respect to the circumstances of the offenses.' After receiving such discovery, we will

> need time to evaluate the evidence, investigate the proposed witnesses and their current lifestyles, and develop a defense, which may include the submission of evidence to defense experts.
>
> 2. An East Bay forensics laboratory has agreed to complete the D1S80 test, and, if defendant is not excluded by that test, all the five remaining available PCR simultaneously within four weeks. This evidence is relevant to the prosecutor's 'evidence with respect to the circumstances of the offenses' (e.g., was there or was there not forcible rape of Inez Cantu Espinoza?) This evidence will also be relevant to certain post-trial relief to be requested by defendant.

(CT 538-539.)

At the same time, defense counsel filed a 'Motion For Transfer Of Evidence For Retesting and Protective Order." (CT 534.) This motion sought to transfer the Espinoza blood and evidence samples, as well as defendant's blood sample, to the Serological Research Institute in Richmond, California, "to permit defendant to obtain an independent analysis of said specimen for the presence of exculpatory DNA evidence." (CT 534.)

At the hearing on the motion, the prosecutor confirmed that he had served the defense with his notice of aggravating evidence

on May 10. (RT 4616.) He claimed the request for DNA testing was tardy and should be denied. (RT 4618.) He offered no specific reason why a continuance was not appropriate; he offered only that in "my experience, you know, we announce ready for trial and when the guilt phase is over we might have a day or two to do a little scrambling to arrange for witnesses, but then we're on to the penalty phase." (RT 4620.) The prosecutor did not claim that a continuance would inconvenience any of his witnesses. (RT 4620; see Pen. Code, § 1050, subd. (g).)

The prosecutor also complained that he had not received any discovery or witness statements from the witnesses the defense intended to produce for the penalty phase. (RT 4619.) Defense counsel replied, "I don't have anything on them. I haven't been able to talk to them because those were names given to me by my client. And if he tells me what those people said to him and I choose to rely on what he tells me they are going to say on the stand, I don't think I'm required at all to tell him that." (RT 4621-4622.) The court asked "what affirmative witnesses have you that you have already determined that you're going to present to the

jury?" (RT 4623.) Counsel replied: "I was thinking of some character witnesses. I can't say anymore than that, Your Honor. I haven't had really any more time to do this." (RT 4623.) Defense counsel went on to explain that he was not required to turn over any statements from his potential witnesses because he did not have any, and he did not have any because he had not in fact spoken to any of the witnesses. (RT 4625-2626.)

The court was skeptical: "You're telling this Court you do not intend to talk to those people and you have not as of this date talked to any of those people concerning what they're going to testify to?" (RT 4626.) Counsel replied: "I do not know if I will talk to them, Your Honor. I have not even discussed it at length with my client. I only got those names." (RT 4626.) The court still did not believe that counsel had not interviewed any witnesses for the penalty phase. (RT 4626.) Counsel reiterated, "I have not talked to the 16 people [on the penalty phase witness list]. I may. I will obtain their telephone numbers and I may. I think if my client says something and he's not always right, he tells me something, that that is privileged information . . . . [] There is, of course, the

danger that I could call people to the stand, Your Honor, and they say something other than my client believed they would say. And, of course, that is something that he and I will have to consider." (RT 4626-2627.)

The court denied the motion to continue the penalty phase. (RT 4627.)

B. The Denial Of The Motion To Continue Forced Defendant To Go To The Penalty Phase Trial Without Investigating The Prosecution Witnesses, Without Interviewing Any Defense Witnesses, And Without Confirming That Defendant's DNA Was Not In The Espinoza Evidence Samples.

Penal Code section 1050 provides that a continuance of a trial may be granted for good cause shown. (Pen. Code, § 1050, subd. (e).) "While the determination of whether in any given case a continuance should be granted normally rests in the discretion of the trial court, that discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense." (*Jennings v. Superior Court* (1967) 66

Cal.2d 867, 872 [citation and internal quotation mark omitted].) "[W]hen a denial of a continuance impairs the fundamental rights of an accused, the trial court abuses its discretion." (*People v. Fontana* (1982) 139 Cal.App.3d 326, 333.)

Penal Code section 1050 expressly provides that in deciding whether to grant a continuance, the court must consider "the general convenience and prior commitments of all witnesses, including peace officers." There was no evidence before the court to suggest that the prosecution witnesses would have suffered any inconvenience. There is no evidence here that testifying in July 1996 would have been any more inconvenient that testifying in May 1996.

The Ninth Circuit has set forth four factors to consider in whether denying a motion to continue constitutes an abuse of discretion. A court should consider: (1) the defendant's diligence in its efforts to ready its defense prior to the date beyond which a continuance is sought; (2) whether the continuance would have served a useful purpose if granted; (3) the extent to which granting the continuance would have inconvenienced the court, opposing

parties, and witnesses; and (4) the amount of prejudice suffered by the defendant due to the denial of the continuance. (*United States v. Flynt* (9th Cir. 1985) 756 F.2d 1352, 1359, amended on other grounds,764 F.2d 675 (9th Cir.1985); *Armant v. Marquez* (9th Cir. 1985) 772 F.2d 552, 556, cert. denied, 475 U.S. 1099 (1986). "[T]he weight given to any one [factor] may vary from case to case. At a minimum, however, in order to succeed, the appellant must show some prejudice resulting from the court's denial." (*Armant*, 772 F.2d at 556-57 (citations omitted).)

"The concept of fairness, implicit in the right to due process, may dictate that an accused be granted a continuance in order to prepare an adequate defense. Denial of a continuance warrants reversal, however, only when the court has abused its discretion." (*United States v. Bogard* (9th Cir. 1988) 846 F.2d 563, 566.) There is no mechanical test for determining when the denial of a continuance is so arbitrary as to violate due process. Rather, the answer lies in the specific facts of each case, and the reasons offered for the continuance. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; *Bogard, supra,* 846 F.2d at 566.)

Here, the prosecution argued that the defense was slow to appreciate the necessity of more discriminating DNA testing. However, the need for *additional* testing did not become apparent until Andrus testified that the evidence sample was a mixture of DNA from more than one person and that further testing was required to isolate the specific genotypes, as opposed to just identifying the alleles. (RT 3299, 3447.) Because the State did not reveal the actual test results during the *Kelly* hearing, the defense had no notice of the mixed sample until Andrus testified at trial on April 24. (RT 3321.)

Further, a continuance would have served a useful purpose. First, it would have permitted the defense to conduct more specific DNA testing on the Espinoza evidence. Second, it would have permitted defense counsel time to interview the penalty phase witnesses for the prosecution and the defense.

Finally, the prejudice to defendant is apparent: his attorney was completely unprepared to rebut the prosecution case or to present a case for life. *One* witness, Dr. Hedberg, testified for the defense and his testimony, that defendant was perfectly sane and

not a danger a society (RT 4750-4751), was hardly mitigating. In fact, Dr. Hedberg's testimony served only to eliminate the possibility that the crimes defendant was convicted of could be explained by mental illness or emotional disturbance.

Dr. Hedberg also alluded to "verbal and emotional abuse" that defendant suffered at the hands of two step-fathers and claimed that a school teacher had unfairly "rapped" defendant's knuckles for poor performance when defendant suffered from a learning disability. (RT 4745-4746.) This paltry showing of mitigating circumstances essentially told the jury that no mitigation existed: defendant had no mental illness and nothing in his upbringing could explain his actions. Essentially, there was no defense.

Once again, the trial court sat on its hands and watched a man facing execution go to trial without a working attorney. Defendant was accompanied to the courtroom by a man the court appointed to represent him, but the court was well aware that appointed counsel was unprepared. The court compounded the problem by denying the motion to continue. Once again, the

actions of the trial court deprived defendant of the effective assistance of counsel. (*Geders v. United States, supra*, 425 U.S. at p. 80.) The error is reversible per se. (*Perry v. Leeke, supra*, 488 U.S. at p. 279.)

Even under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, the error is reversible. At the very least, a continuance would have given counsel time to interview witnesses and develop the childhood abuse issues that Dr. Hedberg so briefly alluded to.

ARGUMENTS RE: CALIFORNIA'S DEATH PENALTY STATUTE

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, defendant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that defendant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of

the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the

fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

XI. DEFENDANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against defendant the statute contained twenty-one special circumstances purporting to narrow the category of first degree murders to those murders most deserving

of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or

under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for*

Furman?, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).) It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case

proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which defendant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

XII. DEFENDANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some

fact beyond the elements of the crime itself.[20] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence,[21] or had a "hatred of religion,"[22] or threatened witnesses after his arrest,[23] or disposed of the victim's body in a manner that precluded its recovery.[24]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been

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[20]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[21]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[22]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S. Ct. 3040 (1992).

[23]*People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[24]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.* 496 U.S. 931 (1990).

used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[25] or because the defendant killed with a single execution-style wound.[26]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-

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[25]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[26]See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

elimination, avoiding arrest, sexual gratification)[27] or because the defendant killed the victim without any motive at all.[28]

c. Because the defendant killed the victim in cold blood[29] or because the defendant killed the victim during a savage frenzy.[30]

d. Because the defendant engaged in a cover-up to conceal his crime[31] or because the defendant did not engage in a cover-up and so must have been proud of it.[32]

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[27]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[28]See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[29]See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[30]See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[31]See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[32]See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

e. Because the defendant made the victim endure the terror of anticipating a violent death[33] or because the defendant killed instantly without any warning.[34]

f. Because the victim had children[35] or because the victim had not yet had a chance to have children.[36]

g. Because the victim struggled prior to death[37] or because the victim did not struggle.[38]

h. Because the defendant had a prior relationship with the victim[39] or because the victim was a complete stranger to the

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[33]See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[34]See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[35]See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[36]See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[37]See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[38]See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[39]See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

defendant.[40]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[41]

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[40]See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[41]See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[42]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[43]

423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[42]See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[43]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[44]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[45]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely

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[44]See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[45]See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

XIII. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3, subdivision (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the

mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

A. Defendant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, defendant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on

the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [hereinafter *Apprendi*] and *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved

beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

1. In the Wake of Ring, Any Aggravating Factor Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[46] Only California and four other states (Florida,

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[46]See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat.

Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors.[47]

Ann. § 53a-46a(c) (West 1985).)

[47]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility; its role "is not merely to find facts, but also – and most important

According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[48] These factual determinations are essential prerequisites to death-

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– to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[48]In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: '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.'" (*Id.*, 59 P.3d at p. 460.)

eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[49]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law.

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[49]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

As section 190, subd. (a),[50] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 592.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree

[50]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. 584.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating*

circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[51] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.

There is no meaningful difference between the processes followed under each scheme. "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." (*Ring*, 536 U.S 584.) The

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[51]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states,

any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. The finding of an aggravating factor is an essential step before the weighing process begins.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra,* 512 U.S. 967, 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the

imposition of a death sentence.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring*, *supra*, 536 U.S 584.)

Finally, this Court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.

(*Ring*, *supra*, 536 U.S 584, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[52] As the high court stated in *Ring*, *supra*, 536 U.S. 584:

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[52]In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly found the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Requirements of Jury Agreement and Unanimity.

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to defendant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[53] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such factual determinations must be made by a jury and cannot

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[53]See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra,* 536 U.S. 584.)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[54] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and

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[54]The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 LEd.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 LEd.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra,* 524 U.S. at pp. 731-732.)

Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, ¶¶ 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring, supra* 563 U.S. 584).

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[55] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th

[55]The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley, supra*, 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California, supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439.) While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed – particularly in a case such as this one, where a chief

reason presented to the jury for imposing a death sentence was misconduct that was not part of the commitment offense.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there*

must be fire.

(*Richardson, supra*, 526 U.S. at p. 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.)

However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which defendant is entitled to unanimous jury findings beyond a reasonable doubt.

B. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

1. Factual Determinations.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the

more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,*430 U.S. 349, 358.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt.

(1) Imposition of Life or Death.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. *Winship*, *supra*, 397 U.S. at 364. Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Stantosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424

U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Stantosky*, *supra*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'

(455 U.S. at 756.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with

in *Stantosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Stantosky*, *supra*, 455 U.S. at 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

The final *Stantosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of

parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California, supra,* 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Stantosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

(2) Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances

found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51.)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 346.)

Accordingly, defendant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based

on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, defendant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing defendant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) That should be the result here, too.

(3) Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie

in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

(4) Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the

defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[56] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra.*)

[56]See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

2. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived defendant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[57] The same analysis applies to the far graver decision to put

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[57] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the

someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, 486 U.S. 367, for

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crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[58]

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[58]See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann.

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and

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§ 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

3. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar

circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida, supra,* 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had

"greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*,

428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2248, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.)

Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[59]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence

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[59]See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the

same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

4. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v.*

Mississippi (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by defendant and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The United States Supreme Court's recent decisions in *Ring v. Arizona*, *supra,* and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Defendant's jury was not instructed on the need for such a

unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

5. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Defendant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

6. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428

U.S. 280, 304.)

It is thus likely that defendant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated defendant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply

drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

XIV. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the

United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the

State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[60] as in *Snow*,[61] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a

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60 "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275.)

61 "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, 30 Cal.4th at 126, fn. 32.)

finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies on basic procedural protections are skewed against

persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen*, *supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its

holding.

(1) The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright*, *supra*; *Atkins v. Virginia*, *supra*.) Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of

uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Pen. Code, ¶ 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and

Stephens, J.J.].) The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra.*)

Nor can this fact justify the refusal to require written findings

by the jury (considered by this Court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at p. 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra.*) California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra.*)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra.*) To withhold them on the basis that a death sentence is a reflection of

community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

XV. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.] Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website.) These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized

nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [dis. opn. of Field, J.].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, *supra*, 122 S.Ct. at 2249-2250.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now

bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 122 S.Ct. at 2249, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 122 S.Ct. at p. 2249.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.]

110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes." Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra.*)

Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect.

Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

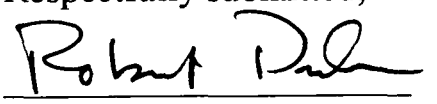
Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Defendant's death sentence should be set aside.

CONCLUSION

For the reasons stated above, the conviction and death sentence must be reversed.

Date: 11/10/2003

Respectfully submitted,



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WORD COUNT

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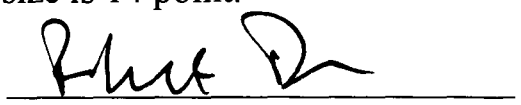

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CERTIFICATE OF SERVICE

I, Robert Derham, am over 18 years of age. My business address is 524 San Anselmo Avenue, #224, San Anselmo, CA 94960. I am not a party to this action.

On November 12, 2003, I served the:

Appellant's Opening Brief

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