IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	S049973
Plaintiff and Respondent,	)	Los Angeles County Superior Court No. LA015339
v.	)	
DOUGLAS OLIVER KELLY,	)	
Defendant and Appellant.	)	

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TEXT AND OTHER AUTHORITIES

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v.	)	
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Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

By an information filed on May 25, 1994, appellant was charged in Los Angeles Superior Court case number LA015339 in Count 1 with murder (Pen. Code, § 187, subd. (a)) and three special circumstances – murder committed during a robbery (Pen. Code, § 190.2, subd. (a)(17)(A)), murder committed during a rape (Pen. Code, § 190.2, subd. (a)(17)(C)) and murder committed during a residential burglary (Pen. Code, § 190.2, subd.

(a)(17)(G)). As to Count 1, the information also alleged enhancements for use of a deadly or dangerous weapon, to wit, scissors (Pen. Code, § 12022 (b)); arming and use of a deadly or dangerous weapon during the commission of a sexual offense (Pen. Code, § 12022.3, subds. (a) and (b)). Count 2 alleged residential burglary. (Pen. Code, § 459.)[1] (CT 236-238.)[2]

At appellant's arraignment in superior court on May 25, 1994, Dennis Cohen of the Los Angeles County Public Defender's Office was appointed to represent appellant at trial. Appellant entered pleas of not guilty to the charges in the information and denied the special circumstance and weapon allegations. (CT 275; RT 1-3.)

Jury selection began on May 2, 1995. (CT 351; RT 132.) The prosecution filed a Notice of Evidence of Aggravating Factors at Penalty Phase on May 9, 1995. (CT 354.) The prosecution noticed as evidence of aggravation at a penalty phase in addition to the circumstances of the crime and any special circumstances found true at the guilt phase of trial, evidence of prior violent criminal activity, including evidence of seven incidents of arrests and/or convictions, as well as "any other criminal activity involving

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[1] This count was dismissed at the close of the guilt phase after the prosecution did not oppose the defense motion to dismiss for lack of evidence. (RT 2039-2041.)

[2] "CT" refers to the Clerk's Transcript on appeal; "RT" refers to the Reporter's transcript on appeal.

the use or threat of use of force or violence." In addition, the prosecution noticed the intent to present a "victim impact statement." (CT 354.)

Pretrial motions were heard on May 10 and 12, 1995. The defense moved to exclude evidence of uncharged misconduct evidence offered by the prosecution under Evidence Code section 1101 (b). (CT 355-356; RT 263-288.) Following a hearing on the oral motion, the trial court ruled that the testimony of an alleged sexual assault victim would be permitted at trial as well as the testimony of Michelle Theard, appellant's former girlfriend, about an alleged assault that occurred the week before the killing.[3] (RT 289.) In addition, the trial court ruled that the prosecutor could present the testimony of several witnesses to testify about questionable financial dealings they had had with appellant. (RT 290.)

Appellant's *Wheeler* motion was heard and denied on May 19, 1995. (CT 367; RT 735.) Jury selection was completed that day, and on May 30, 1995 the guilt phase of trial began. (CT 367; RT 697.)

At the close of the prosecution case, upon the joint motion of the defense and prosecution, Count 2 of the information, which alleged a residential burglary was dismissed. (CT 431; RT 2041.) Defense motions pursuant to Penal Code section 1118.1 were argued and denied. (CT 431;

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[3] As set forth, *infra*, additional witnesses to sexual assaults by appellant were ultimately permitted to testify.

RT 2039-2045.)

Appellant did not testify and the defense presented no evidence or witnesses. (RT 2037.)

Following argument and instruction, the jury retired to deliberate on June 20, 1995. (CT 434; RT 2272.) Deliberations continued over the next three court days until the jury announced the verdict on June 26, 1995. (CT 436-438; RT 2308-2309.) Appellant was found guilty of Count 1 and the special circumstances and weapon use allegations were found true. (CT 440, 519.)

The penalty phase of trial began on June 29, 1995, and concluded the following day without any defense evidence presented. (CT 522, 525; RT 2471.) Arguments and instruction were concluded on July 5, 1995, and the jury retired to deliberate. (CT 528; RT 2545-2608.) After three days of deliberation, the jury returned a verdict of death on July 10, 1995. (CT 562; RT 2734.)

At the sentencing hearing held on November 8, 1995, appellant's motion for new trial was argued and denied, as was the defense motion to reduce the penalty to LWOP. (CT 589; RT 3078-3120.) After considering the probation report, the trial court denied probation. As to Count 1, the trial court imposed the death penalty. (CT 592, 593-595; RT 3121.)

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death and it is automatic under Penal Code section 1239(b).

INTRODUCTION

Appellant Douglas Kelly was convicted of murdering 19 year-old Sara Weir in September 1993, following a trial that was deeply flawed and profoundly unfair. From voir dire to verdict, the trial against appellant was tainted by the suggestion of fear and the specter of race.[4]

The trial began with a jury selection process marred by three egregious errors: a prospective juror was improperly excused for cause based upon his concerns about the death penalty; an African American woman was improperly excused for bias; and appellant's *Batson-Wheeler* objection to the prosecutor's peremptory challenge of another African American woman was denied. As a result, the jury that tried appellant was skewed in terms of both race and death-propensity.[5]

This inherently biased jury was then assaulted with a barrage of irrelevant and devastating "bad character" evidence introduced, not for any legitimate purpose, but to establish the very existence of a crime for which

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[4] Appellant is African American. The victim was part Canadian Indian, adopted as a baby by a white family.

[5] Because appellant was excluded from the proceedings during which prospective jurors were stricken, he was unaware of the manner in which his jury was being shaped.

there was patently insufficient evidence, while at the same time portraying appellant as predatory serial rapist of young white women who needed to be held accountable, if not for this crime, for those for which he was never sufficiently punished. To this end, the jury spent more than a third of the trial listening to the deeply disturbing testimony of three young women who told of being sexually assaulted by appellant.

In addition, the court also allowed a parade of prosecution witnesses to describe irrelevant and immaterial instances of appellant's devious financial dealings and, in some cases, simply express their unease about appellant himself.

On top of all this, the victim's mother was permitted to testify at the guilt phase regarding the many fine attributes of her daughter and the devastating impact of her death on the family.

All of this highly inflammatory and legally inadmissible evidence was absolutely critical to the prosecutor's case, because the evidence to support the first degree murder charge was sorely lacking. Indeed, despite the massive amount of highly prejudicial and inflammatory evidence of appellant's past bad deeds, the jurors deliberated over the course of three days at the guilt phase before returning their guilty verdict.

The trial ended with an achingly emotional penalty phase presentation, at which the victim's mother again testified and then narrated

a 22-minute video tribute to the victim, in which she described the profound loss she and her family suffered as a result of the loss of Sara Weir.

Again, the jurors had obvious difficulty in reaching a verdict. In a case in which they did not hear a word from, or a kind word about Mr. Kelly, it still took the jurors several days to decide that he deserved to die for his crime.

The murder conviction, special circumstance findings and death judgment in this case were obtained at the expense of appellant's fundamental constitutional rights to a fair trial and a reliable penalty determination and should not be permitted to stand.

STATEMENT OF FACTS

Guilt Phase

Michelle Theard testified that in 1993 she and her 12 year-old son, Eric Alton, were living at 4950 Laurel Canyon, apartment number 110. (RT 890-891.) Theard met appellant at the Family Workout gym in Burbank in early 1993 and they started dating in March. (RT 892, 968.)

Appellant told Theard he worked as a trainer at the gym as well as doing maintenance, and later claimed he was a manager/owner of the gym. (RT 898.) Appellant also told her that he was from a very wealthy family in Chicago from whom he received money, although Theard never saw evidence of such a fund. (RT 895.) Appellant said he owned a restaurant,

either in Florida or Chicago. (RT 896.)

Appellant moved into Theard's apartment in April 1993. (RT 968.) He continued to work at the gym and contributed half the rent and finances. (RT 969.) Although the relationship progressed for a few months, by the end of August 1993, Theard had asked appellant to move out because she felt that appellant was not being honest with her. (RT 899.)

On August 30, 1993, Theard and her son came home to the apartment. Appellant was not there, but the doors were open and there were champagne bottles and glasses lying around. In Eric's bathroom Theard found a pair of women's underwear. (RT 900.)

Appellant called the apartment several times that night and sounded like he was highly intoxicated. (RT 981.) He came home shortly before midnight. (RT 901.) Theard spoke to him through the closed door and told him she did not want him to come in because he was drunk. Appellant kicked the door in, grabbed Theard by the neck and yelled at her never to lock him out again.[6] (RT 903-904.) He held her up against the wall with both hands around her neck. Theard felt as if she were going to pass out and told appellant he was going to kill her. (RT 906.) Appellant let her go and fell to his knees on the floor. They were both crying. Appellant was

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[6] This testimony was admitted over defense objection. The propriety of the trial court's ruling is addressed in Argument IV.

pacing around the apartment, talking in a rambling tone that someone was trying to kill him and that Theard and her son's lives were in danger. (RT 906.) His mood swung from anger to tears. (RT 982-983.)

Theard contacted a friend of appellant's who came over and spent the night in the apartment. Appellant and Theard slept together in Theard's bed. (RT 984.)

The next day Theard and appellant stayed in the apartment together while Eric went to school. (RT 986.) That night, Theard went with a friend to the police station and filed a report against appellant, who was arrested later that night at the apartment. (RT 987-988.)

From that night on, Theard stayed with her sister, but went back to the apartment every few days to pick up clothes. (RT 937.) On Labor Day, September 6, 1993, Theard went to the apartment and while she was there she discovered appellant's briefcase. (RT 941.) While Theard was at the apartment she began to smell an odor coming from the bathroom or hallway area. She found some moldy towels which she hung out to dry, but the odor persisted. (RT 944-945.) On September 15, 1993, she and her son went into his bedroom to open a window and discovered a body wrapped up behind the bed against the wall. (RT 946.) She went to the manager's apartment and called the police. (*Ibid*.)

Detective John Coffey testified that he estimated the body had been

there for 3-4 days judging by the odor caused by decomposition. (RT 1410.) The body was rolled up in a blanket and concealed under the child's bed. (RT 1415.) Covering the head and secured by tape around the neck was a plastic bag and on the head and on the head was a baseball helmet.[7] (RT 1426, 1432.)

Appellant's fingerprints were found on the bed frame (RT 1382) and his palm print was identified as being on a roll of tape similar to the tape on the body, which was found in a toolbox in the kitchen (RT 1385).

The victim was identified through dental records as Sara Weir. (RT 1243.) Weir had been reported missing by her mother on September 14, 1993, after she failed to show up at work and could not be located by family members or friends. (RT 863.) Weir's roommate, Elizabeth Mackiewicz, was out of town until the day after Labor Day. Weir was not home, but Mackiewicz assumed she was at her parents' house. (RT 1066.) When she did not hear from Weir by the end of the week, Mackiewicz called Weir's father. (RT 1067.)

Heidi Kindberg, a friend and co-worker of Sara Weir's at Warner Brothers received a phone call from Weir at work shortly after 9 a.m. the Tuesday after Labor Day, 1993. (RT 1933.) Weir said she would not be at

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[7] Theard's son testified the helmet belonged to him and was kept in his closet. (RT 1002, 1006.)

work that day because a friend had committed suicide and she had to deal with that. (RT 1934.) Weir offered no other details, and sounded upset. (RT 1935.)

Robert Coty was the manager of the apartment building across the street from Theard's building. (RT 1144.) In September 1993, Coty saw news crews in the neighborhood and asked what they were photographing. (RT 1145.) When Coty heard they were covering a killing in the building, he contacted the police. (RT 1146.)

Coty testified he was not sure of the exact day he made his observations, although he thought it was after Labor Day weekend. (RT 1147.) He was out on his balcony of his apartment having a cigarette. The balcony faces the building at 4950 Laurel Canyon, and is about 150-175 feet away. (RT 1148.) Coty had caught glimpses of people in an apartment on the first level of that building before, walking from room to room in front of the windows. (RT 1151.) He had seen a black man, broad shouldered with a good build, in the apartment. (RT 1152.) Coty believed the man he saw on this day was the same one. (RT 1153.)

Coty testified he saw a person sitting or kneeling a bit below the window sill in a room near the southern corner of the building. The person was Caucasian with dark hair and appeared to be unclothed. (RT 1153.) The man was not wearing a shirt. (RT 1154.) Coty saw him walk two

times around the kneeling or sitting person, then the drapes were closed, although Coty could not see who closed them. (RT 1154, 1157.)

Coty had the impression that the person who was kneeling or sitting was being dominated or scolded even though he never saw the man touch the other person. (RT 1159, 1160.) He saw no hitting or striking and heard no yelling or screaming coming from the apartment. (RT 1159.)

According to the testimony of Doctor Eva Heuser, the coroner who performed the autopsy on the body, the cause of death was multiple stab wounds inflicted by a knife-like instrument, possibly scissors. (RT 1948, 1958,1964, 1968.) A pair of scissors found in Theard's toolbox could have inflicted the wounds.[8] (RT 1999.) All together, Dr. Heuser counted 29 wounds to the body – to the neck, chest and abdomen – all of which she believed were inflicted with the same instrument. (RT 1992, 1995, 1996.) The body was badly decomposed. (RT 1961.)

A criminalist testified that he examined the sexual assault kit samples that were taken from the body of Sara Weir. He tested the four

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[8] About a week after Weir's body was discovered, Theard was in the apartment with her family packing up her things. (RT 947.) Her sister found a pair of scissors in a toolbox in a kitchen cabinet. The scissors, which were normally kept in the bathroom medicine cabinet, had blood on them. Theard had left the scissors on the bedroom night stand on Labor Day weekend. (RT 949-951.) Theard never kept them in the toolbox. Appellant knew where the tools were kept. (RT 952.)

swabs – two anal swabs and two vaginal swabs – and did not detect any semen or sperm in the sample. (RT 1318.) The criminalist testified that he could not say whether there was sperm in the victim's body one week prior to collection of the samples, or whether it decomposed by the time the sample was collected. (RT 1320.) The coroner testified that a combing of the pubic hair was done, but she was not aware of the results. (RT 2029.)

Weir's car was located in Mexico, but was never recovered. (RT 1245.) On November 24, 1993, appellant was detained at the Texas border, attempting to enter from Mexico. (RT 1246.) In his possession, appellant had two uncashed, signed checks belonging to Weir. (RT 1248.) Weir's mother testified the signatures on the checks did not appear to be her daughter's, and there had been no activity on the account since September, 1993. (RT 1213-1214.) Weir's wallet and purse were never found. (RT 864.)

Appellant met Weir at the gym where he worked. According to Michele Theard, Weir hired appellant to do some weight training with her at the gym. (RT 931.) Theard met Weir when Theard and appellant drove over to Weir's apartment to deliver a dog appellant was giving Weir. (RT 932.) Theard never thought they had anything other than a professional relationship. (*Ibid*.) Appellant told her that Weir had invited all of them, Theard, Eric and appellant, to Big Bear over the July 4th weekend. Weir

had just broken up with her boyfriend and wanted company. She cancelled the plans at the last minute, however, and appellant was upset. (RT 933-935.)

Over defense objection, the prosecution presented the testimony of several witnesses regarding conversations they had had with Weir in order to show the nature of her relationship with appellant. (RT 1016-1017.) The prosecution's theory was that Weir considered appellant only a friend, and

was not interested in a romantic or sexual relationship with him. (RT 1018-1020.)

Sarah Steinberg, a co-worker and friend of Weir's, testified that she and Weir confided in each other about men in whom they were interested, and Weir never mentioned appellant's name. (RT 1028-1030.)

Dolores Whiteside knew Weir as a close friend. (RT 1041.) Weir gave her a membership to the gym where appellant worked and she had a few training sessions with appellant and Weir. (RT 1044.) Weir never expressed any concern about appellant, nor did she display any romantic interest in him. Their relationship seemed strictly professional. (RT 1045-1046.)

Jaci Coe knew Weir since sophomore year in high school. (RT 1053.) Weir talked to Coe about appellant, referring to him by name. (RT 1054.) Sometime in August or September, Weir told Coe that appellant was flirting with her. Weir said she was uncomfortable because she did not want a romantic relationship with him, but also said she was not going to stop the training. (RT 1055-1057, 1062.)

Elizabeth Mackiewicz, Weir's roommate testified she was aware that Weir was seeing two different men – Hobart and Paul – both of whom she brought to the house at various times. (RT 1064, 1065.) Weir had mentioned appellant as a trainer at the gym, and described him as a big guy,

well built. (RT 1066.)

Marissa Palustre, a friend of Weir's since first grade, testified that Weir spoke of the men in her life – Hobart was an ex-boyfriend and Paul was her current love interest in the summer of 1993. (RT 1070-1071.) Weir mentioned the name Douglas Kelly as her personal trainer, but never expressed an interest in pursuing a relationship with him. (RT 1071.)

Doreen Derderian knew Weir for 15 months before her death, and they were very close friends. (RT 1075.) She met appellant when Weir asked Derderian to accompany her to appellant's apartment to look at a dog Weir was thinking of getting. (RT 1079.) They picked appellant up at the gym and Derderian got the impression that appellant regarded her as an intruder. (RT 1083.) Weir and appellant interacted as trainer and client – there was nothing romantic or flirtatious about their behavior. (RT 1084.)

When they dropped appellant off at the gym, Derderian asked Weir if she was seeing appellant outside of the gym, and she said no. Derderian was glad because she had an uneasy feeling about him. (RT 1086.)

Evidence of Uncharged Offenses

Over defense objection, the trial court permitted the prosecution to present the testimony of several witnesses who testified about questionable financial dealings they allegedly had with appellant. (RT 1163-1171 [Damon Stalworth]; RT 1175-1183 [Helen Walters]; RT 1192-1202 [Karrie

Marshall]; RT 1258-1261[Leticia Busby].) In addition, three witnesses, Jodi Dorn, Kim Venter and Teri Baer, testified about alleged sexual assaults committed by appellant in 1987, 1991 and 1993, respectively. (RT 1465-1602 [Dorn]; RT 1610-1754 [Venter]; RT 1755-1902 [Baer].)[9]

Appellant did not testify at the guilt phase. (RT 2036.) The defense rested without presenting any testimony or evidence. (RT 2037.)

Penalty Phase

Esther Dorsey testified that she met appellant in New Jersey in 1984 while they were both working at a restaurant in Morristown. (RT 2341-2342, 2345.) One night after work, Dorsey, appellant and other employees of the restaurant met at a disco. (RT 2345.) Appellant was drinking scotch, bought some champagne for the table and had two beers while they were there. (RT 2356-2357, 2407, 2410.)

After they left the restaurant, Dorsey went with appellant to his room where he said they could talk. (RT 2363.) While they were in the room, appellant tried twice to kiss Dorsey. She was nervous and tried to leave but appellant yelled at her to sit down. (RT 2369-2370.) Appellant's demeanor changed shortly after they got to the room. He eyes looked like they were

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[9] The testimony of each of the witnesses to the uncharged misconduct is set forth in detail in Argument IV, which addresses the trial court's error in admitting the evidence.

popping out of his head and his facial expression was "unreal." (RT 2412.) Dorsey said appellant acted like he had a split personality. (RT 2413.) When Dorsey tried again to leave, appellant grabbed her and threw her on the bed. (RT 2372.) Over the course of the next several hours, appellant raped Dorsey seven times. (RT 2394.) Eventually, appellant fell asleep and Dorsey left the room. (RT 2399.) A friend took her to the police station and then to the hospital where a rape kit was obtained. (RT 2401.)

Dorsey testified in front of a grand jury and was told that appellant was indicted. (RT 2403.) Dorsey was never consulted about a plea bargain, but saw appellant in town after he was released from jail. (RT 2404.) Once he walked past her and told her he would "get" her; a second time he said he was going to kill her. (RT 2405.) No further contact occurred between appellant and Dorsey.

Martha Farwell, Sara Weir's mother, testified to the impact of her daughter's death on Farwell and her family and the pain she, her husband and two young sons suffered. (RT 2435, 2457-2466.) Farwell prepared a video tape of Weir at different ages from birth until the time she died. The photographs and video clips were set to Weir's favorite music, including songs she had played for her mother the weekend before she died. (RT 2463.) Over defense counsel's objection the 22-minute video tape was

played for the jury.[10] (RT 2426, 2468; People's Exhibit Number 47.)

Appellant did not testify and no defense evidence was presented at the penalty phase of trial. (RT 2470-2471.)

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[10] Details of Farwell's testimony and the videotape are included in Argument XV, which addresses the admissibility of victim impact evidence at the penalty phase.

I.

THE TRIAL COURT EXCUSED FOR CAUSE A PROSPECTIVE JUROR BASED ON AN INADEQUATE VOIR DIRE EXAMINATION AND AN ERRONEOUS DETERMINATION THAT THE JUROR COULD NOT VOTE FOR THE DEATH PENALTY; AUTOMATIC REVERSAL OF THE DEATH PENALTY IS REQUIRED

A. Introduction

The trial court erroneously excused prospective juror James Todd for cause based on his views concerning the death penalty. (*Wainwright v. Witt* (1985) 469 U.S. 412.) Because the erroneous exclusion of even one prospective juror based on their views about the death penalty constitutes reversible error, the death judgment in appellant's case must be set aside without a finding of prejudice. (*Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667 (opn. of the court); *id.* at pp. 667-668, (plur. opn.); *id.* at p. 672, (conc. opn. of Powell, J.); *People v. Heard* (2003) 31 Cal.4th 946, 958.)

A prospective juror may be excluded for cause based upon his or her views concerning the death penalty only if the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas* (1980) 448 U.S. 38, 45; *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Heard*, *supra*, 31 Cal.4th 946.) "' A prospective juror is properly excluded if he or

she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' [Citation.]" (*People v. Heard*, *supra*, 31 Cal.4th at p. 958, citing *People v. Cunningham* (2001) 25 Cal.4th 926, 975.)

This Court reviews the trial court's decision to exclude a prospective juror for substantial evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962; *see also Wainwright v. Witt*, *supra*, 469 U.S. at p. 433 [ruling that question is whether the trial court's finding that the substantial impairment standard was met is fairly supported by the record considered as a whole].)

The record in this case reveals that while prospective juror James Todd was generally opposed to the death penalty, he was in favor of it in some cases and could conscientiously consider all the sentencing alternatives in this case. Mr. Todd's answers on voir dire did not demonstrate an impairment of his ability to consider death as a possible punishment in appellant's case. His removal from the jury was therefore erroneous.

B. Voir Dire of Juror James Todd

Prospective juror James Todd was first questioned by the court on voir dire about his views on the death penalty:

> Q: Then you indicated that you may have a problem if we get to a penalty phase?

A: Yes. I'm just – I'm basically against the death penalty except — and then I'll throw out Oklahoma and Oklahoma City and things like that. Then I waffle when it gets to that. When it gets to the very heinous type situations, then I'm waffling. I'm basically against the death penalty but – [11]

Q: Could you see a situation where you could impose it?

A: Yes. Oh, yes.

Q: And then on Question 96, if you could take a look at that.[12]

A: Yes.

Q: And you remember how you answered it?

A: I believe I answered it – other than reading it again, I would answer it yes.

Q: Okay. Thank you.

(RT 585-587.)

Trial counsel then questioned Mr. Todd:

Q: Mr. Todd, when you get to Vegas, play five on the roulette wheel.[13]

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[11] Here the trial court interrupted the juror's answer at a critical juncture. As this Court noted in *People v. Heard*, *supra*, 31 Cal.4th 946, such actions impede effective voir dire. (*Id*. at pp. 966-967, fn. 9 ["the court should '[r]efrain from interrupting the [prospective] jurors during their answers and give them sufficient time to formulate their answers'"].)

[12] Question 96 on the juror questionnaire asked prospective jurors whether they would be able to put aside penalty issues while they deliberated guilt. Mr. Todd circled "Yes," and wrote: "Penalty has nothing to do with guilt or innocence." (CT 290.)

[13] The juror had earlier told the court and counsel during hardship questioning that he and his wife had a trip to Las Vegas planned. (RT 585.)

A: I don't touch the roulette wheel with a pole.

Q: Play five. Where do you put yourself on the extremes of always imposing the death penalty or never imposing the death penalty regardless of the facts of the case? Do you find yourself in either extreme or in the middle?

A: Probably a little bit more towards the not [sic] but it depends on the case. Like I explained to the judge, in some case, like Oklahoma or anything like that, I'd just as soon go out and do the job myself.

Q: The case determines your mind?

A: Absolutely.

Q: Do you find yourself then a person who doesn't want to be put in a general category but wants to look at each individual case to make the decision?

A: Absolutely.

Q: That's how you feel?

A: That's the way I feel.

Q: That's the way you feel it should always be done?

A: Absolutely.

Q: Thank you very much.

(RT 605-606.)

Mr. Todd was then questioned by the prosecutor, Mr. Ipsen:

Q: Mr. Todd, if the law is as I've described it in California, that the death penalty is the law and the jury is supposed to weigh the two factors and make a decision based on aggravating and mitigating, does that law you support [sic]?

A: Yes.

Q: I got the impression you indicated that over all you are an opponent of the death penalty.

A: Basically but with provisos.

Q: You say provisos. You mentioned the Oklahoma situation?

A: There is an awful lot of these serial cases and things like this that crimes are so heinous beyond description as far as I'm concerned.

Q: In what sense are you an opponent of the death penalty because I think many people would say yes, I think that Oklahoma and serial killers –

A: I have struggled with this my entire life. I've never really – morally I'm opposed to it because I don't think anybody really has a right to take another person's life regardless, and it doesn't make it any more right for the government to do it than it is for an individual to do it.

Q: Morally, that's how you feel?

A: That's morally the way I feel.

Q: Have you ever been in a position where you had to deal with that struggle between what you think is morally correct and what the law says the juror is supposed to do? Have you ever been in this position before?

A: No.

Q: Do you know how you are going to resolve the struggle of what you feel your morality is and what the state law is as the judge tells you?

A: That's where – sooner or later I feel that if you are going to do an effective job as a jury [sic], if at all possible you have to set your own inconsistencies aside and go with what the law

says.

Q: You are saying that you don't think you would have a problem doing something that you think – I just feel like you may be in a position of having to decide whether to vote for something which is immoral under your morality but that you think technically is favored by the government. [¶] You may weigh them and say yeah, Mr. Ipsen is right, there are a lot of aggravating factors, there aren't mitigating factors, but I morally just can't support the death penalty. I have trouble with the idea that you would abandon your own morality.

A: I have the same trouble.

Q: Are you the best – we talked about the idea of the doctor before. I think – I'm sure you understand that. You are an intelligent man, I can tell.

A: Yes.

Q: My sense is you might not be the best juror for a death penalty case although excellent for any other murder case or any other –

A: I suspect you might be right. I suspect you might be right.

Q: Are there other laws that you have a moral conflict with what the law of the state is, like it's illegal to commit robberies, illegal to commit burglaries, illegal to shoplift? Do you support those laws?

A: It comes down, as far as I'm concerned, to the death penalty. The death penalty murder basically is the only thing I'm aware of at this point in time where death is an option.

Q: Thank you.

(RT 585.)

Based on his entire voir dire, the record does not support a finding

that Mr. Todd's ability to consider the death penalty as a sentencing option was substantially impaired and thus his removal from the jury requires of the death judgment.

C. The Record Does Not Support a Finding of Substantial Impairment of Mr. Todd's Ability To Serve on a Capital Jury

At a sidebar discussion, the prosecutor challenged Mr. Todd for cause. The court asked trial counsel if he objected to the challenge and counsel responded:

> I better state something for the record or some appellate lawyer is going to scream I'm incompetent and I will because, although he definitely is a strong leaner against the death penalty, I have to agree with that, you know, he didn't say he would in all circumstances not impose it. [¶] He, of course, mentioned Oklahoma and very heinous, what he felt was very heinous, that he could impose it. So I don't think he is a person that qualifies on the prosecution's end to go by cause.

(RT 636.)

The court responded:

> At first I tended to agree with you but then because he indicated on serial cases and, let's fact it, if we do get into a penalty phase, some people might think your client is a serial criminal; but then the more Mr. Ipsen questioned, it's clear to me that Mr. Todd would never vote for the death penalty.

The prosecutor added, "Is morally opposed," and the court agreed: "Yes, absolutely opposed to it." Mr. Todd was excused for cause. (RT 635-636.) The trial court's determination is not support by substantial

evidence.

First, the trial court and prosecutor were simply incorrect in characterizing Mr. Todd as unalterably opposed to the death penalty. Mr. Todd described himself as morally opposed, but with "provisos." He placed himself at neither extreme of the spectrum regarding the death penalty, and answered emphatically "yes" to the court's question whether he could envision a situation where he could impose the death penalty. (RT 585-586.)

Second, although Mr. Todd expressed discomfort with the thought of imposing the death penalty, such feelings are not a legitimate basis for exclusion of jurors from sitting on a capital case. To the contrary, they are entirely appropriate. As Chief Justice Rehnquist explained,

> It is important to remember that *not all who oppose the death penalty are subject to removal for cause in capital cases*; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.[14]

(*Lockhart v. McCree* (1986) 476 U.S. 162, 176, emphasis added; *Adams v. Texas*, *supra*, 448 U.S. at p. 45 [mere opposition to capital punishment is an insufficient basis on which to discharge a prospective juror for cause];

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[14] This is virtually identical to Mr. Todd's interpretation of the law: to be an effective juror, "you have to set your own inconsistencies aside and go with what the law says." (RT 585.)

People v. Kaurish (1990) 52 Cal.3d 648, 699 [personal opposition to the death penalty not grounds for exclusion absent a showing that it would preclude engaging in the weighing process and returning a capital verdict].)

This Court consistently has held that feelings of unease about serving on a capital juror will not justify exclusion. (*See People v. Lanphear* (1980) 26 Cal.3d 814, 841 ["[A]bhorrence or distaste for sitting on a jury that is trying a capital case is not sufficient"]; *People v. Stanworth* (1969) 71 Cal.2d 820, 837 ["the mere fact that a venireman may find it unpleasant or difficult to impose the death penalty cannot be equated with a refusal by him to impose that penalty under any circumstances"].)

Recently, this Court reiterated its adherence to these principles in *People v. Stewart* (2004) 33 Cal.4th 425, 446.) There, this Court held that the removal of several prospective jurors solely on the basis of their questionnaire answers was error because the procedure failed to establish that the views of the jurors were substantially impaired. Without follow up questioning and clarification of the prospective jurors' statements, it was impossible for the trial court to determine whether their opposition to the death penalty was such that they could properly be disqualified from serving.

The Court's observations in *Stewart* are especially pertinent to a juror like Mr. Todd, whose moral qualms about the death penalty were not

unambiguous. In response to the district attorney's statement, "I have trouble with the idea that you would abandon your own morality," Mr. Todd agreed by stating, "I have the same trouble." However, the law does not require jurors to abandon their morality in order to sit on a capital jury, as this Court recognized in *Stewart*:

> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is *not* equivalent to a determination that such beliefs will "substantially impair the performance of his duties as a juror" under *Witt* [citation].

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 447, emphasis added.)

When the prosecutor speculated that Mr. Todd "might not be the best juror for a death penalty case," and that this "might not be the best type of jury to sit on," Mr. Todd answered "I suspect you are probably right." This answer, and Mr. Todd's feelings are not at all surprising, nor are they constitutionally sufficient to preclude him from sitting on appellant's jury. Of course Mr. Todd believed that serving on another, non-death penalty case would be better – he made no effort to hide his feelings about the death penalty. However, he also made clear that he could and would follow the law if he were chosen to sit on appellant's jury.

Moreover, the question is not whether Mr. Todd was "the best juror

for a death penalty case," as the prosecutor repeatedly intoned. Rather, the issue was whether his views would "prevent or substantially impair" the performance of his duties (*Witt*, *supra*, 469 U.S. at p. 424) and thus render him ineligible to sit on appellant's jury.

Mr. Todd stated his willingness to impose the death penalty in certain cases. He listed as examples, the Oklahoma City bombing case and "serial cases." In addition, he "waffled" in his opposition to the death penalty in a cases of the "very heinous type situations," and crimes that "are so heinous beyond description." (RT 586, 606, 619.) However, no effort was made to determine if the circumstances of appellant's case fell within Mr. Todd's parameters as warranting the death penalty. (*See People v. Ochoa* (2001) 26 Cal.4th 398, 431.) Based on Mr. Todd's answers, it is entirely possible that they did. Indeed, the trial court recognized that "if we do get to a penalty phase, some people might think [appellant] is a serial criminal . . .." (RT 636.) As this Court observed in *Stewart*, *supra*, before granting a challenge for cause, the trial court must have sufficient information about the juror's state of mind in order to determine if the juror's views would substantially impair his ability to serve on the jury.

The Supreme Court has held that jurors whose judgment of the facts or assessment of what constitutes reasonable doubt is affected by the prospects of the death penalty cannot properly be excluded from sitting on a

capital case jury. The Texas test at issue in *Adams v. Texas, supra,* 448 U.S. 38, improperly excluded jurors who stated they would be "affected" by the possibility of the death penalty. According to the Supreme Court, this "meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." (*Id*. at p. 50.) Because in this case neither the trial court nor the prosecutor made any effort to ask questions "that were more precisely directed toward identifying [Mr. Todd]'s qualms," the record as it exists fails to establish his unsuitability to sit as a juror. (*People v. Heard, supra*, 31 Cal.4th at p. 968, fn. 11.) In short, the trial court failed to ask the necessary questions in order to determine Mr. Todd's qualifications to sit on appellant's jury.[15]

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[15] Compare *Adams v. Texas, supra,* 448 U.S. at p. 49 (granting habeas relief where "the touchstone of the inquiry . . . was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond a reasonable doubt"); *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1272 (granting habeas relief where "none of the questions which Mrs. Phillips answered articulated the proper legal standard under *Witt*"); and *Szuchon v. Lehman* (3rd Cir. 2001) 273, F.3d 299, 300 (granting habeas relief where "[n]either the Commonwealth nor the trial court, however, questioned Rexford about his ability to set aside his beliefs or otherwise perform his duty as a juror") with *Witt, supra,* 469 U.S. at p. 416 (holding exclusion proper where prosecutor asked prospective juror if her personal feelings against the death penalty would "interfere with judging the guilt or innocence of the Defendant in this case?"); *Darden v. Wainwright* (1986) 477 U.S. 168, 177 (holding exclusion proper where "[t]he court repeatedly stated the correct standard when questioning individual members of the venire" such as asking "Do you have any . . . conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating our own principles to vote to recommend a death

D. Conclusion

Because prospective juror Todd was not "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme" (*Adams v. Texas*, *supra*, at p. 51), his erroneous excusal from the jury panel in appellant's case is grounds for automatic reversal of the death penalty. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 962.) Reversal of the death penalty is required.

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penalty regardless of the facts?"); and *Lockett v. Ohio* (1978) 438 U.S. 586, 595-596 (holding exclusion proper where the trial court asked the prospective jurors "'[Do you feel that you could take an oath to well and truely [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?'"].)

II.

THE ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR CHERYL MARTIN REQUIRES REVERSAL OF THE CONVICTION, SPECIAL CIRCUMSTANCE FINDINGS AND DEATH JUDGMENT

A. Introduction

Over defense objection, an African American prospective juror, Cheryl Martin, was removed by the court after the prosecutor challenged her for cause because he had prosecuted Ms. Martin's son's uncle for rape. The record does not come close to supporting the court's action in removing Ms. Martin from the jury panel. The court's action in wrongly removing a prospective juror violated appellant's constitutional and statutory rights and reversal of appellant's conviction, the special circumstance findings and the death judgment is therefore required.

B. The Record Does Not Support a Finding of Either Actual or Implied Bias of Ms. Martin

During the death-qualification phase of jury selection, Ms. Martin was asked by the prosecutor if her son, whose last name was listed on her juror questionnaire as Pleasant, was related to Keith Pleasant. (CT 2567 [questionnaire]; RT 527-528.) At the prosecutor's request, further proceedings were held in the hallway out of the presence of the other

prospective jurors (and appellant).[16] Ms. Martin explained that Keith Pleasant was the brother of her son's father, to whom she had never been married. (RT 528-529.) She said her son had not seen Keith Pleasant in about 10 years. (RT 527-528.) The prosecutor asked if the Keith Pleasant Ms. Martin knew had been prosecuted for rape and was in prison. Ms. Martin said she knew he was in prison, but did not know what the charges were. (RT 528.) The prosecutor asked Ms. Martin if she had come to court to give Pleasant support while he was on trial, because she looked familiar to him. Ms. Martin denied ever coming to court, and said in fact that she did not know where Pleasant had been in court. (RT 529.) She suggested that she might looked familiar to the prosecutor because she worked at the post office in Van Nuys. (RT 528.)

After Ms. Martin returned to the courtroom, the parties remained in the hallway and the prosecutor announced that he intended to challenge Ms. Martin for cause:

> I think I'm going to make a motion because *I don't know what her views are*, how biased she can be since I prosecuted the son's uncle for rape and he's in prison for a long time. But anyway I guess I'll make that at the appropriate time.

(RT 530, emphasis added.)

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[16] Appellant's absence from this and other critical stages of the trial is addressed, *infra*, in Argument V.

Later, in support of his challenge for cause against Ms. Martin, the prosecutor stated:

> Miss Martin, I prosecuted her son's uncle and he's currently in prison for multiple rape charges and I feel that, I don't know, I feel I recognize her. I don't question her word, but she was not giving me eye contact the whole time and my senses were so strong to ask her about her relationship with Keith Pleasant. I just think that that relationship may interfere with her sitting as [sic] juror.

(RT 538.)

Defense counsel's objection to the cause challenge was overruled by the court, and Ms. Martin was excused. (RT 538.) The court offered no explanation for its ruling, stating only: "I do think it's cause, though." (RT 538-539.) Trial counsel noted for the record that Ms. Martin was the first black juror to be called to the jury box. (*Ibid*.)

The reasons offered by the prosecutor and ostensibly accepted by the court in granting the challenge for cause were these: 1) Mr. Ipsen, the prosecutor, had successfully prosecuted Ms. Martin's son's uncle for serious felony offenses for which he was serving a long prison sentence; 2) Mr. Ipsen felt he recognized Ms. Martin, but "did not question her word" that she was not in the courtroom during Keith Pleasant's trial; and 3) Ms. Martin "was not giving [Ipsen] eye contact the whole time." (RT 538.) These reasons, even if all true, do not support a challenge for cause.

The prosecutor may not have wanted Ms. Martin to sit on the jury,

because of his suspicions and concerns, but the prosecutor's hunches do not amount to cause. The prosecutor's recourse was to exercise a peremptory challenge.[17] Instead, the court erroneously excused the first female African American juror to reach the jury box based on patently insufficient grounds.

Taking the prosecutor's stated reasons for challenging Ms. Martin at face value, the record contains *no* evidence that would support his challenge for cause. A juror may be challenged for cause on the ground that she is actually or impliedly biased in the specific matter on trial. Actual bias is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." (Code Civ. Proc., § 225, subd. (C).) Implied bias exists when the juror "stands in one of several relationships to a party, such as consanguinity, trust or employment, or has been involved in prior legal proceedings relating to the party or the case." (*People v. Wheeler* (1978) 22 Cal.3d 258, 274; Code Civ. Proc., §229, subd. (a)-(e).) Additionally, implied bias may be based on "The existence of a state of mind in the jury

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[17] "[T]he use of *peremptory* challenges to exclude prospective jurors whose relatives and/or family members have had negative experiences with the criminal justice system is not unconstitutional," even if the jurors in questions disclaim any resulting bias against the prosecution. (*People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690, emphasis added.)

evincing enmity against, or bias toward either party." (Code Civ. Proc., §229, subd. (f).)

The removal of a juror for implied bias requires some factual basis for inferring that the juror "might harbor ill feelings amounting to bias." (*People v. Morris* (1991) 53 Cal.3d 152, 154, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824 [upholding discharge of juror who concealed the details of his arrest record during voir dire questioning and had been prosecuted by the same district attorney who was trying the defendant's case]; *see also People v. Farris* (1977) 66 Cal.App.3d 376, 386-387 [juror who was currently facing criminal charges filed by the prosecutor's office and who concealed his extensive criminal record during voir dire]; *In re Devlin* (1956) 139 Cal.App.2d 810 [discharge upheld of juror who asked to be removed after felony arrest].)[18]

As this Court has noted, a challenge for cause must be clearly delineated on the record. The facts supporting removal for cause based on an inability to perform the functions of a juror "must appear in the record as a demonstrable reality." (*People v. Compton* (1971) 6 Cal.3d 55, 60; *People v. Cleveland* (2001) 25 Cal.4th 466, 476.) While this Court must

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[18] Curiously, the prosecutor in the present case passed for cause another prospective juror, Santos Aguilar, who had been convicted of misdemeanors. Aguilar was eventually excused by a defense peremptory challenge during the selection of the alternate jurors. (RT 664-668, 689, 771.)

accept the trial court's determinations of credibility if they are supported by substantial evidence (*People v. Carpenter* (1995) 9 Cal.4th 634, 646), in this case, there was simply no question of credibility. Ms. Martin's statements – in which she unequivocally denied any relationship with the man who was prosecuted by Mr. Ipsen or any knowledge of his criminal case – were uncontradicted. Indeed, the prosecutor specifically stated that he did not question her word.[19]

This record is completely devoid of any basis for deciding that Ms. Martin was unfit to serve as a juror. There was *no* evidence of *any* relationship between Ms. Martin and Keith Pleasant. Indeed, there is no evidence that she ever met him, or if she did, what her feelings were toward him. Moreover, the trial court made no effort to ascertain whether any possible basis for a cause challenge existed. Ms. Martin was never asked if she had any opinion about Keith Pleasant's prosecution and incarceration – she may well have applauded the action of the district attorney's office.

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[19] Nothing else supported Ms. Martin's removal for cause. She told the court and counsel that a close family friend worked as a sheriff, and that her son's cousin on his father's side was killed at a party a year before. As far as she knew, the suspect was awaiting trial. Neither incident would affect her ability to be fair in appellant's case. (RT 504-505.) Ms. Martin had served on other juries, none of which involved charges of violence such as the present case. Again, she said her experience would not affect her attitude toward the present case. (RT 517-518.) When questioned about her views on the death penalty, Ms. Martin offered her opinion that each case had to be judged on its own facts, but that some cases did warrant the death penalty. (RT 527.) Her answers in the juror questionnaire were consistent with her answers on voir dire. (CT 2565-2596.)

Nor was she asked if she felt her impartiality would in any way be affected by the fact that Mr. Ipsen had prosecuted her son's uncle. The prosecutor acknowledged as much when he admitted, "I don't know what her views are [of the prosecution of Keith Pleasant]." (RT 530.)

The record contains nothing to support the trial court's removal of Cheryl Martin for cause.

C. Reversal of the Guilt Conviction is Mandated

The improper removal of Cheryl Martin from the jury panel violated the statutory provisions for removal of jurors for cause (Code Civ. Proc., § 229, subd. (a)-(f)), infringed upon appellant's Sixth and Fourteenth Amendment rights to an impartial jury (*Duncan v. Louisiana* (1968) 391 U.S. 145 (1968) [Sixth Amendment right to jury trial]; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 (1961) [due process right to trial by impartial jury]); arbitrarily deprived him of a state-created liberty interest guaranteed by the Due Process Clause (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347) and violated his Eighth Amendment right to a reliable sentencing determination in a capital case.

Just as the erroneous exclusion of even one prospective juror on the basis of their views on the death penalty requires automatic reversal of the death penalty (*Gray v. Mississippi* (1987) 481 U.S. 648), the erroneous exclusion of a prospective juror in a capital case for reasons unrelated to

death qualification is not amenable to harmless error analysis. However, this Court has held precisely the opposite: that the erroneous exclusion of a juror for cause, not related to the jurors' views on the imposition of the death penalty, is *always* harmless error. (*People v. Holt* (1997) 15 Cal.4th 619, 656.) According to the decision in *Holt*, a "defendant has a right to jurors who are qualified and competent, not to any particular juror. [Citation.] He does not assert that, as a result of the excusal of [the challenged juror], a juror was seated who did not meet those criteria or that, as a result of her excusal, he was tried before a jury that was not fair and impartial." (*Ibid.*) Therefore, this Court concluded, any error in removing a juror for cause, is harmless.

Appellant submits this Court should reconsider its position in *Holt*, that the improper removal of a juror for cause not related to their view of the death penalty is harmless error. To sanction this Court's analysis of the effect of an erroneous challenge for cause – that such errors are harmless absent a showing that a biased juror sat on the defendant's jury – is to insulate this error from meaningful appellate review and to give the prosecution complete immunity from jury selection statutory violations. This Court's position on the effect of an erroneous removal for cause creates an error with no remedy and renders Code Civil Procedure section 229 a statute that cannot be enforced. Such a circumstance invites abuse:

theoretically, an unscrupulous prosecutor who was able to convince a trial judge to grant unfounded challenges for cause could eliminate prospective jurors with impunity.

A defendant who is able to show that a biased juror sat on the jury – the only means cited by this Court for showing error under *Holt* – is already entitled to relief, regardless of a violation of section 229, because his rights to an impartial jury under the state and federal constitutions have been violated. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) However, under the reasoning in *Holt*, a defendant who is unable to make such a showing has *no* remedy for the unlawful removal of a prospective juror.

Instead of finding that the error will always be harmless, the harm from an erroneous challenge for cause should be recognized for what it is: interference with appellant's rights to an impartial jury and due process and one that requires automatic reversal of the conviction. Some errors, involving "'structural defects in the constitution of the trial mechanism . . . defy analysis by "harmless-error" standards,'" because they are "necessarily unquantifiable and indeterminate." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.)[20]

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[20] However, regardless of whether the error is deemed violative of the federal Constitution, the error here is structural and requires reversal without analysis of harmless error. As noted by the Court of Appeals in *United States v. Curbelo* (2003) 343 F.3d. 273, the United States Supreme Court has clearly held that structural errors need not be of constitutional dimension. (*Id*. at p. 280, citing

Such errors always require invalidation of a judgment. (*Id*. at p. 279.)

The United States Supreme Court has held in the context of death-qualification of jurors that the erroneous exclusion of a "scrupled, yet eligible, venire member" is not amenable to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 23. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 668.) When it is known that death-qualified jurors have been removed from the jury, there is a demonstrable risk that the seated jury is skewed toward death. (*Id*. at pp. 667-668.) Arguably, if the prosecution could show that this was not true – i.e., other scrupled, eligible jurors were seated – then harmless error analysis would apply. However, because it is not always possible to discern whether a prosecutor was using his *peremptory* challenges as well as his cause challenges to eliminate scrupled, yet death-qualified jurors, the court in *Gray* held that "a court cannot say with confidence" that the elimination even one juror was an isolated incident, and therefore harmless error analysis cannot be applied. (*Id*. at p. 668.)

Nguyen v. United States (2003) 539 U.S. 69. In *Nguyen*, the Supreme Court recognized that when an error "involves a violation of a statutory provision that 'embodies a strong policy concerning the proper administration of judicial business'" courts may vacate the judgment without assessing prejudice." (*Nguyen v. United States*, *supra*, 539 U.S. at p. 81.) Certainly the statutory provisions which govern the selection of an impartial jury in a criminal case, especially a capital case, must be deemed to embody such policy considerations.

In a case such as appellant's in which a juror is wrongly excluded for a reason unrelated to death qualification, even though there is no indication that her exclusion skewed the seated jury in favor of the prosecution, the same analysis applies. Appellant submits that the issue is not whether a particular juror was excluded from the panel as a result of the trial court's erroneous ruling. Rather, "The proper focus of [the reviewing court's] inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error." (*Moore v. Estelle* (1982) 670 F.2d 56, 58, (conc. opn. of Goldberg, J.) *cert. denied* (1982) 458 U.S. 1111, emphasis in original.) When the issue is framed as it was by the court in *Moore* – "how can we know beyond a reasonable doubt that the selection of the remainder of the jury panel would have been unaffected?" – then it is clear that the error in striking a prospective juror without "just cause" is not amenable to harmless-error analysis and requires reversal.

In addition, as noted by the concurring opinion in *Moore*, by granting the prosecutor's improper cause challenges, the court effectively gave the prosecutor extra peremptory challenges. Regardless of whether the prosecutor used all of his peremptories, the court found that the very fact of having more discretionary challenges available to him than did the defense could have had an effect on the jury selection process:

> . . . when a trial court erroneously excludes veniremen, "for

> cause," it allows the prosecutor to save peremptory challenges it would otherwise have had to use to exclude those prospective jurors. Armed with more peremptory challenges than she would have if the trial court had ruled correctly, a prosecutor may feel that she is in a position to exclude jurors she might otherwise have accepted. We can thus imagine a situation in which the composition of the jury panel as a whole could indeed have been affected by the erroneous ruling of the trial court. Therefore, we cannot say that such error can be characterized as harmless beyond a reasonable doubt.

(*Id*. at p. 59; *see also Gray v. Mississippi*, *supra*, 481 U.S. 648 [rejecting "unused peremptory"argument and citing opinion in *Moore*].)

Disparity in the number of peremptory challenges between the prosecution and the defense implicates the defendant's due process rights under the Fourteenth Amendment.

> Peremptory challenges are a significant means of achieving an impartial jury, and as between the defendant and the prosecution, the "balance" struck to achieve an impartial jury and a fair trial is one of at least equivalent rights, and arguably weighs in favor of the defendant. In addition, that balance serves an important function in maintaining the appearance, as well as the reality, of justice. Therefore, a shift in the balance of peremptory challenges favoring the prosecution over the defendant can raise due process concerns.

(*United States v. Harbin* (2001) 250 F.3d 532, 541.)[21]

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[21] In the present case, the disparity in number of peremptories became an issue. Trial counsel noted for the record that he used 18 of his 20 peremptory challenges, whereas the prosecutor used only 12. (RT 793.) Counsel stated his belief that the next two jurors who would have been called into the box were not good jurors for the defense, especially as to penalty. Therefore, counsel chose not to use his two remaining challenges.
(RT 794.)

The trial court's dismissal of a prospective juror without just cause violates the state statutes governing removal of jurors for implied bias, which have federal constitutional underpinnings in the Sixth and Fourteenth Amendments right to due process and an impartial jury. (Code Civ. Proc., §§ 228- 230k; *see People v. Bowers* (2001) 87 Cal.App.4th 722 [California statutory process for substitution of jurors "preserves the essential features of the jury trial required by the Sixth Amendment and due process clause of the Fourteenth Amendment"]).

The unlawful removal of a prospective juror in a capital case should not be an unenforceable violation. On the contrary, because of the constitutional implications of any interference with jury selection procedures, as well as in the impossibility of assessing prejudice when it occurs, the error mandates automatic reversal of the guilt conviction.

D. Conclusion

In this case, the erroneous removal of prospective juror Cheryl Martin requires reversal of the conviction, special circumstance findings and death judgment.

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III.

THE TRIAL COURT ERRED IN FINDING APPELLANT HAD FAILED TO MAKE A PRIMA FACIE CASE OF DISCRIMINATORY USE OF PEREMPTORY CHALLENGES BY THE PROSECUTOR; THE USE OF A PEREMPTORY CHALLENGE AGAINST AN AFRICAN AMERICAN JUROR VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL

A. Introduction and Factual Background

Having successfully challenged for cause the first African American prospective juror to reach the jury box (RT 538), and having the second African American prospective juror excused by stipulation (RT 705-706), the prosecutor next used a peremptory challenge against the third African American to reach the box, Selina Safari.

Before questioning Ms. Safari, the prosecutor examined another prospective alternate juror, Charlene Valdez, about her opinion of the death penalty and asked, "Could you balance the decision as the judge orders you to if he says you have to balance factors and if the factors in aggravation substantially outweigh those in mitigation, the verdict is to be death?"[22] Ms. Valdez answered yes to that question as well as to the prosecutor's next question, "If that was the case, do you see yourself voting that way?" The

[22] The voir dire in this case, including death qualification, was conducted in open court in the presence of other prospective jurors.

prosecutor then turned to Ms. Safari and asked her, "Could you, Miss Safari, same question." She responded, "Probably." (RT 730.)

The remainder of the prosecutor's questioning of Ms. Safari was as follows:

Q: I see now you are one of our business owners, you have a business?

A: Yes.

Q: How do you like that compared to working for other people?

A: I like it.

Q: How long have you been doing that?

A: About six years.

Q: Prior to that I just couldn't quite understand your writing. It's very nice but I think in the xerox it was hard to read. You wrote a lot on your questionnaire but there was a counselor of some type?

A: Behavior therapist, yeah.

Q: What kind of place?

A: I worked with mental [sic] retarded adults, and also I was a behavior therapist, I worked with teenage kids who were wards of the court. They lived in what we call satellite homes.

Q: Did they at any times include people who had problems with the criminal justice system?

A: Most of them were people that had been taken out of their homes because they were runaways or because they just didn't, you know, get along with their parents or what have you. So the court ended up – they became wards of the court.

Q: Did you ever deal with people that had problems within the criminal justice system, either adults or they had problems – you spoke of juveniles that may have gone through the criminal justice system. Would you ever be aware of that if that was in their background?

A: Yeah. We were given a background sheet on them, and some of them were members of gangs, and some of them, you know, had been in, you know, involved in various activities, I should say.

Q: What was the background, special education, or do you take classes to help be a counselor?

A: I took some classes.

Q: Thanks.

(RT 730-732.)

After the prosecutor exercised a peremptory challenge against Ms. Safari, trial counsel made a *Wheeler* motion.[23] (RT 735-738.) The trial court ruled that appellant had not met his burden of showing a prima facie case of discrimination. (RT 738.) The trial court erred.

II. Legal Standards

To prevail on a *Batson* claim, a defendant must first establish a prima

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[23] In California, a motion under *People v. Wheeler* (1978) 22 Cal.3d 25, is the procedural equivalent of a federal challenge under *Batson v. Kentucky* (1986) 476 U.S. 79, and thus an objection on the basis of *Wheeler* is sufficient to preserve both state and federal constitutional claims. (*Fernandez v Roe* (9th Cir. 2002) 286 F.3d 1073, 1075; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985, 987 (citing *People v. Jackson* (1992) 10 Cal.App.4th 13, 21, fn. 5); *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

facie case of discrimination by the prosecutor in striking the prospective jurors. "That is, the defendant must demonstrate that the facts and circumstances of the case 'raise an inference' that the prosecution has excluded venire members from the petit jury on account of their race" (*Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1195 [citing *Batson v. Kentucky, supra*, 476 U.S. 79, 96].) If a defendant makes this showing, the burden shifts to the prosecution to provide a race-neutral explanation for its challenge. The trial court then has the duty to determine whether the defendant has established purposeful racial discrimination by the prosecution. (*Batson v. Kentucky, supra*, 476 U.S. at pp. 97-98.)

Although, to establish a prima facie case, *Batson* requires an objecting party to raise an "inference of discriminatory purpose" (*Batson, supra*, 476 U.S. at pp. 94, 97) and *Wheeler* demands a "strong likelihood" of group bias (*Wheeler, supra*, 22 Cal.3d at p. 280), this Court has held that these standards are the same, and that both phrases mean an "objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1306.)

Appellant submits that, under *Batson* and its progeny, the California standard for the determination of whether the defendant has made a prima

facie case of the state's race-based exclusion of veniremen, both at the time of appellant's trial and today, places an unconstitutionally high burden on the moving party.[24] This point is moot, however, because as will be shown below, when evaluated under either standard, appellant has established a prima facie case, and the trial court's failure to so find requires reversal of appellant's conviction.

C. The Requirements for a Prima Facie Case Were Met

Under the circumstances of the present case – namely, that so few African American jurors had made it into the jury box, and at the point counsel made his *Wheeler* motion, the first three to do so had been stricken for one reason or another – defense counsel made a sufficient showing to constitute a prima facie case of discrimination.

In support of his *Wheeler* motion, trial counsel noted that only three black jurors had made it into the box during jury selection for both the 12 seated jurors and the alternates. (RT 735.) One of the three jurors was

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[24] The United States Supreme Court initially granted certiorari in part in Johnson on December 1, 2003, and limited review to the question of whether a prima facie case under *Batson* requires a showing that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. The court dismissed its grant of certiorari on May 3, 2004, for want of jurisdiction. (*People v. Johnson*, *supra*, 30 Cal.4th 1302, *cert. granted sub nom. Johnson v. California* (2003) --- U .S. ---- [124 S.Ct. 817, 157 L.Ed.2d 692], cert. dismissed (2004) --- U.S. ---- [124 S.Ct. 1833, 158 L.Ed.2d 696].)

removed by the court for cause, over defense objection, because her son's uncle had been prosecuted by the district attorney handling appellant's trial, Mr. Ipsen.[25] (RT 736.) A second black juror who revealed she had been the victim of rape was excused for cause pursuant to stipulation by the parties. (RT 705-706.) The third black juror was Selina Safari, who was excused by the prosecutor.

Defense counsel set forth his argument in support of a prima facie finding of discriminatory purpose:

> And then as to, again, Miss Safari, she is then the first black juror. We have only had two who have gotten – three have gotten to the box. One off for cause and now Mr. Ipsen challenged Miss Safari who specifically stated in answers to all the questions she would be a fair, independent, impartial juror and would judge the case on its merits and I'm making a *Wheeler* motion.

(RT 737.)

The trial court found that appellant had failed to make a prima facie case of discrimination, but allowed the prosecutor to place his reasons for excusing Ms. Safari on the record if he wished. (RT 738.) The court stated, "I am not going to ask Mr. Ipsen for an explanation. If he wants to put something on the record, he may; but I do not think that you have laid out any legal grounds for me to grant a *Wheeler* motion." (*Ibid*.)

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[25] The erroneous removal of this prospective juror for cause is discussed in Argument II, *supra*.

The prosecutor opted to give an explanation:

Miss Safari, it's my recollection after speaking with [prospective juror] Mr. Clauss who indicated he would have some difficulty implementing the court's – the use of aggravating, mitigating factors, I asked her the same question and she said that she probably would have difficulty with that, implementing that standard also. That is one basis.
So I thought she was indicating she probably would have some difficulty imposing the death penalty. That was not my initial or primary cause for concern as to her. And I had, just from reading her, the questionnaire, her being a social worker was one area I wanted to inquire into.

The defendant in this case had early childhood problems without his father being around. I don't know if that's going to come up, but I would suspect defense [sic] would bring that out, and that I think her empathy for that, she chose for a while a path of counseling children, helping them out, which I think is a wonderful thing, but I think it may show a bias or a concern for children in those situations. I thought she would be biased.

It's also hard for me to express why, but the nature of her questionnaire is, she wrote probably five times as much as any other juror, which may have just been helpful. May have been she wanted to be helpful, but I just found it very disturbing.
It was just so odd that a person would be so expressive and redundant and repetitive and she'd write the same answer three or four or five times. I just felt very strange about her.
And I did not upon rereading that she said she was Afro-American [sic]. When I read this, I didn't realize that, but I put a negative on her, and just that she wrote too much, and I found her writing disturbing as far as psychological perspective.

So that is a very ambiguous reason but that was one of my reasons when I first read her questionnaire. I think the primary reason for me making my decision was her indicating she thought she would probably have a problem implementing the death penalty even if the court instructs her and her

background, her employment.

(RT 738-740.)

On appeal, this Court employs a deferential standard of review when a trial court does not find a prima facie case. (*People v. Howard* (1992) 1 Cal.4th 1132, 1155.) But, as this Court has recognized, "deference is not abdication . . . ." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1325 [quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1212]; *see also Miller-El v. Cockrell* (2003) 537 U.S. 322, 324 ["deference does not imply abandonment or abdication of judicial review"].)

In its review of the trial court's decision, this Court considers the record of voir dire (*see e.g., People v. Farnam* (2002) 28 Cal.4th 107, 135) as well as juror questionnaires (*see People v. Boyette* (2002) 29 Cal.4th 381, 419, 423). The ruling will be sustained when the record discloses grounds upon which the prosecutor properly might have exercised the peremptory challenges against the prospective jurors in question. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 135; *People v. Crittenden* (1994) 9 Cal.4th 83, 116-117.)

On appeal, courts may look at various factors to determine whether a prima facie case of discrimination was established: (1) whether most or all of the members of the identified group were challenged, or whether a disproportionate number of peremptories challenges have been used against

members of that group; (2) whether the challenging party failed to engage the challenged jurors in more than desultory voir dire or any voir dire at all; (3) whether the defendant is a member of the challenged group and the victim is a member of the group to which the majority of the jurors belong; and (4) whether the challenged jurors share only one characteristic – their membership in the group – but are otherwise as heterogenous as the community as a whole. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.)

In cases where the trial court denies a *Wheeler* motion without finding a prima facie case of "group bias," the reviewing court must "consider 'the entire record of voir dire'" and "not limit [its] review solely to counsel's presentation at the time of the motion," because "'other circumstances' readily apparent to the trial court might support the finding of a prima facie case even though not cited by defense counsel." (*People v. Howard*, *supra*, 1 Cal.4th at p. 1155.)

In the present case, because of the extraordinarily small number of black jurors called to the box, defense counsel was unable to establish a "pattern" of strikes against black jurors. (*See, e.g.*, *People v. Christopher* (1992) 1 Cal.App.4th 666, 672.) However, other facts exist in the record which combine to produce a prima facie case. First, appellant, like Ms. Safari, is black (*see, e.g.*, *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281);

second, the victim, Ms. Weir, was white, like the majority of the other jurors, (*ibid*.); and third, the prosecutor's questioning of Ms. Safari was more than perfunctory in length only, for it did not seek to determine in any way Ms. Safari's views on the issues about which she was questioned (*ibid*.). Considering the record in its entirety, it is clear that a prima facie case of discrimination was in fact established as to prospective juror Safari.

The interracial aspects of the offense in this case – the brutal murder of a young white woman by an African American man – were highlighted by the testimony of three other young white women about additional sexual assaults by appellant. Numerous studies have shown that the risk of racial prejudice is particularly great in cases involving interracial crimes.[26] Therefore, in assessing a prima facie showing under *Batson*, courts have taken into account the fact that the case involved an interracial offense or "racially-sensitive issues."[27]

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[26] *See* King, *1993 Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, (1993) 92 Mich. L. Rev. 63, 81-82 (summarizing studies).

[27] *Mahaffey v. Page* (1998) 162 F.3d 481, 484 ("And lest we forget, the crimes at issue in this case were obviously racially-sensitive – Mahaffey, a young African-American male from Chicago's South side, was charged with murdering a white couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to *Mahaffey's* defense at trial, as well as to his arguments in mitigation at the capital sentencing phase"); *Jones v. Ryan* (3rd Cir. 1993) 987 F.2d 960, 971 (taking into account that defendant was charged with a

When, as in the present case, the trial court states it does not believe the defense has made a prima facie case, but invites the prosecution to justify its challenges for the record, the reviewing court considers the entire record of voir dire. "If the record 'suggest grounds upon which the prosecutor might reasonably have challenged' the jurors in question," the trial court's ruling will be upheld. (*People v. Welch* (1999) 20 Cal.4th 701, 745, quoting *People v. Davenport* (1995) 11 Cal.4th 1171, 1200.)

Nothing in the record in the present case suggests a race-neutral reason for excusing Ms. Safari.

D. Review of the Prosecutor's Reasons for Excusing Ms. Safari Reveal Their Pretextual Nature

While this Court has held that when an appellate court is presented with a record in which the trial court ruled that a prima facie case was not made, but allows the prosecutor to state his or her justifications for the record, the appellate court need not review the adequacy of counsel's

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violent offense against a white victim in finding a prima facie case); *Williams v. Chrans* (7th Cir. 1991) 945 F.2d 926, 944 ("In a case where the defendant is black and the victim is white, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many white jurors as possible in order to enlist any racial fears or hatred those white jurors might possess."); *Commonwealth v. Mathews* (Mass. 1991) 581 N.E.2d 1304 ("[T]he interracial sexual aspect of the crime involved is a factor to be considered. . . . That factor made it highly possible that racial prejudice would play a part in the jury process.").

justifications for the peremptory challenges, if it determines that the trial court's ruling was proper. (*People v. Turner* (1994) 8 Cal.4th 137, 168.) However this Court has opted to review the prosecutor's reasons, when given, even after the trial court found no prima facie case. (*Ibid*. ["we have elected to perform such an evaluation"].)

Recently, in *People v. Johnson*, *supra*, 30 Cal.4th at p. 1322, this Court observed,

> Both *Wheeler* and *Batson* place the burden of making the prima facie showing on the objecting party. [Citations.] Neither decision requires a reviewing court to search the record itself for evidence that might have supplemented the objector's showing. Nor must the trial court consider arguments not made and evidence not presented, *although nothing prevents it from doing so in judging all of the circumstances*.

(Emphasis added.)

Because of the discrepancy between the reasons offered by the prosecutor and the record in this case, the trial court should have reconsidered its ruling on appellant's *Wheeler* motion. Further, appellant's unlawful exclusion from the proceedings on the *Wheeler* motion makes it incumbent upon this Court to consider the legitimacy of the prosecutor's reasons in this case.[28]

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[28] Appellant's improper exclusion from this proceeding is addressed in Argument V, *infra*. As appellant has argued elsewhere he could have, inter alia, alerted the court to the discrepancy between the prosecutor's representations and the record.

At "step three" of the *Wheeler/Batson* inquiry, the trial court has an obligation to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [. . .] and to clearly express its findings." *(People v. Silva* (2001) 25 Cal.4th 345, 385[citations omitted]; accord *Batson, supra,* 476 U.S. at p. 98.)

"The trial court has a duty to determine the credibility of the prosecution's proffered explanations." (*McClain v. Prunty* (9th Cir.2000) 217 F.3d 1209, 1220.) "[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." (*Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830.) In the present case, as in *Silva*, the reasons offered by the prosecutor for striking Ms. Safari are demonstrably false.

The prosecutor's first reason – that Ms. Safari's answers were similar to another prospective juror, Mr. Clauss, whom the prosecutor felt "would have some difficulty implementing the . . . use of aggravating, mitigating factors" – is inaccurate on both counts. First, Ms. Safari's answers bore no relation to Mr. Clauss's (*see* RT 701-702)[29], but more important, nothing in Ms. Safari's answers during voir dire or on her juror questionnaire in any

[29] Prospective Juror Clauss was excused for cause over defense objection based on his answers on voir dire that he would only vote for the death penalty for a second murder. (RT 732-733.)

way suggests that she would "probably have some difficulty imposing the death penalty," as the prosecutor claimed. To the contrary, after being asked whether she would impose death if the aggravating factors outweighed mitigating factors, Ms. Safari said, "probably" – a pro-death stance given the inartful phrasing of the question.[30]

The "obvious gap between the prosecutor's claimed reasons for exercising a peremptory challenge against [Ms. Safari] and the facts as disclosed by the transcript of [Ms. Safari's] voir dire responses," bear a striking similarity to that in *Silva*. (*People v. Silva, supra*, 25 Cal.4th at p. 385.) There, this Court found that nothing in the voir dire transcript supported the prosecutor's assertions that the juror would be reluctant to return a death verdict or that he was "an extremely aggressive person." (*Ibid*.) Similarly, in the present case, nothing in the record supports the prosecutor's assertion that Ms. Safari "would have some difficulty imposing the death penalty."

In fact, it appears the prosecutor himself could not decide whether

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[30] The *only* question Ms. Safari was asked by the prosecutor about her views on the death penalty was legally inaccurate – as well as awkwardly phrased. The prosecutor asked another prospective juror this question: "Could you balance the decision as the judge orders you to if he says you have to balance factors and if the factors in aggravation substantially outweigh those in mitigation, the verdict is to be death?" He then asked Ms. Safari if she could answer his next question: "If that was the case, do you see yourself voting that way?" (RT 730.)

Ms. Safari's stance on the death penalty was truly troubling, for he contradicted himself while explaining his challenge to her. First, he said it "was *not* my initial or primary cause for concern" (RT 739), but later said it *was* "the primary reason for making my decision" (RT 740).

In addition, when Ms. Safari's responses are compared with other non-African American prospective jurors who were not challenged by the prosecutor, the discriminatory intent of the challenge to Ms. Safari becomes clear.

For example, the plausibility of the prosecutor's concern over Ms. Safari's views on the death penalty is severely undermined by his acceptance of another prospective alternate whose view of the death penalty was extreme when compared to Ms. Safari's. The prosecutor asked trial counsel if he would stipulate to excuse a white prospective alternate juror Dorothy Paschke based on her stated religious convictions against the death penalty. (RT 682-683.) On her questionnaire in response to the question, "Do you have any religious or moral belief or conviction that makes it difficult or impossible for you to sit as a juror and pass judgement on another individual?" Ms. Paschke wrote, "In fairness to the defendant I have to say 'yes' because God's word says 'thou shalt not kill.' Only God can really judge him." (CT 813.) Based on this answer, the court asked Ms. Paschke the following questions:

Q: You have some religious beliefs that would conflict with your duties as a juror in this case?

A: Yes, I do.

Q: Do you think you could put them aside or would that be too much to ask?

A: I would have problems with that.

(RT 663.)

After trial counsel refused to stipulate to excuse Ms. Paschke, the prosecutor questioned her about her "very strong religious beliefs." She stated she could consider the death penalty, but "I just don't want to be the guy that does it." She said that "it would be extremely difficult for me to do but I certainly hope I could be fair." When asked if she could follow the law regarding the death penalty, Ms. Paschke answered, "It would be a real struggle. I would probably have a lot of nightmares but it would just be difficult for me. I don't know what else to say." (RT 694-695.) During a discussion outside the presence of the prospective jurors, the court expressed its opinion that Ms. Paschke's answers rendered her subject to a challenge for cause. When both counsel expressed confusion about Ms. Paschke's feelings toward the death penalty, she was questioned further. (RT 671-672.) The court asked if she could ever see herself voting for the death penalty. She answered, "I don't think I could . . ." and "I would have trouble doing it." (RT 673-674.)

Despite these answers, Ms. Paschke was accepted by the prosecutor as a seated alternate juror. While Ms. Paschke may not have been unqualified to sit as a juror under *Witherspoon/Witt*, her views were certainly more pro-life than Ms. Safari's, rendering the prosecutor's professed concerns about Ms. Safari's attitude toward the death penalty highly suspect.

The prosecutor also expressed concern about Ms. Safari's suitability based on "her being a social worker," because of the prosecutor's assumption – which turned out to be unfounded – that the defense would present evidence of appellant's troubled childhood. (RT 739.) The record does not support the prosecutor's characterization of Ms. Safari's previous work as a behavior therapist as "counseling children, helping them out."[31] (*Ibid*.) The prosecutor never asked Ms. Safari about the nature of her work, or more significantly, her feelings toward the work or the people she encountered while she was in the field. Not every behavioral therapist or residential counselor holds a bias in favor of their young wards. Indeed, her answers on voir dire and her questionnaire, reveal nothing about Ms. Safari's philosophy or whether her job choice demonstrated a "bias or concern for children in those situations." Because the prosecutor chose not to question Ms. Safari in any meaningful fashion, the record contains nothing that would

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[31] On her juror questionnaire, Ms. Safari listed her two previous jobs as "residential counselor" and "behavioral therapist." (CT 1607.)

support an assumption that Ms. Safari's philosophy was such that she would not be a pro-prosecution juror.

In another instance, the prosecutor's failure to question a non-African American prospective juror on the same subject is revealing. Connie Gonzales, who served as a juror in this case, was asked *no* questions on voir dire about her current job as an employment representative for the Employment Development Department, the duties of which she described in her questionnaire as "mentor youth, special programs, earthquake recovery, etc." Nor was she asked about her most recent previous job as the Program Director of San Fernando Valley Interfaith. (CT 1447 [questionnaire]; RT 691-692 [voir dire questions by prosecutor].) Employing the same criteria the prosecutor used to judge Ms. Safari's previous job, such information should have provoked similar concerns for the prosecutor, but he asked Ms. Gonzales nothing about her jobs.

The only other reason offered by the prosecutor for striking Ms. Safari, which even he characterized as "ambiguous," was the fact that she wrote long answers on her juror questionnaire. (RT 739.) Based on the prosecutor's description of the answers as "odd" and "disturbing as far as psychological perspective," one would expect to find pages of bizarre writing. Instead, Ms. Safari's questionnaire reveals answers provided in full sentences to questions that are themselves "redundant and repetitive." For

example, in response to the question, “What specific duties does your job involve?” Ms. Safari wrote, “My duties involve supervising two employees and one subcontractor in the janitorial cleaning of contracts we have. This also involves ordering and maintaining supplies for our cleaning contracts.” The next question asked if she had supervisory responsibilities. She answered, “My supervision involves two employees and one sub-contractor as previously stated above.” (CT 1607.) Subsequent questions again asked if she supervised people at her present or past place of employment, if she had never been a supervisor, would she like to become one someday, whether she had ever managed a business or had an ownership interest in one, and whether she had ever been self employed. (CT 1608-1610.)

Her answers to these and many of the other questions on the questionnaire were necessarily repetitive because the questions called for similar answers, or because her answers were by definition repetitive. For example, the questionnaire asked for her husband’s occupation three different times, and because he was also her business partner, it was listed a fourth time. (CT 1607-1610.) A review of Ms. Safari’s questionnaire reveals nothing remotely unusual about her answers. The prosecutor’s justification for striking her as a prospective juror on this ground is clearly pretextual.

Moreover, the prosecutor’s claim that he “felt very strange about

her," because "she wrote probably five times as much as any other juror," is simply false. A seated juror, Eduardo Zoppi, also gave several lengthy answers on his questionnaire. For example, in response to the question, "Can you think of any reason that you might not be an impartial juror, if selected to serve on this case?" Mr. Zoppi circled the answer "Yes," and wrote:

> I never paid much attention to when an individual complained that someone was biased towards them until it happened to me last year in a court of law. I don't think that anybody should go through the humiliation that I went through that day. The court room turned into a cultural debate instead of a court of law. There was no witnesses on my side. I was representing myself in superior court after winning the small claims court. Which was appealed by the defendant.

(CT 2293.) He continued his answer on the explanation sheet provided at the end of the questionnaire, writing nearly a whole page about his experience with the appeal of his small claims judgment. (CT 2306.) Under the prosecutor's criteria, Mr. Zoppi's questionnaire would certainly qualify as "expressive and redundant and repetitive," as the prosecutor characterized Ms. Safari, and yet Mr. Zoppi was chosen to sit on the jury. Such disparate treatment of prospective jurors belies the prosecutor's claim of legitimate reasons for striking an African American woman from the jury.

E. Comparative Analysis of the Answers Given By Prospective Jurors Must Be Used in Evaluating Whether the Prosecution's Reasons Were Pretextual

Although this Court recently reaffirmed in *People v. Johnson*, *supra*, 30 Cal.4th at p. 1325, that a reviewing court should not attempt its own comparative juror analysis for the first time on appeal[32], appellant submits that comparative analysis is required by *Batson* and its progeny.

In *Miller-El v. Cockrell*, *supra*, 537 U.S. 322, the United States Supreme Court established that comparative juror analysis is a constitutionally required technique to be employed by courts in evaluating whether a prosecutor's stated reasons for use of the peremptory violated *Batson*'s proscription against race-based peremptory challenges. The issue before the Court was whether Miller-El had shown "a substantial showing of the denial of a constitutional right," thus warranting the issuance of a certificate of appealability ("COA"), relating to the third prong of his *Batson* claim: that is, whether he had carried his burden of proving purposeful racial discrimination. (*Miller-El*, *supra*, 537 U.S. 322 .) The Court explained that while a COA ruling was not the occasion for ruling on the merits of Miller-El's claim, the COA determination required an overview of the claims and a general assessment of their merits. (*Id*. at p. 335.)

Miller-El contended that the prosecutor's stated race-neutral reasons

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[32] The comparison between the answers given on voir dire or in questionnaires by prospective minority jurors who were challenged and those who were not.

for use of peremptories were pretextual;[33] the Court reaffirmed its holding in *Purkett v. Elem* (1995) 514 U.S. 765, 768, that the critical question in determining whether a defendant has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for the peremptory strike. (*Ibid*.) "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Ibid*.) The Court held that, while such a finding is an issue of fact normally accorded deference, such deference does not amount to abandonment of judicial review. (*Id*. at p. 339.)

In determining the defendant's claim that peremptory strikes were race-based, the Court considered statistical evidence showing that the strikes were more than happenstance and conducted a comparative analysis of whether the state's proffered race-neutral rationales for striking African American jurors pertained just as well to some white jurors who were not challenged and served on the jury. (*Miller-El*, *supra*, 537 U.S. at pp. 341-342.) The Court thus left no doubt that comparative analysis was a factor to be considered on review of a claim of purposeful discrimination under

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[33] The State conceded the existence of a prima facie case, and Miller-El conceded that the prosecutor had offered facially race-neutral reasons for the three strikes subject to defense objection. (*Miller-El*, *supra*, 537 U.S. at p. 338.)

Batson.

An examination of other federal and state courts, as well as an opinion previously issued by this Court, proves that use of comparative analysis as a necessary analytical tool in determining whether a party is engaging in discrimination is the rule rather than the exception. (*See e.g.*, *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830-831; *McClain v. Prunty, supra,* 217 F.3d at pp. 1220-1221, citing *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251 (overruled on other grounds in *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (en banc)) ["A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."]; *People v. Hall* (1983) 35 Cal.3d 161, 168 ["Such disparate treatment is strongly suggestive of bias, and could in itself have warranted the conclusion that the prosecutor was exercising peremptory challenges for impermissible reasons."].)

As these courts have recognized, the inconsistent use of peremptory challenges to excuse some jurors but retain others who share the same ostensibly objectionable characteristic can raise an inference of purposeful discrimination.

Moreover, comparative analysis is employed by state and federal appellate courts to review, for the first time on appeal, the grounds on which

a trial court has based a ruling under *Batson*.[34] As Justice Kennard noted in her dissenting opinion in *People v. Johnson*, *supra*, 30 Cal. 4th at p.1332:

> The United States Supreme Court ruling in *Miller-El*, *supra*, [citation omitted] was made on what could be termed a "chilly" if not a "cold," record. When the jury was selected, the defendant objected to its composition but did *not* use comparative jury analysis. Two years later, after the high court's intervening decision in *Batson, supra*, [citation omitted], the case was remanded to the trial court. The original prospective jurors were not present, and it is open to question how much the trial court could recall of the demeanor and body language of the prospective jurors or the circumstances of the challenges. The trial court's ruling on remand was based on a cold record – the written questionnaires and the transcript of the voir dire – plus new testimony offered by the prosecutors to explain their challenges. Yet the United States Supreme Court noted no difficulty in using comparative juror analysis under those circumstances. . . . *Miller-El* shows that comparative juror analysis is very much on point when the trial court or the appellate court analyzes the prosecution's explanations for its peremptory challenges.

A comparative analysis of the answers given by prospective jurors reveals that the prosecution's reasons for striking African-American jurors in appellant's case belied the race-based nature of the challenge.

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[34] *See e.g.*, *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 273-294 (conducting comparative analysis of struck black jurors with unstruck white jurors for first time on appeal); *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695 (appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were struck and those who were not fatally undermines the prosecutor's credibility); *Young v. State* (Tex.Crim.App. 1992) 826 S.W.2d 141, 146 ("this type of analysis is significant, maybe even more so, on appeal when the appellate court is reviewing the trial judge's findings as to purposeful discrimination").

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F. Additional Factors Support the Finding of a Prima Facie Case of Discriminatory Intent

Contrary to the suggestion by both the trial court and the prosecutor in the present case, the presence on the jury of Sandra Jones, an African-American woman, did not negate a finding of discrimination by the prosecutor. (*See e.g.*, RT 706; 738.) In *People v. Snow* (1987) 44 Cal.3d 216, this Court stated: "the fact that the prosecutor 'passed' or accepted a jury containing two Black persons [does not] end our inquiry, for to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." (*Id.* at p. 225.) Adopting the reasoning of a Court of Appeal opinion, the Court further noted:

> If the presence on the jury of members of the cognizable group in question is evidence of intent not to discriminate, then any attorney can avoid the appearance of systematic exclusion by simply passing the jury while a member of the cognizable group that he wants to exclude is still on the panel. This ignores the fact that other members of the group may have been excluded for improper, racially motivated reasons.

(*Ibid.* [internal quotations and citation omitted]; *People v. Fuentes* (1991) 54 Cal.3d 707, 721 [finding a *Wheeler* violation even though the trial jury contained three African American jurors and three African American alternates]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 1254 [*Batson* "does not hold that a prosecutor can strike as many African Americans as he

wishes as long as he leaves one or two on the panel"].)

Finally, a factor that is especially relevant to finding a prima facie is the fact that both appellant and Ms. Safari are African American. (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1323; *People v. Howard*, *supra*, 1 Cal.4th 1132, 1156.) As stated by the United States Supreme Court:

> In the many times we have addressed the problem of racial bias in our system of justice, we have not 'questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.' [Citation omitted.] To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

(*Edmonson v. Leesville Concrete Co.* (1991) 500 U.S. 614, 628.)

Considered together, these factors – the interracial nature of the offense, the lack of evidence to support the prosecutor's proffered race-neutral reasons for striking Ms. Safari, and his failure to excuse non-African American jurors who shared the same characteristics as Ms. Safari – established the "inference" of discrimination required by *Batson*. Appellant further submits that the factors also establish that it was more likely than not that the prosecution's use of peremptory challenges were based on impermissible group bias. (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1318.)

The evidence strongly suggests that the prosecutor struck Selina Safari because of her race, not because of her previous job, her questionnaire answers or her feelings about the death penalty. Accordingly, appellant

established a prima facie showing of discrimination by the prosecutor and the judgment must be reversed. (*People v. Snow*, *supra*, 44 Cal.3d at p. 227 [reversing for failure to find a prima facie case where voir dire occurred six years before and it was unrealistic that the prosecutor and court could recall sufficient details for any rehearing].)

G. Conclusion

In light of the facts available to the trial court, the trial court had "a duty to determine if the defendant has established purposeful discrimination." (*Batson, supra,* 476 U.S. at p. 98.) Appellant raised an inference that the prosecution had excluded Ms. Safari on account of race, and the burden should have shifted to the prosecution to articulate a race-neutral explanation of the peremptory challenges in question. The trial court's failure to find that petitioner had established a prima facie case of discrimination with respect to the challenge of Ms. Safari was contrary to clearly established federal law as determined by the Supreme Court of the United States in *Batson* and its progeny and was also based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The trial court's erroneous denial of appellant's *Wheeler* motion deprived appellant of his rights under the Equal Protection Clause of the federal Constitution, *Batson v. Kentucky, supra,* 476 U.S. 79, as well as the right under the California Constitution to a trial by a jury

drawn from a representative cross-section of the community (*People v. Wheeler*, *supra*, 22 Cal.3d 258); reversal of appellant's conviction and judgment of death is required.

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IV.

THE TRIAL COURT ERRED IN ADMITTING EXTENSIVE AND HIGHLY INFLAMMATORY EVIDENCE OF UNCHARGED MISCONDUCT

A. Introduction

The evidence in this case was patently insufficient to support findings of first degree murder and the robbery and rape special circumstances. (*See* Arguments VI, VII and VIII.) To compensate for this lack of evidence, the prosecution relied instead on evidence of appellant's "bad character" and criminal propensity. This evidence fell into three categories, each of which was more highly prejudicial than the next and each of which was inadmissable in the present case.

First, the prosecutor introduced evidence of alleged fraud committed by appellant against friends and co-workers. Witnesses testified to appellant's borrowing money or credit cards from them without repayment, bouncing checks and other questionable financial dealings. None of these allegations had any relevance to the issues in this case.

Next, the prosecutor put on evidence that shortly before the killing of Sara Weir, appellant assaulted his girlfriend Michelle Theard. Theard's testimony about the assault, her reporting it to the police and obtaining a restraining order, and her continuing fear of appellant was neither relevant nor admissible at this trial.

Finally, the most devastating evidence came from the testimony of three women – Jodi Dorn, Kim Venter and Teri Baer – that appellant had raped and terrorized them.

The character evidence, which comprised the majority of the prosecution's case, was inflammatory, cumulative, remote and far more prejudicial than probative. Its admission violated state law as well as appellant's state and federal constitutional rights. In view of the weakness of the evidence to support the first degree murder conviction and the special circumstance findings and the highly inflammatory nature of the other crimes evidence, its admission was prejudicial and requires reversal of the murder conviction, special circumstance findings and death judgment.

B. Proceedings Below

At a hearing before jury selection the prosecutor stated his intention to present witnesses to prior uncharged acts by appellant in support of the special circumstances that were alleged at that time.[35] Trial counsel then, and throughout the trial argued vigorously against its admission.[36] (RT 265-287.) The trial court erred in permitting the prosecution to introduce such

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[35] At the time of the pretrial hearings, three special circumstances were alleged: murder in the commission of burglary, robbery and rape. The burglary allegation was dismissed at the end of the prosecution case.

[36] No written motion was filed by the prosecutor seeking admission of the evidence, nor did counsel submit written opposition. (RT 260.)

evidence, if not in its entirety, in its volume.

1. *Uncharged Evidence of Fraud*

At the pretrial hearing, the prosecutor argued – accurately – that in order to prove the robbery-murder special circumstance, he needed to show that appellant formed the intent to steal Sara Weir's checks before she was murdered. (RT 265-266.) He proposed to do this by presenting the testimony of individuals to show "a uniform pattern of lies and deceptions," by which appellant "induced numerous [people] to . . . enrich him financially none of whom he ever paid back." This, he argued, was necessary to prove "there was an intent to get money and not pay it back through this design." (RT 267.) As trial counsel pointed out in his argument against admission of this evidence, the proposed evidence more accurately demonstrated appellant's ability to obtain money or checks *without* the use of force or violence. (RT 270.) The trial court disagreed, and trial counsel's objection was overruled. (RT 273-274.)

At trial, the prosecutor presented the testimony of witnesses Damon Stalworth, Helen Waters, Karrie Marshall, Leticia Busby and Teri Baer, all of whom had met appellant through the gym where he worked and had had some questionable financial dealings with appellant.[37]

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[37] Teri Baer was originally slated to testify about alleged shady financial dealings she had with appellant. While she was being prepared for her testimony,

Damon Stalworth owned the Ribs USA restaurant near the gym and met appellant in 1993. (RT 1163-1164.) Stalworth testified he accepted two personal checks from appellant, not in his name, both of which bounced. (RT 1167.) One time when appellant asked to cash a check he was with a white woman named Teri. Stalworth had seen them together twice. (RT 1171.) The other time appellant cashed a check, Stalworth was not present. On neither occasion did Stalworth see who wrote the check. (RT 1170.) The checks were cashed as a favor to appellant who said he needed the cash. Appellant never covered the checks, although after the checks bounced, he came to the restaurant a few times when Stalworth was not there. (RT 1168.)

Helen Walters worked at the Hard Bod Café, which was located in the gym. Appellant was her manager and Walters considered him a friend. (RT 1175-1176.) After she had known him for about three months, appellant told Walters that he had inherited money and planned to use it to open a business at Disneyland. He asked to borrow Walter's credit card to rent a car to drive to Disneyland for the weekend. (RT 1179.) He showed her his bank book that reflected a balance of thousands of dollars – enough

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she told the investigating officer that appellant had raped her. Her testimony, which includes an extensive description of uncharged misconduct – both the financial dealings as well as the alleged rape – is set forth in detail *infra*.

so that she believed that he had sufficient money to cover any charges he made to her credit card. (*Ibid*.) On Monday, the rental company called and said the car had not been returned. When Walters called appellant, he said he needed the car for one more day. Eventually the car was returned, but $900 had been charged to Walters's credit card, for which she was never repaid. (RT 1183.)

Karrie Marshall also worked at the Hard Bod Café with Walters and appellant. (RT 1192.) At the end of August 1993, Marshall received a phone call from appellant who said he was in jail and needed Marshall to pick up bail money and bring it to him. (RT 1193-1194.) Marshall told appellant she could not bring him money. He called later that day, to tell her he had been bailed out and had money to give her from a paycheck that had been returned for insufficient funds.[38] (RT 1195.) Appellant, who knew Marshall lived by herself, arrived at her apartment later that afternoon. (RT 1196.) Marshall testified that she had a male friend visiting her and that appellant seemed surprised and annoyed that the man was there when he arrived. (RT 1197.) Appellant did not have the money, although Marshall testified that was the only reason he gave for coming to her apartment. (RT 1198.) Appellant said he would return in 20 minutes with the money. He

[38] The record is unclear as to why appellant was responsible for making good on Marshall's pay check.

called again a few hours later and said he would be there around 9 p.m. with the money. (RT 1198-1199.) Instead, he arrived at 12:30 in the morning and asked if he could stay at Marshall's apartment because his girlfriend had changed the locks on the apartment. (RT 1201.) Marshall, who knew that appellant had been arrested for assaulting his girlfriend, told him no, despite his repeated requests. (RT 1202.) Appellant eventually left without incident. (RT 1204.)

Leticia Busby, an aerobics teacher at the gym and a friend of appellant's, testified that on August 26, 1993, appellant asked to borrow her credit card to take his girlfriend to San Diego for the weekend. (RT 1258, 1260-1261.) Busby refused, telling appellant he was crazy to think she would agree. (RT 1260-1261.)

2. *Assault of Michelle Theard*

In addition to the erroneous admission of evidence of appellant's financial dealings, the court also allowed the prosecutor to introduce evidence of appellant's alleged assault of Michelle Theard the week before Weir's body was found in the apartment. In his argument in favor of the admissibility of this evidence, the prosecutor struggled to find a basis for admissibility:

> The defendant, as far as Miss Theard, he is charged with burglary of her apartment. And I think that the relationship between a victim and a defendant is always critical in this case

> not only burglary of her apartment but in that apartment another individual is found murdered. [¶] I think that the motivation for some of the activity and his going back and breaking in and doing everything he did cannot be divorced from the events that happened only a very, very short period of time prior to that where his girlfriend had him arrested for attacking her.

(RT 275.) Despite the patent inadmissibility of this evidence under Evidence Code section 1101, the court ruled the testimony could be presented. (RT 291.)

Ultimately, the burglary charge and related special circumstance allegation were dismissed prior to the case being submitted to the jury, but after Theard testified. (RT 2041.) At that point, there was *no* basis for the testimony, but the jury was never instructed to disregard the evidence.

At trial, Theard testified in detail about appellant's physical assault of her on August 30, 1993. (RT 900-906.) Over defense objection, she testified that appellant "was trying to strangle me to death," and stated she was under the impression "that he was trying to kill me." (RT 905.) Such dramatic and explicit testimony was wholly unnecessary to prove the elements of burglary – a subsequently irrelevant charge – that allegedly happened days later.

3. *Evidence of Sexual Assaults Against Kim Venter, Jodi Dorn and Teri Baer*

There was no evidence of the events leading up to Sara Weir's death,

and no physical evidence of her rape. Lacking such evidence, the prosecutor sought to prove the rape special circumstance through evidence of uncharged prior sexual assaults. The cornerstone of the prosecution's case consisted of the testimony of three women – Kim Venter, Jodi Dorn and Teri Baer – each of whom testified she was sexually assaulted by appellant.

Initially, the prosecutor proffered evidence only of the Venter incident, which occurred in Florida in 1991. He argued that the parallels between Venter – a platonic friend who was allegedly raped by appellant and threatened with a kitchen knife when they returned to his hotel room after a night on the town – and Weir – a platonic friend who was found naked in appellant's apartment, stabbed to death – justified admission of Venter's testimony and "fill[ed] in the blanks as to what the defendant's motivations were" with regard to Weir. (RT 282-284.) The testimony, however, was needed – and intended – to do more than fill in the blanks of this case. It was needed to establish that anything sexual ever happened between Weir and appellant in connection with her death. Trial counsel understandably objected that this evidence was prejudicial character evidence but the court overruled the objections and permitted Ms. Venter to testify. (RT 288-290.)

Two days after the court ruled on the Venter evidence, the prosecutor sought to introduce the testimony of another alleged sexual assault victim,

Jodi Dorn.[39] (RT 296-297.) Again, trial counsel's objection was overruled and the testimony was ruled admissible. (RT 300-303, 306.)

During trial, the prosecutor announced that Teri Baer, who had originally been listed as a witness to alleged fraudulent behavior by appellant, had told the investigating officer while he was interviewing her in preparation for testifying, that she had been raped by appellant. (RT 1447.) The prosecutor offered her testimony as evidence of appellant's intent and "modus operandi," under Evidence Code section 1101. (RT 1453.) Trial counsel's objection to Baer's testimony was overruled. (RT 1452-1453, 1454.)

The women's testimony was detailed, graphic and extensive.[40] It was also inadmissible.

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[39] The prosecutor stated he had known about the Dorn incident, but had received the police reports and a copy of Dorn's deposition only the day before and immediately provided it to trial counsel. (RT 296-298.)

[40] Each woman's testimony covered well over 100 pages of transcript.

a. Jodi Dorn

Jodi Dorn testified that in 1987 she was 21 years old, living in Florida and waitressing at a restaurant where appellant worked as a cook. (RT 1466-1467, 1469.) Dorn and appellant had a good working relationship. Appellant had made some light, flirtatious comments, but no physical advances, toward Dorn. (RT 1476.) Dorn had no interest in dating appellant and did not ordinarily socialize with him outside of work as she did with other co-workers. (RT 1472, 1475.)

One night after work, Dorn and a group of employees from the restaurant went to a bar and appellant joined them. (RT 1475, 1479, 1480.) Appellant and Dorn were talking about relationships – Dorn had recently broken up with her boyfriend and felt comfortable talking to appellant who seemed sympathetic. (RT 1482, 1485.) While they were at the bar, Dorn drank mixed drinks and appellant had a beer or two. (RT 1479-1482.) After the group broke up, appellant suggested they might continue talking and Dorn agreed. (RT 1485.) Appellant did not have a car so Dorn drove them in hers to a location suggested by appellant. (RT 1486-1490.) Appellant told Dorn he was going to get some money at a boardinghouse where he stayed on nights when he got off work late. (RT 1496, 1497.) Dorn felt comfortable with appellant, but the neighborhood made her feel unsafe. (RT 1498, 1499.) Dorn went with appellant up to his room where he got some

money. (RT 1500.) Appellant suggested they buy some beer at a convenience store, return to the room and talk. Dorn agreed. (RT 1502, 1503.)

They bought some beer and returned to the room. While they were sitting on the bed looking at recipes, appellant tried to kiss Dorn. (RT 1505.) She responded briefly, but then pushed him away and told him she was not interested. (RT 1506.) They talked some more and appellant tried to kiss her again. (RT 1507.) Dorn told appellant that she was leaving, picked up her keys and purse and started for the door, but appellant blocked it. (RT 1508.) When Dorn said she wanted to leave, appellant told her that the Yeh Wehs were outside. Dorn had heard that they were a " black cult" of some kind and "commit crimes and do bad things to people." (RT 1512.) Appellant told her that he would try to get her out, but that her car was not there. (RT 1513.) First, he said, he needed one thing from her. (RT 1515.)

Appellant then took Dorn's clothes off. He said he was not going to hurt her. He put her on the bed and took his clothes off. (RT 1518-1519.) Dorn was crying and telling appellant she did not want to do this. (RT 1519.) He got on top of her and started to penetrate her vagina with his penis. Before he did, she asked him to use a condom. (RT 1523-1524.) He got a condom, put it on and then forced his penis into Dorn's vagina. (RT 1528.)

Dorn was convinced that the Yeh Wehs were outside, and that there had been a plot by appellant to keep her in the room. (RT 1531.) Appellant kept talking to her as if they were friends and he was trying to figure out how to get her safely out of the room. (RT 1530.)

Dorn was in the room with appellant for several hours, during which he raped her several more times. (RT 1534, 1538, 1542.) Dorn described appellant as acting bizarre and totally unaffected. (RT 1534.)

Appellant took Dorn's jewelry and her watch. (RT 1547.) When she asked for it back, he said he needed it for something, but would give it back to her if she would meet him in front of the Olive Garden Restaurant at noon the next day. (RT 1561.) Appellant then walked Dorn to her car. Dorn got in and drove off. (RT 1565.) As she was leaving, appellant squeezed her arm affectionately and said he would see her at the restaurant. (RT 1565.)

Dorn reported the incident to the police. Appellant was charged, and the case was plea bargained. (RT 1570.) Appellant pled to a lesser charge for time served. (RT 1599.)

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b. Kim Venter

Kim Venter visited the United States from South Africa in 1991. (RT 1610-1611.) She was 22 years old, staying in Miami at a youth hostel when she met appellant. (RT 1611-1614.) He approached her at the pool at the hostel, asked her if she needed work and told her he could get her a job at a restaurant. (RT 1616.) When he found out where she was from, appellant offered to introduce her to his friend Gordon, who was also from South Africa. (RT 1617, 1620, 1624, 1626.) The next day, they went to another hotel where Venter met Gordon and a woman named Jane. They drank and socialized in Gordon's room for a while and appellant walked her back to the hostel. (RT 1626-1627.) Over the next few days, Venter, appellant, Gordon and Jane went out several times together. (RT 1630.) Appellant gave Venter the impression that he was financially well off. He said he had money in a bank account which his mother managed and from which he received an allowance. (RT 1636.)

After a week, Venter moved into Gordon's hotel room at his invitation. (RT 1637.) While she was staying there, she made plans to go to Coconut Grove with appellant and Gordon. When Gordon fell ill at the last minute, Venter and appellant went by themselves. (RT 1640.) They had lunch, then went to a couple of bars, and listened to jazz until about 11:30 p.m. They each had one or two drinks and then took a cab back to the hostel

where appellant was staying. Neither of them seemed to be intoxicated. (RT 1641-1642.) Appellant dozed off during the cab ride, but Venter attributed it to the length of the ride rather than intoxication. His speech was slightly slurred, but he was not staggering or acting offensive. (RT 1648-1649.)

Venter went to appellant's room to get her bathing suit and cigarettes. (RT 1645.) Appellant went straight into the bathroom, and Venter waited for him to come out so she could say goodbye. (RT 1647.)

Earlier in the evening appellant had given Venter a rose and told her that she was his "home girl," which she took to mean that she was one of the group. She took it as a compliment and it made her feel good. (RT 1651.) When appellant came out of the bathroom his shirt was unbuttoned, and his pants were unfastened so that Venter could see his underwear. (RT 1657-1658.) Appellant moved his hips in a suggestive way and said that she should know that she was more than his home girl. (RT 1671.) Venter was nervous. She got up and tried to leave, but appellant bolted the door. (RT 1660.) He put his hand over her mouth and told her to "shut up, bitch." (RT 1662.)

Over the course of the evening, appellant said more than once that he would kill Venter if she screamed. (RT 1666.) He held a knife to her throat and dragged her to the bed. As he did this, he pulled off the bag she wore around her waist that contained her passport, airline ticket and money, threw

it across the room and said, “this is not what I’m after.” (RT 1672-1673.) Appellant then forced her to the bed where he raped her. (RT 1674-1681.) Venter was in the room with appellant for about five hours, during which he raped her three more times. (RT 1689, 1700,1710-1714.)

After the first rape, appellant went through Venter’s bag, then picked up the phone and appeared to make a call. Appellant said to put a hold on Venter’s passport, and read off the number. Then he said to cancel her train and airline tickets and to “block her,” which she thought meant that she would not be able to leave the country. (RT 1695.) Appellant told her that he wanted her to help him smuggle money out of the country and thought South Africa would be a good place to do it. (RT 1692.)

Appellant had been drinking beer throughout the evening and had brought some up to the room with him after they got back from Coconut Grove. (RT 1747.) Before he came out of the bathroom and attacked Venter, appellant had always acted like a perfect gentlemen. His demeanor changed very abruptly over the course of the night. (RT 1748.) After the second rape, appellant began to cry and apologized in a way that Venter believed was genuine. He acted like his old self and seemed truly regretful. (RT 1706.) Minutes later, though, his mood abruptly changed again and he started shouting at Venter. (RT 1708.)

Eventually, appellant fell asleep and Venter left the room, taking all

of her things with her, including jewelry that appellant had taken from her. (RT 1717-1719.) At a friend's urging, Venter reported the incident to the police and submitted to a rape examination at the hospital. (RT 1721-1723.) She never saw appellant again until the day she testified in the present case. (RT 1725.)

c. Teri Baer

Teri Baer testified she met appellant at the gym where he worked in the summer of 1993. (RT 1756-1761.) Appellant helped Baer with her weight training, and they became friends. (RT 1770-1773.) Appellant expressed an interest in a romantic relationship with her, but Baer said no. (RT 1807.) He told Baer he was from a wealthy family in Chicago and that his mother was coming to Los Angeles to open up a string of juice bars. Appellant told Baer she would be a good candidate for the job of his mother's assistant and she agreed to take the position. (RT 1774-1777.)

Their agreement was that Baer would be paid $400 a week under the table until appellant's mother arrived and they could draw up the paperwork for the position. (RT 1806.) Baer, however, was never paid, even after many requests to appellant for money. Eventually, he gave her a check for $1000 drawn on Michelle Theard's account. The check bounced. (RT 1812-1813.) Baer paid for cell phones and paid off a car rental for appellant with her own money, based on assurances by appellant that she would be

repaid. (RT 1814, 1818.) Baer accompanied appellant to buy a car for the business. (RT 1822.) Appellant asked Baer to write a check for $48,000 for the deposit, and told her that he was expecting a million dollars to arrive by wire from Chicago. (RT 1822.)

On August 30, 1993, appellant told Baer to meet him at the apartment on Laurel Canyon he shared with his sister to introduce her to his mother who had arrived from Chicago. (RT 1820.) When Baer arrived, appellant was upset about the way Baer was dressed, but refused her offer to go change, even though she lived nearby. (RT 1842.)

Baer used the bathroom. As she was coming out, appellant burst through the door and grabbed her by the back of her hair. He was holding a pair of scissors with his right hand. They were about five inches long with a blue handle. (RT 1847.) Appellant was yelling at her, "Shut the fuck up, bitch, shut the fuck up or I'll kill you." (RT 1848.)

Appellant dragged Baer into the bedroom and pushed her down on the bed with his hand on her throat. He held the scissors to her throat and she could feel and see blood on her chest. (RT 1852.) Appellant was acting like he was "possessed." He was like a different person, completely out of character. (RT 1865, 1915.) Baer later described him to Detective Hooks as being "in psycho land." (RT 1923.)

Baer testified she knew she was going to be raped, so she pretended

to go along with appellant – telling him that she loved him, that he did not have to do this to her. (RT 1869.) Appellant pulled off Baer's clothes, told her she had better like it and raped her twice vaginally. (RT 1870-1872.)

Appellant put on a condom, then raped Baer anally twice. The second time, she defecated. (RT 1874-1875.) While she was cleaning herself off in the bathroom, appellant yelled that she was taking too long. He came in and hit her on the head, telling her to get back in the bedroom. (RT 1875.)

Baer could not tell if appellant had been drinking before she arrived at the apartment, but while she was there he drank champagne and whiskey and forced her to drink them as well. (RT 1920.) At one point, appellant poured champagne over Baer's body and wanted her to orally copulate him. (RT 1878.) More sexual assaults occurred over the course of the afternoon.

Appellant told Baer that he was a member of the Black Mafia in Chicago, and that if she went to the police, he would have her and her family killed. (RT 1877.) He told Baer that he was to be killed as part of a ritual and that he had only a few days to live. (RT 1879.) When Baer asked appellant why he was doing this to her, he said she was who he wanted to be with during his last few days. (*Ibid*.) He asked Baer if there was anything he could do for her. She asked for his medallion, which he gave to her along with a watch and a ring. (RT 1876.)

After several hours, they left the apartment and appellant took Baer to a restaurant where they had dinner. While appellant stood nearby, Baer called her boyfriend and told him she was going to be late. Appellant asked her if he was going to tell him that they were involved, and she said no. (RT 1881.) Baer went with him because she was terrified that appellant would hurt her if she refused. (RT 1882.)

At one point, appellant apologized for what he had done, but when Baer cried, he asked her what she had to cry about and became angry. Then he apologize again and offered to give her money. (RT 1887.)

They left the restaurant and Baer drove to the beach as part of a plan she had to escape from appellant. (RT 1887.) While they were driving, appellant was having a telephone conversation with Michelle Theard. From what she could hear of the conversation, Baer realized that many of the things appellant had told her about himself were not true. (RT 1893.)

Baer drove to a liquor store in an area near a friend's house and told appellant to get them a six-pack of beer. When he got out of the car, Baer drove to a friend's apartment, jumped out of the car and headed to the apartment. Appellant ran after her and followed her upstairs. (RT 1895.) Baer and some friends drove him back to his apartment. On the drive back he was ranting against Theard, and asking Baer to take care of Theard's son if anything should happen her and to appellant. (RT 1897.) When Baer

dropped appellant off at the Laurel Canyon apartment he kissed her on the cheek. (RT 1900.) She never saw him again until she testified at the present trial. (RT 1901.)

Baer did not report the rape because she was embarrassed that she had been taken in by a person whom she had trusted. (RT 1857.) She sought help through counseling, but when she went to the police initially she told Detective Hooks only about the business aspects of her relationship with appellant. She did not tell him about the sexual assault. (RT 1861.)

At trial, Baer was asked to identify items taken from appellant's briefcase, which was found in Theard's apartment, including her sunglasses and a bounced check statement from her bank for the check appellant gave her. (RT 1834.) Her driver's license and checks from her account were returned to her by Detective Hooks who said they were found in the briefcase. Baer testified it was possible she loaned her license to appellant, although she did not recall doing it. (RT 1835-1836.) When the checks were returned to her they were blank except for the signature which was filled in with handwriting that was not Baer's. (RT 1837.) Baer did not give the checks to appellant; there was no money in the account. (RT 1838.)

Baer testified that she had to borrow $1500 to pay off the debts she incurred because of appellant. She gave money to Helen Walters, who had allowed appellant to use her credit card and had never been repaid. (RT

1902.)

C. The Character Evidence Was Inadmissible

All of the uncharged misconduct evidence presented at trial was admitted under Evidence Code section 1101. (RT 274, 306.) Subdivision (a) of that statute prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) allows the admission of evidence of misconduct when that evidence is relevant to establish some fact other than the person's character or disposition.[41]

In the cases of *People v. Ewoldt* (1994) 7 Cal.4th 380 and *People v. Balcom* (1994) 7 Cal.4th 414, this Court set forth the parameters for admission of other crimes evidence. Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the

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[41] Evidence Code section 1101, as it read at the time of appellant's trial stated: "Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section 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, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented, other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.) The admissibility of bad character evidence depends upon the materiality of the fact to be proved or disproved, and the tendency of the proffered evidence to prove or disprove it. (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.)

In the present case, evidence of uncharged misconduct by appellant was erroneously admitted because it was not relevant to prove a material fact other than his criminal propensity.

1. Evidence of Alleged Fraudulent Behavior by Appellant was Not Relevant to Prove the Robbery-Murder Special Circumstance

In his argument in favor of admission of evidence of appellant's fraudulent behavior, the prosecutor said the evidence was relevant to prove that "the defendant intended to steal whether by robbery force, fear or by trick, steal from the victim, take her checks covertly convince her to give him her checks or *any type of theft*, that would be relevant." (RT 265, emphasis added.) He argued,

> I think that it increases the likelihood that there was deception with the victim. We know at least that he claimed to be a trainer where as [sic] he was only a janitor and that his motivation and intent in stealing from the victim was not a mere afterthought. It was part of his ongoing course of seeing women as victims and sources of income either by covertly stealing the instruments or convincing them or defrauding

them into giving him the instruments.

(RT 268.)

The prosecutor repeatedly referred to appellant stealing "covertly," or practicing "deception" on friends and co-workers. (RT 267, 268, 269.) He described the witnesses as "individuals . . . who were approached, defrauded, stolen from," and who "would be relevant witnesses to show the frame work of the defendant's intent." (RT 270.)

As trial counsel pointed out, none of the incidents described by the people who were allegedly defrauded by appellant involved violence, force or fear – the very elements necessary to prove the robbery special circumstance. Indeed, as counsel argued, even assuming that the proposed testimony was true, it would show nothing more than that appellant was "a person who was able to convince people to loan him money or to give him items to use – use a credit card and go to Disneyland or loan him money and things like that, but maybe with the best of intent to repay but through a financial situation was unable to do so." (RT 270.)

The court overruled counsel's objection and stated:

> . . . it seems that there is a very logical connection that exists among all of the the, you know, in the borrowings or the thefts depending upon which they are, and that's not for me to determine whether they are thefts or borrowings at this time, that's going to be for the jury to determine, and the fact that there is no violence in any of the other ones, that to me is a collateral issue because the People are going to have to prove

> to the jury a number of things and that's what they are going to have to do and taking a fallacy [sic] 352 type of analysis, of course, all of the evidence is prejudicial.

(RT 273-274.)

Other crimes evidence is admissible to show a common plan or design, intent or identity. Evidence that appellant had obtained money or property from friends and acquaintances through fraud or deceit was relevant to none of these issues with regard to the alleged robbery-murder special circumstance. When appellant was arrested almost two months after Weir's death, he had two of her signed but uncashed checks in his possession. The evidence in no way proved that property was taken by Sara Weir by force or fear. On the contrary, it more strongly suggested that the property was taken as an afterthought, or that he defrauded Weir to get it.

Even if one were to accept the prosecutor's theory of the relevance of evidence of appellant's questionable financial dealings, no discernible, legitimate reason exists for admitting the testimony of Karrie Marshall and Leticia Busby. Marshall's testimony was nothing more than a prelude to the prosecution's theme at trial – that appellant was a dishonest and frightening individual who preyed upon young white women.[42] The import of Busby's

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[42] The prosecutor elicited testimony from Marshall that she was "scared" of appellant and "had a bad feeling about him." (RT 1201.) She agreed with the prosecutor that her refusal to allow him to stay at her apartment was "for [her] own protection." (RT 1202.)

testimony, describing her refusal to lend appellant her credit card, is incomprehensible, except as another chance to impugn appellant's character.

Moreover, even if the evidence of appellant's fraudulent behavior is deemed relevant to the robbery-murder special circumstance, it should have been excluded on the basis that the prejudicial effect of the evidence outweighed its minimal probative value.

Under Evidence Code section 352, a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will created substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. (*People v. Crew* (2003) 31 Cal.4th 822, 840.) Evidence is substantially more prejudicial that probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, n. 14.) This precisely describes the evidence of bad conduct introduced in this case. The evidence served only to paint appellant as a devious, untrustworthy individual who took advantage of his friends and acquaintances. Such evidence was entirely irrelevant as it bore no relation to any disputed, material fact necessary to the prosecution. At the same time it

was immeasurably prejudicial – in keeping with the prosecutor's theme, portraying appellant as an untrustworthy bad man who preyed upon innocent white women and was capable of much more nefarious acts.

2. Evidence of the Assault of Michelle Theard Was Inadmissible to Prove the Burglary Special Circumstance

The prosecutor's theory of admissibility of appellant's alleged assault of Michelle Theard several days before Sara Weir was killed was strained even when the burglary-related charges were still before the jury. Theard's testimony was needed only to establish that at the time of the alleged theft from her apartment, appellant no longer had permission to live there, and thus any entry was unlawful. The alleged assault of Theard bore no relation to any of these elements of burglary. The testimony regarding the totally immaterial and irrelevant assault only underscored appellant's "bad nature."

Moreover, even if the alleged assault was admissible to prove a burglary, once the burglary related charges were dismissed, there was no conceivable basis for its admission at appellant's trial. The irrelevant, but highly damaging evidence should have been stricken and the jurors instructed not to consider it for any reason during their deliberations.

3. Evidence of Uncharged Sexual Assaults Was Inadmissible to Prove the Rape Special Circumstance

Evidence of uncharged crimes is admissible to prove identity,

common design or plan, or intent, but only if the charged and uncharged crimes are sufficiently similar to support a rational inference of those facts. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.) Depending on the fact that the uncharged misconduct is offered to prove, different degrees of similarity are required for its admission.

In this case, the failure of the trial court to adequately analyze the theory of relevance of the uncharged misconduct evidence resulted in its erroneous admission. As stated by this Court in *Ewoldt*, "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.)

The prosecutor and court gave differing and often conflicting interpretations of the bases for admission of the testimony. During the parties' initial discussion of the admissibility of the Venter evidence, the prosecutor stated unequivocally that the Venter testimony was *not* offered to prove identity. (RT 280.) The court expressed its understanding of the basis for admission as "a common scheme." (RT 291.) Later, however, in support of admission of the Dorn testimony, the prosecutor referred to the evidence as relevant to intent and modus operandi. (RT 303, 304.) The court did not articulate a specific basis for admission of the evidence, but suggested it came in as evidence of a common plan. (RT 306-307.)

As the proceedings continued and the prosecutor proffered evidence of additional incidents of uncharged sexual misconduct, the grounds upon which the court admitted the evidence expanded until ultimately the jury was instructed they could consider the other crimes evidence on all three points: common plan or design, intent and identity. (RT 1462-1464.) Appellant submits that the testimony of Venter, Dorn and Baer was inadmissible under any theory. A careful analysis of the relevance of the uncharged evidence to a disputed fact at appellant's trial reveals the lack of sufficient probative value to justify its admission.

Evidence of uncharged sexual assaults may not be, as it was here, improperly admitted to prove the very existence of a sexual offense. In the absence of independent evidence of the underlying offense, "other crime" evidence does not merely establish identity, intent or common plan – it establishes the existence of the crime.

In evaluating the relevance of uncharged misconduct, a court must determine the nature and degree of similarity *between the uncharged misconduct and the charged offense.* In the present case, both the prosecutor and the court focused on the similarities between and among the *uncharged* crimes.[43] There was no determination of the similarities between

[43] The trial court ruled that evidence of the uncharged offenses was admissible because of the "many similarities," between those incidents and the

those similar uncharged offenses and the charged offense – and there could be none because of the lack of evidence of what happened on the night Ms. Weir was killed. The prosecutor attempted to fill in the lacuna with evidence of appellant's criminal propensity – something for which the other crimes evidence clearly cannot be used.

> Proof of other crimes of like character serves the real purpose of supplying missing elements of intent, knowledge of the character of some act proved to have been done by a defendant or bolstering up otherwise weak evidence of some phase of such matters. Such proof cannot be received to show general tendency to commit crime *or to show physical acts by a defendant of which there is no other evidence.*

(*People v. Garcia* (1962) 201 Cal.App.2d 589, 593, emphasis added.) Thus, while evidence of a common design or plan is admissible to establish that the defendant committed the act alleged, there must be some independent evidence to establish that the alleged act even occurred.

To illustrate the use of other crimes evidence to establish that the defendant committed the act alleged, this Court in *Ewoldt* gave as an

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present offense. But in fact, the court focused on the uncharged crimes. The court explained: "And the way that I look at it is it's a physical emotional domination and control exercised by the defendant . . . ." (RT 288.) The court reiterated its view of the probative value of the evidence as showing "the domination, the control aspect that in my understanding of what happened it's almost like a T.V. series when it keeps replaying and so there's to my mind shocking similarities." (RT 290.) In ruling that the testimony of Jodi Dorn was admissible, the court observed, that it was "*strikingly similar to the other 1101 (b) evidence*." (RT 306, emphasis added.) The court stated "It looks to me that it's back to the analysis of the other day. It's severe power domination play." (*Ibid*.)

example a prosecution for shoplifting in which the defendant's presence at the scene of the alleged theft was conceded. In that case, evidence that the defendant had committed previous acts of shoplifting in a markedly similar manner might be admitted to show that he took the merchandise in the manner alleged by the prosecution. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.) However, using the same example, if the merchandise was missing from its place on the store shelf, but there was no other evidence that a theft had occurred – i.e., that the item had not simply been misshelved or temporarily removed by another employee for a legitimate purpose – then evidence of the defendant's prior shoplifting convictions could not be used to prove that a theft occurred.

In the present case, the act which the uncharged sexual assault evidence was ostensibly admitted to prove was the rape or attempted rape of Sara Weir. What is missing from the record in this case, and what the prosecutor tried to use the uncharged misconduct to prove, was evidence of the underlying crimes: the theft described in *Ewoldt*, and in this case any sexual assault against Sara Weir.

Neither the court nor the prosecutor offered an analysis of how "power domination play," common to the uncharged offenses was relevant to the disputed issues in this case. The court's statements reveal the fundamental flaw in its reasoning: the court assumed that the circumstances

surrounding Sara Weir's death were the same as the scenarios described by the other women, not because of any evidence presented, but because appellant had a propensity to do such things. This is the very reason why such prior bad act evidence is excluded as overly prejudicial.[44]

The prosecutor offered evidence of incidents involving these three women, not, as he acknowledged, to establish appellant's identity as Weir's killer, but to fill in the blanks as to what happened to Weir. "What we don't have is the victim here to tell us what the conversation was, why she was there, why she was resisting *and what happened during the course of that night*." (RT 285, emphasis added.) Referring to the other crimes evidence, the prosecutor stated, "That fills in the blanks as to what the defendant's motivations were." (RT 284.) The prosecutor summed up the import of the other crimes evidence in his rebuttal closing argument at the guilt phase: "That's how you know what happened." (RT 2246.)

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[44] As this Court has taught, other crimes evidence:

> "is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much*." Inevitably, it tempts "the tribunal . . . to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."

(*People v. Alcala* (1984) 36 Cal.3d 604, 630-631, quoting *People v. Schader* (1969) 71 Cal.2d 761, 773, fn. 6; quoting 1 Wigmore on Evidence (3d ed. 1940) §194 at 646.)

When evidence of other crimes is offered, as it was here, as essentially the *only* evidence that a sexual assault occurred, then it becomes strictly evidence of criminal propensity, inadmissible under well-established law.

> Where evidence of sexual activity is inconclusive in the instant offense, allowing evidence of prior sexual offenses merely to show aggressive sexual tendencies so that the jury can infer an intent to rape in the case before it is to allow proof of an intent to rape by means of evidence of criminal disposition.

(*People v. Guerrero* (1976) 16 Cal.3d 719, 728; *see also Michelson v. United States* (1948) 335 U.S. 469, 475-476.)

Based on the lack of evidence of a forcible sexual assault against Weir, the present case is distinguishable from *People v. Kipp* (1998) 18 Cal.4th 349, in which this Court found the admission of an uncharged rape murder proper to prove the special circumstance of rape murder. In *Kipp*, according to this Court, there was evidence of sexual assault: "the condition of her corpse and her clothing suggested that [the killing] had occurred during an actual or attempted rape." (*Id*. at p. 351.) The victim's blouse was open and missing a button, her bra was clasped, but twisted above her breasts and her pants and underwear were around her ankle. In addition to the condition of her clothes, the victim in *Kipp* had bruises on her body, including her thigh. (*Id*. at p. 360.) In the present case, the body was found naked, but there was no trauma to the victim's mouth, vaginal or anal areas.

(RT 2027-2029.) Moreover, there was no other physical evidence of a sexual assault – no semen was detected on the vaginal or anal swabs, and a pubic combing was taken, but no evidence of the presence of an assailant's hair was presented.

Without sufficient evidence of a sexual assault in the charged offense[45], other crimes evidence is nothing more than evidence of criminal propensity. Such evidence was lacking in this case, and thus, the uncharged crimes testimony should have been excluded on this basis. The evidence was also inadmissible to prove identity, intent or common plan.

a. *Identity*

The greatest degree of similarity between the uncharged and charged crimes is required for evidence of the uncharged misconduct to be relevant to prove identity. (*People v. Ewoldt, supra,* 7 Cal.4th at 403.) "'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*Ibid*., quoting 1 McCormick § 190, pp. 801-803.) Other crimes evidence is admissible only if it is relevant to an issue material to the People's case and "is not merely cumulative with respect to other evidence which the People may use to prove the same issue." (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.)

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[45] The insufficiency of evidence of rape or attempted rape is discussed in greater detail in Argument VIII.

Evidence of uncharged crimes was not admissible in the present case on the issue of identity because appellant's connection to Weir's death was established by other evidence. There was ample evidence of his presence at the apartment where the body was found, his fingerprints were found on the tape used to attach the plastic bag around Weir's neck, and he was found in possession of items belonging to her. In addition, Rosell Momon testified that appellant told him he was at his apartment with a girl other than Michelle Theard in the days before the discovery of Weir's body. This evidence all pointed to the fact that appellant was with Weir at or near the time she died. The prosecutor conceded as much, stating plainly that he was not seeking admission of the uncharged crimes evidence to prove identity, and citing the evidence that linked appellant to the victim and the apartment.[46] (RT 280-281.) Thus, the highly inflammatory evidence of the uncharged sex offenses was cumulative on the issue of identity and should not have been admitted.

[46] The prosecutor stated that the other crimes evidence was "not to show identity. The identity is shown by fingerprints . . . .The defendant knew the victim and the defendant is connected to the location. So it's not a matter of saying he did this same type of crime in Florida, therefore, he must be the man who did it here." (RT 280-281.)

b. *Common Plan or Design*

"To establish the existence of a common plan or design, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.) Because the evidence of the incidents involving Dorn and Venter happened six and two years respectively before the charged offense, they cannot legitimately be considered part of a plan or design. The incident with Baer, despite having occurred closer in time to Weir's death, also fails to establish the requisite "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. 403, quoting 2 Wigmore (Chadbourn rev. ed. 1979) § 304, p. 249.) Appellant's behavior during the incident with Baer, and as discussed in more detail below, is not consistent with a plan or scheme.

The evidence clearly reveals that the three incidents were spontaneous acts rather than parts of a common plan or scheme, based not only on the passage of time between the incidents, but also in terms of appellant's behavior, which was utterly inconsistent with the notion of a plan or design. To say that appellant had a *plan* to cultivate friendships with young women, lure them to his room and sexually assault them is to ignore

what actually happened during each of the incidents.

Jodi Dorn's description of appellant's behavior suggests he was delusional – he spoke to her throughout the time she was in the room with him as if they were friends, he made arrangements for them to meet the next day and squeezed her arm affectionately as he saw her off in her car. (RT 1530, 1565.) Dorn herself described appellant's behavior as "bizarre" and "unaffected." (RT 1534.)

The incident with Kim Venter, which occurred four years later, began when Venter went to appellant's room to retrieve her bathing suit and cigarettes. (RT 1645.) Thus, her presence there was not planned. According to Venter, appellant's demeanor changed very abruptly over the course of the evening – alternating between anger and tearful apologies. (RT 1706, 1708.) His behavior as described by Venter, was bizarre, as when he appeared to make a phone call trying to "block" Venter from leaving the country, and told her of a plan to smuggle money out of the country. (RT 1692, 1695.)

Finally, Teri Baer described appellant's behavior during the incident that took place in 1993, two years after Venter's, as "psycho." Again, appellant's actions appear to have been impulsive – Baer described an explosion of violence by appellant when he came after her (RT 1847-1848), and bizarre behavior – appellant claimed that he had only a few days to live

before he was to be killed as part of a Black Mafia ritual. (RT 1875.) He appeared to be "possessed," and while he spoke about being together with Baer as "two people who care about each other," Baer testified he never mentioned her name and she was not sure who appellant thought she was. (RT 1865.) His behavior in giving her his medallion and watch, taking her out to dinner later that evening and asking her if she was going to tell her boyfriend about their relationship can only be described as delusional.

The facts of the uncharged incidents in this case do not suggest a design or plan. Rather, the testimony of all three women demonstrates the impulsive, spontaneous and manifestly *unplanned* nature of the assaults.

c. *Intent*

> Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it."

(*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2, quoting 2 Wigmore, (Chadbourn rev. ed. 1979) § 300, p. 238.) In cases such as the present one, in which the act – here, sexual intercourse – is *not* conceded, evidence of uncharged crimes is not admissible on the issue of intent.

The prosecutor's argument in support of admission of the other crimes evidence made clear his intended – and erroneous – use of the evidence: "He [appellant] befriends Sara Weir and the question for the jury

is when we find this assuming platonic friend of the defendant she is naked *without circumstantial evidence of rape*, was she murdered in the course of a rape? And I think that with the path that the defendant has taken in his life victimizing individuals it is clear what his motive, what his intent what, his motus [sic] operandi was, that's why it's critical for the jury to see that." (RT 305-306, emphasis added.)

Yet, this is precisely the "ill-defined" standard condemned by this Court in *People v. Balcom*, *supra*, 7 Cal.4th at p. 423. Addressing the conclusion expressed in the concurring and dissenting opinion that other crimes evidence was admissible to show that a defendant "intended" to rape the victim, this Court made a critical distinction regarding use of the word "intent."

> To the extent that the concurring and dissenting opinion concludes that evidence of defendant's uncharged misconduct was admissible because it demonstrates that defendant had a plan to commit the charged offenses, it simply restates the holding of the majority. But the statement in the concurring and dissenting opinion that such evidence is admissible "if the circumstances of the accused's criminal sexual misconduct on other occasions tend to establish that he harbored criminal sexual intent toward the current complainant" (conc. and dis. opn. of Baxter, J.) would establish an ill-defined standard that does not clearly exclude evidence of a defendant's criminal disposition, as required by Evidence Code section 11101, subdivision (a). For example, evidence that a defendant charged with rape had committed rape on another occasion in a manner different from the charged offense may tend to establish that the defendant had a propensity to commit rape and, therefore, "harbored criminal sexual intent toward the

> currant complainant," but such evidence is inadmissible under Evidence Code section 1101 as mere evidence of criminal disposition.

(*Id*. at p. 423, citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.)

As the prosecutor's own words – "the path that the defendant has taken in his life" – make clear, the other crimes evidence in this case was presented simply to show appellant's criminal propensity. This was highly improper and highly damaging.

4. The Probative Value of the Other Crimes Evidence Was Vastly Outweighed by its Prejudicial Effect

Evidence of other crimes "should be scrutinized with great care . . . in light of its inherently prejudicial effect, and should be received only when its connection with the charged crime is clearly perceived." (*People v. Elder* (1969) 274 Cal.App.2d 381, 393-394, quoting *People v. Durham* (1969) 70 Cal.2d 171, 186.) Thus, other acts evidence is only admissible in very limited circumstances, when the court has carefully weighed the evidence and found that it is so probative in value that it overcomes its inherently strong prejudicial effect on the defense. (*Ibid*.; *People v. Haslouer* (1978) 79 Cal.App.3d 818, 825.)

The exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance "is

particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Murphy* (1963) 59 Cal.2d 818, 829.) "[U]ncharged offenses are admissible only if they have *substantial* probative value." (*People v. Thompson* (1980) 27 Cal.3d 303, 318, original emphasis, fn. omitted.)

The lack of *any* probative value of the evidence of appellant's financial dealings render admission of that evidence clearly erroneous. As discussed, *supra*, the testimony of the witnesses to appellant's alleged fraudulent acts was wholly irrelevant to prove the robbery-murder special circumstance. The evidence showed appellant's ability to swindle friends and co-workers, but had absolutely no bearing on whether property was taken from Weir by force or fear. In fact, the evidence shows just the opposite – that appellant did not need to use force or fear to obtain money or property from people.

The evidence served only to turn the jury against appellant by portraying him as a devious and exploitive person. Indeed, what other conclusion could the jury draw about the significance of such testimony, except that it was offered to show negative and frightening aspects of appellant's personalty.

Similarly, admission of Michelle Theard's testimony lacked sufficient probative value to outweigh the monumental prejudice inherent in such

testimony. Her description of the violent assault by appellant, during which she felt as if she might die, lacked not just the requisite substantial probative value; it lacked any probative value whatsoever.

The probative value of the uncharged offenses – especially the Dorn and Venter incidents – was diminished by the weakness of the inference that the events were part of "a planned course of action rather than a series of spontaneous events." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) As discussed in detail above, the significant passage of time between the incidents as well as the impulsive and explosive nature of appellant's behavior militates against such a finding.

The probative value of evidence of the Baer incident was tainted by her knowledge of the facts of the present case, meaning that "the source was not independent of the evidence of the charged offense." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) Baer initially said nothing to the police about a sexual assault; it was only after she found out about Weir's death, and the assault of Michelle Theard that she came forward with her allegations against appellant. (RT 1858.) Indeed, Baer expressed her guilt about not reporting the incident with appellant. Before she was interrupted by counsel's objection she testified, "I felt like if I had come forward, maybe I could have done something to keep him from killing Sara. After I heard about her, I just –" Baer acknowledged that her motivation for testifying

was that she "wanted to make sure that this person [appellant] couldn't go out and hurt other women." (RT 1859-1860.)

Moreover, Baer's knowledge of the facts of the Weir case may have influenced not only her testimony but also her recollection of the alleged incident. According to Baer, the incident at appellant's apartment happened on August 30, 1993. (RT 1841.) Baer claimed that during the attack appellant wielded the blue-handled scissors which the prosecution claimed was the weapon used to murder Sara Weir. (RT 1847.) However, Michelle Theard testified that she left those scissors on the night stand next to her bed in the bedroom on Labor Day, September 6, 1993, a week after the alleged attack against Baer. The scissors were usually kept in the bathroom. (RT 951-952.) They were found by in the toolbox in the kitchen a week after Weir's body was discovered in the apartment. (RT 947-949.) Thus, Baer's identification of the scissors is highly questionable and certainly diminishes the reliability and probative value of her testimony.

Against the diminished probative value of the other crimes evidence must be weighed the overwhelmingly prejudicial effect of the testimony of Dorn, Venter and Baer. There can be no doubt that "the jury's passions were inflamed by the evidence of defendant's uncharged offenses." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 405.) The trial court permitted all three women to testify at length to the graphic and disturbing details of their

ordeals. [47] Even if, arguendo, evidence of uncharged misconduct was admissible to establish a common plan or design to rape or attempt to rape the testimony of any one of the three women was sufficient to accomplish this task. In this case, however, the sheer volume and graphic nature of the testimony rendered any attempt by the jury to rationally consider appellant's liability for the charges before them an impossibility.

In the present case, as in *Ewoldt*, the prejudicial effect of the uncharged evidence is heightened by the fact that appellant's uncharged acts resulted in little or no criminal punishment. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405.) According to Jodi Dorn, as the result of a plea bargain, appellant plead guilty to a lesser charge and was given credit for time served. (RT 1599.) In the case of Kim Venter, she testified that she reported the incident to the police. (RT 1723.) No evidence that appellant was prosecuted for the Venter offense was presented. Appellant was never arrested or charged with any offenses related to Teri Baer.

This circumstance "increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless of whether it considered him guilty of the charged offenses." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405.) Indeed, the prosecutor made sure the

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[47] (*See* RT 1465-1602 [Dorn]; RT 1610-1754 [Venter]; RT 1755-1902 [Baer].)

jury did not forget that appellant had not been punished for the uncharged offenses. In his closing argument at the guilt phase, the prosecutor speculated about Sara Weir's last thoughts:

> And she had no idea that there would be three heros to come forward and testify and go through all this, even though the defendant can't be convicted of their rapes here, even though he is not even charged with raping Teri and Jodi and Kim. She didn't know that there would be three heroes. She didn't know all of that would happen.

(RT 2190.)

The effect of the barrage of marginally relevant uncharged misconduct evidence was to bury any legitimate reasonable doubts appellant's jury may have had about his liability for the *charged* offenses.

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D. The Admission of Bad Character Evidence Violated Appellant's Constitutional Rights

The admission of this evidence violated appellant's right to due process under the Fourteenth Amendment, which "protects the accused against conviction except upon proof [by the state] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (*See e.g.*, *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) The introduction of such evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; *see also McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code section 1101 not to have his guilt determined by propensity evidence. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at pp. 346-347.) By ignoring well-established state law that prevents the state from using evidence admitted for a limited purpose as general propensity evidence and excludes the use of unduly prejudicial evidence, the state court arbitrarily

deprived appellant of a state-created liberty interest.

Appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (*See Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328 (1989), *abrogated on other grounds Atkins v. Virginia* (2002) 536 U.S. 304.)

E. The Use of Bad Character Evidence Was Not Harmless

The prominence of the other crimes evidence in the prosecution's case cannot be overstated. The sheer volume of the testimony of uncharged offenses is staggering – over one-third of all the prosecution's guilt phase evidence was devoted to the testimony of Jodi Dorn, Kim Venter and Teri Baer. This is in addition to the four witnesses who testified to alleged fraud by appellant.

The prosecutor knew he could not make his case without the other crimes evidence. In fact, in his opposition to a defense motion for judgment of acquittal of the special circumstances at the end of the prosecution case, the prosecutor relied entirely on the other crimes evidence. (RT 2043-2045.)

The prosecutor began his guilt phase opening statement with an 14-page narrative – more than half of the entire statement – describing the

offenses against Jodi Dorn, Kim Venter and Michelle Theard.[48] (RT 807-820.) During the prosecutor's first closing argument at the guilt phase, he began by mentioning the uncharged offenses and referred to them throughout his argument. (RT 2158 ["it wasn't the first time he'd been in a similar situation"]; RT 2162 [use of scissors against Baer]; RT 2165 [reference to other victims]; RT 2174-2175 [same]; RT 2177 ["all of (appellant's) behavior to be considered" by this jury]; RT 2179 [reference to survival skills of other victims]; RT 2181 [use of weapons with other victims]; RT 2182 ["not just a coincidence that you heard three identical nightmares and a fourth which . . . is a fourth nightmare"]; RT 2183 ["in all of his past instances he had a joint desire to take from his victims"]; RT 2186 [reference to other victims]; RT 2187-2191 [extended discussion of "past deeds"]; RT 2190 ["three heroes to come forth and testify and go through all this"].)

Referring to Dorn, Venter and Baer, the prosecutor summed up the significance of their testimony to his case:

> Fortunately . . . Sara did have three who came to speak for her, speak as her and answer, I think, for everyone what happened and answered, hopefully, for this jury exactly what happened to her beyond a reasonable doubt; murdered in the course of a

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[48] At the time, Teri Baer had not yet made her sexual assault allegations. Otherwise, undoubtedly the opening statement would have included an extended discussion of her testimony as well.

rape, murdered in the course of a robbery. . . .

(RT 2189.)

In his rebuttal argument, the prosecutor went after appellant with a vengeance and used the uncharged misconduct evidence as his primary ammunition. He started right in by discussing "Corky," a dog – presumably appellant – who is caught with his jaws around a hot dog. The question is whether Corky has an innocent explanation for his actions. The prosecutor argued that any innocent explanation should be disregarded because of Corky's propensity to steal and eat hot dogs, that is, based on the three previous times Corky had been caught stealing and eating hot dogs, Corky's intent to steal on this occasion was clear. (RT 2237-2239.)

The prosecutor referred to appellant as "this serial rapist, this amoral person who is a predator." (RT 2239.) The prosecutor told the jury they were "supposed" to consider "what he had done before," (RT 2240), use his "past deeds" to determine his intent (RT 2241), "consider prior events" (RT 2245) and use evidence of "his three prior brutal rape situations . . . to show identity, to show his plan, to show what happened." (RT 2246).

The prosecutor told the jury that the similarities between the three uncharged offenses provided the evidence of what happened to Sara Weir. (RT 2249 ["in all the cases, we know the defendant is in his own place, would shut the door and have them there by his design, and then the attack,

the grabbing"].) He relied on the prior acts to show an attempted rape and asked the rhetorical question of what constituted sufficient evidence of an attempt: "How about if you knew that this guy is a serial rapist who has done it three times before in the same way? That every single time it's in his room. That every single time it's with a friend. Of course it's the first act toward the attempted rape." (RT 2251; *see also* RT 2252 ["background of the perpetrator" lends significance to naked condition of body]; RT 2255 ["based on his methodology, I believe the evidence shows [Weir] had already been raped"].)

What began as a discussion of the evidence of the special circumstances devolved into a rambling ten-page diatribe in which the prosecutor argued that the death of Sara Weir in 1993 was the inevitable culmination of events that began with the attack on Jodi Dorn in 1987. (RT 2256-2266.) The prosecutor compared appellant to a predatory dinosaur, who incorporated the use of a weapon into his attacks upon the women. (RT 2256.) He referred to appellant as "a serial acquaintance rapist who has learned to adapt to his environment. He's the lizard who had learned to turn doorknobs." (RT 2263.) The prosecutor likened appellant's tactics with his victims to those of an African lion preying on young, unsuspecting antelope. (RT 2260-2261.)

Without the other crimes evidence, the prosecutor's case for first

degree murder and special circumstances was extremely weak. Even with it, the case was a close one, justifying a lesser showing of error to warrant reversal. (6 Witkin Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, 45, pp. 506-507 ["[I]n a close case, *i.e.*, one in which the evidence is evenly balanced or sharply conflicting, a lesser showing of error will justify reversal than where the evidence strongly preponderates against the defendant"]; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 ["'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]"].)

The first indication that this was a close case was the jury's request for read-back of testimony. (*See People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror questions and requests to have testimony reread are indications that the deliberations were close]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for read-back of critical testimony].) On the second day of deliberations, the jurors requested read-back of the testimony of Robert Coty, the witness who testified about his observations from the adjacent apartment building. (CT 523; RT 2273.)

The most significant indicator that the jury was struggling with the prosecution's evidence in this case – even in the absence of *any* defense evidence – was the length of the jury deliberations. (*See People v.*

Cardenas (1982) 31 Cal.3d 897, 907 [six hours of jury deliberations is evidence of a close case]; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612 [nine hours of deliberations "deemed protracted"].) When the jurors are troubled by the case, the appellate court is required to take heed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the jury].) In this case, the jury began deliberating on the afternoon of June 20, 1995, but did not reach a verdict until the morning of June 23, 1995, after deliberating for more than two and half days. (RT 2272, 2273, 2277, 2301, 2306.)

The obvious closeness of the case leaves no room for doubt that the admission of a massive amount of devastating evidence of uncharged crimes was prejudicial.

F. Conclusion

The admission of wholly irrelevant and highly inflammatory evidence of uncharged misconduct rendered appellant's trial fundamentally unfair and requires reversal of the conviction, special circumstance finding and death judgment.

V.

APPELLANT WAS REPEATEDLY DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO BE PRESENT AT ALL CRITICAL STAGES OF TRIAL

A. Introduction

Throughout the trial proceedings, the court and counsel held in camera hearings in the hallway behind the courtroom. These hearings were, almost without exception, conducted outside of appellant's presence while he remained in the courtroom. Appellant's rights under the federal and state constitutions and state statutes were violated by the court's actions in excluding appellant from critical proceedings at trial. Moreover, appellant's complete exclusion from the many hallway discussions, which the jurors knew often involved critical rulings by the court, contributed to the overall isolation and marginalization of appellant that existed throughout the trial.

No reason was given for appellant's blanket exclusion, and appellant at no time waived his right to be present at the proceedings discussed in this argument.

Appellant had a right under the federal constitution to be present at all proceedings at which his presence bore a reasonably substantial relation to his opportunity to defend himself. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-107.) This right is rooted largely in the confrontation clause of the Sixth Amendment, as well

as the due process clause of the Fifth and Fourteenth Amendments. (*United States v. Gagnon* (1985) 470 U.S. 522, 526.) Article I, section 15 of the California Constitution applies the same standard. On appeal, this Court's review is de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 742.)

Because appellant was wrongly excluded from several hearings at which he had both a constitutional and a statutory right to be present, the conviction, special circumstance findings and death judgment must be reversed.

B. Appellant Was Erroneously Excluded From Critical Stages of the Trial at Which His Presence Was Directly Related to his Ability to Defend Himself

Appellant was excluded from every hearing that was conducted in the hallway outside the courtroom. These hearings encompassed various proceedings, including jury selection, rulings on significant evidentiary matters and revelations by the prosecutor about damaging testimony of prospective witnesses. At several of these proceedings appellant's presence bore a reasonably substantial relation to his ability to defend himself.

1. *Wheeler/Batson Motion*

Appellant was wrongly excluded from the hearing where his attorney made a *Wheeler* motion after the prosecutor excused an African American woman named Selina Safari. (RT 735-740; *see* Argument III.)

In *People v. Ayala* (2000) 24 Cal.4th 243, this Court held that it was

error under state law for the trial court to conduct a hearing on a defense *Wheeler* motion with the prosecutor, but out of the presence of the defendant and his counsel.[49] (*Id*. at p. 262.)

This Court in *Ayala* relied on the Ninth Circuit Court of Appeals decision in *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1257, in which the exclusion of the defense from *Batson* proceedings was held to be reversible error.[50] This Court agreed with the court in *Thompson* that at the *Wheeler/Batson* hearing, the defense serves two critical functions: to probe the prosecutor's reasons and to create an adequate record on appeal.[51]

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[49] The majority noted the possibility that the error also violated the federal constitution, but under either standard found the error harmless. (*Id*. at pp. 263-264.)

[50] In both *Ayala* and *Thompson*, the trial court excluded the defendant *and his attorney* from the proceeding during which the prosecutor gave his reasons for making peremptory strikes. However, in discussing the error, neither the majority nor the dissenting opinion made a distinction between the exclusion of the defendant and his attorney. (*See e.g*., *People v. Ayala*, *supra*, 24 Cal.4th at p. 262 ["error to exclude defendant from participating in the hearings on his *Wheeler* motions" and referring to the lack of "facts and law from the defendant"]; *id*. at pp. 263-264 [discussing danger that "defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete]; *id*. at p. 292, disn. opn. of George, C.J. ["seen in this light it becomes clear why a defendant must have the right to be present with his counsel"]; *ibid.* ["the presence of the defendant and his or her counsel may assist the court in probing the prosecutor's stated reasons"]; *id*. at p. 293 ["defense counsel (possibly assisted by the defendant) might be able to shed light on the matter"]; *id.* at pp. 293-294 ["under . . . today's decision a defendant has a right to be present and have his or her counsel orally rebut the prosecution's justifications"].)

[51] The proceeding at issue in *Ayala* was "step three" of the *Wheeler/Batson* process at which the prosecution attempted to set forth its race-

(*People v. Ayala, supra*, 24 Cal.4th at pp. 292-293.)

This case offers clear examples of how appellant's presence bore a reasonably substantial relation to his ability to protect his right to a fair and impartial jury and why his exclusion from the *Wheeler/Batson* hearing constitutes reversible error.

Appellant has argued that trial counsel made an adequate showing for the trial court to find a prima facie case of the discriminatory use of a peremptory challenge by the prosecution. Further, appellant has argued that the trial court could have and should have examined the prosecutor's reasons for striking the juror. (*See* Argument III.) If this Court finds trial counsel's presentation in support of the prima facie case lacking, it must then consider the possible assistance appellant could have offered had he not been excluded from the proceedings. Indeed, the possibility of an inadequate record when a defendant was excluded from a critical hearing was explicitly noted by this Court in *Ayala*:

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neutral reasons for exercising peremptory challenges. Each of the reasons why a defendant should be present at "step three" of the *Wheeler/Batson* process cited by this Court applies equally to the stage of the proceedings at issue here – "step one" of the process: setting forth a prima facie case of discriminatory exercise of challenges by the prosecution. For, as Chief Justice George observed in his dissent, because the burden of persuasion was on the defense, "it becomes clear why a *defendant must have the right to be present* with counsel and to participate in the proceeding when the prosecution undertakes its rebuttal." (*Id*. at p. 293, emphasis added.) The burden of persuasion is on the defense at both steps one and three. (*Purkett v. Elem* (1995) 514 U.S. 768, 769.)

> [I]t is error in particular to conduct ex parte proceedings on a *Wheeler* motion because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete.

(*People v. Ayala*, *supra*, 24 Cal.4th at pp. 263-264.)

In this case, had appellant been present during the hearing on the *Wheeler* motion, he could have offered a comparative analysis to the trial court which would have mandated comparative analysis review by this Court. (*People v. Johnson*, *supra*, 30 Cal.4th at pp. 1321-1322; *see also People v. Heard*, *supra*, 31 Cal.4th at p. 971.) It is not unreasonable to surmise that appellant would have made such a comparison, which is in fact fairly intuitive: if the prosecutor claims he excused a juror for a certain reason, but did not exclude another juror who shared the same characteristics it would not make sense. Even a non-lawyer would recognize the inconsistency and could call it to the court's attention.

Appellant demonstrated that he was engaged during the proceedings, and willing to assert his rights, as evidenced by his filing a cause challenge against the trial judge during jury selection in which he alleged that the court "had displayed an improper indifference to the defendant's constitutional rights" throughout the trial. (CT 410; RT 884-885.) Appellant's presence at the hearing on the *Wheeler* motion would clearly have "contribute[d] to the fairness of the procedure" and his exclusion from it violated his right to due

process. (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745.)

The error from appellant's exclusion cannot be considered harmless, as the majority of this Court found in *Ayala*. After reviewing the transcript of the ex parte hearing, the majority declared: " [W]e are confident that the prosecutor was not violating *Wheeler*, and that defense counsel's presence could not have affected the outcome of the *Wheeler* hearings." (*People v. Ayala*, *supra*, 24 Cal.4th at p. 266.) Dissenting from the majority opinion, Chief Justice George set forth a compelling argument for why the trial court's error was prejudicial. Addressing the majority's reliance on the record of the ex parte hearings, he observed, "The record on this issue is incomplete, having been erroneously constructed with the input of only the prosecution and the court, and without crucial and necessary participation by defendant and his counsel." (*Id*. at p. 296, disn. opn. of George, C.J.) As appellant has demonstrated, his potential contribution to the hearing went well beyond the "speculation regarding theoretical possibilities" dismissed by the majority in *Ayala*. (*People v. Ayala*, 24 Cal.4th at p. 267.)

Respondent cannot meet his burden of showing that appellant's exclusion from this critical portion of trial was harmless.

2. *Other Jury Selection Proceedings*

Appellant was wrongly excluded from other critical proceedings during the jury selection process. For example, he was not present when

Cheryl Martin was questioned by the prosecutor about her connection to a man whom the district attorney had prosecuted for rape. (RT 527-530.) Nor was appellant present when Ms. Martin was excused for cause on the prosecutor's motion. (RT 538-539.) Appellant was also absent when prospective juror James Todd was excused based on his views on the death penalty.[52] (RT 635-636.)

Appellant clearly could have contributed to the proceedings had he been present during the proceedings at which these two jurors were excused. Appellant's contribution to the discussion concerning the challenges to Ms. Martin and Mr. Todd was, again, fairly intuitive. It is not unreasonable to think that had he been present, appellant might have pointed out that Ms. Martin was never asked what her feelings were toward her son's uncle, and therefore the court had no basis for concluding that she harbored any bias against the prosecutor or his office. Similarly, appellant could have augmented his attorney's argument against excusing Mr. Todd based on his voir dire answers.

In other words, appellant's presence at these proceedings would have accomplished the dual purpose described by the court in *U.S. v. Thompson*, *supra*, 827 F.2d 1254: he "could say things that might persuade the [trial]

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[52] The erroneous dismissal of Mr. Todd and Ms. Martin are discussed in Arguments I and II, respectively.

court or, failing that, he could say things that might persuade us. Both functions are crucial to our adversary system and to the principles of due process it serves." (*Id*. at p. 1261.)

Chief Justice George concluded his dissenting opinion in *Ayala* with this observation:

> Neither the majority nor any of the briefs cites any appellant decision that has found harmless the erroneous exclusion of the defense from a crucial portion of jury selection proceedings, and my own research similarly has not uncovered any such ruling.

(*People v. Ayala*, *supra*, 24 Cal.4th at pp. 299-300, disn. opn. of George, C.J.) The trial court effectively silenced appellant and in so doing prevented him from receiving a fair trial.

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3. *Exclusion from Other Critical Proceedings*

As previously noted, appellant was absent from hearings held in the hallway throughout the trial, not just during the voir dire process. His exclusion from these critical proceedings further violated both his statutory and federal constitutional rights.

In his discussion of the necessity of having the defendant present to assist the trial court, as well as counsel, Chief Justice George in his dissenting opinion in *Ayala*, gave as an example the following scenario:

> If the prosecution stated that it challenged a juror because the juror was a neighbor of or lived near the defendant, a trial judge unfamiliar with the juror's neighborhood might not be able to determine whether this was so, but defense counsel (possibly assisted by the defendant) might be able to shed light upon the matter.

(*People v. Ayala*, *supra*, 24 Cal.4th at p. 293, fn. 3, disn. opn. of George, C.J.) This reasoning applies equally to the two proceedings from which appellant was excused that are discussed here.

During the cross-examination of Martha Farwell, the victim's mother, trial counsel attempted to ask about her knowledge of her daughter's drinking. (RT 871.) The prosecutor's objection to counsel's questions about Weir's arrest for driving under the influence of alcohol was addressed by the court and attorneys in the hall outside of the presence of appellant and the jury. (RT 872-875.) Trial counsel argued that he was not attempting to get

the fact of the arrest before the jury, but simply trying to establish that Weir did drink on occasion. (RT 873.)

The trial court agreed that in light of the image of Sara Weir as portrayed by her mother – "a virtual saint" according to the court – the defense would be permitted to put in evidence to show that she drank alcohol, but only if the prosecutor did not establish that she had in fact drunk alcohol at some time. (RT 873.)

In the second instance, the prosecutor informed trial counsel and the court that Teri Baer, who had until that time been described as a witness to appellant's alleged fraudulent business practices, now claimed that she had been raped by appellant. (RT 1020.)

Certainly, appellant's presence was needed during both proceedings – regarding Sara Weir's driving under the influence arrest and Teri Baer's allegations – to protect his interests, assure him a fair trial, and assist counsel in defending the case. In *People v. Holt* (1997) 15 Cal.4th 619, this Court found that the defendant's absence from various trial proceedings – discussions of evidentiary motions, admissibility of defendant's statements and possible objections to an anticipated question by the prosecutor – did not interfere with his Sixth Amendment right to confront and cross-examine the evidence against him. (*Id*. at pp. 707-708.) However, in its decision, this Court relied on the fact that the defendant prevailed in each of the matters

discussed – either the trial judge's ruling went his way or the prosecutor offered no objection to the defense request. (*Id*. at p. 707.) In this case, of course, the defense did not prevail in either instance. Moreover, both proceedings involved issues about which appellant had personal knowledge and likely could have assisted his counsel in presenting the defense side of the argument.

The issue of Sara Weir's drinking was relevant to the issue of whether Weir was voluntarily at appellant's apartment, socializing and drinking. In his argument to the court, counsel stated he wanted to introduce evidence of Weir's drinking to establish that she and appellant had a more social relationship than had been portrayed by the prosecution. (RT 1119.)

The record contains evidence that suggests appellant had knowledge of Weir's consumption of alcohol. Trial counsel attempted to introduce evidence of a telephone conversation between appellant and Michelle Theard in the summer of 1993 in which appellant told Theard that Weir was at the apartment and the two of them were drinking. The trial court would not admit the evidence over the prosecutor's hearsay objection. (RT 971-976.)

Had appellant been present during the discussion with the court, he could have assisted his attorney in arguing for admission of evidence of Sara Weir's alcohol consumption. As it was, trial counsel entered into a virtually

meaningless stipulation that "on one occasion, perhaps more, but in October 1992 [the date of her driving under the influence arrest], Sara Weir was known to consume some amount of alcohol." (RT 1122, 1249.)

Appellant should also have been present when the prosecutor revealed the new allegation made by Teri Baer. The revelation that another allegation of a sexual assault had surfaced – this one within a short period before the killing – was certainly a proceeding at which appellant's presence was necessary to protect his interest.

In the recent case of *People v. Cole* (2004) 33 Cal.4th 1158, 1230, this Court found the even a defendant's absence from a hearing on a defense motion to continue "require[d] greater discussion," than his absence from other proceedings such as bench conferences. This Court ultimately ruled that his absence from the hearing on the motion to continue was harmless because when the defendant arrived after the proceedings, he was informed of what had happened and because there was nothing the defendant could have done to assist his attorney at the hearing. (*Id*. at p. 1231.) Neither can be said about the circumstances in appellant's case. The hearings in the present case are more akin to a pretrial evidentiary hearing than the routine motion to continue in *Cole*, and mandated appellant's presence.

C. Conclusion

Appellant's wholesale exclusion from critical proceedings at his trial

requires reversal of the conviction, the special circumstances and the death judgment.

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VI.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FELONY MURDER CONVICTION BASED ON ROBBERY AND THE ROBBERY SPECIAL CIRCUMSTANCE FINDING

A. Introduction

The evidence in this case was grossly insufficient to support the felony murder conviction based on robbery and the robbery murder special circumstance.[53] Accordingly, appellant's murder conviction and the related special circumstance violated his right to due process as guaranteed by Article I, § 13 of the California Constitution and the Fourteenth Amendment to the federal constitution (*In re Winship*, *supra*, 397 U.S. 358), and thus the conviction, special circumstance findings and death judgment must be overturned.

In assessing a claim of insufficiency of evidence, this Court must review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) The test is the same under the Fourteenth

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[53] This claim was raised in the trial court in appellant's motion for judgment of acquittal under Penal Code section 1118.1. (RT 2042.)

Amendment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 ["the test is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"] emphasis in original.)

The standard of review for sufficiency of the evidence with regard to a finding of special circumstances is the same. (*People* v. *Ochoa* (1999) 19 Cal.4th 353, 413; *People* v. *Alvarez* (1996) 14 Cal.4th 155, 224-225; *People* v. *Clair* (1992) 2 Cal.4th 629, 670.) No rational trier of fact could find the essential element of robbery in the record below.

B. The Evidence Does Not Support a Finding of Robbery

To find robbery felony murder or the robbery-murder special circumstance the jury must find beyond a reasonable doubt that the murder was committed while the defendant was engaged in the commission of the robbery *and* that the murder was committed in order to carry out or advance the commission of the crime of robbery. (*People* v. *Green* (1980) 27 Cal.3d 1, 54.)

The record in this case cannot support the preliminary finding of robbery, let alone that the murder was in the commission and advancement of the robbery. Robbery is defined as the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive

the person of the property. (Pen. Code, § 211; *People v. Harris* (1994) 9 Cal.4th 407, 415.) To support a robbery conviction, the evidence must show that the intent to steal arose either before or during the application of force. (*People v. Morris* (1988) 46 Cal.3d 1, 19, overruled on other grounds by *In re Sassounian* (1995) 9 Cal.4th 535.) "[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft." (*Ibid*.) The wrongful intent and the act of force or fear must "concur in the sense that the act must be motivated by the intent." (*People v. Green, supra*, 27 Cal.3d at p. 53.)

In this case, there was, arguably, evidence that a theft occurred. Ms. Weir's car was located by authorities in Mexico and appellant was arrested by customs agents attempting to cross the border from Mexico at Laredo, Texas on November 30, 1993. (RT 1245.) When appellant was arrested, he had two of Weir's uncashed checks. (RT 1248.) Weir's mother testified the signatures on the checks did not look like her daughter's. (RT 1212-1214.) She also testified there had been no activity on Weir's account since September 1993. (RT 1214.)

While that evidence *may* establish a *theft*, no other element of robbery was established. There is nothing in the record to show that either Weir's checks or the keys to her car were in her possession at the time she was killed – either or both could have been in the car. There is no evidence that

appellant took the items from her through the use of force or fear – nothing to say that Weir did not give the items to appellant, either voluntarily or through the use of guile on appellant's part. As a result, the record lacks any evidence of the critical elements of robbery – the *forcible* taking of property from the victim's person or immediate presence.

Even the prosecutor had a hard time articulating a theory of robbery, especially as it was directly contradicted by the prosecution's own evidence. During pretrial argument regarding admission of other crimes evidence that appellant defrauded several individuals, the prosecutor noted, "In the case of Sara Weir, maybe he panicked and took the checks. The jury needs to know that this is a man who knew that he could use and *deceive* women into *giving* him checks or *loaning* him money." (RT 269, emphasis added.)

The reviewing court "does not . . . limit its review to the evidence favorable to the respondent." Instead, it "must resolve the issue in light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and my not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577, original emphasis, internal quotations omitted; *see Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 ["*all of the evidence* is to be considered in the light most favorable to the prosecution"], original emphasis.)

In this case, witnesses to the uncharged offenses described methods

used by appellant to obtain money, credit cards or checks that involved guile or deceit, but not violence. Accordingly, the evidence presented at most suggests that the checks found in appellant's possession were obtained by similar means of guile. As this Court in *Morris* observed about the defendant's possession of the victim's credit card three days after the murder, "any such taking could have been a simple theft or even consensual." (*People v. Morris*, *supra*, 46 Cal.3d at p. 21.)

Further, it would be sheer speculation to conclude that appellant, at or prior to the time of the stabbing, had formed an intent to take Weir's checks. Indeed, the evidence suggests the contrary. Appellant had the checks with him at the time of his arrest almost two months later. It thus appears more likely that the taking was an afterthought or that appellant had obtained the checks from Weir sometime before the killing.

Alternatively, the prosecutor himself suggested that appellant's intent in taking items from his victims, including Sara Weir, was for the purpose of domination, not for the value of the items taken. He argued to the jury:

> If you plan to take something of Sara's because you always take from your female victims, you victimize in every way, you suck any value out of them, you satisfy your needs for violence and domination and you take money because you know it's always there, every time you victimize these women, you can do both. Sometimes they may not have valuable jewelry but your intent is there all the time. We have seen it there every time.

(RT 2258; *see also,* RT 2183 ["what he took was his sustenance and his need for inflicting pain; *and as long as I'm at it, I'm going to take some money, too,* but that was always the decision"] emphasis added.)

If that were the case, appellant's possession of Ms. Weir's uncashed checks "supports an inference that he took the[m] from [Weir] or her immediate presence, but it is not evidence that 'reasonably inspires confidence' [citation] that defendant killed [Weir] for the purpose of obtaining the [checks]." (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) In *Marshall*, this Court found the evidence was insufficient to support the robbery conviction where the defendant was found in possession of a letter from a grocery store to the victim responding to her request for a check-cashing card. The prosecutor at trial and Attorney General on appeal argued that the defendant took the letter from the victim as a memento or souvenir. However, this Court rejected as "speculation," the theory that the defendant killed the victim in order to obtain the letter, which had no apparent value to him. (*Id*. at p. 34.) While in the present case, the checks did have potential

value to appellant, the fact is, they remained uncashed for two months, which makes it highly unlikely they were so valuable to appellant that he would kill to obtain them.

Recognizing the weakness of the evidence of robbery, the prosecutor at one point in his argument suggested to the jury that they should find the robbery true as a backup conviction in the event the rape-related convictions were reversed on appeal:

> It's a complicated legal system, complicated appellate procedures. If the defendant is guilty of two crimes, you know, who knows what's going to happen with one. Let's say it gets overturned. [¶] Make sure you do the right thing on the second one. Now what you don't want to do, and I will beg you not to do this, do not convict him of two just to make sure he gets it for the rape. If you are convinced he did the rape special circumstance, don't just convict him of the robbery without evidence.

(RT 2184.)[54]

The prosecutor's protest that he did not want the jury to find the robbery-related charges true without sufficient proof rings hollow. His assurance that he was not suggesting that the jury have an alternative basis for convicting appellant in the event the rape-related charges were reversed

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[54] The court recognized the improper nature of the prosecutor's argument and summoned counsel to the hallway. There the court told the prosecutor, "[t]here may have been a slip when you referred to the appellate processes and I'm not so sure that should have been said." (RT 2193.) Trial counsel claimed he did not object to the comments at the time because he did not want to draw attention to them, and moved for a mistrial. (RT 2194.) The mistrial motion was denied and trial counsel declined the court's offer to admonish the jury. (*Ibid*.)

on appeal served to spotlight that possibility. As this Court recognized in *People v. Wrest* (1992) 3 Cal.4th 1088:

> Although the prosecutor's comments here were strategically phrased in terms of what he was *not* arguing, they embody the use of a rhetorical device – paraleipsis – suggesting exactly the opposite.

(*Id.* at p. 1107.)

This Court's opinion in *People v. Morris*, *supra*, 46 Cal.3d 1, is especially pertinent to this case. In *Morris*, the victim, who had been shot, was found nude in a bathhouse. A witness saw shots being fired and the assailant run to a waiting car. The victim's credit card was used three days after the murder by a man who "looked like" the defendant. As this Court stated in reversing the robbery conviction and special circumstance finding:

> There is obviously nothing here from which the jury could reasonably infer that defendant deprived the victim of personal property in his possession by means of force or fear. [Footnote omitted.] The evidence merely shows that the assailant shot the victim, who was nude, and shortly thereafter a man who resembled the assailant was observed running from the scene to a waiting car. It is impossible to make a reasonable inference from these facts that the taking occurred either before or during the shooting, that the taking was from the person of the victim, and that the taking was accomplished by means of force or fear. . . . We may *speculate* about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guesswork . . . . In the absence of any substantial evidence that the taking was accomplished either before or during the killing by means of force or fear, we must conclude that the evidence will not

> support a conviction of robbery. Absent substantial proof of the robbery, the special circumstance finding of robbery-murder must fall. [Citations.]"

(*Id.* at pp. 20-21.)

In the present case, there is a similar dearth of evidence to support a reasonable inference that any taking occurred before or during the stabbing, that there was a taking from Ms. Weir's person, or that any taking was accomplished by force or fear. The robbery felony murder conviction simply cannot stand.

C. The Record Contains Insufficient Evidence To Support the Special Circumstance Finding of Robbery Murder

For similar reasons, the evidence was not sufficient to establish that the murder was committed "during the commission or attempted commission of" the robbery for purposes of the special circumstance of robbery murder. As stated by this Court in *People v. Morris*, *supra*, "whether or not a murder was committed *during* the commission of a robbery or other felony is not merely 'a matter of semantics or simple chronology.'" (*People v. Morris, supra,* 46 Cal.3d at p. 21, quoting *People v. Green, supra,* 27 Cal.3d at p. 60; *People v. Thompson* (1980) 27 Cal.3d 303, 322.) In order to establish the special circumstance it must be shown that the killing took place in order to "advance an independent felonious purpose." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 322.)

Missing from the present case is any evidence to suggest either the existence of an independent felonious purpose to rob, or the necessary connection between the killing and the intent to further such a plan. As argued above, appellant's continued possession of uncashed checks renders it highly unlikely that he killed Weir in order to obtain them. Moreover, the taking of Weir's car as the motivation for the killing is "mere speculation." The far more likely explanation is that the car was taken as a means of escape after the fact.

Accordingly, the felony murder conviction and the finding of the special circumstance based on robbery cannot stand.

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VII.

THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF FIRST DEGREE MURDER ON A THEORY OF RAPE OR ATTEMPTED RAPE FELONY MURDER

A. Introduction

The evidence in appellant's case was insufficient to support the felony murder conviction based on rape or attempted rape and the corresponding felony-murder special circumstances.[55] Appellant's murder conviction and the related special circumstance violated his right to due process as guaranteed by Article I, § 13 of the California Constitution and the Fourteenth Amendment to the federal constitution (*In re Winship, supra,* 397 U.S. 358), and thus, the conviction, special circumstance findings and death judgment must be overturned.

As set forth in Argument VI, above, a conviction will be sustained on appeal only when a review of the entire record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Only if a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt are the requirements of due process, a fair trial

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[55] This claim was raised in the trial court in appellant's motion for judgment of acquittal under Penal Code section 1118.1. (RT 2039.)

and reliable guilt and penalty determinations satisfied. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *Herrera v. Collins* (1993) 506 U.S. 390, 401-402.)

The standard of review for sufficiency of the evidence with regard to a finding of special circumstances is the same. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413; *People v. Alvarez* (1996) 14 Cal.4th 155, 224-225; *People v. Clair* (1992) 2 Cal.4th 629, 670.) No substantial evidence can be found in the record here.

"A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.) In addition, the reviewing court "does not . . . limit its review to the evidence favorable to the respondent." Instead, it "must resolve the issue in light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577, original emphasis, internal quotations omitted; *see Jackson v. Virginia, supra*, 443 U.S. at p. 319 ["*all of the evidence* is to be considered in the light most favorable to the prosecution"], original emphasis.)

The prosecution theory of rape felony murder was premised on evidence of uncharged offenses, the testimony of Robert Coty, and the unclothed condition of Weir's body. None of these facts provides the solid credible evidence that is constitutionally required to sustain a conviction.

B. The Physical Evidence Did Not Establish That a Rape or Attempted Rape Took Place

Missing from the record in appellant's case are any physical indicia of a sexual act, let alone assault. There was no evidence of penetration, no evidence of trauma to the genitals, no abrasions or wounds in the immediate area of the genitals (as opposed to other parts of the victim's body on which bruises were evident) and no semen found in or on the body.

Because of the lack of physical evidence of rape, the prosecutor was forced to repeatedly emphasize to the jury in closing argument that a completed rape was not a prerequisite to conviction of first degree murder on a felony-murder theory. After admitting there was no evidence of ejaculation or penetration, the prosecutor argued that, "You just have to do acts substantially towards that goal." (RT 2186-2187.) After defense counsel's closing argument, in which he focused on the complete absence of evidence of rape (RT 2227-2228), the prosecutor's rebuttal consisted almost entirely of a discussion of attempted rape.

In support of his argument on attempted rape, the prosecutor

minimized and distorted the evidence necessary to prove an attempted rape, as when he argued: "An attempted rape or an attempted robbery can be any act in the direction of your intent. So once you intend to do an act, a crime, that one act." (RT 2241.) To illustrate the notion of attempt, the prosecutor set out a scenario of a robber who enters a 7-11 store, ties up the clerk at gunpoint, but is then interrupted by the arrival of the police. (RT 2242.) The prosecutor then erroneously argued, "What is important is what his intent was; and *if he had that intent when he did that first act of entering that door*, it's an attempted robbery." (RT 2245.) Later, referring to the same scenario, the prosecutor repeated his assertion that, if the robber opens the door to the store with the intent to rob the clerk, "whatever happens after that doesn't matter . . . he's engaged in an robbery. Same thing with a rape." (RT 2249.) The prosecutor then made the following analogy to the present case: "All you have to do factually is decide an act was done towards an attempted rape. [¶] That could be the slamming of the door, the confronting of Sara, the first use of physical violence to restrain her, pushing her down on the bed . . .." (RT 2255.)

The prosecutor's argument misstates the law of attempt by claiming that the simply entry of the 7-11 store by the hypothetical robber or the closing of the apartment door by appellant, accompanied by the requisite intent was sufficient for a finding of attempt. The prosecutor was actually

describing an attempted attempt – an act done towards an attempt. In fact, however, an attempt to commit a crime has two elements – the criminal intent *and* an act beyond mere preparation, i.e., a direct movement after the preparation that "would result in the accomplishment of the crime unless frustrated by extraneous circumstances." (*People v. Memro* (1985) 38 Cal.3d 658, 698.)

Faced with insufficient evidence to prove a completed rape, the prosecutor told the jury, "You just all have to agree it was at least an attempt." (RT 2255, *see also* RT 2256.) However, the evidence of uncharged misconduct, the testimony of Robert Coty, and the condition of the victim's body do not – whether considered separately or together – add up to sufficient evidence of the underlying felony.

As set forth at length in Argument IV, the prosecutor built his case almost entirely around the evidence uncharged offenses involving Jodi Dorn, Kim Venter and Teri Baer, and, thus, in his argument to the jury, the prosecutor claimed that their testimony proved the truth of the underlying rape-related allegations: "We are not children. We can't be deceived. And even children would know that this, again, is the same act, an attempted rape because of the past deeds." (RT 2251.)

The prosecutor's method was to refer to the evidence of the uncharged offenses and extrapolate that the same acts – about which there

was no evidence – also happened in the present case.

> In every instance the defendant's first thing after attacking, after brutalizing with the weapon was a rape. During that point, the weapon was used. The knife was held to the throat of Teri or the scissors. The knife was held with Kim. The choking and hair pulling with Jodi during the first rape.

(RT 2188.)

For example, the prosecutor argued that appellant prevented Weir from leaving the apartment, put her down on the bed on her back, held her there and ripped off her clothes. (RT 2251.) There was no evidence in the record that any one of those things happened to Weir. There *was* testimony from Dorn, Venter and Baer about each act described by the prosecutor, and so he simply combined their testimony.[56] (*See e.g.*, RT 2249-2250, 2258-2259, 2263-2265.) He argued in support of a finding of attempted rape: "In all of the cases, we know the defendant is in his own place, would shut the door and have them there by his own design, and then the attack, the grabbing, that's all it takes. At that point that's enough of an act." (RT 2249.) Because of the lack of evidence of rape or attempted rape in the record, the prosecutor's argument presents "layers of inference far too speculative to support the conviction" (*People v. Raley* (1992) 2 Cal.4th 870, 890) on a felony-murder theory.

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[56] As set forth in Argument IV, the evidence of uncharged acts constituted impermissible propensity evidence.

The prosecutor tried in vain to argue that even without the other crimes evidence, there was sufficient evidence to find the special circumstances true ["even if you don't know about his past"]. (RT 2185.) For this argument, the prosecutor relied on the testimony of Robert Coty. However, it is important to keep in mind exactly what Robert Coty did – and more importantly, did not – testify to, because the prosecutor grossly embellished Coty's testimony in support of his theory of first degree murder based on attempted rape.

For example, the record in no way supports the prosecutor's argument that Coty could see "Sara sitting on that bed in that dominating posture . . . without [her] clothes on" (RT 2251) or that "we know before Sara is killed she is seen naked, dominated. We know she is on this bed" (RT 2252). In fact, Coty was unable to say whether the dark-haired Caucasian person he saw through the window was male or female.[57] (RT 1153.) Coty clearly did *not* see the person sitting on the bed because he was unsure that the room he could see into was the bedroom, nor could he tell whether the person was kneeling or sitting. (RT 1156, 1157.) Coty testified it appeared "to be all

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[57] Coty was not even sure of when he made his observations. He testified that he thought it was after Labor Day weekend, but he could not be sure. When he told the police he thought it was a Tuesday or Wednesday, he was not sure. (RT 1147.) Thus, there is some question as to whether the person he saw through the window was Sara Weir, and more importantly, whether his observations were of Weir, but made sometime earlier, and not the day on which she was killed.

natural color . . . a light complexion . . . like the person didn't have no [sic] clothes on." (RT 1153.) However, Coty's inability to discern the gender of the person, or whether or not they were kneeling or sitting and whether they were in a bedroom belies this conclusion. And while Coty testified that he had the impression that the person was being "dominated" or "scolded or something"(RT 1160), the only observations he made of the interaction between the two people – which included no touching, hitting, screaming or yelling – contradicted Coty's " feelings."

Recognizing that Coty's testimony did not give him the proof he needed, the prosecutor only briefly referred to it and concluded that "the evidence seems compelling, this is during the course of some domination involving nudity" before he quickly reverted back to a discussion of the uncharged misconduct evidence: "Now we know something about this person from his past deeds." (RT 2185, 2186.)

The prosecutor also relied on the fact that the body was naked when it was found:

> A lot of people get killed. They are not all naked. We know she was naked and alive and she is found dead naked and wrapped up and packaged, gift wrapped for Michelle. Not all murder victims end up naked. And that can tell you about the intent.

(RT 2185.) However, the condition of Weir's body does not provide sufficient evidence of rape or attempted rape to support the felony murder

conviction.

In *People v. Johnson* (1993) 6 Cal.4th 1, this Court found insufficient evidence of a sexual assault on one of the murder victims where her body was found dressed only in a sweat shirt and bra and she was wearing nothing from the waist down, a pair of pantyhose were found on the floor of her room, she had been beaten severely, and the defendant told the police "rape is hard to prove . . ." even though his interrogators had not accused him of rape or even mentioned that offense. (*Id*. at p. 39). This Court noted that the appellant "correctly observes that no evidence was introduced to indicate any sexual trauma, seminal traces or other evidence of penetration, forced or otherwise, as to victim Holmes." (*Ibid.*) This Court expressly rejected the People's argument that, under the evidence in that case, a felony-murder charge could be sustained on a finding of *attempted* rape. (*Ibid.*) This Court emphasized that "[o]ther than victim Holmes's partly clothed body, there was no evidence of a sexual assault on her," and concluded that, "under *Anderson* and *Craig*, the evidence was insufficient to support a finding of first degree murder based upon rape or attempted rape of victim Holmes." (*Id.* at pp. 41-42.)

The evidence in appellant's case was far less indicative of a sexual assault than in either *People v. Craig* (1957) 49 Cal.2d 313 or *People v. Anderson* (1968) 70 Cal.2d 15, the two cases expressly relied upon by this

Court in *Johnson*; or in *People v. Granados* (1957) 49 Cal.2d 490, another case cited in *Johnson* (6 Cal.4th at p. 39); and less than in *Johnson* itself.

In *Craig*, this Court found insufficient evidence of specific intent to commit rape or attempted rape where the victim had been strangled and beaten 20 to 80 times, she had apparently been dragged across the ground about 25 feet, she was wearing a raincoat over her nightgown and panties, her nightgown had been ripped open, her nightgown and panties were torn so that the front part of her body was exposed, her panties were torn open and were under her body, she was found lying on her back with her legs slightly spread, and she had suffered multiple contusions and lacerations of her face, breasts, neck and lower abdomen. In addition, earlier in the evening the defendant had expressed his general desire to "have a little loving," and later quarreled with a woman in a bar who had refused to dance with him. (*People v. Craig*, *supra*, 49 Cal.2d at p. 316.)

In *Anderson*, this Court found insufficient evidence of intent to commit a lewd act under section 288 where the 10-year-old victim had been repeatedly stabbed (more than 60 wounds were inflicted over her entire body, including vaginal lacerations), her naked body was found under a pile of boxes and blankets, her bloodstained and shredded dress was found under her bed, the crotch of her blood-soaked panties had been ripped out, and the evidence that only defendant's socks and shorts were bloodstained suggested

that he was only partly clothed during the attack. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 20-22.)

In *Granados*, this Court found the evidence insufficient to establish felony-murder based on commission of a lewd act where the victim was found in a bloodstained room with her skirt pulled up and her genitals exposed. In addition, the defendant had asked the victim prior to the time of killing whether she was a virgin. (49 Cal.2d at p. 497.)

This Court in *Johnson* cited *Anderson* for the proposition that "the victim's lack of clothing, even coupled with evidence indicating the defendant was nearly naked during the attack, is insufficient to establish specific sexual intent," adding that "[w]e have found no cases holding otherwise." (People v. Johnson, supra, 6 Cal.4th at p. 41.) The *Johnson* opinion also noted the following significant factors in the holdings of the three above-cited cases: In *Craig*, "no blood was found on the front of [the defendant's] trousers, fly or undershorts, making it unlikely a sex act was accomplished or even attempted. The open position of the victim's legs 'loses significance when it is recalled that the body had been dragged some 20 to 25 feet.'" (*Id.* at p. 40, quoting 49 Cal.2d at p. 319.) In *Anderson*, "[n]o evidence of spermatozoa was found" and "the location of the victim's wounds bore little relevance" to the issue of the defendant's sexual intent. (*Id.* at pp. 40, 41.) In *Granados*, there was "no evidence of spermatozoa or

genital trauma." (*Id*. at p. 39.) This Court in *Johnson* found those cited cases "close on point, though factually distinguishable in some respects" (*id.* at p. 40), and ultimately controlling (*id*. at pp. 41-42).

In the present case, the victim was found naked. As a matter of law, under *Johnson* and the cases cited and analyzed therein, the mere fact of the exposure of the victim's body does not constitute evidence of a sexual assault. Indeed, the condition of the victim's body in appellant's case is certainly comparable to the factual scenarios of the cases where this Court deemed the evidence insufficient to establish a sexual crime: the victim naked from the waist down and a pair of pantyhose on the floor of her room (*Johnson*); the victim naked, the crotch torn out of the victim's panties, and evidence indicating that the defendant was nearly naked during the attack (*Anderson*); the victim lying on her back with legs slightly spread, her panties torn open and under her, and the front part of the body exposed (*Craig*).

Here, as in *Craig*, "[n]o evidence of a sexual attack was found on the body of the decedent; no evidence of semen or spermatozoa was found on either the clothing of the decedent or the defendant" (49 Cal.2d at p. 317); as in *Granados* there was "no evidence of contusion or laceration on the private parts of decedent's body, and a microscopic examination disclosed no spermatozoa" (49 Cal.2d at p. 497; *see also People v. Guerrero* (1976) 16

Cal.3d 719, 727 ["an examination revealed no trace of sperm or trauma related to a sexual approach"]; compare, e.g., *People v. Duncan* (1959) 51 Cal.2d 523, 526); as in *Anderson*, "[n]o evidence of spermatozoa was found in the victim [or] on her panties" (70 Cal.2d at p. 22; compare, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 247-248).

In the present case, a sexual assault kit was obtained from Weir's body. The samples from the vaginal and anal areas were examined by the criminalist who found no evidence of semen or sperm. (RT 1317-1318.) And while the criminalist testified that the passage of time and decomposition of the body could degrade the samples to the point that any semen or sperm would be undetectable, he also testified that there was no way to tell if there ever was semen or sperm in the body. (RT 1318, 1320.)

Here, there were no bruises or contusions in the genital area of Weir's body. The coroner was, however, able to determine the existence of trauma on the head, meaning that such trauma had not been obscured by the decomposition of the body. (RT 2007-2008; 2025.) The coroner conducted an external and internal examination but observed no evidence of trauma to the vaginal or anal regions of the body. (RT 2028.)

The prosecutor argued, based on the coroner's testimony that Weir's hand had cuts which could be defensive wounds, that she fought off her attacker. (RT 2179 [prosecutor's argument]; RT 2004 [coroner's

testimony].) However, this evidence reveals nothing about the nature of the attack, i.e., whether she was fending off the weapon or a sexual assault.

The prosecutor argued that Weir was attacked on the bed, but there was no trace of blood found on the bed. (RT 2252.) He speculated that perhaps there was blood on the sheets found in the closet, but not seized as evidence (RT 1275), and asked the jury to do the same:

> Now the sheets were found in the closet and there's been no testimony about blood or absence of blood. There's been no testimony if you turn one of those pillows over if there is a small drop of blood. There is no evidence of it. You don't know whether it exists or not. [¶] Don't look at what you don't have. Look at what you do. The fact that the stuff is all moved and is missing, the fact that the blanket was never recovered[58] is evidence that something happened on that bed.

(RT 2253.)

Despite his statements to the contrary, the prosecutor relied on conjecture, innuendo and misstatements of law to make his case. There was no solid, credible evidence presented to support a finding of first degree murder based on rape or attempted rape.

C. Conclusion

Because the evidence of rape or attempted rape was insufficient, the murder conviction and rape murder special circumstance must be reversed.

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[58] It is unclear upon what evidence the prosecutor based his statement. The criminalist testified that the body was wrapped in a blanket, which was seized at the scene. (RT 1289, 1291.)

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VIII.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF PREMEDITATED AND DELIBERATE FIRST-DEGREE MURDER

A. Introduction

Appellant was charged with murder committed with malice.[59] (CT 236-238.) Trial counsel's objection to instruction on premeditated deliberate murder was overruled by the court, which delivered CALJIC No. 8.20. (RT 2060-2061 [argument and ruling]; RT 2134.)

As set forth in Argument VI, above, a conviction will be sustained on appeal only when a review of the entire record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley*, *supra*, 10 Cal. 4th at p. 792.) Only if a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations satisfied. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *Herrera v. Collins*, *supra*, 506 U.S. at pp. 401-402.) A review of the record in this case reveals that the

[59] The question of whether the jury was erroneously instructed on first degree murder based on the language in the information is addressed *infra*, in Arguments XI.

evidence was legally insufficient to sustain a jury finding of deliberate and premeditated murder of Sara Weir. Appellant's conviction cannot be sustained on such a basis without violating state and federal constitutional standards governing the sufficiency of evidence to support a conviction.

B. There Was No Substantial Evidence That Appellant Committed Deliberate, Premeditated First Degree Murder

An unjustified killing of a human being is presumed to be second, rather than first, degree murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) In order to support a finding that the murder is first degree the prosecution bears the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. (*Ibid*. *See also In re Winship* (1970) 397 U.S. 358; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-490 [state must prove every element that distinguishes a lesser from a greater crime].)

> In order for a murder to be first degree based upon a theory of premeditation and deliberation, the intent to kill must have been formed upon a preexisting reflection and must have been the subject of actual deliberation and forethought. [Citation.] A finding of first degree murder due to premeditation and deliberation is proper only when the slayer killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design. (Citation.).

(*People* v. *Rowland* (1982) 134 Cal.App.3d 1, 7, citing *People v. Anderson*, *supra*, 70 Cal.2d at p. 26.)

In *People v. Anderson, supra,* 70 Cal.2d 15, this Court set forth the guidelines for reviewing a finding of first degree murder based on premeditation and deliberation. Although the *Anderson* tripartite test does not establish "normative rules" (*People v. Sanchez* (1995) 12 Cal.4th 1, 31) it provides a "framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations" (*People v. Thomas* (1992) 2 Cal.4th 489, 517), and this Court has continued to employ the test in deciding whether the murder occurred as a result of "preexisting reflection rather than unconsidered or rash impulse." (*People v. Sanchez, supra,* 12 Cal.4th at 31 (quoting *People v. Pride* (1992) 3 Cal.4th 195, 247.)

The *Anderson* case identified three categories of evidence to be considered in assessing the presence or absence of premeditation and deliberation: (1) planning activity prior to the killing; (2) motive, usually established by a prior relationship or conduct with the victim; and (3) manner of killing.[60] (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.) Typically, this Court will sustain a verdict of first degree murder on a theory

[60] The Court described category three as facts about the nature of the killing from which the trier of fact could infer that the manner of killing was so particular and exacting as to be accomplished according to a preconceived design "to take [the] victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of [planning or motive]." (*Id*. at pp. 26-27.)

of premeditation and deliberation when there is evidence of *all three factors*; otherwise, absent other significant factors outside the rubric of *Anderson*, there must be "at least extremely strong" evidence of planning activity, or some evidence of planning activity in conjunction with either motive evidence or an exacting manner of killing. (*Id*. at p. 27; *People v. Sanchez*, *supra*, 12 Cal.4th at p, 31.)

The prosecutor's theory of premeditated deliberate murder was based primarily on appellant's actions during the uncharged offenses, namely, threatening the alleged victims with harm if they did not comply with his demands. (RT 2171.) In addition, the prosecutor argued that even if the stabbing with the scissors was not sufficient evidence of premeditation, then the placement on the victim's head of the baseball helmet and plastic bag was. (RT 2166, 2171, 2240.) Appellant's motivation, according to the prosecutor, was to eliminate Weir as a witness. (*Ibid*.)

However, as the prosecutor apparently recognized, the evidence to support a finding of premeditated murder was weak. In his closing

argument, he reminded the jury of the "two paths" to finding first degree murder. He remarked that "a more interesting argument to me that I think reflects more on the evil of that guy is his premeditation," but opined that "the most direct and clear path" to a verdict of first degree murder was via felony murder. (RT 2247.)

Apart from the prosecutor's argument, an examination of the evidence of the evidence presented and the possible inferences which can be drawn from it reveals insufficient evidence of all three areas identified in *Anderson*. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126.)

1. *No Evidence of Planning*

No evidence was introduced against appellant that could support a reasonable inference of a prior plan to kill Sara Weir. The prosecutor's theory was that appellant killed Weir because she would not comply with his demands for sex or property. The prosecutor based his argument on appellant's behavior during other, uncharged sexual assaults, during which he allegedly threatened the victims in such a manner.

However, this theory is belied by the very evidence upon which it is ostensibly based. All three women – Jodi Dorn, Kim Venter and Teri Baer – described appellant's behavior during the attacks as impulsive, irrational and highly erratic. Dorn described delusional behavior by appellant when he made arrangements to see her the day after the incident and squeezed her

arm affectionately as he saw her off in her car. (RT 1530, 1534, 1565.) Appellant was acting erratically, according to Venter, who described his moods as alternately angry and tearfully apologetic. (RT 1706, 1708.) And Teri Baer called appellant "possessed," and in "psycho land." (RT 1923.)

Moreover, the women's testimony makes clear that while they all resisted appellant's actions against them, none of them was killed. Indeed, appellant appeared to have had no qualms about leaving witnesses to the prior incidents. For example, as noted, he allowed Jodi Dorn to leave and made plans to meet her the following day, and he gave some of his jewelry and a watch to Teri Baer and took her to a restaurant after the alleged assault. There is simply no evidence from which to discern any indication that appellant planned to kill any of the other victims or Weir.

2. *No Evidence of Motive*

Motive evidence was similarly lacking. Motive evidence consists of "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill." (*Anderson*, 70 Cal.2d at pp. 26-27.) This Court has held that evidence that a defendant killed his victim "to silence her as a possible witness to her own sexual assault," could be considered evidence of premeditation and deliberation. (*People v. Pride, supra,* 3 Cal.4th at p. 247; *see also People v. Hart* (1999) 20 Cal.4th 546, 609.) *Pride* is distinguishable from the present case in that,

unlike in this case, in *Pride* there was strong evidence of a sexual assault – the victim's nearly nude body was found on top of a black pubic hair on a semen-stained portion of carpet. (*Id*. at p. 247.) Moreover, there was evidence of a motive to kill the victim because she had complained about the defendant's work, as well as evidence that the defendant planned the fatal encounter with the victim in order to kill her. (*Ibid*.) No comparable evidence exists in the present case.

Moreover, under the *Anderson* analysis, such motive evidence, *alone*, is insufficient to support a finding of premeditation and deliberation. It must be supported by facts of planning or the nature of the killing which would "support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]." (*Id.* at pp. 26-27.)

3. *No Evidence of A "Particular and Exacting" Manner of Killing*

The manner in which Ms. Weir was killed also does not support a finding of premeditation and deliberation. In *Rowland*, the court found that strangulation of the victim with an electrical cord did not suggest that the defendant took "'thoughtful measures' to procure a weapon for use against the victim." (*People v. Rowland*, *supra*, 134 Cal.App.3d at p 8.) The court reasoned that an electrical cord "is a normal object to be found in a bedroom

and there was no evidence presented that defendant acquired the cord at any time prior to the actual killing." (*Ibid*.) In this case, the presumed murder weapon was a pair of scissors left on the night stand in the bedroom by Michelle Theard. Thus, it appears that the weapon was one that was at hand, rather than one procured for the purpose of killing the victim.

In contrast, this Court found evidence of planning in *People v. Wharton* (1991) 53 Cal.3d 522, where the likely murder weapon – a hammer – was not found in its usual place in the toolbox in the garage. The evidence thus suggested that the defendant either procured it and had it nearby before he attacked his live-in partner, or else he got it from the garage after they quarreled and struck her while she slept. This Court found that either scenario was indicative of planning activity. (*Id*. at p. 548.)

Finally, the manner of killing in this case certainly was not "so particular and exacting" as to show a preconceived design to take the victim's life in a particular way. (*See People v. Anderson*, *supra,* 70 Cal.2d at p. 27.) To the contrary, this homicide was the classic example of the sudden "explosion of violence," or "spontaneous reaction," or "act of animal fury produced when inhibitions were reduced by alcohol," which this Court and other reviewing courts have repeatedly deemed insufficient to support a finding of premeditation and deliberation. (*See e.g.*, *id*. at p. 32; *People v. Tubby* (1949) 34 Cal.2d 72, 78; *People v. Rowland*, *supra*, 134 Cal.App.3d

at p. 9.) Evidence of defensive wounds on Ms. Weir's hands also support the theory that the murder occurred on impulse or in a rage. (*Cf.*, *People v. Hawkins* (1995) 10 Cal.4th 920, 956, overruled on another ground in *People v. Lasko* (2000) 23 Cal.4th 101 [lack of evidence of struggle suggestive of premeditated rather than impulse killing].)

As in the cases cited by this Court in *Anderson*, in which this Court found insufficient evidence of a premeditated and deliberate killing, the evidence here showed the infliction of assorted injuries which were inflicted in a "random" and "indiscriminate" way, rather than by "deliberately placed wounds inflicted according to a preconceived design." (*Anderson*, *supra*, 70 Cal.2d at p. 32.) The medical examiner testified there were wounds to the neck area, left breast area, the stomach near the rib cage and the upper abdomen. (RT 1962, 1992, 1995.) (*Cf.*, *People v. Pride*, *supra*, 3 Cal.4th at p. 248 [symmetrically clustered stab wounds near heart of second murder victim indicates calculated manner of killing rather than "unconsidered explosion of violence"].)

Nor does the presence of the plastic bag and helmet on the victim's head support a finding of premeditation and deliberation. Putting on the baseball helmet is simply bizarre behavior that is consistent with the erratic and strange actions described by Dorn, Venter and Baer. Taping the plastic bag over the victim's head does not demonstrate a preexisting plan to kill

her, for she may already have been dead. The coroner testified that there was no way to tell if the bag had been placed on Weir's head before she died. (RT 2015.)

Moreover, the actions taken after the stabbing do not provide sufficient evidence of the existing state of mind at the time of the attack. In *People v. Tubby, supra*, 34 Cal.2d 72, the defendant was seen beating the victim, his stepfather, in the yard outside the house and then dragging the victim into the house where the sounds of a continued beating continued for several minutes. (*Id*. at p. 75.) On appeal, the defendant argued the record did not support a finding of premeditated murder. This Court agreed, rejecting the prosecution argument that the defendant's actions in dragging the victim into the house to continue the beating demonstrated a premeditated and deliberate killing. While acknowledging that it was reasonable to infer that the defendant dragged the victim into the house to continue the assault, "that in itself would not warrant the further inference that with a preexisting intent he set about to kill his stepfather." (*Id*. at pp. 78-79.)

As in *Tubby*, "the cumulative effect of all the circumstances seems to negative any possibility that [appellant] on reflection formed a design to produce death before or at any stage of the incident." (*Id*. at p. 79.)

C. Conclusion

Even viewed in the light most favorable to the judgment, the evidence presented at appellant's trial does not support a finding that appellant premeditated and deliberated the killing. His first degree murder conviction was a violation of state law. (*People v. Anderson, supra*, 70 Cal.2d at pp. 34-35.) The improper conviction also violated appellant's federal rights to due process of law (*Jackson v. Virginia, supra*, 443 U.S. at pp. 313-314 [the "due process standard . . . protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt"]), to present a defense (*id*. at p. 314 ("[a] meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused") and to a reliable guilt and penalty verdict. (U.S. Const., Amends. VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

IX.

THE TRIAL COURT ERRONEOUSLY FAILED TO DEFINE RAPE AND ROBBERY, THE TWO UNDERLYING OFFENSES ALLEGED TO SUPPORT THE FELONY MURDER CHARGE

A. Introduction

Appellant was charged with one count of murder in violation of Penal Code section 187, subd. (a) and the information alleged that the murder was

committed willfully, unlawfully, and with malice aforethought. (CT 236.) Despite the fact that the information alleged only second degree malice murder, the jury was instructed on felony murder based on the underlying felonies of rape and robbery. Neither felony was charged as a substantive crime in the information. The trial court delivered the felony murder instruction, CALJIC No. 8.21, as follows[61]:

> The unlawful killing of a human being, whether intentional, unintentional or accidental which occurs during the commission or attempted commission of the crime or as a direct or casual [sic] result of robbery and/or rape is murder of the first degree when the perpetrator had the specific intent to commit such crime.
>
> The specific intent to commit rape and/or robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(RT 2136.)[62]

The trial court did not instruct the jury on the elements of either rape or robbery in connection with the felony murder instruction. The jury was later instructed on the elements of the underlying felonies as part of the special circumstance instructions. (RT 2144-2148.) At that point, however, because the jury had already reached a verdict on murder, it is likely that

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[61] The error in instructing on the offense of felony murder is addressed in Argument XI, *infra*.

[62] The additional errors made by the trial court in delivering this instruction are addressed in Argument X, *infra*.

their consideration of the elements of the felonies was restricted to the special circumstances. The trial court's failure to instruct on the elements of the underlying felonies requires reversal of the murder conviction and death judgment.

B. The Trial Court Was Required to Instruct Sua Sponte on the Elements of Rape and Robbery

The trial court has a sua sponte duty to instruct on "general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) In this case, the court had a duty to define the elements of rape and robbery as the underlying offenses of the felony murder allegation. (*People v. Prettyman* (1996) 14 Cal.4th 248, 268.)

The leading case on the court's obligation to instruct on predicate offenses is *People* v. *Failla* (1966) 64 Cal.2d 560, where this Court held:

> [W]here the evidence permits an inference that the defendant at the time of entry intended to commit one or more felonies and also an inference that his intent was merely to commit one or more misdemeanors or acts not punishable as crimes, the court must define "felony" and must instruct the jury which acts, among those which the jury could infer the defendant intended to commit, amount to felonies. Failure to do so is error, for it allows the triers of fact to indulge in unguided speculation as to what kinds of criminal conduct are serious enough to warrant punishment as felonies and incorporation into the burglary statute.

(*Id.* at p. 564.)

By the time of appellant's trial, the duty to define predicate offenses was well-established. (*See e.g*., *People v. Williams* (1975) 13 Cal.3d 559, 563; *People v. May* (1989) 213 Cal.App.3d 118, 129; *People v. Smith* (1978) 78 Cal.App.3d 698, 708-711.) The Use Note to the felony murder instruction, CALJIC No. 8.21, specifically admonished the trial court that, "This instruction must be supplemented by an instruction defining the felony involved."

More recently, in *People v. Prettyman, supra*, 14 Cal.4th 248, this Court explained:

> In *Failla*, . . ., we held that when a defendant is charged with burglary, the trial court must, *on its own initiative*, give instructions to the jury identifying and defining the target offense(s) that the defendant allegedly intended to commit upon entry into the building. [Citation.]

(*Id.* at p. 268, emphasis in original.)

In this case, the trial court's failure to instruct the jury on the elements of rape and robbery violated the rule that *Failla* established and *Prettyman* reaffirmed.

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) Without guidance from the trial court, the jurors had no way of knowing what specific findings were required to justify a

conviction of felony murder predicated on the intent to commit rape or robbery. (*See Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

C. The Failure to Define the Underlying Felonies Violated Appellant's Constitutional Rights

Allowing the jury to "indulge in unguided speculation" (*People v. Failla*, *supra*, 64 Cal.2d at p. 564) regarding the elements of the underlying felonies violated appellant's constitutional rights. The court's error violated appellant's right to trial by jury (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16) by denying him the right to have a properly-instructed jury determine each element of the crime, and it violated his right to due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15) by denying him both a fair trial and the benefit of the presumption of innocence and the requirement of proof beyond a reasonable doubt. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *Carella v. California* (1989) 491 U.S. 263, 265; *People v. Kobrin* (1995) 11 Cal.4th 416, 423.)

In addition, the failure to define rape and robbery for the jury violated appellant's federal right to due process (U.S. Const., Amend. 14) by arbitrarily denying him a liberty interest created by state law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488.)

Furthermore, because this was a capital case, and felony murder

based on the underlying felonies of rape and robbery was one of the theories used to secure the conviction for first-degree murder upon which a death sentence was ultimately imposed, the failure to define those felonies violated appellant's rights to a fair and reliable capital guilt trial. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. at p. 638.)

D. The Murder Conviction Cannot Be Upheld On the Assumption that it Was Predicated on Premeditated Murder

Although the murder charge was also submitted to the jury on the theory of premeditated and deliberate murder, the murder conviction cannot be upheld on the assumption that the jury based their verdict on that theory of liability (*cf. People v. Sedeno* (1980) 10 Cal.3d 703, 721, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12), because, as argued elsewhere, the evidence was insufficient to support the murder conviction on a theory of premeditation and deliberation. (*See* Argument VIII.)

When the case is submitted to the jury on several theories, and one or more of them is legally erroneous, the judgment must be reversed unless it can be determined that the jury relied on a proper theory in order to convict. (*Griffiv v. United States* (1991) 502 U.S. 46, 53; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.)

Here, the felony murder theory of first degree murder was legally erroneous because the court's instructions were "clearly inadequate" (*People v. May*, *supra*, 213 Cal.App.3d at p. 129) to tell the jurors what findings had to be made before they could employ that theory.

Because appellant was not charged with the substantive offenses of rape and robbery and the jurors were not required to make a finding on the underlying felonies for the felony murder allegation, the jurors' general verdict does not reveal which theory or theories they relied on to convict. Consequently, there is no basis in the record for an assumption that the jury relied on a theory other than felony murder in order to support the murder conviction.

This case resembles *People v. Smith*, *supra*, 78 Cal.App.3d 698, where the defendant was charged with burglary, and the jury was instructed that the burglary could be based either on the intent to commit theft or the intent to commit an assault by means likely to produce great bodily injury. The appellate court found the evidence sufficient to show both an intent to steal and an intent to commit felonious assault (*id*. at pp. 703-704), but it reversed the burglary conviction because assault by means of force likely to produce great bodily injury was not defined (*id*. at pp. 708-711).

"The jury may have decided that, upon defendant's entry into Eva's apartment, his intent was to steal," the court conceded, but it might also have

rested its verdict on intent to commit felonious assault. Without an instruction defining that assault, the jury

> may have concocted its own definition of the assault-by-means-of-force felony and convicted defendant for having an intent to commit acts constituting a misdemeanor or to commit acts amounting to no crime at all.

(*People v. Smith*, *supra*, 78 Cal.App.3d at p. 711; *see also People v. Failla*, *supra*, 64 Cal.2d at p. 566.) Similarly, in this case, without instruction on the elements of the underlying felonies there is no way to ensure that the jury found the necessary elements to support a finding of felony murder.

E. The Failure to Define Rape and Robbery Was Reversible Error

"The intentional commission of the underlying felony is not only an essential element of the crime of first degree felony murder, it is the sole basis for holding the killing is murder in the first degree." (*People v. Anderson, supra*, 70 Cal.2d at pp. 34-36.) The failure to define rape and robbery deprived appellant of a jury determination concerning whether the killing occurred during the commission of one of the underlying felonies, a necessary element of first degree murder predicated on felony murder, and thus the error is a "structural defect" in the trial process which is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282; *see People v. Kobrin, supra*, 11 Cal.4th at pp. 428-429.)

Even under the more lenient standard of *Chapman v. California, supra*, 386 U.S. at p. 24, which governs non-structural constitutional errors, reversal is required here because the instructional error was not harmless beyond a reasonable doubt. The evidence of the underlying felonies was not "so dispositive" that this Court can say that a properly-instructed jury would necessarily have found it to exist. (*Cf. Rose v. Clark* (1986) 478 U.S. 570, 583.) Indeed, as appellant has argued, there was constitutionally insufficient evidence of either rape or robbery to support a finding of either felony offense. (*See* Arguments VI and VII.)

This was not a case in which the issue posed by the omitted instruction was necessarily resolved by the jury under other, correct instructions. (*Cf. People v. Sedeno, supra,* 10 Cal.3d at p. 721.) The fact that the jury found the special circumstances true does not render the instructional error harmless. Instead of assuming that the subsequent instructions given during instruction on the special circumstances cured the initial error in completely failing to instruct on the elements of the underlying felonies in connection with the felony murder allegation, it is far more likely that the initial error infected the special circumstance finding. *At the time they were deciding* appellant's liability for murder under the felony theory, the jurors had no way of knowing what was legally required in order to make such a finding.

Appellant acknowledges the decision in *People v. Marshall* (1997) 15 Cal.4th 1, in which this Court rejected the defendant's argument that because the court found one of two theories of felony murder – robbery murder – unsupported by the evidence, the felony murder conviction had to be reversed. (*Id*. at p. 38.) Because the jury had found true the special circumstance of rape murder, this Court held that the jury necessarily found the defendant guilty on a proper felony murder theory. However, in *Marshall*, the jury was *correctly* instructed on felony murder as well as the special circumstance. In other words, this Court did not use the subsequent

instructions from the special circumstances to attempt to cure corrupted felony murder findings. (*Ibid*.)

Similarly, in the recent case of *People v. Haley* (2004) 34 Cal.4th 283, this Court found felony murder instructional error harmless because it could determine that the jury necessarily found defendant guilty on a proper felony murder theory based on their special circumstance finding. In *Haley*, as in *Marshall*, and unlike the present case, the jury was correctly instructed on felony murder. (*People v. Haley*, *supra*, 34 Cal.4th at p. 315.)

The trial court's error removed an element from the jury's consideration at the time they were deciding the felony murder allegation. Such error was prejudicial and requires reversal of the murder conviction.

F. Conclusion

Reversal of the murder conviction is required because of the trial court's error in failing to instruct the jury on the underlying felonies for felony murder and because there is insufficient evidence in the record to support any other theory of first degree murder.

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X.

THE TRIAL COURT DELIVERED AN ERRONEOUS FELONY MURDER JURY INSTRUCTION THAT ELIMINATED A FINDING OF INTENT TO COMMIT THE UNDERLYING FELONIES

A. The Trial Court's Failure to Properly Instruct the Jury on Felony Murder Requires Reversal of the Murder Conviction, Special Circumstance Findings and Death Judgment

Errors made by the trial court in delivering the felony murder jury instructions permitted the jury to convict appellant without making the necessary finding of specific intent to commit one of the underlying felonies and without a finding that the necessary mental state existed at the time of commission of the felony. The erroneous delivery of the felony murder instruction violated appellant's rights to due process, a fair trial and a reliable death judgment in violation of the 5th, 6th, 8th and 14th Amendments and requires that appellant's conviction and death sentence be reversed.

The standard unmodified CALJIC No. 8.21 instruction reads as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] [as a direct causal result] of (felony) is murder of the first degree when the perpetrator had the specific intent to commit that crime.

The bracketed phrases offer two alternatives, depending on the facts

of the case. "The differing language represents two options appearing in a bracketed portion of CALJIC 8.21. Which one is given depends on whether the victim's death occurred close in time to the predicate felony or at a later period." (*People v. Lewis* (2001) 25 Cal.4th 610, 648.) In the present case, only the first bracketed phrase should have been given. (*People v. Alvarez* (1996) 14 Cal.4th 155, 222 [The language, "as a direct causal result" should be reserved for situations other than those when the fatal blow is struck in the course of an enumerated felony, even if death does not result until later"].)

Had the trial court properly read the first paragraph of the instruction it would have directed the jurors:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of rape or robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime.

Instead, however, the written copy of the instruction, as well as the oral version delivered to the jury, included both alternative options and omitted the brackets, thereby fatally eliminating a necessary element of the offense. The jury was instructed by CALJIC No. 8.21 as follows, with the erroneous passages in bold:

> The unlawful killing of a human being, whether intentional, unintentional or accidental **which occurs during the commission or attempted commission of the crime or as a**

> **direct or casual [sic] result of robbery and/or rape** is murder of the first degree when the perpetrator had the specific intent to commit **such** [sic: that] crime.
>
> The specific intent to commit rape and/or robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(RT 2136.)[63]

Because of the court's error, the first bracketed phrase, "during the commission or attempted commission of the crime," was not juxtaposed with the words "of robbery or rape," which it would have been had the second option – the phrase "as a direct causal result" – been properly omitted. In addition, the bracketed phrases were erroneously offered in the disjunctive as two different options – i.e., either the killing was intentional, unintentional or accidental, *or* it occurred as a direct or causal result of robbery or rape.

Thus, in both the oral and written versions given the jury, the first bracketed phrase referred back to "the unlawful killing," rather than to the felonies of "robbery and/or rape." It is therefore reasonably likely that the jurors understood that they could convict appellant of first degree murder if they found that the killing was unintentional or accidental, as long as it occurred during the commission of "the crime." Because the two methods of

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[63] The written instruction was the same, except that "causal" was correctly spelled and there was no "or" between direct and causal. (CT 479.)

finding felony murder were phrased in the disjunctive, a reasonable juror so instructed could interpret the phrase, "the crime," to mean the circumstances surrounding the *killing* rather than the enumerated felonies of robbery and rape which appeared in the second, disjunctive phrase.[64] As a result, the juror would not necessarily find the requisite specific intent to commit at least one of the underlying felonies, a necessary element of felony murder. (Cf., *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1249 [proper delivery of CALJIC Nos. 8.21 and 3.31 effectively told the jury that the specific intent to burglarize or rob must exist at the time of the killing].)

The United States Supreme Court has held that "in reviewing an ambiguous instruction . . . , we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v.McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380.)

In the present case, it is highly likely the jurors believed they did not have to find the specific intent to commit one of the underlying felonies. Because the instruction was clearly phrased in the alternative and presented two options, only one of which mentioned the crimes of robbery or rape, the

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[64] This is particularly true since the court erroneously failed to instruct the jurors regarding the underlying felonies of rape and robbery. (*See* Argument IX, *supra*.)

jurors were presented with distinct two paths to finding felony murder, only one of which required a finding of specific intent to commit one of the underlying felonies.

The instruction violated due process by improperly removing the issue of intent to commit the underlying felonies. (*See Sandstrom v. Montana, supra,* 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

B. The Error Was Not Harmless

The court's error permitted the jury to reach of verdict of first degree felony murder without making the necessary findings that the killing occurred during the commission of one or both of the underlying felonies of rape and robbery, and that appellant had the specific intent to commit one or both of the underlying felonies.[65]

The erroneous instruction removed from the jury's consideration the

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[65] As noted, the written version of CALJIC No. 8.21 provided to the jury was incorrect in that it contained both bracketed phrases in the disjunctive, and therefore did not cure the error made by the court in its oral instruction. (*Cf., People v. Garceau* (1993) 6 Cal.4th 140, 189-190 [trial court's omission of portion of CALJIC No. 3.19 held harmless because jurors received correct instruction in written form].)

very mental element that makes a felony-murder a first degree murder and relieved the jury from making a finding of the necessary specific intent to rape or rob that must be concurrent with the proscribed conduct. Thus, instead of requiring the jury to find an element before it could convict, that is, specific intent, the court eliminated that element.

"Conflicting or inadequate instructions on intent are closely related to instructions that completely remove the issue of intent from the jury's consideration, and, as such, they constitute federal constitutional error. [Citation.]" (*People v. Macedo* (1989) 213 Cal.App.3d 554, 561, disapproved on another ground in *People v. Montoya* (1994) 7 Cal.4th 1027, 1040.) In addition, concurrence between act and intent or mental state is a fundamental element of the charged offense. (*People v. Green*, *supra*, 27 Cal.3d at p. 53; *see also Morissette v. United States* (1952) 342 U.S. 246, 250-255; Pen. Code § 20.) The faulty instruction on this principle removed a material factual issue from the jury's consideration, and thus deprived appellant of the due process of law guaranteed him under the state and federal constitutions, as well as his rights to a jury determination of his guilt and a reliable guilt and penalty verdict. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 633-638; U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const, art. I, §§ 15, 16 and 17.)

For all these reasons, appellant submits that this Court should determine whether the instructional error is harmless beyond a reasonable doubt under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The United States Supreme Court explained the *Chapman* test as follows:

> Harmless-error review looks . . . to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee. [Citations.]

(*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 280-281 [emphasis in original]; *accord People v. Esquivel, supra,* 28 Cal.App.4th at pp. 1399-1400.)

Even under the *Watson* standard of review, the error was prejudicial as there is more than a reasonable probability that the instructional error had an effect on the outcome.

Accordingly, whether characterized as a violation of state law or a federal constitutional violation, and whatever standard of prejudice is applied, the error was prejudicial and requires that the first degree murder conviction, special circumstance finding, death verdict and ensuing

judgment be reversed.

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XI.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

After the trial court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; CT 470; RT 2134), or killed during commission of robbery or rape (CALJIC No. 8.21; CT 479; RT 2136), the jury found appellant guilty of murder in the first degree. (CT 436.) The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[66]

Count 1 of the information filed on May 25, 1994 alleged:

> On and between September 7, 1993 and September 15, 1993, in the County of Los Angeles, the crime of MURDER, in violation of PENAL CODE SECTION 187 (a), a Felony, was

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[66] Appellant is not contending that the information was defective. On the contrary, as explained hereafter, Count 1of the information was an entirely correct charge of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony-murder in violation of Penal Code section 189.

> committed by DOUGLAS KELLY, who did willfully, unlawfully, and with malice aforethought murder Sara Weir, a human being.

(CT 236.)

Both the statutory reference ("section 187 of the Penal Code") and the description of the crime ("with malice aforethought murder") establish that appellant was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (*i.e.*, willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[67] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)

Because the information charged only second degree malice murder

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[67] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

in violation of Penal Code section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (*See e.g., People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[68] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

(*Id*. at pp. 107-108.)

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained

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[68] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that Penal Code section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *People v. Dillon, supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride, supra*, 3 Cal.4th at p. 249; *accord*, *People v. Box* (2000) 23 Cal.3d 1153, 1212.) Although that conclusion can be questioned (*see* Argument XI, *infra*,), it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (*see* Pen. Code, § 664, subd. (a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]), or murder during the commission of a

felony, and *People v. Dillon, supra,* 34 Cal.3d at p. 472, expressly held that the first degree felony-murder rule was codified in Penal Code section 189. Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara, supra*, 30 Cal.4th at p. 712.) First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (*See People v. Hart, supra*, 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford, supra,* 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[69]

The greatest difference is between second degree malice murder and

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[69] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction.* This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson,* 60 Cal.2d, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

first degree felony-murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony-murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id*. at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony-murder or not. The vital thing is that it is a distinct and different offense." (*Id*. at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt."

(*Id*. at p. 476, emphasis added, citation omitted.)[70]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (Pen. Code, § 190, subd. (a).) Therefore, those facts should have been charged in the information. (*See United States v. Allen* (8th Cir. 2004) 357 F.3d 745, 758 [vacating death sentence because failure to allege aggravating factor in indictment was not harmless error]; *State v. Fortin* (N.J. 2004) 843 A.2d 974 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re*

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[70] *See also Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

Hess (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony-murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (*See State v. Fortin*, *supra*, 843 A.2d 974.) Therefore, appellant's conviction for first degree murder, the special circumstance finding and the death judgment must be reversed.

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XII.

THE TRIAL COURT'S FAILURE TO INSTRUCT SUA SPONTE ON THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY REQUIRES REVERSAL

The jury was instructed that it could convict appellant of felony murder on based upon a robbery murder theory. (CT 479; RT 2136.) The jury was not instructed on the elements of robbery in connection with the murder count, but only in reference to the special circumstance allegation.[71] However, appellant contends that, assuming arguendo the evidence on Count I is sufficient to sustain a finding of some theft or attempted theft by appellant, that evidence more compellingly suggests that any theft related activity was conceived of and took place only after the homicide was committed and/or that it did not involve the use of force or fear. Because the instructions did not include an instruction which provided the jury an avenue to determine that any theft related activity was only theft or attempted theft rather than robbery, the conviction on Count I must be reversed.

It is well settled that theft is a lesser included offense of robbery. (*People v. Melton* (1988) 44 Cal.3d 713, 746.) If the intent to steal arose after the victim was assaulted, the robbery element of stealing by force or fear is absent and the offense committed is theft. (*People v. Ramkeesoon*

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[71] This error is addressed in Argument IX, *supra*.

(1985) 39 Cal.3d 346, 351; *People v. Green, supra*, 27 Cal.3d at p. 54.)

Where there is substantial evidence that an element of an offense is missing, but that the accused is guilty of a lesser included offense, the court *must* instruct upon the lesser included offense even if not requested to do so. (*People v. Breverman* (1998) 19 Cal.4th 142, 162; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055-1056; *People v. Kelley* (1992) 1 Cal.4th 495, 529-530.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) This requirement is based on the defendant's constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Ramekeesoon*, *supra*, 39 Cal.3d at p. 351.) The requirement also finds a basis in the Eighth Amendment guarantee of a reliable determination of guilt in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 627 et. seq.) The duty to instruct on lesser included instructions is not dependent upon a request from defense counsel. (*People v. Wickersham* (1982) 32 Cal.3d 307, 325.) Therefore, the failure of defense counsel to request instructions on theft as a lesser included offense does not affect either the analysis of the error, or the question of whether or not reversal is required.

In this case, the jury was instructed that it could convict appellant of felony murder as to the murder count and was only instructed on the

elements of robbery in relation to the special circumstance allegations, not as a substantive offense of which appellant could be convicted, but as an element of felony-murder. As set forth in Argument VI, the evidence did not support a finding of robbery, and arguably no more than a theft. Appellant submits that the evidence required that the trial court give a theft instruction sua sponte, and that the failure to do so constituted error.

This Court has repeatedly found that the failure to give a theft instruction where it is warranted by the evidence in a robbery-murder prosecution is error as to a conviction of murder. (*See People v. Ramkeesoon*, *supra*, 39 Cal.3d at pp. 351-353; *People v. Kelly*, *supra*, 1 Cal.4th 495, 530-531; *People v. Turner*, *supra*, 50 Cal.3d at pp. 690-693.) Appellant acknowledges this Court's decisions in *People v. Silva* (2001) 25 Cal.4th 345, 371 and *People v. Cash* (2002) 28 Cal.4th 703, 737 holding that when robbery is not a charged offense but merely forms the basis for a felony murder charge and a special circumstance allegation, a trial court does not have a sua sponte duty to instruct the jury on theft. Appellant respectfully requests that this Court reconsider its position on the issue. In addition, appellant raises the issue to preserve it for federal review.

Appellant submits that to hold that the absence of the instruction is not error where the robbery is *not* charged, but where the robbery *is* charged, the trial court's failure to instruct is not only error as to the robbery, but

affects the robbery murder conviction as well violates defendants' right to equal protection and inserts an element of arbitrariness to the determination of guilt which renders it unreliable for purposes of enforcing a judgment of death. (*Evitts v. Lucey* (1985) 465 U.S. 387; U.S. Const., 8th & 14th Amends.; Cal.Const., art. 1, § 7; cf. *Hawkins v. Superior* Court (1978) 22 Cal.3d 584, 586-593.) Where two defendants charged with robbery are similarly situated, i.e., have precisely the same factual issues presented by the evidence, it is fundamentally unfair, and without any sound basis in law or policy, to hold that their rights to instructions may differ, due solely to the decision of the prosecutor on whether or not to charge the underlying robbery separately. (*Cf. Hawkins v. Superior Court, supra*, 22 Cal.3d at p. 593 [tactical advantage to prosecution inadequate to justify denial of substantial rights to criminal defendant].)

Application of such a logically unsound and unfair standard in this case constitutes a violation of appellant's rights to equal protection, to a fair trial, to have the jury determine every material issue presented by the evidence, and to a reliable determination of penalty. (U.S. Const., 5th, 6th, 8th & 14th amends.; Cal. Const., art. 1, §§7, 15.)

Therefore, the conviction, special circumstance findings and death judgment must be reversed.

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XIII.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CT 465; RT 2127 [oral version].) This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

A. The Instruction Allowed The Jury To Determine Guilt Based On Motive Alone

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere

modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (*See e.g.*, *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (*See People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; *see also People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].) Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7 & 15.)

B. The Instruction Impermissibly Lessened The Prosecutor's Burden Of Proof And Violated Due Process

The jury was instructed that an unlawful killing during the commission of a rape or robbery is first degree murder when the perpetrator has the specific intent to commit robbery. (RT 2136.) By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on this crucial, contested element of the prosecutor's capital murder case – *i.e.*, that appellant had the intent to rape and/or rob. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (*See Sandstrom v. Montana, supra,* 442 U.S.

510; *People v. Lee, supra,* 43 Cal.3d at p. 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn, supra,* 653 F.2d at p. 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The only theory supporting the first degree felony-murder allegation was that appellant killed Weir in order to rob and/or rape her. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]"

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, emphasis added.)

> "A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the

> commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping.

(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, emphasis added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, emphasis added.)

> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: "But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful."

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, emphasis added.) Quite

clearly, the terms "motive" and "intent" are commonly used interchangeably under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id*. at pp. 1126-1127.) The Court of Appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id*. at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id*. at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case. The jury was instructed to determine if appellant had the intent to rob and/or to rape, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

C. The Instruction Shifted The Burden Of Proof To Imply That Appellant Had To Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the

prosecutor. As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (*See Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is Required

The motive instruction given in this case diluted the prosecution's obligation to prove beyond a reasonable doubt that appellant had a specific intent to rob and /or rape. CALJIC No. 2.51 erroneously encouraged the jury to conclude that proof of a specific intent to rob and/or rape Ms. Weir was unnecessary for guilty verdicts on the first degree murder and a true finding of the special circumstances allegation. Accordingly, this Court must reverse the judgments on Count One and the special circumstance allegation because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIV.

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra,* 397 U.S. at p. 364; *accord, Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia, supra,* 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship, supra,* 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the

jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that never can be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.90, 2.01, 8.83, And 8.83.1)

At the guilt trial, the court instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the State the burden of proving him guilty beyond a reasonable doubt." (CT 471; RT 2130.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(CT 471; RT 21300 [oral version].)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be

constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions, it was reasonably likely to have led the jury to convict appellant on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given three interrelated instructions that discussed the relationship between the reasonable doubt requirement and circumstantial evidence – CALJIC No. 2.01 ([sufficiency of circumstantial evidence] CT 451; RT 2118); CALJIC No. 8.83 ([special circumstances – sufficiency of circumstantial evidence] CT 487; RT 2141); and CALJIC No. 8.83.1 ([special circumstances – sufficiency of circumstantial evidence to prove required mental state] CT 488; RT 2143.) These instructions, addressing different evidentiary issues in nearly identical terms, advised appellant's jury that:

> if . . . one interpretation of [the] evidence appears to you to be reasonable and the other interpretation to be unreasonable, *it would be your duty to accept the reasonable interpretation and to reject the unreasonable*.

(CT 451, 487, 488 emphasis added.)

These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This thrice repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating

appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th, & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (*See Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama, supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (*Cf. In re Winship*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia, supra*, 443 U.S. at p. 315; *see Sullivan v. Louisiana, supra*, 508 U.S. at p. 78 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty," emphasis added.) Thus, the instructions improperly required conviction on a degree of proof less than

the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, emphasis added, fn. omitted.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id*. at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, all three instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case,

which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations. During his closing argument the prosecutor relied on the existence of circumstantial evidence to argue that the jury should convict appellant of first degree murder and the special circumstances. (*See* RT 2158-2159.) He argued that circumstantial evidence "can be incredibly damning It can be incredibly strong. It can leave no doubt in the mind as to what happened." (RT 2158.) Contrary to the prosecutor's argument, however, the jurors had to find that the prosecution carried its burden of proving appellant's guilt beyond a reasonable doubt.

The prosecution's incriminatory interpretation of the evidence may have been reasonable, but it was not sufficient to prove the murder and special circumstances alleged. The challenged instructions did not provide for this alternative. The circumstantial evidence instructions, as highlighted by the prosecutor's argument, permitted and indeed encouraged the jury to convict appellant of first degree murder and to find the special circumstances true upon a finding that the prosecution's theory was reasonable, rather than

upon proof beyond a reasonable doubt.

For these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2 2.22, 2.27, 2.51 And 2.52)

The trial court gave seven other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (CT 445; RT 2113); CALJIC No. 2.21.1 regarding discrepancies in testimony (CT 461; RT 2126); CALJIC No. 2.21.2 regarding willfully false witnesses (CT 462; RT 2126); CALJIC No. 2.22, regarding weighing conflicting testimony (CT 463; RT 2126); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (CT 464; RT 2127); and CALJIC No. 2.51, regarding motive (CT 465; RT 2127).[72] Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the

[72] In Argument XIII, *supra*, appellant argues that this instruction unconstitutionally permitted the jury to find him guilty on the basis of motive alone.

"preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated appellant's constitutional rights (as enumerated in section A of this argument) by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity for or prejudice against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (CT 455; RT 2113.) CALJIC No. 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (CT 451; RT 2118.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence." (CT 465; RT 2127.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find appellant

guilty because it had not been proven that he was "innocent."[73]

Similarly, CALJIC No. 2.21.1 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his testimony" unless "from all the evidence, you shall believe the *probability of truth* favors his testimony in other particulars." (CT 462; RT 2126, emphasis added.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (*See People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[74] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the

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[73] As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*

(*People v. Han* (2000) 78 Cal.App.4th 797, 809, original emphasis.) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.) The same is not true in this case.

[74] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, the jurors were instructed:

> You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

(CALJIC No. 2.22; CT 463; RT 2126 [oral version].)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, was more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt"

with something that is indistinguishable from the lesser "preponderance of the evidence standard," *i.e.*, "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC No. 2.21.2, discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (CT 464; RT 2127), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." CALJIC No. 2.27, by telling the jurors that testimony by one witness "as to any particular fact" which they believed is "sufficient for the proof of that fact" and that they "should carefully review all the testimony upon which the proof of such fact depends" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) appellant himself had the burden of convincing them that he was not guilty and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could

be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation. . . ." (CT 477; RT 2134, emphasis added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (*See People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the

prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (*See e.g.*, *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court

consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (*See People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (*See People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *see generally Francis v. Franklin*, *supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally

infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[75] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was

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[75] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

overwhelmed by the unconstitutional ones. Appellant's jury heard seven separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section 1096 as set out in former CALJIC No. 2.90.[76] This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

D. Reversal Is Required

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[76] As this Court has noted, the statutory language – with its references to "moral evidence" and "moral certainty" – is problematic. (*See People v. Freeman* (1994) 8 Cal.4th 450, 503.) In combination with the instructions discussed in this argument, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict appellant on proof less than beyond a reasonable doubt in violation of his right to due process. (*In re Winship*, *supra*, 397 U.S. 358.)

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible *per se.* (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. Despite the lack of any defense evidence at the guilt phase, the jury deliberations lasted almost three days. Clearly, the jury struggled with their decision. Accordingly, the dilution of the reasonable-doubt requirement by the guilt-phase instructions, particularly when considered cumulatively with the other instructional errors set forth above, must be deemed reversible error no matter what standard of prejudice is applied. (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.)

The guilt phase conviction, the special circumstance findings and the death judgment must be reversed.

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PENALTY PHASE CLAIMS

XV.

EXTENSIVE VICTIM IMPACT EVIDENCE RENDERED THE PENALTY PHASE OF APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR AND REQUIRES REVERSAL OF THE DEATH PENALTY

A. Introduction

At the penalty phase of trial Sara Weir's mother, Martha Farwell, described in heart-wrenching terms the devastating effect of Sara's death on her and her family. (RT 2435-2466.) The jury was then shown what can only be described as a eulogy to Sara Weir – a 22-minute videotape, prepared and narrated by her mother – composed of dozens of still photographs and video clips documenting nearly every aspect of Weir's life. (People's Exhibit Number 47; RT 2427-2431.)

In response to this extraordinary accumulation of emotional evidence, the defense offered nothing. As it did at the guilt phase, the defense presented *no* evidence at the penalty phase. (RT 2470-2471.) The complete lack of mitigation evidence coupled with the overwhelmingly sympathetic nature of the victim impact evidence rendered the jury's death verdict a product of emotion rather than reason.

Appellant submits that because of the circumstances of this case, no victim impact evidence should have been admitted. However, even if some

victim impact evidence was admissible, the length, detail and emotional effect of the videotape of Sara Weir's life exceeded any legitimate function it may have had and made a death sentence for appellant a foregone conclusion, regardless of any doubts the jury may have had about the appropriateness of the sentence for appellant's crime. No juror having seen this video tape and heard Ms. Farwell's commentary could have been expected to set emotions aside and make a decision based on reason alone. As such, admission of the videotaped prevented the jury from reaching a penalty verdict in a reliable and non-arbitrary way, and denied appellant a fair and reliable penalty hearing. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Gardner v. Florida* (1997) 430 U.S. 349, 358; U.S. Const., 5th, 8th & 14th Amends; Cal. Const., art. I, §§ 7, 15 & 17.) Appellant is entitled to reversal of the death judgment and a new penalty trial.

B. Victim Impact Evidence Should Not Have Been Admitted At Appellant's Trial

Victim impact evidence should not be admitted at every capital trial. Its admission violates due process in the rare case, such as appellant's, where the jury has already been provided with an enormous amount of humanizing information about the victim, where voluminous evidence of uncharged offenses has been admitted at both phases, and where *no* defense evidence has been offered at either the guilt or penalty phases of trial. In such cases,

the evidence serves no legitimate function.

The United States Supreme Court in *Payne v. Tennessee*, *supra*, 501 U.S. 808, held that the Eighth Amendment did not erect a *per se* bar to admission of victim impact evidence. However, the Court did "not hold . . . that victim impact evidence must be admitted, or even that it should be admitted." (*Id*. at p. 831, conc. opn. of O'Connor, J.)

Thus, while "*In the majority of cases*, and in [*Payne*], victim impact evidence serves entirely legitimate purposes"(*Payne v. Tennessee*, *supra* 501 U.S. at p. 825, emphasis added), victim impact evidence will not be admissible in every capital trial. This Court in *People v. Edwards* (1991) 54 Cal.3d 787, framed the issue as whether "'evidence of the specific harm caused by the defendant' (*Payne*, *supra*, 501 U.S. at p. 825) is a circumstance of the crime admissible under factor (a). We think it *generally* is." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833, emphasis added.)

Concern over the imbalance cause by the defendant's right to present humanizing, mitigating evidence and the state's inability to present comparable evidence about the victim was at the heart of the decision in *Payne* which overruled the Court's earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805, which barred the admission of victim impact evidence. Writing for the majority in *Payne*, Chief Justice Rehnquist referred to the Court's previous

decisions as having misread precedent and thus, "unfairly weighted the scales in a capital trial," against the state. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 809.) The majority opinion recognized the states's

> legitimate interest in *counteracting* the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. [Citation.]

(*Id*. at p. 825, emphasis added; *see also, id.* at p. 839 (conc. opn. of Souter, J.) ["given a defendant's option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process" [Citations].)

This Court in *People v. Edwards*, *supra*, 54 Cal.3d 787 held

> "[A]t the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. *It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's against those that may offend the conscience*. [Citation.]"

(*Id*. at p. 834, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 863-864, emphasis added.)

Similar language from *Payne* was cited by this Court in *People v. Pollock* (2004) 32 Cal.4th 1153, in upholding the admission of victim impact testimony by the victim's son. This Court noted, "'there is nothing unfair

about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant.'" (*Id*. at p. 1182, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 826.)

Concern about parity between the prosecution and defense in the presentation of evidence to the sentencer was also paramount in this Court's recent decision in *People v. Brown* (2004) 33 Cal.4th 382. Following a discussion of *Payne* and *Edwards*, which included the same quotations from both opinions as set forth above, this Court addressed the defendant's argument that admission of victim impact evidence at his trial was error:

> With these guiding considerations in mind, we turn to the specific evidence at issue, *keeping in mind that at the penalty phase defendant offered section 190.3 (k) testimony describing an abusive and troubled childhood, in addition to a psychiatrist's opinion he suffered from posttraumatic stress disorder and other mental disorders, and guilt phase evidence he acted under the influence of drugs*.

(*Id*. at p. 396, emphasis added.)

This Court went on to note the *Payne* court's acknowledgment that "just as the defendant is entitled to be humanized, so too is the victim," and quoted Justice Cardozo in *Snyder v. Massachusetts* (1934) 291 U.S. 97, 122: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*People v. Brown*, *supra*, 33 Cal.4th at p. 398.)

The concerns that motivated the court in *Payne* to permit states to

present victim impact evidence, and which this Court has relied upon in upholding admission of such evidence under factor (a), are not present in appellant's case. In his concurring opinion in *Payne*, Justice Souter wrote: "Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles." (*Payne v. Tennessee, supra*, 501 U.S. at p. 838, (conc. opn. of Souter, J).)

From the beginning, the victim in this case was never a faceless, fungible stranger. On the contrary, the jury in this case heard a tremendous amount of sympathetic and humanizing evidence about Sara Weir. In order to establish the circumstances of Ms. Weir's disappearance and the nature of her relationship with appellant, the prosecutor presented the testimony of six of her friends and co-workers who described Weir and her life at length. (RT 1025-1091.)

In addition, Martha Farwell testified about her daughter at the guilt phase, and offered numerous examples of Weir's fine qualities. Weir was "very friendly, very open," (RT 839); "academically above average" (RT 831); "naive" (RT 839); popular (RT 839); "very pretty" (RT 844). When she was in high school she went on work trips with the youth church group (RT 849). Ms. Farwell described her relationship with her daughter as one with "open communication." (RT 845.) She recounted in detail the events of the last weekend she spent with Weir – shopping, watching movies,

hiking. (RT 847-856.)[77]

Indeed, Ms. Farwell's glowing description of her daughter during her guilt phase testimony prompted the court to observe that the prosecutor had "painted Sara out as a virtual saint." (RT 873.) The court warned the prosecutor that if he could not "control [Farwell's] answers," the court might do so itself." (RT 875.)[78]

While Weir was deified, on the other side of the scale, appellant was demonized. More than a third of the prosecution's case at the guilt phase was devoted to the testimony of witnesses who described past acts of violence and deceit by appellant while the defense presented nothing.[79] After having been inundated with the testimony of the uncharged crimes at the guilt phase, the jurors were presented at the penalty phase with the testimony of a fourth sexual assault victim, Esther Dorsey, who, like the three women who testified at the guilt phase, described in explicit and haunting testimony the details of her ordeal. (RT 2340-2419.)

The efforts of the prosecutor combined with the lack of any defense evidence rendered appellant as close to the "cipher" referred to by Justice

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[77] Weir's qualities were reiterated by another guilt phase prosecution witness, Doreen Derderian, who described Weir as "very trustworthy," "loving," "warm," "very bright" and loved by all who knew her. (RT 1075-1077.)

[78] This discussion took place out of the presence of the jury and appellant.

[79] *See* Argument IV, *supra*.

Souter, as it is possible to imagine. The prosecutor repeatedly referred to appellant in his penalty phase closing argument as a "thing" or "it." (RT 2561, 2566, 2568, 2569, 2571, 2582.) He also described appellant as "something born in the form of a human being" (RT 2571) and "not human" (RT 2577).

In contrast to the situation in *Payne,* in which witnesses attested to the defendant's good character and experts offered mitigating mental health evidence, nothing but highly negative testimony was presented about appellant throughout the trial. To then allow the prosecutor to present a massive amount of highly charged victim impact evidence at the penalty phase of trial impermissibly skewed the balance and resulted in an arbitrary and unconstitutional death sentence.

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C. If Victim Evidence Is Deemed Admissible, the Extensive Evidence of the Victim's Life Presented at Appellant's Trial Exceeded the Bounds of Fairness and Due Process

If this Court finds that victim impact evidence was admissible at appellant's trial, it must nonetheless conclude that the evidence presented exceeded any parameters envisioned by the United States Supreme Court in *Payne*, or this Court in *Edwards*. After hearing the extensive evidence of Sara Weir's life *at the guilt phase*, the jury heard from Weir's mother again at the penalty phase. Martha Farwell's penalty phase testimony covers 30 pages of trial transcript. She described her horror and distress when she heard that Weir had not shown up at work and her frantic search over the next few days. (RT 2434-2441.) She and her husband went to the police station and filed a missing person report. (RT 2442.) Three days later she received a phone call from Detective Hooks asking for dental records in order to identify a body. Weir's family was, according to Ms. Farwell, "absolutely devastated," "overcome with grief." (RT 2443.) She told the jury of the pain she suffered from running into friends who did not know of Weir's death and having to tell them. (RT 2445.) She experienced physical pain and facial tics. (RT 2446.) In response to the prosecutor's questions, Farwell described her nightmares in which Weir struggled to escape, calling to her mother. (RT 2449.)

After hearing the testimony of three women – Dorn, Venter and Baer – Farwell felt she understood what Weir went through. (RT 2451.) Farwell described the horrible task of telling her two young sons that their sister had been "killed by a very bad man." (RT 2453.) They were all devastated. One of the boys became shy at school, isolated from his friends. (RT 2457.) Farwell also expressed her sense of loss: the loss of the future she envisioned for Weir – going to college, marrying and having children (RT 2459) – and the loss of Weir's presence in their family's life (RT 2461).

Farwell discussed Weir's Blackfoot Indian heritage. (RT 2464-2465.) She completed her testimony by recounting a story about the day she and her husband learned that Weir was dead. They went for a hike in a wilderness area, and while they were walking a large bird flew in front of them, perched in a tree and stared at them for a long time. (RT 2465.) A week or so later the daughter of a friend who is also Indian and also adopted sent her a print of a bird's wing. She only knew that Weir had died – not about Farwell's experience. In an accompanying card she wrote, "When native blood is shed in a sorrowful way, the birds will cherish their soul." (RT 2466.) After this haunting conclusion to Ms. Farwell's testimony, a 22-minute videotape was played for the jury. (RT 2468.)

In *Payne*, *supra*, 501 U.S. 808, the United States Supreme Court

held that a state could allow admission of evidence providing "'a quick glimpse of the life' which a defendant 'chose to extinguish'" in order " to show . . . each victim's 'uniqueness as an individual human being.'" (*Id*. at pp. 822-823.) In *Payne*, the victim impact evidence presented was limited to a single question eliciting brief testimony about the effect of the crime on the victim's young son who was in the same room when his mother was killed. The boy was also stabbed in the attack and suffered serious wounds. (*Id*. at pp. 812-815.) The evidence was closely tied to the circumstances of the crime – the impact on a young child who the killer knew was present at the time the crime was committed and who was himself a victim. The Court held that a state may permit the jury to consider "the specific harm caused by the defendant" without violating the Eighth Amendment. (*Id*. at p. 825.) *Payne* noted, however, that "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Ibid*.)

California permits victim impact evidence as a circumstance of the crime under Penal Code section 190.2, subd. (a) [factor (a)] (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835), but this Court has stated that evidence which "invites an irrational, purely subjective response should be curtailed." (*Id*. at p. 836.) In *Edwards*, the victim impact evidence was also quite

limited, consisting of photographs of the victim and a short argument by the prosecutor. (*Id*. at pp. 832, 839.)

In *Edwards*, this Court suggested additional limitations, emphasizing that "we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* . . . ." (*Id*. at pp. 835-836.) The Court further warned that:

> Our holding also does not mean there are no limits on emotional evidence and argument. In *People v. Haskett*, *supra*, 30 Cal.3d [841] at page 864, we cautioned, "Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citation.]"

(*Id*. at p. 836, fn. 11.)

Even if, under some interpretation of *Payne*, testimony as extensive, detailed and far-ranging as Ms. Farwell's, is deemed admissible, then it must be deemed to constitute the absolute limit on such testimony. Instead, in appellant's case, the testimony was further enhanced by the playing of the video tape tribute to Weir's life.

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D. The Videotape Tribute to the Victim's Life was Cumulative, Excessive and Unfairly Inflammatory

Over defense objection, the prosecutor was permitted to play a 22-minute videotape prepared by Ms. Farwell. The tape is a montage of numerous still photographs and video clips of Sara Weir from infancy throughout her childhood and teenage years, ending with photographs of her grave and video footage of landscape in Canada, described by her mother as "the kind of heaven she seems to belong in." These last images were particularly prejudicial and should have been excluded. (*See Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373.) In *Welch*, the court held it was error to admit evidence that the victim's son put flowers on his mother's grave and brushed the dirt away because that evidence "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative." (*Ibid*.) Similarly, in *State v. Storey* (Mo. 2001) 40 S.W.3d 898, 909, the court held that a photograph of the victim's tombstone was not relevant to show the impact of the victim's death, "and it inappropriately drew the jury into the mourning process."

Beginning with pictures of Weir as a baby, the photographs document milestones in her life – sitting up for the first time, birthdays, high school proms and graduation – as well as holidays – Weir as a child sitting on Santa's lap – family vacations, and her many achievements – learning to ski

and horseback ride, singing in the school chorus, fashion modeling. Weir is shown in many pictures with her mother, as well as with her two younger brothers, her grandmother, and her friends, cousins and schoolmates. She is shown in family portraits, holding her younger brothers on her lap. There are several video clips of poignant moments with family and friends – Weir playing with her younger brothers and nieces and nephews, getting dressed up for Halloween in a costume she and her mother made together, or playing with her special cat, Smokey.

The video is narrated by Weir's mother, who identifies each image as it appears. Even though Ms. Farwell's tone of voice is not overly emotional, *what* she says is heartbreaking in its familiarity with the people and occasions depicted. Listening to Farwell's narration imbues the tape with a haunting sense of loss. The simple intonation of the date of a family picnic video becomes chilling when the viewer realizes that it was shot just a few months before Weir's death and may have been the last time she saw the family members shown in the video. The emotions evoked by this videotape are obvious and easily anticipated and they have no place in a capital sentencing trial. A juror could not help but feel tremendous pity and sorrow for the victim and her family and rage and loathing for the source of this pain – appellant Kelly.

In *Salazar v. State* (Tex. Crim. App. 2002) 90 S.W.3d 330, the Texas

Court of Criminal Appeals found error in the admission of a 17-minute video montage of approximately 140 photographs of the victim's life, arranged in chronological order and set to a musical accompaniment of songs, including those by the artist Enya. (*Id*. at p. 333.) The video, which was created by the victim's father, covered the victim's entire life, from infancy to young adulthood. Echoing the objection made by trial counsel in this case[80], the court held that:

> punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial.

(*Salazar v. State*, *supra*, 90 S.W.3d at pp. 335-336.)

The videotape in this case is nearly identical to that in *Salazar*, even in the music that accompanied both tapes.[81] The court in *Salazar* was particularly critical of the video's "undue emphasis on the adult victim's halcyon childhood," noting that the defendant had "murdered an adult, not a child," a fact which the video tended to obscure. (*Id*. at p. 337).

Appellant submits that the videotape tribute to Ms. Weir in this case

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[80] As trial counsel in the present case noted, "It's a beautiful tribute to Sara. There is no question about that . . . I don't think this qualifies, Your Honor, as victim impact." (RT 2427.)

[81] During the narration of the videotape, Weir's mother identified the musical accompaniment as songs of Enya, which she described as "Sara's favorite," and music that she played often around the time of her death.

was so highly inflammatory and emotional that its admission violated the constitutional guarantees of due process, fundamental fairness and a fair and reliable penalty determination.[82]

Courts must guard against the potential prejudice caused by the "sheer volume," "barely relevant," or "overly emotional" evidence introduced at penalty phase. (*Salazar v. State*, *supra*, 90 S.W.3d at p. 336.) "A 'glimpse' into the victim's life and background is not an invitation to an instant replay." (*Ibid*.)

No doubt the many bittersweet images of Sara Weir occupied the minds of the jurors as they considered the videotape during their deliberation. The prosecutor urged the jury to "reflect upon those you love and what that loss would mean to you." (RT 2464.) Any viewer of this videotape would find it impossible not to do so.

To be relevant to the circumstances of the offense, the evidence must show the circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards*, *supra*, 54 Cal.3d. at p. 833.) The only victim

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[82] Videotapes of the murder victim have been admitted as victim impact evidence in capital sentencing hearings. (*See e.g., Whittlesey v. State* (Md. 1995) 665 A.2d 223 [90-second video of victim playing piano admissible to show appearance at time of death when pictures of remains were inadequate]; *State v. Gray* (Mo. 1994) 887 S.W.2d 369[videotape of victim's family at Christmas]; *State v. Anthony* (La. 2000) 776 So.2d 376, 393-394 [brief videotape of portions of wife's life during husband's testimony].) In each case, the video was brief and found to be probative of some aspect of the victim's life, unlike the videotape in the present case.

impact evidence which meets this standard is evidence of the "immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935) and evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence properly received during the guilt phase (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.)).

Clearly, the extended tribute to Sara Weir provided by the videotape, which followed lengthy testimony by her mother at both the guilt and penalty phases of trial, went far beyond the standards set by this Court and by the United States Supreme Court. Whatever relevance such evidence had was vastly outweighed by its prejudicial effect.

E. Extensive Victim Impact Evidence Such as that Presented in Appellant's Creates an Intolerable Risk of Improper Comparisons Between the Victim and the Defendant

The portrait of the victim in this case as a caring, talented and joyful young woman that was created by the extensive evidence of her outstanding character could not help but invite comparison with the picture of appellant painted by the prosecution evidence. Such contrasts – not only between victims, but between a defendant and his victim – create the risk that arbitrary and irrelevant comparisons will influence the jury's decision

whether to impose the death penalty.

The evidence presented at appellant's trial was not limited to the "quick glimpse" of the victim's life approved in *Payne v. Tennessee*, *supra*, 501 U.S. 808. The prosecutor in this case, like the prosecutor in *Moore v. Kemp* (11th Cir. 1987) 809 F.2d 702, sought "'not merely to let the jury know who the victim was, but rather to urge the jury to return a sentence of death *because of* who the victim was'" (*id*. at p. 749, emphasis in original [conc. and dis. opn. of Johnson, J.]), rendering the penalty trial unconstitutionally unreliable and unfair.

The prosecutor's argument in this case invited an improper comparison between appellant and Ms. Weir:

> And any person that's killed during a rape, this could be – this law protects anybody, a street person, not to devalue that, but when you look at aggravation and mitigation, there may be less pain caused to loved ones of the person who has been so unfortunate as to choose a life of drinking and being on the street. [¶] And you can consider that in this case Sara was something else . . . . [¶] And the reason we got to know her was so that we could decide, Sara, is your loss aggravated, is that a factor that would tend to be something that we can consider when deciding what the just verdict is.

(RT 2565.)

In *State v. Carter* (Utah 1995) 888 P.2d 629, the Utah Supreme Court prohibited the admission of victim impact evidence as a matter of state law and explained:

> In our society, individuals are of equal value and must be treated that way. We will not tempt sentencing authorities to distinguish among victims – to find one person's death more or less deserving of retribution merely because he or she was held in higher or lower regard by family and peers. Such a scheme draws lines in our society that we think should not be drawn. The worth of a human life is inestimable, and we do not condemn those who take life more or less harshly because of the perceived value or quality of the life taken. [Citation.] Indeed, society is probably incapable of even-handedness in such judgments.

(*Id*. at p. 652.)

The Utah death penalty statue was later amended to abrogate *Carter's* blanket prohibition on the admission of all victim impact evidence, but the new statute retained the prohibition on evidence of comparative worth. The statute permits the presentation of evidence of "the victim and the impact of the crime on the victim's family and community *without comparison to other person or victims*." (Utah Crim. Code, § 76-3-207, subd. (2)(a)(iii), emphasis added.)

The majority in *Payne v. Tennessee*, *supra*, 501 U.S. 808 discounted *Booth*'s concern that the admission of victim character "evidence permits a jury to find that defendants whose victims are assets to their communities are more deserving of punishment than those whose victims are perceived to be less worth." (*Payne*, *supra*, at p. 809.) The only reason given for this position was the assertion that, as a general matter, "victim impact evidence is not offered to encourage comparative judgments of this kind." (*Ibid*.)

Payne did not hold or suggest that evidence and argument that *was* offered to encourage such comparative judgments would be permissible.

The introduction of extensive evidence of victim impact evidence also creates the danger that racial discrimination will affect the jury's decision. "[I]n many cases, expansive [victim impact evidence] will inevitably make way for racial discrimination to operate in the capital sentencing jury's life or death decision." (Blume, *Ten Years of Payne*: *Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 280 [hereafter cited as Blume].)

"Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for race prejudice to operate but remain undetected." (*Turner v. Murray* (1986) 476 U.S. 28, 35.) That danger is particularly acute in cross-racial crimes like this one, where the defendant is black and the victim and her surviving relatives are not.[83]

Neither the race of the victim nor the race of the defendant is a constitutionally permissible factor in capital sentencing. (*McClesky v. Kemp* (1987) 481 U.S. 279 [race of victim]; *Zant v. Stephens* (1983) 462 U.S. 862, 885 [race of defendant].) Nevertheless,

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[83] According to her mother's testimony, Sara Weir was adopted when she was six weeks old, and her birth mother was a Blackfoot Indian. (RT 836.) All of Weir's adoptive family is white.

> Virtually every statistical study, including one commissioned by the federal government, indicates that although the death penalty is rarely sought in black-victim cases, it is sought (and obtained) in a disproportionate share of cases involving black defendants and white victims.

(Blume, *supra*, at p. 280, fn. omitted.)

Evidence that glorifies the homicide victim and emphasizes her virtues exacerbates this disparity. In *Moore v. Kemp, supra* 809 F.2d 702, the victim character evidence was much less extensive that it was in this case, and the prosecutor's argument did not mention race expressly. (*Id*. at pp. 747-748 fn. 12.) Nevertheless, as the concurring and dissenting opinion observed:

> [I]t would not help but inflame the prejudices and emotions of the jury to be confronted with a father's testimony of the virtuous life of his white daughter violated and mercilessly snuffed out by this black defendant.

(*Id.* at p. 749, conc. and disn. opn. of Johnson, J.].)

A death sentence is surely unconstitutional "if it discriminates against [the defendant] by reason of his race, . . . *or if it is imposed under a procedure that gives room for the play of such prejudices*." (*Furman v. Georgia* (1972) 408 U.S. 238, 242, conc. opn. of Douglas, J.) Therefore, while it may be impossible to eliminate the pernicious effect of race from capital sentencing altogether (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 308-314) the court should engage "in 'unceasing efforts' to eradicate racial

prejudice from our criminal justice system" *id*. at p. 309) and disapprove any procedures which create an unnecessary risk that racial prejudice will come into play. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 99; *Turner v. Murray*, *supra*, 476 U.S. at pp. 35-37.)

The presentation of extensive biographical evidence about the virtues and accomplishments of the homicide victim is one such procedure. It invites both purely arbitrary comparisons and, especially in cross-racial cases like this one, arbitrary comparisons tainted by racial bias.

F. Conclusion

The quantity and emotional quality of the victim impact evidence in this case was so out of proportion to the utter lack of mitigation evidence presented on appellant's behalf as to completely shift the focus of the jury's deliberative task from the appropriate sentence considering the defendant and the circumstances of the crime, to a wholly inconsistent and constitutionally unauthorized task – responding to the sorrow of the victim's family.

The evidence was so inflammatory that it diverted the jury from a "reasoned moral response to the defendant's background, character and crime." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328, quoting *California v. Brown* (1987) 479 U.S. 538, 545, conc. opn. of O'Connor, J.) The admission of this evidence "'so infected the trial with unfairness as to make

the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

This Court has emphasized that a death verdict is subject to the highest standard of review:

> In light of the broad discretion exercised by the jury at the penalty phase of a capital case the difficulty in ascertaining "[t]he precise point which prompts the [death] penalty in the mind of any one juror" (*People v. Hines* (1964) 61 Cal.2d 164, 169), past decisions establish that "any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial." *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137.

(*People v. Robertson* (1982) 33 Cal.3d 21, 54; *see also Stringer v. Black* (1992) 503 U.S. 222, 232 ["reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale"].)

In this case, of course, it was much more than simply a thumb tipping the scales against appellant. It was the full weight of the prosecution, unanswered by the defense, and the heavy heart of a grieving mother. Against these odds, appellant did not stand a chance.

The jury clearly struggled with its decision to return a death verdict: despite the complete lack of *any* defense evidence, the jury deliberations at the penalty phase spanned more than three days. (CT 529, 530, 562.) Thus, the prosecution cannot show that the admission of the extensive victim

impact evidence did not affect the outcome. Reversal of the death sentence is mandated.

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XVI.

THE TRIAL COURT ERRED BY REFUSING SEVERAL JURY REQUESTED DEFENSE JURY INSTRUCTIONS

The trial court refused several specially-tailored instructions appellant requested which would have helped to alleviate confusion engendered by the instructions that were given, and would have informed the jury about how to evaluate mitigation in this case. None of these instructions were argumentative, or contained incorrect statements of law, and they were not properly refused on either of those grounds. (*See People v. Sanders* (1995) 11 Cal.4th 475, 560; *People v. Mickey* (1991) 54 Cal.3d 612, 697 (1991).) Moreover, the instructions were offered to pinpoint appellant's theory of the case, rather than specific evidence, and were thus proper. (*See People v. Kraft* (2000) 23 Cal.4th 978, 1068 (2000); *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.) Refusing to deliver the requested instructions was reversible error.

A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190); *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 865; *see Penry v. Lynaugh, supra*, 492 U.S. 302.) Accordingly, "in considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the

respective parties than to those contained in the latest edition of ... CALJIC ...." (Cal. Stds. Jud. Admin., § 5.) It is equally well-established that the right to request specially-tailored instructions applies at the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

The trial court's refusal to give the instructions at issue here deprived appellant of the right recognized in the above-cited cases, as well as his rights to a fair and reliable penalty determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the applicable sections of the California Constitution.

A. The Trial Court Rejected Appellant's Proposed Instruction That The Jury Need Not Be Unanimous To Consider Mitigating Evidence

The trial court refused to give appellant's proposed instruction which would have informed the jurors that the factors in mitigation need not be found unanimously to be considered in their sentencing determination. (RT 2533.) The proposed instruction read as follows:

> There is no requirement that all jurors unanimously agree on any matter offered in mitigation or aggravation. Each juror must make an individual evaluation of each fact or circumstance offered in mitigation or aggravation. Each juror must make his or her own individual assessment of the weight to be given such evidence. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(CT 558.)

The jury was instructed that "in order to make a determination as to the penalty, all twelve jurors must agree." (RT 2558.) The jury was also explicitly instructed that it was not necessary for jurors to agree that factor (b) acts existed before they could be considered as aggravating factors. (CT 2553.) In the absence of an explicit instruction regarding mitigating evidence, there is a substantial likelihood that the jurors believed they had to unanimously agree not only on the ultimate sentence but also on the existence of any mitigating factors. Without the proposed instruction, therefore, it was likely that the jury disregarded certain factors in mitigation if all twelve jurors did not agree. In appellant's case, no evidence in mitigation was offered by the defense. The jury was instructed on factors (d), (e), (f), (g), (h), (i) and (k). (CT 543; RT 2550-2553.)

It is well settled that, in a capital case, it is improper to preclude a jury from considering relevant mitigating evidence. (*Mills v. Maryland* (1988) 486 U.S. 367, 373; *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443. In *Mills*, the trial court failed to instruct the jury what it should do if some, but not all, of the jurors were willing to recognize a mitigating factor. (*Id*. at p. 379.) The Supreme Court held there was a substantial probability that reasonable jurors may have thought they were precluded from considering mitigating evidence unless *all* twelve jurors agreed on the existence of one particular circumstance. (*Id*. at p. 384.) Vacating the

imposition of the death penalty, the Court explained, "[t]he possibility that a single juror could block such consideration and consequently require the jury to impose the death penalty, is one we dare not risk." (*Ibid*.)

Mitigating circumstances are not rendered irrelevant simply because all twelve jurors do not agree to their existence. Indeed, had the jury explicitly been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be warranted. (*See McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Yet, because the jury in appellant's case was not instructed that they need not unanimously agree on each factor in mitigation, it is reasonably likely the jury disregarded the relevant mitigating circumstances which were not unanimously found. This danger was further compounded in the present case by the lack of any mitigation offered by the defense. This circumstance made it all the more likely that the jury would not be unanimous on any given mitigation factor when they were not instructed that unanimity was not required.

The failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Eighth and Fourteenth Amendments as well as his corresponding rights under article I, sections 7,

17, and 24 of the California Constitution. The refusal to instruct that the jury need not be unanimous to consider mitigating evidence impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth and Fourteenth Amendments. The failure to so instruct in this case also created the likelihood that different juries will utilize different standards, and such arbitrariness violates the Eighth Amendment and the equal protection and due process clauses of the Fourteenth Amendment. Since the reasonable likelihood that the jury failed to consider any possible mitigating evidence could have led to the erroneous imposition of the death sentence, the failure to give appellant's proposed instruction violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair and impartial jury, a fair trial, and a reliable determination of penalty.

B. The Trial Court Rejected Appellant's Proposed Instruction on the Scope and Proof of Mitigation

The trial court also refused appellant's proposed instruction that would have informed the jury that it could reject the death penalty based on evidence that gives rise to sympathy or compassion for the defendant. (RT 2533.)

Defendant's proposed instruction read as follows:

> In determining which penalty is to be imposed on the defendant, you have absolute power to select the sentence of life without parole based solely upon your desire to show mercy, no matter how egregious the crime or how

> unsympathetic the defendant. The law permits you to choose life over death simply because you believe life itself is more desirable than death.

(CT 557.)

This instruction should have been given because it contained a proper statement of law. Rejecting it denied appellant his Eighth and Fourteenth Amendment rights to a fair, non-arbitrary and reliable sentencing determination, to have the jury consider all mitigating circumstances (*see e.g., Skipper v. South Carolina* (1989) 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604), and make an individualized determination whether he should be executed, under all the circumstances. (*See Zant v. Stephens* (1983) 462 U.S. 862, 879.)

As discussed above, all non-trivial aspects of a defendant's character or circumstances of the crime constitute relevant mitigating evidence. (*Tennard v. Dretke* (2004) __ U.S. __ [124 S. Ct. 2562, 2571.) Furthermore, a capital jury has the right to reject the death penalty based solely on sympathy for the accused. (*See People v. Robertson* (1982) 33 Cal.3d 21, 57-58 [*Lockett* and *Eddings*, "make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it"]; *see also People v. Easley* (1983) 34 Cal.3d 858, 876; *People v. Brown* (1985) 40 Cal.3d 512, 536 ["The jury must be free to reject death ... on the basis of any

constitutionally relevant evidence "].)

This Court explained in *People v. Haskett*, *supra*, 30 Cal.3d at p. 863 why the jury must be allowed to consider such sympathetic factors:

> Although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase [citation], at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on [its] moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience.

(*Ibid*. *See also People v. Easley*, *supra*, 34 Cal.3d 858.)

Further, excluding considerations of sympathy from the penalty determination process restricts the range of evidence the defendant is entitled to have the jury consider. Thus, it is impermissible to "[exclude] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind ...." (*People v. Lanphear* (1984) 36 Cal.3d 163, 167, quoting *Woodson v. North Carolina*, 428 U.S. at 304.)

The general "factor (k)" instructions given at appellant's trial clearly did not suffice to inform the jurors they had the power to return a verdict of life without the possibility of parole based solely on considerations of sympathy or compassion. Those instructions merely informed the jurors

they shall "consider" any "sympathetic ... aspect of [appellant's] character or record," (RT 2552), but did not tell them that any feelings of sympathy engendered by those aspects of appellant's character were, in and of themselves, a sufficient basis for rejecting a death sentence.

The refusal to give this requested instruction prevented the jury from considering and giving full effect to the mitigating circumstances offered by appellant, in violation of the Eighth and Fourteenth Amendments and the California Constitution (art. I, § 17), and in violation of appellant's rights to a fair trial and a reliable penalty determination, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

C. The Trial Court Rejected Appellant's Proposed Instruction That a Single Mitigating Factor Could Outweigh A Number of Aggravating Factors

The trial court erred in refusing appellant's proposed instruction that would have informed the jury that because the jury may assign whatever weight to the factors in aggravation and mitigation they deem appropriate, "one mitigating factor can sometimes outweigh a number of aggravating factors." (CT 559; RT 2533.) This instruction was an accurate statement of law which pinpointed a crucial fact in mitigation, and should have been given. (*People v. Sears*, *supra*, 2 Cal.3d at p.190.)

"The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the

appropriate penalty." (*People v. Brown*, *supra*, 40 Cal.3d at p. 540.) The jury must be given that freedom, because the penalty determination is a "moral assessment of [the] facts as they reflect on whether defendant should be put to death." (*People v. Easley*, *supra*, 34 Cal.3d at p. 889; *People v. Haskett*, *supra*, 30 Cal.3d at p. 863.) Since that assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the circumstances." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035.)

The proposed instruction would have clarified for the jury the nature of the process of moral weighing in which they were to engage by demonstrating that any single factor in mitigation might provide a sufficient reason for imposing a sentence other than death.

People v. Sanders, *supra* 11Cal.4th at 557, noted with approval an instruction that "expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that *a single factor could outweigh all other factors*." (*People v. Sanders*, *supra*, 11 Cal.4th at p. 557, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 845, emphasis added.) This Court indicated that such an instruction helps eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope

of their discretion to determine [the appropriate penalty] through the weighing process ....” (*Id*. at p. 557; *see also People v. Anderson* (2001) 25 Cal.4th 543, 599-600 [approving an instruction that “any one mitigating factor, standing alone,”can suffice as a basis for rejecting death].)

Without proper guidance as to how to weigh aggravating and mitigating circumstances, it is unlikely the jurors realized that just one mitigating factor could outweigh all the aggravating factors. This was a real danger in appellant’s case in which no mitigating evidence was presented and therefore the jury had few options to consider. Consequently, the court’s refusal to give the proposed instruction violated appellant’s rights to a fair trial and a reliable, non-arbitrary and individualized penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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XVII.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition 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*

(1976) 428 U.S. 242, 251 [opinion of Stewart, Powell, and Stevens, JJ.]).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (*See Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (*See People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v.*

Harris was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris*, to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative

or intercase proportionality review.[84]

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed

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[84] *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, 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. § 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).

Many states have judicially instituted similar review. *See State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973); *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); *People v. Brownell*, 404 N.E.2d 181, 197 (Ill. 1980); *Brewer v. State*, 417 NE.2d 889, 899 (Ind. 1980); *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977); *State v. Simants*, 250 N.W.2d 881, 890 (Neb. 1977)(comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State*, 548 S.W.2d 106, 121 (Ark. 1977).

in Arguments XVIII-XX, which are incorporated here. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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XVIII.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute fails to provide any 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. As discussed herein, they do not have to find 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. (*See* Argument XVII.) 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. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Cal. Penal Code § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538; *see also People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[85]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state

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[85] There are two exceptions to this lack of a burden of proof. The special circumstances (Cal. Penal Code § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Cal. Penal Code § 190.3(b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3(b) below.

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 ...." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *see also People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent*, *supra*, 43 Cal.3d at pp.773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington*, *supra*, 124 S. Ct. 2531.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme

violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id*. at pp. 471-472.) 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 pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id*. at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*.

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[86] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Id*.)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington* (2004) __ U.S. ___, 124 S.Ct. 2531, 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid

[86]Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

because it did not comply with the right to a jury trial. (*Id*. at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2537, emphasis in original.)

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.[87] Only

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[87] *See* Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); 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); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; 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

California and four other states (Florida, 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*, 16 Cal.4th at p. 1255; *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) substantially

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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. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. *State v. Ring* (Az. 2003) 65 P.3d 915.)

outweigh any and all mitigating factors.[88] [89] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "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." (CT 553; CALJIC No. 8.88.)

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 substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the

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[88] 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*. at p. 460.)

[89] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra*, 46 Cal.3d at p. 448.)

inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[90]

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*, the Court repeated the same analysis. (*See e.g.*, *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["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"]; *see also People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (*See Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "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

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[90] 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*, *supra*, 42 Cal.3d at pp. 1276-1277; *People v. Brown*, *supra*, 40 Cal.3d at p. 541.)

it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2551, (dis. opn. of Breyer, J.), emphasis in original.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Cal. Pen. Code § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring*

v. Arizona, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541, (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 (quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

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." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The

Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra,* 30 Cal.4th at p. 275; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32.)

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. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

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. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 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 in support of a death sentence. (*See People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

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. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (*See State v. Ring*, *supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; *accord*, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d

256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[91]

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S. Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated

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[91] *See also* Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in Ring as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[92]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed

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[92] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*. (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman, supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed de novo. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id*. at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto, supra*, 30 Cal.4th at p. 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." [Citation.] 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 v. Arizona*, *supra*, 536 U.S. at p. 606 (quoting with approval *Apprendi*

v. New Jersey, 530 U.S. at 539 (dis. opn. of O'Connor, J.)).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California*, *supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . 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.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether 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 findings 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 United States Constitution.

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B. The State and Federal Constitution Require That The Jury 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, supra*, 397 U.S. at p. 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. at p. 358; *see also Presnell v. Georgia* (1978) 439 U.S. 14.) 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. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. *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. (*In re Winship, supra,* 397 U.S. at pp. 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. (*In re Winship, supra,* 397 U.S. at p. 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." (*Santosky 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 human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 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 In re Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Ca1.3d 306 [same]; *People v. Thomas* (1977) 19 Ca1.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Ca1.3d 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," *Santosky v. Kramer*, *supra*, 455 U.S. at p. 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] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], 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."

(*Santosky v. Kentucky, supra,* 455 U.S. at p. 755 (quoting *Addington v. Texas, supra*, 441 U.S. at pp. 423, 424, 427).)

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 *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky, supra,* 455 U.S. at p. 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." (*In re Winship, supra*, 397 U.S. at p. 363.)

The final *Santosky* 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 v. North Carolina*, *supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (*See Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* 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.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 (quoting *Addington v. Texas* (1979) 441 U.S. 418, 423-424 (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.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (*See e.g.*, *People v. Griffin* (2004) 33 Cal.4th 536, 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a

> moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell*) (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (*See People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth

Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to

the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (*See Proffitt v Florida*, *supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (*see* Cal. Penal Code §190.3), and may impose such a sentence even if no mitigating evidence was presented. (*See People v. Duncan* (1991) 53 Cal.3d 955, 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code Section 190.4(e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and

to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[93]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (*See* Cal. Rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Cal. Evid. Code § 520 ["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

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[93] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*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. In addition, as explained in the preceding argument, to provide greater protection to noncapital 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.)

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*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, 428 U.S. at 260 – the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 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.

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*, 508 U.S. 275.) 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. 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,* 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (*See e.g., Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the

circumstances in aggravation that support its verdict." (*See People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 147; *see also People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (*See Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[94]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does

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[94] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (*See e.g.*, *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id*. at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[95]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity … is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina, supra*, 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California,* 524

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[95] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto, supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. *See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

U.S. at p. 732; *accord Johnson v. Mississippi,* 486 U.S. at p. 584; *Gardner v. Florida*, 430 U.S. at 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial 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 also People v. Wheeler*, *supra*, 22 Cal.3d at p. 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[96] For example, in cases where a criminal defendant has

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[96] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k). In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. *See* Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); 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(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (*See e.g.*, Cal. Penal Code § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (*see Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see e.g.*, *Myers v. Y1st, supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause 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.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States 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.

(*Id.* at p. 819.)

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*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

Compounding the error from the failure of the jury instruction to inform the jurors about the burden of proof, was the trial court's rejection of the defense requested instructions. (*See* Argument XVI, *supra*.) This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (*See Mills v. Maryland*, *supra*, 486

U.S. at p. 374; *Lockett v. Ohio, supra*, 438 U.S. at p. 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California* (1990).) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid*.) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armountrout* (8th Cir. 1992) 957 F.2d 1495, 1501, *rev'd on other grounds* (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (*See* Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

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

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal constitution. (*See McKoy v. North Carolina, supra,* 494 U.S. at pp. 442-443.) Thus, had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be warranted. (*Ibid.*; *see also Mills v. Maryland, supra,* 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously did believe that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and

the equal protection and due process clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Fourteenth and Eighth Amendments as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Also Be Instructed on the Presumption of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (*See Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (*See* Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the

appropriate sentence violated appellant's right to due process of law (U.S. Const. amend. 14; Cal. Const. art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. amends. 8, 14; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. amend. 14; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id*. at p. 190.) However, as the other subsections of this argument demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XIX.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> 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. A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a

> judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(CT 553; RT 2557-2558.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. The flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.) and require reversal of his sentence. (*See e.g., Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 553; RT 2558.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find

in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id*. at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*See Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

> In analyzing the word "substantial," the *Arnold* court concluded:
>
> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is

> highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[97]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid*., emphasis added), while the instant instruction, like the one in *Breaux*, uses

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[97] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*See Gregg v. Georgia, supra*, 428 U.S. at p. 202.)

that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id*. at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (*See Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. CONST., 8th & 14th Amends.), the death judgment must be reversed.

B. The Instructions Failed To Inform The Jurors That

The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment, Not Simply An Authorized Penalty, For Appellant

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; *accord, People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; *see also Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of

"appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id*. at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id*. at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; *i.e.*, it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular

case. (*See People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," *i.e.*, that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (RT II 4892 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate . . . ."].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required

by state law. The death judgment is thus constitutionally unreliable (U.S. CONST., 8th & 14th Amends.) denies due process (U.S. CONST., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346) and must be reversed.

III. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[98] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*See Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if

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[98] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (*See People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (*See Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original emphasis.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan, supra,* 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to

instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (*See e.g.*, *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; *see also People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[99]

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

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[99] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (*See also Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. GOLDSTEIN, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 YALE L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" … there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

> It is true that the … instructions … do not incorrectly state the law …, but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id*. at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (*See People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (*See Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Moreover, the

instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (*See* U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (*See Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; *cf. Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. The Instructions Failed To Inform The Jurors

That Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (*See People v. Hayes* (1990) 52 Cal.3d 577, 643 ["Because the determination of penalty is essentially moral and normative … there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, did not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id*. at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

XX.

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3 pursuant to a modified version of CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (CT 543; RT 2551)[100] and pursuant to CALJIC No. 8.88, the standard instruction

[100] In the written instructions, the factors were renumbered after the parties agreed to delete factor (c) and include the incident with Esther Dorsey, for which appellant was convicted of a criminal offense in New Jersey, under factor

regarding the weighing of these aggravating and mitigating factors (CT 553; RT 2557). These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional. First, the application of Penal Code section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the introduction of evidence under Penal Code Section 190.3, subdivision (b) violated appellant's federal constitutional rights to due process, equal protection and a reliable penalty determination. Even if this evidence were permissible, the failure to instruct on the requirement of jury unanimity with regard to such evidence denied appellant his federal constitutional rights to a jury trial and to a reliable penalty determination. Third, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Fourth, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fifth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Sixth, the failure of the instruction to require specific, written findings by

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(b). (RT 2525-2526.)

the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Seventh, and finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be reversed.

I. The Instruction On Penal Code Section 190.3, Subdivision (a) And Application Of That Sentencing Factor Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Penal Code section 190.3, subdivision (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (CT 543; RT 2551.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

However, an analysis of how prosecutors actually use section 190.3, subdivision (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decisionmaking that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose

capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

As applied in California, however, section 190.3, subdivision (a), not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk.

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 argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[101] or because the defendant killed with a single execution-style wound;[102]

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[101] *See e.g.*, *People v. Morales*, Cal.Sup.Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera*, No. S004569, RT 160-161 (same).

[102] *See e.g.*, *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-3027

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[103] or because the defendant killed the victim without any motive at all;[104]

- because the defendant killed the victim in cold blood,[105] or because the defendant killed the victim during a savage frenzy;[106]

- because the defendant engaged in a cover-up to conceal his crime,[107] or because the defendant did not engage in a cover-up and so must have been proud of it;[108]

(same).

[103] *See e.g.*, *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-969 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[104] *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).

[105] *See e.g.*, *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

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

[107] *See e.g.*, *People v. Stewart*, No. S020803, RT 1741-1742 (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).

[108] *See e.g.*, *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-3031 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

- because the defendant made the victim endure the terror of anticipating a violent death,[109] or because the defendant killed instantly without any warning;[110]

- because the victim had children,[111] or because the victim had not yet had a chance to have children;[112]

- because the victim struggled prior to death,[113] or because the victim did not struggle;[114]

- because the defendant had a prior relationship with the victim,[115] or because the victim was a complete stranger to the defendant.[116]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have

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[109] *See e.g., People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S14636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

[110] *See e.g., People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[111] *See, e.g., People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[112] *See, e.g., People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[113] *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).

[114] *See, e.g., People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[115] *See, e.g., People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[116] *See, e.g., People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge 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 facts inevitably present in every homicide:

- **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;[117]

- **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;[118]

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[117] *See, e.g., People v. Deere*, No. S004722, RT 155-156 (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 (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 4715-4716 (victim was "elderly").

[118] *See, e.g., People v. Clair*, No. S004789, RT 2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868,

- **The motive for 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;[119]

- **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;[120]

- **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.[121]

RT 5546 (use of an axe); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT 8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[119] *See, e.g.*, *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (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).

[120] *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 2603-2604 (late at night); *People v. Lucero*, No. S012568, RT 4125-4126 (middle of the day).

[121] *See, e.g.*, *People v. Anderson*, No. S004385, RT 3167-3168 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.

In this case, the prosecutor urged the jury to consider the manner in which the murder was committed, urging them to imagine the victim's last moments: "We know what happened to Sara. We know the terror. We know the fear . . . We know it was prolonged. We know Sara suffered that fear." (RT 2567.) The details of the murder were deemed significant by the prosecutor, including the fact that there was "no slashing, not out of control, not the acts of anger. Held down by a strong arm, and scissors plunged deeply until three of them pierced the heart." (RT 2568.)

The prosecutor also exhorted the jury to find appellant's attitude in committing the crimes to be aggravating, including the people he chose as his victims. "You can consider who that thing decided to prey upon . . . If her you have . . . had any doubt as to whether good or evil exist, you have seen such a collection of incredibly nice good hearted people." (RT 2566.)

As this case illustrates, the 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, supra,* 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

B. The Instruction On Penal Code Section 190.3, Subdivision (b) And Application Of That Sentencing Factor Violated Appellant's Constitutional Rights To Due Process, Equal Protection, Trial By Jury And A Reliable Penalty Determination

1. Introduction

Factor (b), which tracks Penal Code Section 190.3(b), permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." Pursuant to that factor, the prosecution in this case presented

evidence of five prior acts of alleged violence.

The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if appellant should be executed. (CT 543; RT 2553.) The jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that appellant did in fact commit the criminal acts alleged. (CT 545; RT 2552.) Although the jurors were told that all 12 must agree on the final sentence (CT 545; RT 2553-2554), they were not told that during the weighing process, before they could rely on the alleged unadjudicated crimes as aggravating evidence, they had to unanimously agree that, in fact, appellant committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation.

(*Ibid*.) Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on appellant's guilt, the degree of the homicide (if any), and the special circumstance allegations.

As set forth below, the unadjudicated crimes evidence should not have been admitted. But even assuming the evidence was constitutionally

permissible, the aspect of Penal Code section 190.3, subdivision (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

2. The Use of Unadjudicated Criminal Activity as Aggravation Renders Appellant's Death Sentence Unconstitutional

The admission of evidence of previously unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth Amendment. (*See, e.g., Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital

proceeding violated appellant's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst*, *supra*, 897 F.2d at p. 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated appellant's state and federal rights to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 7 and 15.)

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3. The Failure to Require a Unanimous Jury Finding on the Unadjudicated Acts of Violence Denied Appellant's Sixth Amendment Right to a Jury Trial and Requires Reversal of His Death Sentence

Even assuming, arguendo, that the evidence of the prior unadjudicated offenses was constitutionally admissible at the penalty phase, the failure of the instructions pursuant to Penal Code section 190.3, subdivision (b) to require juror unanimity on the allegations that appellant committed prior acts of violence renders his death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

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The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[122]

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988)

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[122] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) It is arguable, therefore, that where the state seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged act of violence, there is no need to reach this question here.

497 U.S. 639, 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (*See, e.g., People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Lines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona, supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id*. at p. 609; accord *id*. at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exists]"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to determine if all 12 jurors would have agreed that appellant committed the alleged prior offenses. (*See People v. Crawford*

(1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Decliner* (1985) 163 Cal.App.3d 284, 302 [same].)[123]

4. Absent a Requirement of Jury Unanimity on the Unadjudicated Acts of Violence, the Instructions on Penal Code Section 190.3, Subdivision (b) Allowed Jurors to Impose the Death Penalty on Appellant Based on Unreliable Factual Findings That Were Never Deliberated, Debated or Discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-330;

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[123] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California, supra*, 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

Green v. Georgia (1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (Pen. Code, § 190.3, subd. (b).) Before the factfinder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (CT 545; RT 2553.)

Thus, as noted above, members of appellant's jury were permitted individually to rely on this – and any other – aggravating factor any one of them deemed proper as long as all the jurors agreed on the ultimate punishment. Because this procedure totally eliminated the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (*See Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of DOUGLAS, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364. a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required … even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id*. at pp. 388-389

(dis. opn. of Douglas, J.).)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding …." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; *see also Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred

before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of DOUGLAS, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (*See Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

C. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. However, the trial court did not delete those inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously *(see, e.g., People*

v. Carpenter (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation – in this case, only factors (a) and (b) were included. (*See People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts

have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an *ad hoc* determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411, 414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

D. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable And Evenhanded Application Of The Death Penalty

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of

state law, each of the factors introduced by a prefatory "whether or not" – in this case factors (c), (d), (e), (f), (g), and (i) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Failing to provide appellant's jury with guidance on this point was reversible error.

E. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (*see* factors (c) and (f); RT 2551-2552), and "substantial" (*see* factor (f); RT 2552), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

F. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Violated Appellant's Constitutional Rights To Meaningful Appellate Review And Equal Protection Of The Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1984) 512 U.S. 967, 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (*See Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state

procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id*. p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t 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." (11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (*See also People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid*.; Pen. Code, § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital

defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (*see* generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision 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 its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[124] California's failure to require such findings renders its

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[124] *See* Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); 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(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993);

death penalty procedures unconstitutional.

G. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Them To Capital Defendants Like Appellant Violates Equal Protection

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (*See, e.g.*, *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal

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Md. Ann. Code art 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); 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); 41 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., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

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.) "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* (Mass. 1975.) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," 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 affecting a fundamental interest without showing that a compelling interest 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 that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants

and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument XVII *supra*, appellant explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such the requirement of written jury findings, unanimous agreement on violent criminal acts under Penal Code section 190.3, subdivision (b) and on other particular aggravating factors, and the disparate treatment of capital defendants set forth in this argument. The procedural protections outlined in these arguments but denied capital defendants are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

H. Conclusion

For all the reasons set forth above, appellant's death sentence must be reversed.

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XXI.

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

The United States in one of the few nations that regularly uses the death penalty as a form of punishment. (*See Ring v. Arizona*, *supra*, 536 U.S. at p. 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) And, as the Supreme Court of Canada recently explained:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan … According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human

rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (*See Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; (*Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390, dis. opn. of Brennan, J.)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. U.S. Const. art. VI, § 1, cl. 2. Consequently, this Court is bound by the ICCPR.[125]

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[125] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. *See* 138 Cong. Rec. S4784, § III(1). These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (*see* Riesenfeld &

The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284 ; *but see Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *see also id*. at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (*See United States v. Duarte-Acero, supra*, 208 F.3d at p.1284; *McKenzie v. Day* (9th

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Abbot (1991) *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties*, 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (*see* 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty. *See* Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582.

Cir. 1995) 57 F.3d 1461, 1487, dis. opn. of Norris, J.) Thus, appellant requests that the Court reconsider and, in the context of this case, find his death sentence violates international law.

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (*See, e.g*., *Stanford v. Kentucky*, *supra*, 492 U.S. at p. 389 dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, plurality opinion.) Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[126]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded

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[126] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (*See* Amnesty International's "List of Abolitionist and Retentionist Countries.")

and for the meaning of terms in the Constitution. "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.'" (*Miller v. United States* (1870) 78 U.S. 268, 315, dis. opn. of Field, J., quoting l Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57, dis. opn. of Field, J.)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "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.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus 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 supposed to be antithetical to our own. (*See Atkins v. Virginia*, *supra*, 536 U.S. at p, 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming arguendo that 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 contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (*See Hilton v. Guyot*, *supra*, 159 U.S. 113; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are

enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence should be set aside.

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XXII.

IF EITHER SPECIAL CIRCUMSTANCE FINDING IS REVERSED, THE DEATH JUDGMENT MUST ALSO BE REVERSED

The jury made its decision to impose a death judgment at a time when it had found both the rape and robbery special circumstances to be true. If this Court reverses either of the special circumstance findings, the death judgment must likewise be reversed. (*See Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849 [in finding prejudicial error, court noted that three of the four special circumstances the jurors found to be true were invalidated on appeal].)[127]

Section 190.3 codifies the factors that a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's penalty phase jury was instructed that it "shall consider . . . the existence of any special circumstances found to be true." (CT 543; RT 2551; *see* § 190.3, subd. (a).) Reliance by the jury on an aggravating factor which "has been revealed to be materially inaccurate" is a violation of the Eighth and

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[127] Needless to say, if *both* special circumstance findings are reversed, there can be no valid death judgment. (*See* § 190.2, subd. (a); *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1322-1323 ["Without a valid special circumstance finding, [the defendant] is ineligible for the death penalty."].)

Fourteenth Amendment prohibition against cruel and unusual punishment and reversible per se. (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590.) That is the situation here if this Court finds insufficient evidence to support either of the special circumstance findings (*see* Arguments VI and VII, *supra*).

Moreover, in *Ring v. Arizona, supra,* 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, to capital-sentencing procedures and concluded that specific findings the legislature makes prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In this state, jurors have two critical facts to determine at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists; and (2) if one or more aggravating circumstances exist, whether they outweigh the mitigating circumstances. If this Court reverses a special circumstance finding, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt. This Court cannot conduct a harmless-error review regarding the death sentence without making findings that go beyond "the facts reflected in the jury verdict alone." (*Ring, supra*, 536 U.S. at p. 602; *Apprendi, supra*, 530 U.S. at p. 483.) Accordingly,

because jury findings regarding the facts supporting an increased sentence are constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any special circumstance finding is reversed.

Finally, even applying a harmless-error standard to the invalidation of a special circumstance aggravator, reversal is required here. "'[T]his is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances.'" (*Silva v. Woodford, supra*, 279 F.3d at p. 849, quoting *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081.) Furthermore, the length of the deliberations over a three day period in a case in which *no* defense evidence was presented at either phase of trial, "suggests that a death sentence . . . was not a foregone conclusion." (*Silva, supra*, at pp. 849-850.) Given the closeness of the penalty determination – including the existence of even one of the special circumstances, or appellant's death-eligibility in the first instance – it is more than reasonably possible that the erroneous consideration of an invalid special circumstance contributed to the judgment of death. (*Chapman v. California, supra,* 386 U.S. 18, 24; *Stringer v. Black, supra,* 503 U.S. at pp. 230-232; *People v. Brown* (1988) 46 Cal.3d 432, 448.) It certainly cannot be found that the error had "no effect" on the penalty verdict. *(Caldwell v. Mississippi, supra,* 472 U.S. at p. 341.) The death judgment must therefore be reversed.

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XXIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (*See Cooper v. Fitzharris* (9th Cir. 1987)(*en banc)* 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The improper removal of a juror for cause should result in reversal

alone, as should the impermissible striking of a prospective juror based on a racially motivated peremptory challenge. In addition, numerous guilt phase evidentiary and instructional errors resulted in the admission of highly inflammatory and prejudicial evidence. Moreover, the insufficiency of the evidence of first degree murder also requires reversal. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643. Appellant's conviction, therefore, must be reversed. (*See Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of

appellant's trial. (*See People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. *(See People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; *see also People v. Brown, supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Aside from the erroneous exclusion of a prospective juror, which is reversible per se, the errors committed at the penalty phase of appellant's trial include, inter alia, the introduction of highly inflammatory and improper victim impact evidence, and numerous other instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (*See Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

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CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: October 6, 2004

Respectfully submitted,

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(CAL. RULES OF COURT, RULE 36(B)(2))

I, Evan Young, am the Senior Deputy State Public Defender assigned to represent appellant, Douglas Kelley, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 86,113 words in length excluding the tables and certificates.

Dated: October 6, 2004

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Evan Young