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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LARRY KUSUTH HAZLETT, JR.<br><br>Defendant and Appellant. | Cal. Supreme Ct. No. S126387<br><br>Kern County Superior Court No. BF100925A |

SUPREME COURT
FILED

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Deputy

# APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Kern County

HONORABLE MICHAEL G. BUSH, of the Superior Court

MICHAEL J. HERSEK
State Public Defender

ARNOLD A. ERICKSON
Bar No. 148358
Senior Deputy State Public Defender

221 Main Street, Tenth Floor
San Francisco, California 94105
Telephone: (415) 904-5600

Attorneys for Appellant

DEATH PENALTY

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# APPELLANT'S OPENING BRIEF

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## STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.) The appeal is taken from a judgment that finally disposes of all issues between the parties.

## STATEMENT OF THE CASE

On March 17, 2003, an information was filed in the Kern County Superior Court charging appellant with the October 24, 1978, murder of Tana Woolley in violation of Penal Code section 187. It was also alleged as special circumstances that the murder was committed with premeditation and deliberation during the commission of a rape or attempted rape within the meaning of former Penal Code section 190.2, subdivision (C)(3)(iii), and during commission of burglary, based on entering an established dwelling with the intent to commit rape, within the meaning of former

Penal Code section 190.2, subdivision (C)(3)(v), as enacted in 1978. (2 CT 318-319.)

Jury selection began on May 20, 2004. (3 CT 897.) The jurors were chosen and sworn on June 10, 2004. (4 CT 1056.) The prosecution began its case-in-chief on June 11, 2004 (4 CT 1072) and rested on June 16, 2004 (4 CT 1087.). Appellant rested his case the same day after presenting two witnesses. (4 CT 1087.) On June 17, 2004, the jurors found appellant guilty of first degree murder and found that the special circumstances were true. (4 CT 1155.)

The penalty phase of the trial began on June 21, 2004. (5 CT 1296.) On June 23, 2004, the jury imposed a judgment of death. (5 CT 1323.)

On July 14, 2004, the trial court denied appellant's motions for a new trial and automatic motion for modification of the verdict. (6 CT 1576.) The trial court imposed a sentence of death. (6 CT 1586.)

Appellant's appeal to this Court is automatic. (Pen. Code, § 1239, subd. (b).)

## STATEMENT OF FACTS

### A. The Crime

On October 24, 1978, Rick Rush met Tana Woolley at her apartment after school in Rosamond, California. He also lived in the town and went to high school there. Tana was his girlfriend. (18 RT 3952.) Rick stayed for about 45 minutes. (18 RT 3953.) During that time, he and Tana had sexual relations in the bedroom, lying on the sheet with the bedspread pulled down. Afterwards, the two got dressed and went to Rick's house. Before leaving he believed that he turned on the kitchen and outside lights. (18 RT 3954.)

Rick and Tana ate dinner and watched television at his house. Rick's parents arrived sometime after dinner. Tana was not wearing a bra and she was barefoot. Tana's legs were cold so Rick got a pair of socks for her to wear. (18 RT 3957.) After watching television, Rick took Tana back to her apartment. (18 RT 3958.)

When Rick and Tana arrived at the apartment, Rick noticed that the lights in the kitchen were off. He thought that was strange, so he went in the apartment, turned on the lights and looked inside but did not see anything unusual. He assumed that the lights had been turned off before they left, so he kissed Tana goodbye and left. (18 RT 3958.) He was there for 10-15 minutes, but for most of the time, he stayed just inside the door talking to Tana. (18 RT 3975.)

At trial, Rick testified that Tana was neat and kept the apartment tidy. She always left the shower curtain open. (18 RT 3960.) There was a cracked window in the bedroom, but the glass was intact. (18 RT 3961.) The kitchen window was missing and she had moved a refrigerator and blanket in front of it to help keep the cold out. (18 RT 3963-3965.) The refrigerator could be moved easily because it was on wheels, but Rick did not notice that it was out of place when he dropped Tana off at the apartment. (18 RT 3965, 3967.) A picture taken during the crime scene investigation showed the refrigerator against the wall instead of in front of the window. (18 RT 4037; People's Exhibit No. 10.)

The next day, October 25, 1978, Helen Woolley learned that her daughter Tana had not reported to work. She obtained a key to Tana's apartment from Rick, who was a student at the high school where Helen worked. Helen went to the apartment. The door was open, but not locked. She went in and saw Tana's body on the bed. (17 RT 3861-3862.) There

was a green bedspread on the bed, which she identified at trial as People's Exhibit No. 4. (17 RT 3865.) She could see that Tana was dead, so she immediately went to deputy sheriff Bill Baker's house.[1/] (17 RT 3868.)

Sheriff's deputy Craig Hatfield met Baker at the apartment after he received a phone call from Baker's wife at 10:23 a.m. (18 RT 3927.) Hatfield testified that he saw Tana's body lying on a bed. (18 RT 3828-29.) She was dressed in an unbuttoned blue plaid shirt. A blue sock was on her right foot. She was lying across the bed with her head dropping over the edge, almost touching the floor. A blue sock was tied around her neck, crisscrossed with ends hanging off the sides. (18 RT 3932-3933.) Tana was partially on the green bedspread, with her left foot entangled into it. Other than that, she lay on a sheet. (18 RT 3949.) Her panties and shorts were lying neatly by the side of the bed and had not been torn from her. (People's Exhibit No. 19.) Hatfield also noticed a mark on the wall that appeared to be smeared blood. (18 RT 3933.)

After Hatfield left the apartment, he realized that he had not searched it for possible suspects. He went back inside and noticed a plastic shower curtain drawn shut over the bathtub. He opened it, but found no one there.[2/] (18 RT 3835.) He also found a broken window in the victim's bedroom. Glass was on the ground, along with a wood portion of the window that would normally have been horizontal. (18 RT 3936-3937.) It appeared that someone had broken the window out rather than loosen it as a whole. (18

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[1/] Baker was Rick Rush's stepfather. (18 RT 3955.)

[2/] The next day, Rick Rush noticed shoe prints inside the bathtub. (18 RT 3969.) There was no evidence establishing the source of the prints.

RT 3940.) The glass was put into a dumpster right after he saw it. (18 RT 3946.)

On October 26, 1978, Gregory Laskowski was a criminalist with the Kern County Regional Criminalistics Laboratory. He went to the coroner's facility and saw Tana's body on an autopsy table. She had a blue sock around her neck and her face had been bleeding and frothing from the mouth. (18 RT 3992-3993.) Laskowski took the sock and put it in a bag after identifying it as evidence. (18 RT 3994.) He collected two rape kits from the victim. but did not find anything that looked to be foreign, such as hairs that did not belong to the victim.[3/] (19 RT 4008-4009.) The only injury that he noted was related to strangulation, bruising about Tana's neck and bleeding from her face and nose. (19 RT 4010.)

Dr. Debra Hanks, a pathologist, testified at trial after reviewing the coroner's report prepared by Dr. Ambrosecchia, who had died before trial. (19 RT 4062.) After reviewing the report and the photographs taken at the time of the autopsy, she determined that the victim died from ligature strangulation, having something wrapped around her neck and pulled so hard that it cut off oxygen to the brain. (19 RT 4063.) A victim who suffered this type of strangulation could become unconscious in as little as 20-30 seconds, or as long as three minutes depending on the amount of struggling. Dr. Hanks testified that death occurs a few minutes after a victim is unconscious. She believed that it would take from three to five minutes for a victim to die. (19 RT 4064-4065.) Dr. Hanks stated that it is not easy to determine the amount of time a person could be strangled and

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[3/] The vaginal swab that was taken from the crime scene as part of the rape kit was later found to be missing and could not be tested. (19 RT 4151.)

still be able to revive themselves, or how long it would take before a victim was unable to do so and would eventually die. (19 RT 4072-4073.) There is a range from seconds to minutes and Dr. Hanks could not determine the exact time it took in this case. (19 RT 4074.)

Dr. Hanks testified that if a person is being strangled and has free use of his or her arms, there can be signs of a struggle. Here, the autopsy did not report any other wounds or bruises suggesting such a struggle. No evidence of any other injury was found, other than the strangulation. There was not even a minor wound. (19 RT 4068-4069, 4074.) Nothing collected during the autopsy indicated that the victim was scratching the perpetrator. (19 RT 4071.) Nothing revealed that the perpetrator used his or her hands or any other instrument except the blue sock to commit the crime. (19 RT 4074.)

Dr. Ambrosecchia placed the time of death at between 11 p.m. and 1 a.m. (20 RT 4303.) Dr. Ambrosecchia's report indicated that he performed a liver temperature test to help determine the time of death, but Dr. Hanks did not have the results of this test to review. Dr. Hanks relied on her belief that the test was done properly. Her conclusion about the time of death was based on the results of Dr. Ambrosecchia's test. (20 RT 4300, 4304, 4307.) Dr. Hanks also testified that Dr. Ambrosecchia found undigested food in the victim's stomach. Dr. Hanks stated that it takes from four to five hours for a person to digest a heavy meal. She believed that the amount of food in Tana's stomach indicated that she had died within a few hours of eating.[4/] (20 RT 4302, 4311.)

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[4/] The only evidence concerning when the victim ate was Rick Rush's testimony that he and Tana had dinner at his house before watching television. (18 RT 3956.)

In 1978, David Diosi was a forensic scientist employed by the Kern County crime laboratory. He was assigned to collect trace evidence for examination and testing in this case, which took him about 15 days. (20 RT 4313, 4315, 4327.) He recalled the case because of the amount of evidence collected, including a large number of hairs and fibers that he and Gregory Laskowski examined that had been vacuumed from the apartment and from the crime scene. (20 RT 4314, 4316.) Diosi examined the green bedspread from the crime scene, looking for trace evidence and biological material, such as blood or semen. He went through the bedspread carefully to pick out individual hairs and fibers. Diosi's report did not indicate that he found any blood or semen on the bedspread. (20 RT 4321-4323.)

Diosi also examined the bed sheet, from which he removed numerous hairs and fibers. He found several biological stains on the sheet. (20 RT 4323.) Diosi was aware that another criminalist, Gregory Laskowski, also examined the bed sheet, noted stains on it, and conducted biological testing of several items from the crime scene. (20 RT 4324.) There was no indication in Laskowsi's report that biological material was found on the bedspread. (20 RT 4325.)

No trace evidence collected and tested in this case linked appellant – or, for that matter, any African American – to the crime scene. No fingerprints were introduced into evidence.

Dwight Pendleton was with the Sheriff's detective division and assigned to the homicide investigation of this case. He was part of a team that canvassed the neighborhood. As part of this investigation, he spoke with appellant, who lived in an apartment across from Tana's. (18 RT 3979-3981.) Pendleton stated that appellant was cooperative. He did not see any scratches on appellant. Appellant was not excited or evasive and

answered all of Pendleton's questions. Nothing caused Pendleton to be concerned about appellant. (18 RT 3983-84.)

Appellant told Pendleton that on the night of the crime, he had gone to the Circle K market around 11:00 p.m., or shortly thereafter, and returned home, took a shower, and went to bed. Appellant noticed that Tana's porch light was on at around 11:30 p.m, and that the light was off when appellant woke up during the night. (18 RT 3981-3982.)

**B. Subsequent Investigation and DNA Analysis**

No arrests were made at the time of Tana's death. In 1999, however, the crime lab adopted DNA analysis. (18 RT 4019.) That same year, Christopher Speer, a detective assigned to robbery and homicide, was asked to look at this case to see if he could give it a fresh perspective. (18 RT 4021) As part of this investigation, Detective Speer obtained biological samples for DNA testing from appellant and Rick Rush. (18 RT 4023.)

On October 27, 1999, Speer and Sergeant Glen Johnson went to appellant's home in Sacramento. Appellant told them that at the time of the crime he had worked at a borax plant. He had vague recollections of the incident, recalling that he had been told about it by some children at the apartment complex when he drove home from work the next day. (18 RT 4024.) Appellant stated that he had not known Tana. (18 RT 4025.) The detectives asked for samples for DNA testing, which appellant readily provided. (18 RT 4026.) Appellant answered all of their questions and was cooperative. (18 RT 4029.) Although Speer had obtained a search warrant, he did not have to use it or inform appellant about it. (18 RT 4027.)

Brenda Smith, a supervising criminalist with the Kern County Regional Crime Laboratory, examined various items containing biological material that had been collected from the crime scene and compared the

DNA results to the samples provided by appellant and Rush.[5] (19 RT 4081.)

She was not able to obtain detectable DNA from the stains on the sheet due to degradation. (19 RT 4093, 4102-4103.) She also was not able to obtain any DNA results from material taken from the victim's fingernails, which were clipped at the time of the autopsy, either because the sample had degraded or there was not sufficient cellular material. (19 RT 4118.) Smith was unable to use saliva and hair samples given in 1978 by Rick Rush because of degradation. (19 RT 4135.)

In 2000, Smith examined the green bedspread that had been entangled around Tana's foot, which both Diosi and Laskowski had examined at the time of the crime. Smith did a visual inspection and used an alternative light source. (19 RT 4088, 4141.) She easily saw semen stains on the underside of the bedspread without using the alternative light.[6] (19 RT 4156, 4150.) The alternative light source helped her identify two smaller, different stains on the top side of the bedspread. (19 RT 4089, 4154.) The semen that she found was not collected in a pool, rather, they were smaller drops, nickel and dime size, that had not penetrated the bedspread. (19 RT 4146-47.)

In November, 2002, Smith tested two samples taken from the bedspread for DNA analysis. (19 RT 4091.) Smith focused on the larger stains on the underside because the two stains on the top were very small

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[5] Smith obtained a reference sample of the victim by using hair roots of pubic hair that was collected during the autopsy. (19 RT 4117.)

[6] At the time of the crime, the laboratory had an ultraviolet or black light available for use with examinations, but not the alternative light source used by Smith. (19 RT 4143.)

and screened very weakly as semen. (19 RT 4160.) The DNA on the bedspread was somewhat degraded at one of the loci, but she matched appellant at eight loci without any problems with degradation. (19 RT 4101, 4105.) The DNA profile obtained from the two semen samples on the bedspread were 126 billion times more likely to match appellant's profile rather than that of some unknown individual. (19 RT 4107.)

On December 17, 2002, detectives Joe Hicks and Scott Jelletich of the Kern County Sheriff's Department returned to Sacramento to arrest appellant in connection with this crime. They interviewed appellant before his arrest. Appellant was again cooperative. He stated that in 1978, he lived on the end apartment in the same complex as the victim. The back window of his apartment faced the victim's unit, but he had never been inside her apartment. He told the officers that he had never had sexual relations with the victim and never sneaked into her apartment when she was not there. Appellant was arrested after the interview. (19 RT 5058-5059.)

On January 16, 2003, Smith tested the blue sock that was found around the victim's neck. (19 RT 4113.) She scraped off fuzzy material from the sock and extracted DNA. (19 RT 4114.) Although the sample was somewhat degraded, Smith was able to obtain information at five of the nine genetic locations or markers (loci). (19 RT 4124.) She was unable to find any matches that linked Rick Rush as a contributor to the DNA taken from his sock. (19 RT 4139.) She could not exclude appellant as a contributor and found that it was 310,000 times more likely that the DNA matched appellant than it did an unknown or unrelated male individual. (19 RT 4119, 4126.) Smith believed that the most likely explanation for a person leaving DNA on a sock would be that he was not wearing gloves. (19 RT 4143.)

Lisa Calandro, a DNA laboratory supervisor in the forensics science division of Forensic Analytical, was retained by appellant and tested four cuttings on the bed sheet that was under the victim when she was found. (20 RT 4328, 4331.) Some of the tests she conducted showed a weak positive result indicating semen. (20 RT 4334.) Calandro testified that there were problems in this case because of the age of the biological material. (20 RT 4342.) DNA breaks down with time and the samples were very degraded, particularly in comparison to that found on the bedspread (20 RT 4346, 4349, 4362, 4365.) Calandro normally would expect similar rates of degradation between the bedspread and the sheet if they were stored the same.[7] (20 RT 4364.) However, with the sheet, Calandro was able to find only a low quantity of DNA, with just two of the four samples containing sufficient material for testing. (20 RT 4339, 4341.) Only three-out of the nine loci could be used for analysis. (20 RT 4348, 4361.) She did not have enough material that was not degraded to get a full profile. (20 RT 4365.) From the results of the biological material on the sheet, she was able to exclude appellant as a donor, but not Rick Rush. (20 RT 4357-4360.)

### C. Evidence Admitted Pursuant to Evidence Code section 1108

The prosecutor introduced four incidents under Evidence Code section 1108, which allows evidence of other sexual offenses to be introduced into evidence. Appellant did not stand trial in regard to any of these incidents.

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[7] Calandro stated that results may also vary depending on the weave of the fabric, the manner in which DNA is extracted, and the amount of material that is deposited. (20 RT 4369.)

### 1. Lenora Nash Bennett

In July 1982, Lenora Nash Bennett lived in San Mateo. One evening she went to a local nightclub to dance. She saw appellant, who she knew as "Larry," at the club. Nash went to the club fairly often and knew appellant from previous occasions when they had danced together. (17 RT 3798, 3808, 3811.) According to Bennett, appellant suggested that they go someplace to have coffee. They drove separate vehicles to a local Denny's. Appellant parked his van in the lot behind the coffee shop against an embankment. Bennett went to appellant's van. He said something to her about wanting to talk and she got in the van. (17 RT 3799-800, 3814.)

Within a short time, appellant made a remark that had something to do with sex. This surprised her since they did not have a sexual relationship; they had only danced together and exchanged small talk. He reached over and locked the door. She tried to leave but appellant grabbed her waist and jerked her to the back of the van. She tried to hold on to the door or the seat as appellant dragged her to the back. Appellant put her hand over her mouth when she screamed. She thought she would be hit if she screamed any more, although appellant never hit her throughout the entire incident. (17 RT 3801-3803, 3808, 3820.)

Bennett told appellant that he did not have to do anything, but he said, "I have to do this." (17 RT 3804-05.) He took off her pantyhose and performed oral sex on her. Afterwards, he penetrated her and had sex for about ten minutes. (17 RT 3805-3806.) After it was over, she sat in the front seat and talked to appellant for a period of time. (17 RT 3807.) Her objective in talking to him throughout the incident was to get out of the van alive. (17 RT 3821.) The entire incident lasted several hours. (17 RT 3820.) She reported the matter to the police. (17 RT 3858.)

### 2. Irene Joanne Tarbell

Irene Tarbell first became acquainted with appellant because he was a neighbor of her former husband. They were reintroduced several years later because her husband decided to produce a concert with appellant. Appellant provided the financing and her husband knew some bands. (17 RT 3822-3824.)

Tarbell testified that, at some point in 1973, she called appellant and made arrangements to go to his home and collect $50 that he owed her and her husband. When she arrived, about three to five other men were there. Appellant walked her through the living room and into his bedroom, where she assumed the money was kept. They were within earshot of the other people. He closed the door, but after a short conversation, he grabbed her in a hug and tried to remove her clothes. There was a struggle and they ended up on the ground. (18 RT 3825-3826, 3840.) He held her with one arm while taking off both their clothes with the other. (18 RT 3843-3844.) Appellant briefly penetrated her, but then told her that he guessed that she really did not want to have sex. He let her go and she dressed and left. (17 RT 3828.) She did not report the incident because she was afraid it would hurt her marriage. (17 RT 3829.)

In May 1973, appellant knocked on her door and woke her up. Her husband was not at home and her two-year old was sleeping in another room. Appellant said that he had been driving a long distance and had a way to go. He asked for some coffee and she let him in. (17 RT 3830.) She did not think about the previous incident. (17 RT 3849.) Tarbell testified that appellant went into the kitchen to make the coffee while she waited in the living room. Appellant returned to the living room and reached for her. She pushed him away and they got into a wrestling match.

(17 RT 3831.) He forced her into the bedroom and they continued to struggle. Appellant penetrated her for ten minutes until she dug her fingernails into his arm. (17 RT 3833.) A few seconds later, appellant got up and left. She reported the incident to the sheriff. (17 RT 3834.)

### 3. Sharron Lansing Rogers

In December 1976, Sharron Rogers attended a Christmas party at a business near Lancaster, California. She had been drinking during the party. Afterwards, another woman drove Rogers back to her car, which she had left at work. (18 RT 3881.) On her way home, Rogers had to swerve off the road to avoid another car coming towards her with its lights off. She struck a fence and ended up stuck. It was a dirt road in a desolate area, and Rogers had to walk for quite awhile before another car stopped and the driver offered to help her get to a phone. (18 RT 3882-3884.)

The driver asked Rogers a number of personal questions and drove around quite a bit. Rogers kept asking when they were going to get there and the driver kept saying, "soon." Rogers became concerned that she had gotten into a car with someone who was not going to help her. (18 RT 3884.) Eventually, the driver stopped at a convenience store. He told her not to get out of the car, not to look at him, and to keep her head down. She obeyed because she was scared. (18 RT 3885-3886.) The driver returned to the car and they drove out into the desert. The driver laughed at her when she asked if they were going to stop and get help. (18 RT 3887.)

The driver threatened Rogers and told her that he would kill her if she did not do what he wanted. She tried to get out of the car but the driver grabbed her by her hair and hit her in the face. He called her a "fucking white bitch." He beat her because she would not give him oral sex. He pulled her dress up and penetrated her. (18 RT 3888-3890.) She was able

to get out of the car and tried to run but he grabbed her, kicked her, and hit her in the face. The driver threw her keys away and told her she could walk. She lay in a roadway until someone stopped to help her. (18 RT 3891-3892.)

Rogers reported the incident to the sheriff and picked out her assailant from a photo lineup. (18 RT 3893.) She was able to identify various things about the car her assailant drove. (18 RT 3894.) At trial in this case, she identified appellant as the person who attacked her. (18 RT 3900.)

**4. Karen Ann Schaefer**

In 1976, Schaefer lived in Lancaster, California. She had been a foster sister of Christine Daniels, appellant's wife, and remained close friends with her. (18 RT 3903-3904.)

In December 1976, she saw appellant along the side of the road. Appellant told her that his car had broken down and she gave him a ride to his trailer, since she was on her way there to see Daniels. They watched television while they waited for Daniels to arrive at the residence, but after a while Schaefer told him that she was leaving. (18 RT 3905-06.) Christine was normally at home around that time[8/]. (18 RT 3915.)

According to Schaefer, appellant walked to the door and locked it. He told her, "You're going to be fucked by a nigger." Then he grabbed her hair and pulled her into the bedroom. (18 RT 3906.) She asked him not to do it, but he told her that she would remember this for the rest of her life. He warned her that if she told anyone they would find her body in the desert. Appellant slapped her a few times and bit her breast and thigh. She

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[8/] Schaefer testified that during the course of the events, appellant told her that Daniels was working late. (18 RT 3920.)

was scared for her life. (18 RT 3907-08.) He performed oral sex until he penetrated and raped her. The incident lasted 90 minutes. (18 RT 3907-09.)

Schaefer reported the matter to the sheriff's department but told them that the incident occurred outside the house. She thought that they would think that she got what she deserved if she told them otherwise. She did not tell them appellant's name because she was scared for her life, but a few weeks later came forward and identified appellant after she read in the paper about another rape that sounded like it might have been committed by him. (18 RT 3910-3911.) At trial in this case, Schaefer identified appellant as her assailant. (18 RT 3911.)

**D. The Prosecution's Penalty Case**

The prosecutor introduced court records to show that appellant had been convicted in 1971 of a misdemeanor assault with a deadly weapon. (22 RT 4671.) He also introduced evidence relating to the impact of Tana's death upon her family.

Helen Woolley, the victim's mother, testified that Tana was the eldest of her four children and sometimes acted as almost a mother to the younger three. Tana enjoyed dancing, poetry, tennis, and activities with the Rainbow Girls, a Masonic group. She was a class officer and a cheerleader in high school. (22 RT 4639-4641.) Helen identified a picture of Tana that was taken after she won the "Miss Rosamond" pageant at the age of 17. (22 RT 4637.)

At the time of her death, Tana was attending classes at Antelope Valley Community College. She was to have obtained an AA degree within two months and planned to attend Long Beach State College. She was

interested in special education. Tana had always wanted to help the underdog. (22 RT 4641-4642.)

Helen testified that Tana's death was "a living nightmare." (22 RT 4638.) It was hard for her to go out, particularly to weddings, and she saw her daughter's body every night before going to bed. (22 RT 4638-4639.) After Tana's death, Helen and her husband became very despondent. There was a cold feeling between them, although they eventually worked it out. Her other children did not stay in Rosamond. Her son, Hal, became bitter, distant, and sullen. (22 RT 4642-4643.)

Tana's father, Wayne Woolley, testified that the death tore the family apart. Tana was the kingpin of their family. (22 RT 4648.) After Tana's death, Wayne's children moved out of the area. Helen became a "basket case" and he thought he might lose her. (22 RT 4647.) Tana's brother Hal was never the same – he had the chance to play professional baseball but let it go and quit school. He carried a deep hatred for appellant. (11 RT 4649.)

Tamara Michelle Smith was four years younger than her sister Tana. (22 RT 4651.) Before Tana's death, Tamara was involved with cheerleading and a number of school activities. Afterwards, she had to get out of town. She did not go to school. She did not want to be in the house any longer. (22 RT 4651-4652.) Her father and mother became distant. Her father sometimes stayed in the motor home in front of the house and became withdrawn. He drew up a list of unreasonable rules and posted them in the hall by their bedroom. (22 RT 4653.) She moved out to live with her grandmother. (22 RT 4652.) When Tamara became a mother, she wanted to know where her daughters were all the time. Her children had cellphones and Tamara panicked if she could not reach them. (22 RT 4654.)

Taryn Cain was five years younger than Tana. (22 RT 4656.) Tana was her second mother. (22 RT 4660.) Everything had been perfect with her family until Tana was killed. After that, Hal became angry and was never the same. Her parents had many problems. Her father set rules that were hard to follow and often slept in the motor home outside the house. This situation lasted for a couple of years. (22 RT 4656-4657.) Taryn finished school and moved as soon as she could. She still only returns to Rosamond when she must. (22 RT 4658.) She had two children and wanted them to stay at home so that nothing would happen to them. Taryn called them if they were with friends, and if she could not find them, she went out looking for them. (22 RT 4659.)

Tana was two years older than Hal Woolley. Hal testified that Tana was like a mother to him, helping him with his homework, and never getting angry with him. After her death, Hal tried to hide his emotions and distanced himself from everyone. Tana's death made him angry and he wanted vengeance. He was isolated. Hal did not like returning to Rosamond. He just wanted to stay away. (22 RT 4661-4663.)

Sharon Sizelove, Tana's aunt, was 10 years old when Tana was born and frequently babysat her. Sharon testified that Tana's death affected everyone. (22 RT 4664-4666.) Sizelove's mother – Tana's grandmother – was devastated by the death and the effect it had on others. The anxiety hit her hard and she died within 10 years. (22 RT 4666.)

Sizelove had a lot of nightmares after Tana's death. She would wake up screaming. She had surgery the day of Tana's funeral and when she woke up there was a candy striper with long hair. Sizelove thought it was Tana and was devastated. (22 RT 4667.) Sizelove lost her job in a hospital after she went "ballistic" when somebody came up and grabbed her by the

neck. (22 RT 4667.) Tana's death was like something out of a horror book. The loss was beyond anything she could describe. (22 RT 4668.)

**E Appellant's Penalty Case**

**1. Gina Snowden**

Gina Snowden, appellant's sister, was a master sergeant in the Air Force. Appellant was the oldest of her 10 brothers. Five of her brothers have gone to prison. (22 RT 4737, 4739.)

For as long as Gina could remember, her father abused her mother.[9/] (22 RT 4745.) She had memories of altercations occurring between appellant and her father, some of which occurred before appellant moved out of the family house. (22 RT 4764.) Although some of her brothers left the area, appellant continued to live close by and stayed in their lives. (22 RT 4764.)

She particularly got to know appellant as an adult when she joined the military and was stationed at Mather Air Force Base near Sacramento, where appellant was living. (22 RT 4740.) Appellant went to school at night and took care of his son, Lucas, during the day while his wife, Ellen, worked. Appellant treated Ellen's daughter Rachel as if she were his own child. (22 RT 4742-4744.)

Gina was transferred to Germany after being stationed at Mather for five years. She came back to Sacramento yearly and stayed with appellant even though her parents had moved to the area. She was more comfortable with him. She maintained her home of record at appellant's house. (22 RT 4742-4743.)

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[9/] Gina testified vividly about the physical and vertbal abuse that she and her mother endured, although the violence increased after her older brothers, including appellant, moved out of the house. (22 RT 4746.)

Gina's father had medical problems and was confined to a wheelchair. Appellant was patient with him, driving him around, taking him to his house, and caring for him. She asked appellant how he could be so nice after the way their father had treated him. (22 RT 4643-45.) It made her look at herself and work harder to forgive her father. (22 RT 4746.)

After her mother had heart surgery, appellant took both parents in until they could find a facility that could care for her father. (22 RT 4578.) Their mother complained, but appellant just listened and told her that everything would be better. (22 RT 4758.)

Appellant was also supportive of Gina. He helped her when she had a professional crisis and did not know how she could go on. She did not want to let him down. (22 RT 4759.)

**2. Dan Snowden, Jr.**

Dan Snowden, Jr., was five years younger than appellant. He lived with appellant when they grew up and spent time with him as an adult in Sacramento. (22 RT 4775, 4783.)

The three older brothers sometimes tried to intervene when their father beat their mother, but they were shoved aside and told to go to their room. Appellant was beaten almost every week. His father cursed him while it happened, calling appellant an "MF" and an "ungrateful bastard." Afterwards, appellant sulked and was depressed. (22 RT 4777, 4779.)

His father made it obvious that appellant was not his biological son. (22 RT 4778.) Appellant was very proud of a plaque that he made that said "The Snowdens" on it. His father came into the bedroom when appellant and his brother Lenny were making too much noise, and hit appellant in the

leg with the plaque and broke it. Appellant was hurt physically, but more hurt over the broken plaque. (22 RT 4780.)

Appellant was present when his father hit his mother during a party. In response, their mother lashed out at his father and used a can opener to knock her husband's eye out. (22 RT 4782-4783.) The boys would talk about the fights and state that when they got older, they would make sure that their mother was never hit again. (27 RT 4783.)

Dan also spent time with appellant as an adult in Sacramento. (22 RT 4773.) Appellant often visited his parents in order to check on them and see if they needed anything. He would take them for dinner. His father was in a wheelchair and appellant took him outside. (22 RT 4774.) Appellant was a proud parent and grandfather. (22 RT 4775.)

**3. Kevin Snowden**

Kevin is appellant's younger brother. Kevin described their father as "vicious" and "out of control" when he beat appellant. (22 RT 4789.) Although their father beat other children in the family, appellant got it the worst. (22 RT 4789-4790.) When their father beat them, he would hit the children hard with his hand or use whatever was nearby – an extension cord, hose, or board. (22 RT 4792.) When his mother was beaten, appellant and Lenny got the younger children out of the room. Sometimes they stayed to try to stop the beating. (22 RT 4791-4792.)

**4. David Snowden**

David, appellant's younger brother, described watching his father beat both appellant and his mother. It often started with their father drinking. It took almost nothing to set him off. Something inside of him would snap and he went flying. He used whatever was around, but if he asked for a belt it could not be anything light; if he used an extension cord

he would double or triple it; he used a hose or a board if he had them. Appellant and the other children sometimes went to school with welts from their beating. (22 RT 4803-4804.)

Appellant and the other children at times tried to intervene when their father beat their mother. Some times appellant was successful; other times he was beaten instead. The children tried to run interference, believing that it was better that they be hit rather than their mother. (22 RT 4806.)

**5. Dr. Rahn Minagawa**

Dr. Rahn Minagawa was a clinical psychologist with specialties in forensic psychology and child and adolescent psychology. He also had expertise in the effects of domestic violence and child abuse. (22 RT 4812, 4814.)

Dr. Minagawa testified that studies have shown that domestic violence has a tremendous negative effect on a child and actually alters the child's developmental path. Children are supposed to develop attachments and morals, internal abilities to control themselves, but that path deviates with the presence of domestic violence. Children are much more at risk as a result. When the child gets older, problems may include substance abuse, as well as poor concentration and problems with academic performance. Victims of domestic violence also have more problems with relationships than other individuals. They often possess an underlying rage that leads to fights or self-mutilation. The child's brain pathway and physiology can change as a result of domestic violence. (22 RT 4821-4823, 23 RT 4871-4872.)

Dr. Minagawa also testified that when there are multiple children in the home, it is frequently the case that some children do remarkably well

and others do terribly. Research indicates that it is important to look at those who were targeted more frequently. Some children may not be the target at all, but were exposed to it. It is also important to consider that children enter the world with different strengths and weaknesses. Older children will often have more problems because they try to intervene. (22 RT 4826-4827.)

Dr. Minagawa stated that appellant's family was "a textbook case of domestic violence gone completely amok." (22 RT 4829.) Apart from the testimony presented in court, Minagawa learned that appellant was present when his father threw a knife at his mother – the knife missed appellant's mother but struck his brother David in the head. The police were called to try to calm the situation. Appellant's brothers and sisters also described hearing appellant pleading with their father to stop beating their mother, while trying to intervene on her behalf. The family members also witnessed their father repeatedly striking appellant, who frequently suffered welts and scars on his back and legs. (23 RT 4870.)

Dr. Minagawa testified that in most cases of domestic violence, he would expect to see alcoholism, difficulty in developing relationships, aggression, assaultive behaviors, and other problems. Some individuals can get back on the appropriate path. Therapy can help. Sometimes a partner will provide support to counter what a person has experienced in the past. (23 RT 4872-4873, 4875.)

Dr. Minagawa interviewed appellant's wife and family. Appellant's wife reported that he had never hit or slapped her. Appellant did not show symptoms such as possession of weapons, use of threats, drug use, or alcohol abuse. (23 RT 4875, 4876.) Appellant's stepdaughter, Rachel, reported that she was not treated differently from her brother. (23 RT

4877.) Dr. Minagawa administered some tests to appellant, but found no significant problems. Appellant did not exhibit the kind of behavior that might otherwise be expected in a victim of domestic violence. Appellant had shown himself capable of controlling himself and not committing acts of violence. (23 RT 4878-4879.)

### 6. Ellen Zuckman

Ellen Zuckman married appellant in 1983. She has a daughter, Rachel, who is not biologically related to appellant. They have a son, Lucas, together. (23 RT 4382-83.) After Lucas was born, appellant stayed home to care for him. When Lucas was old enough to attend pre-school, appellant worked part time and went to school to earn his B.A., which he received from Sacramento State University in 1992. (23 RT 4883-4884.)

When Ellen first met appellant, he enjoyed going out and dancing at the clubs, oftentimes without her. That changed after Lucas was born. Appellant went out less and less. Most of the time they went out together and it was generally for dinner rather than to dance at a club. (23 RT 4885.)

Appellant never hit her or forced her to do anything against her will. (23 RT 4886.) He does not treat Rachel any differently than Lucas.[10/] (23 RT 4888.)

### 7. Lucas Hazlett

Lucas Hazlett is appellant's son. At the time of trial, he was attending St. John's University in New York and planned to graduate in 2005. (23 RT 4903.) His father taught him the value of education and the importance of grades. He was never abused growing up, nor did he ever see his father hit his mother. Appellant loves him. (23 RT 4904-4906.)

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[10/] Appellant introduced numerous photos depicting his relationship with Lucas, Rachel, and his grandson Markel. (23 RT 4894-900.)

### 8. Rachel Foster

Rachel Foster is appellant's stepdaughter, but she considers him her "dad" because he took care of her, helped her with school, taught her how to take care of her hair, went to her games when she was a cheerleader, and was there for her each day. (23 RT 4916-4917.)

When Lucas was little, appellant stayed home to take care of him. Either parent would wake Rachel up and they ate breakfast together. Appellant took her to school and was at home when she returned. (23 RT 4911-12.)

She graduated from high school early and started attending college, but still had a curfew. She got married after completing her master's degree, but still saw her parents. She and her husband frequently drove to Sacramento to do laundry or take care of the cars. When her son, Markel, was one, they took him to see his grandparents. (23 RT 4913.) Sometimes appellant came to visit by himself. He helped out with grocery shopping, household chores, or taking care of Markel. (23 RT 4914.)

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## ARGUMENT

## I.

## THE TRIAL COURT ERRONEOUSLY FOUND THAT THERE WAS NO PRIMA FACE CASE OF DISCRIMINATION UNDER *BATSON V. KENTUCKY* AFTER THE PROSECUTOR USED HIS FIRST PEREMPTORY CHALLENGE TO STRIKE THE SOLE REMAINING AFRICAN AMERICAN FROM THE JURY

The discriminatory use of peremptory challenges to remove African American and other minority groups from a jury violates both the California and United States Constitutions. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79; Cal.Const., art. I, § 16 [right to jury drawn from representative cross-section of the community]; U.S. Const., 6th & 14th Amends. [equal protection clause].) Under state and federal law, the defendant has the initial burden of showing that peremptory challenges are being exercised for discriminatory reasons against a cognizable group. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-97.)

When a defendant believes the prosecution is exercising its peremptory challenges on the grounds of group bias alone, he must alert the trial court to the improper tactics, triggering the three-step analysis. First, the defendant must establish a prima facie case of discriminatory use of a peremptory challenge by the prosecution (step one). The prosecution must then provide a facially race-neutral explanation for the challenge (step two). Finally, if a facially race-neutral explanation is tendered, the trial court must determine whether the defendant has established purposeful discrimination by the prosecution (step three). (*People v. Wright* (1990) 52 Cal.3d 367, 399; *Batson v. Kentucky, supra*, 476 U.S. at pp. 96-98.)

To establish a prima facie case, a defendant must only show the use of a peremptory challenge raised an "inference of discrimination." (*Johnson v. California* (2005) 545 U.S. 162, 170.) This is not a high standard. The United States Supreme Court has repeatedly emphasized that a prima facie burden is low, describing it as "minimal" (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 506) and "not onerous" (*Texas Department of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253; see also *Johnson v. California*, *supra*, 545 U.S. at p. 170 [Court did not intend the first step to be "so onerous" that a defendant would have to persuade the judge on the basis of all the facts that the challenge was likely the product of purposeful discrimination]; *Price v. Cain* (5th Cir. 2009) 560 F.3d 284, 287 ["prima facie case to be simple and without frills"]; *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 512 [burden at the prima facie stage is low, requiring only circumstances raising a suspicion that discrimination occurred].)

Here, appellant made a *Batson* motion after the prosecutor used his first peremptory challenge to strike prospective juror Edwards (Juror No. 240410), the only remaining African American, from the jury.[11/] (17 RT 3720, 3727; see also 17 RT 3756 [court finds that there were no other African Americans remaining in the jury pool].) Appellant argued that dismissing the sole remaining African American was enough to establish a prima facie case of discrimination under *Batson*. (17 RT 3720, 3727.)

The prosecutor stated that he did not have to state his reasons for making a challenge unless the trial court found that there was a prima facie

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[11/] Immediately after using this single challenge, the prosecutor accepted the jury as constituted. (17 RT 3734.) The prosecutor used only three other peremptory challenges throughout the process of selecting the jury. (17 RT 3735, 3737.)

case of discrimination.[12] (17 RT 3722.) He maintained that it was "incumbent" upon the trial court to examine the record and its own memory to determine if there was a valid reason for him to have exercised a peremptory challenge. (17 RT 3722-23.) The trial court apparently adopted this analysis and believed that there was a "logical, rational reason why the District Attorney would excuse" the prospective juror, so it did not find that there was a prima facie case of discrimination. The court did not identify the reason that it had found that would defeat a prima facie case.[13] (17 RT 3726.)

At the close of the penalty phase, the trial court stated that it when it had made its ruling, it did not believe that there was an inference of discrimination based upon *both* this Court's rulings and the Ninth Circuit's then-recent decision in *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 [holding the strong likelihood test was impermissibly stringent under *Batson*].[14] (23 RT 4970.)

The trial court erred because it improperly focused on the third stage of the *Batson* analysis – whether the prosecutor had a valid reason for striking the prospective juror – rather than determining if appellant had established a prima facie case of discrimination. (*Paulino v. Castro*, *supra*, 371 F.3d at p. 1090.) The issue was not whether the trial court could come

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[12] Appellant agrees that a prosecutor is not required to state reasons to support a peremptory challenge unless the trial court finds that the defendant has established a prima facie case of discrimination. (*Hernandez v. New York* (1991) 500 U.S. 352, 358-359.)

[13] Appellant renewed this motion, and it was denied, after the jurors were selected. (17 RT 3756.)

[14] *Paulino* was filed on June 14, 2004, after the trial court had made its initial ruling.

up with a reason why the prosecutor might have exercised a challenge, but if there was a prima facie case of discrimination that required the court to determine the prosecutor's actual reasons for exercising the challenge. This Court should find that the prosecutor's use of his first challenge to excuse the only remaining juror of appellant's own race was enough to establish an inference of discrimination. Accordingly, the judgment must be reversed. (*People v. Motton* (1985) 39 Cal.3d 596, 608. [trial court's "error in finding that no prima facie case had been established [under *Wheeler/Batson*], and in failing to require the prosecutor to justify his challenges . . . is reversible per se"].)

### A. This Court Should Not Give Deference to the Trial Court's Ruling

This Court generally employs a deferential standard of review when a trial court does not find a prima facie case of discrimination:

> [W]hen a trial court denies a *Wheeler* motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire. [Citations.] As with other findings of fact, we examine the record for evidence to support the trial court's ruling. Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with "considerable deference" on appeal. [Citations.] If the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question, we affirm.

(*People v. Howard* (1992) 1 Cal.4th 1132, 1155.)

Deference is not required, however, when a court bases its decision on an incorrect legal standard. (*People v. Howard* (2008) 42 Cal.4th 1000, 1017 [independent review adopted when it was not clear that the trial court used the correct legal standard when ruling on *Batson* claim]; *Paulino v. Castro*, *supra*, 371 F.3d at p. 1090 [court of appeal employed incorrect legal standard requiring court to review *Batson* claim de novo]; *United States v.*

*Singer Mfg. Co.* (1963) 374 U.S. 174, 195 [where trial court's finding "derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law"].)

Here, the trial court explained that it had relied upon both state and federal law when it had found that appellant did not establish a prima facie case of discrimination. The trial court stated that at the time it had not believed that there was an inference of discrimination. (23 RT 4970-4971.) This did little to clarify the standard that the trial court used. At the time of appellant's trial, this Court had ruled that the requirement that a defendant show a"strong likelihood" of discrimination was the *same* as the *Batson* standard for a "reasonable inference" of discrimination. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1313.) Under this decision, a defendant was required to show that it was "more likely than not" that a prosecutor improperly exercised a peremptory challenge. (*Id.* at p. 1318.)

It was only after appellant's case was tried that the United States Supreme Court ruled that these tests are not the same, and California had adopted a stricter standard than permissible under *Batson.* (*Johnson v. California*, *supra*, 545 U.S. at p. 173.) During appellant's trial, the trial court was bound to follow this Court's ruling in *People v. Johnson*, and would have incorrectly equated the federal and state standards as being the same. Therefore it surely required evidence establishing that discrimination was "more likely than not" before an inference of discrimination could be established. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 [lower courts must follow this Court's decisions].) This Court cannot rely upon the trial court's ruling and should review the issue de novo.

De novo review is also appropriate because this Court must "resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on the basis on race. (*People v. Cornwell* (2005) 37 Cal.4th 50, 73.) Here, the trial judge did not specify the exact reason why it denied appellant's motion, only that it believed that the prosecutor had an unidentified logical or rational reason. This is not a sufficient basis to establish any factual finding upon which the trial court's conclusion rests. This Court should therefore conduct an independent review to determine whether appellant established a prima facie case of discrimination. (See *Turner v. Marshall* (9th Cir.1995) 63 F.3d 807, 814, fn. 4 ["Although we normally give great deference to a trial court's factual findings regarding purposeful discrimination in jury selection, this deference applies to the court's assessment of the prosecutor's state of mind and credibility. . . . Because the trial judge made no inquiry into the prosecutor's reasons for excluding the African-American venirepersons, we need not defer to the judge's conclusory determination that there was no discrimination"].)

### B. The First Step of the *Batson* Inquiry Should Not Focus on Whether a Court Believes That a Prosecutor Had a Reason for Striking the Prospective Juror

The trial court found there was no prima facie case of discrimination because it believed that the prosecutor may have had a logical or rational reason for striking Edwards from the jury panel. (17 RT 3726.) This Court has adopted a similar approach in cases where it has found that a prima facie case of discrimination was not established if there were "obvious race-neutral" grounds for striking a particular juror. (See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 643; *People v. Davis* (2009) 46 Cal.4th 539, 584.) This analysis does not comport with the requirements for determining

whether a prima facie case is established under *Batson*. Indeed, no United States Supreme Court decision supports the view that even an "obvious" race-neutral reason appearing in the record will defeat a prima facie showing.

The United States Supreme Court has emphasized, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. [Citations.] The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Johnson v. California*, *supra*, 545 U.S. at p. 172, citing *Paulino v. Castro*, *supra*, 371 F.3d at p. 1090 ["it does not matter that the prosecutor might have had good reasons". . . . "what matters is the real reason" jurors were stricken]; *Holloway v. Horn* (3d Cir. 2004) 355 F.3d 707, 725 [speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike].) These concerns are the basis for the entire *Batson* analysis. Thus, the Supreme Court has made clear that a court's opinion of the reasons underlying a strike cannot substitute for a prosecutor's actual reasons. (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 252 [*Batson* "does not call for a mere exercise in thinking up any rational basis" that a prosecutor might have had for a strike].)

This Court has interpreted *Johnson* to refer only to "the considerations applicable at the third step of the *Batson* inquiry, *after* a prima facie case has been established." (*People v. Lancaster* (2007) 41 Cal.4th 50, 76, italics in original.) This interpretation unduly restricts *Johnson's* meaning. As the two opinions cited by *Johnson* reveal, *Batson* was designed to avoid speculation at every step of the process. *Paulino v.*

*Castro*, *supra*, 371 F.3d 1083, is a first-step case that emphasized the prosecutor's *real reasons* for striking prospective jurors. *Holloway v. Horn*, *supra*, 355 F.3d 707, is a third-stage case, which teaches that apparent or obvious reasons do not shed any light on a prosecutor's state of mind in striking a juror. (*Id.* at p. 725.) *Johnson* itself is the most significant case governing the first-step analysis, defining the standard that is used to determine whether a prima facie case of discrimination is established. There is no logical reason to believe that *Johnson's* concern with actual answers is limited to *Batson's* third step or that it allows possible reasons, unspoken by a prosecutor, to defeat *Batson's* purpose "to eradicate racial discrimination" in the jury selection process. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 85.)

In *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107, the defendant raised a *Batson* claim based on the statistical disparity in the way that the prosecutor used his challenges against African Americans. The federal district court and the California Court of Appeal rejected this claim because they had found that the record established that there were race-neutral grounds for the peremptory strikes. The Ninth Circuit emphasized that this finding addressed a different question than what was at issue. "Although their conclusion that the record supported such grounds for the peremptory challenges may have been reasonable" it did not address the concerns identified in *Johnson* and *Miller-El*. (*Id.* at p. 1108.) At bottom, the finding that there may be reasons for the challenge did "not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges." (*Id.* at p. 1109.)

The real reason for a challenge can only be determined after a prima facie case is established. At the first stage of the *Batson* inquiry, a court should consider whether the defendant established a prima facie showing of discrimination; only at the third stage should it consider whether the prosecutor had a reason that is sufficient to overcome the prima facie case. (*Paulino v. Castro*, *supra*, 371 F.3d at p. 1090.) In other words, a prima facie case is not measured by whether there might be a reason that refutes an inference of discrimination – that inquiry comes later and its ultimate resolution depends on the facts of a particular case.[15/] Accordingly, focusing on whether the prosecutor might have had a reason for making a challenge reverses the first and third stages of the *Batson* analysis.

This conclusion is also apparent because the focus at the first two stages of the *Batson* analysis concern the production of evidence rather than the persuasiveness of the constitutional claim. (*Johnson v. California*, *supra*, 545 U.S. at p. 171.) *Batson* "held that a prima facie case of discrimination can be made out by *offering a wide variety of evidence*, so long as *the sum* of the *proffered facts* gives "rise to an inference of discriminatory purpose." (*Johnson v. California*, *supra*, 545 U.S. at p. 169, citation and footnote omitted, italics added.) As this suggests, a

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[15/] Even assuming that there may be race-neutral reasons for removing a prospective juror, this merely leads to *Batson*'s third stage, in which the reasons are analyzed by the trial court. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; *Purkett v. Elem* (1995) 514 U.S. 765, 768 (per curiam) [the justification for a strike becomes relevant at the third step of the Batson proceedings].) The trial court could reject such reasons if it was believed that the prosecutor was lying or using the reasons as a pretext to remove jurors on account of their race or gender. Accordingly, good or obvious reasons for a challenge that might be on the record are not necessarily sufficient to overcome a claim of discrimination and should not be used to defeat a prima facie case at the first stage of the *Batson* inquiry.

defendant's prima facie burden should be "simple and without frills." (*Price v. Cain*, supra, 560 F.3d at p. 287.) The defendant presents facts and the court examines the evidence presented *by the defendant* to determine whether they create an inference of discrimination.

*Batson* itself suggested the kinds of evidence a trial court might consider at the prima facie stage, including whether "a 'pattern' of strikes against black jurors" and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." (*Batson v. Kentucky*, supra, 476 U.S. at p. 97.) Moreover, a "defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 96, quoting *Avery v. Georgia* (1953) 345 U.S. 559, 562.) The defendant "must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." (*Johnson v. California*, *supra*, 545 U.S. at p. 169.)

Thus, the proper focus of the prima facie stage is whether there are facts that give rise to an inference of discrimination, not whether there are reasons that might eventually defeat such a claim.[16/] The trial court's analysis, and any analysis that simply looks to reasons in the record that the prosecutor might have to challenge a particular juror is erroneous in

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[16/] In *Miller-El v. Cockrell* (2003) 5537 U.S. 322, 347, the Court concluded that the trial court committed "clear error" in finding no prima facie case. Yet nowhere in *Miller-El* did the Court mention any obligation on its part to scour the record to determine if the prosecutor might have had a good reason to strike jurors.

determining whether there was a prima facie case of discrimination. (*Williams v. Runnels*, *supra*, 432 F.3d at p.1109.)

### C. The Circumstances of the Prosecutor's Strike Created a Prima Facie Case of Discrimination

This Court should make its own determination about whether the record raised an inference of discrimination. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 79.) As discussed above, in making this determination, it does not matter that a prosecutor could have had a basis for striking the prospective juror, or whether this Court can find reasons in the record that might support a peremptory challenge. *Batson* focuses on the actual subjective intent of the party exercising the peremptory challenge and whether there was a prima facie case that should have compelled the trial court to inquire further into the reasons that a potential juror was struck. Thus, the only meaningful focus is whether there was an inference – a suspicion – that the prosecutor's strike was discriminatory. (*United States v. Stephens*, *supra*, 421 F.3d at p. 512.)

Appellant argued at trial that striking the last – and only – African-American prospective juror on the panel was enough to create a prima facie case of discrimination.[17/] (17 RT 3720, 3727.) Without question, striking a

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[17/] Appellant also argued that the prosecutor 's refusal to explain his reasons and the manner in which he questioned another African American supported his claim. (17 RT 3724-3725.)

The other African American in the venire, prospective juror McTeer, was struck for cause on the prosecutor's motion because of her aversion to looking at graphic images. (12 RT 2439.) McTeer had explained to the trial court that she did not like looking at graphic photographs, but could do so if she was chosen. She compared it to taking shots, something that she did not like but would do if necessary. (12 RT 2423.) Although the prosecutor later told the trial court for purposes of the voir dire that the photographs were not particularly gruesome and did not involve the actual

single person from the jury panel can give rise to a *Batson* claim. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 95-96; *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202, 1206; see *J.E.B. v. Alabama* (1994) 511 U.S. 127, 142 [striking individual juror].) Here, the prosecutor's strike of Edwards took on particular significance because she was the only African American remaining on the panel, in a case with an African-American defendant that was charged with racial issues – including acts that the prosecutor alleged were part of an underlying racial hatred of white women. (See 20 RT 4408 [prosecutor argues that appellant was seething with racial hatred].) Moreover, the prosecutor focused on Edwards, using his first challenge to strike her, accepted the jury thereafter, and ultimately used only four challenges altogether.

Appellant is entitled to rely on the fact that peremptory challenges are easy avenues for discrimination. (*Batson v. Kentucky*, *supra*, 475 U.S. at p. 96.) Thus, this Court has recognized that striking potential jurors of the same race as a defendant provides "some evidence permitting an inference of discriminatory excusal." (*People v. Taylor*, *supra*, 48 Cal.4th at p. 643.) The significance of such strikes is dependent on the racial composition of the venire panel. (See *United States v. Armstrong* (1996)

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autopsy (14 RT 2873), in questioning McTeer he portrayed the evidence as being "very graphic" and "violent." (12 RT 2430.) He asked her about what her reactions would be if she had to "intently examine" the photographs and were "forced" to look at a number of graphic photographs. (12 RT 3431.) McTeer was not the only juror to state that she avoided looking at graphic media or news portrayals (see, e.g., 9 RT 1977 [Black]; 10 RT 2180 [Galloway]), yet McTeer was the only one to be asked if she could intently examine very graphic and violent photographs or told that she would be forced to look at them. The manner in which the prosecutor portrayed the evidence in his voir dire indicates that he was focused on removing her and any other African-American juror.

517 U.S. 456, 468 [recognizing that the importance of a strike may differ "if the venire consists mostly of blacks or of whites"].) Accordingly, this Court should consider that the prosecutor's peremptory challenge took on added significance in light of the racial characteristics of the remaining members of the jury panel

In this case, the prosecutor's peremptory strike left appellant with an all-white jury in a case where race-based issues were part of the prosecutor's theory of the crime. This was enough to create an inference of discrimination, particularly when the prosecutor's challenge focused on the first juror at the start of selection and the prosecutor accepted the panel immediately thereafter. (See, e.g., *United States v. Chalan* (10th Cir.1987) 812 F.2d 1302, 1314 [exercise of a peremptory challenge to strike the last remaining juror of defendant's race is sufficient to raise an inference of discrimination]; *Pearson v. State* (Fla. Dist. Ct. App. 1987) 514 So.2d 374, 375-376 [prima facie case established when prosecutor struck only member of jury venire of the same race as defendant]; *People v. Portley* (Colo.Ct.App.1992) 857 P.2d 459, 464 [prima facie case of discrimination is established if no members of a cognizable racial group are left on a jury as a result of the prosecutor's exercise of peremptory challenge]; *Hollamon v. State* (1993) 312 Ark. 48 [846 S.W.2d 663, 666] [appellant "clearly" established prima facie case "when he pointed to a peremptory strike by the state dismissing the sole black person on the jury"); *State v. Rhodes* (Wash. Ct. App. 1996) 82 Wash.App.192, 201 [striking only African American on panel created a prima facie case of discrimination]; *Highler v. State* (Ind.

2006) 854 N.E.2d 823, 827 [removal of the only African–American juror raises an inference that the strike was racially motivated].[18/])

Even assuming that further inquiry was needed to determine whether a prima facie case of discrimination was established, any reason to the contrary must directly refute the inference raised by the prosecutor's focus in using his first challenge to strike the sole remaining African American from the jury. (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1109.) Speculation about an unidentified reason that the prosecutor may have had for striking a juror fails to refute the evidence of a prima facie case, both as a matter of law and under the specific facts of this case.

This case makes it clear that even a "logical reason" might not be so obvious upon closer examination. In her questionnaire, Edwards stated that she was concerned that a person might be accused, sentenced to death, and then proven innocent. (Questionnaire 8 CT 2395.) During her voir dire, Edwards told the trial court that these concerns would not influence her in making the penalty decision. (10 RT 2200.) She reiterated to appellant's counsel that she could vote for death under these circumstances. (10 RT 2201-02.) At one point, during the prosecutor's voir dire, Edwards said that

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[18/] Washington has apparently adopted a bright-line rule that a prima facie case of discrimination is established once the State exercises a peremptory challenge against the sole remaining venire member of the defendant's constitutionally cognizable racial group. (See *State v. Rhone* (2010) 168 Wash.2d 645, 658-59 (conc. opn. J. Madsen; dis. opn. of Alexander, J.) [majority of justices agree that rule should be followed in future cases]; see also *Commonwealth v. Harris* (1991) 409 Mass. 461, 466 [court recognizes that there is a "real risk" when the only member of a particular group is excluded from jury service, adopts rule that prima facie showing of discrimination is established when a defendant in a constitutionally protected group demonstrates that a prospective juror of the same group has been peremptorally challenged].)

she would "probably not" vote for death (10 RT 2204), but after the prosecutor questioned her further to clarify this statement, Edwards said that human beings will always have the possibility of innocence in the back of their minds, but that if she found appellant guilty of the crime beyond a reasonable doubt it would not be difficult for her to vote for death. (10 RT 2206-07.) Indeed, her concerns worked both ways. She also recognized that as human beings, "we have thoughts" that a particular defendant in a news report deserves death. (10 RT 2207.) It was apparent that she would resolve either belief in the same way: "I would look at the evidence." (*Ibid.*)

Edwards essentially stated that she wanted to be certain before imposing death. In this regard, she was not the only person on the panel who expressed concern about the certainty of the evidence before making this decision.[19/] Alternate Juror 214749 wrote in her questionnaire that "if you are going to take someone's life you better be 100% certain they deserve it." (16 Questionnaire CT 4825.[20/]) Neither the prosecutor nor the

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[19/] This Court has stated that comparative analysis is neither mandated or useful in a first-stage *Batson* case. (*People v. Dement* (2011) 53 Cal.4th 1, 21.) The Ninth Circuit, however, has recognized the importance of such review even at the initial stage. (*See Boyd v. Newland* (9th Cir.2006) 467 F.3d 1139, 1149 [noting that nothing suggests that comparative review is not appropriate to stage one claims].) Comparative review is useful here because it raises a question about the prosecutor's use of the strike, further indicating that a prima facie case is established so that the question can be resolved at the later stages of a *Batson* proceeding. It therefore is a valid factor that this Court should consider.

[20/] She also indicated that her husband was against the death penalty. Although she did not "necessarily agree," she expressed concern that the money spent to enforce the death penalty was not "worth it." (16 Questionnaire CT 4824.)

trial court questioned her about whether this would affect her judgment. (5 CT 1194-1204.) Similarly, juror 341527 wrote in her questionnaire that the death penalty "should be used only if the crime is without a doubt proven and the crime is disturbingly inhumane." (16 Questionnaire CT 4608.) The prosecutor questioned her only about whether she would have to be persuaded of appellant's guilt by a standard higher than proof beyond a reasonable doubt before she could vote for death. (15 CT 3197-3199.)

Although the prosecutor may have had a reason to determine if Edwards's concerns might affect her judgment, he also would have had equally strong reasons to question juror 214749 about whether her need for "100% certainty" would similarly affect her. He did not do so. Moreover, he had no more reason to assume that Edwards would be compromised than he had cause to believe that juror 341257 might require extraordinary proof – both juror 341257 and Edwards were concerned about the level of certainty, but answered that they could vote for death if they found appellant guilty beyond a reasonable doubt. Without further inquiry at the third stage of a *Batson* proceeding, it cannot be determined whether there were distinguishing factors that led the prosecutor to single out Edwards or if the prosecutor applied his challenge in a way that undermined seemingly legitimate reasons he might have had for striking her. (See *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 371 [seemingly race-neutral reasons were found to be pretextual]; *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830 [reasons not applied to white jurors were improper]; *United States v. Chinchilla* (9th Cir.1989) 874 F.2d 695, 699 [proffered reasons that would normally be held to be neutral explanations do not hold up to judicial scrutiny when measured against the record as a whole].) The record shows that there are more questions than answers, which in itself should be

sufficient to create a suspicion of discrimination that supports a prima facie case. (See *United States v. Stephens*, *supra*, 421 F.3d at p. 512.)

Under these circumstances, this Court should find that the inference raised by initially striking the only remaining African-American juror was sufficient to establish a prima facie case of discrimination. The trial court erred in ruling otherwise.

**D. The Judgment Must Be Reversed**

Appellant established a prima facie case of discrimination, a reasonable inference that the prosecutor engaged in the discriminatory exercise of peremptory challenges. A trial court's "error in finding that no prima facie case had been established [under *Wheeler/Batson*], and in failing to require the prosecutor to justify his challenges . . . is reversible per se." (*People v. Motton* (1985) 39 Cal.3d 596, 608; *People v. Hall* (1983) 35 Cal.3d 161, 171 [three years after the trial it was "unrealistic" to think that on remand the prosecutor could recall his reasons for challenging minority jurors, or that the court could "assess those reasons"]; *People v. Snow* (1987) 44 Cal.3d 216, 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].) Accordingly, the judgment in this case must be reversed.

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## II.

## EVIDENCE CODE SECTION 1108 AND THE INSTRUCTIONS GIVEN IN THIS CASE IMPROPERLY ALLOWED THE JURORS TO FIND THAT APPELLANT COMMITTED RAPE AND MURDER BASED ON A PREPONDERANCE OF THE EVIDENCE

Evidence of prior sexual misconduct, admitted under Evidence Code section 1108 and the instructions governing this evidence (CALJIC Nos. 2.50.01 and 2.50.02), allowed the jurors to find appellant was predisposed to commit sexual offenses, based on a mere preponderance of the evidence, and to use that finding to infer that appellant was guilty of the charged murder. The jurors were permitted to rely on that inference in order to resolve numerous hotly disputed factual issues at the heart of the guilt phase case. This weakened the prosecutor's burden to prove the offense beyond a reasonable doubt in violation of appellant's federal and state constitutional rights to a a fair trial guaranteed by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15), his right to an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

### A. The Admission Of Prior Offenses To Prove A Defendant's Propensity To Commit Such Crimes Violates Due Process Under The Fifth And Fourteenth Amendments and Appellant's Right to a Reliable Verdict Under the Eighth Amendment

Evidence Code section 1101 contains a broad prohibition on the admission of other crimes evidence to prove a defendant's general criminal disposition to commit a charged crime. Evidence Code section 1108 (hereafter "section 1108"), enacted in 1995, contains an exception to this

proscription. Under section 1108, the prosecution may, in any sexual offense case, introduce "evidence of the defendant's commission of another sexual offense." This evidence is admissible to prove the defendant's general criminal disposition, or propensity, to commit the charged crime. Appellant objected to the constitutionality of this statute. (3 CT 885-889.) This Court, however, has ruled that these provisions and the associated jury instructions are constitutional. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Reliford* (2003) 29 Cal.4th 1007, 1113.) This Court has found that the section applies to charges of first degree felony murder based on rape or burglary with the intent to rape, as was alleged in this case. (*People v. Story* (2009) 45 Cal.4th 1282, 1294.) These opinions allow a conviction based on a standard of proof less than beyond a reasonable doubt and radically alter historic practices, violating due process. This Court should reconsider its decisions and reverse the judgment in this case.

The Due Process Clause guarantees "fundamental elements of fairness in a criminal trial." (*Spencer v. Texas* (1967) 385 U.S. 554, 563-564.) The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 43-44; accord *Medina v. California* (1992) 505 U.S. 437, 445; *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913.) When a trial procedure is not in conflict with any express constitutional provisions, courts "look to those settled usages and modes of proceeding in the common and statue [sic] law of England, before the emigration of our ancestors . . . ." (*Murray's Lessee v. Hoboken Land & Improvement Co.* (1856) 59 U.S. 272, 276-277.) As the United States Supreme Court concluded more than a century ago, a practice "must be taken to be due process of law, if it can show the sanction of settled usage both in England

and this country . . . ." (*Hurtado v. California* (1884) 110 U.S. 516, 528; see also *Twining v. New Jersey* (1908) 211 U.S. 78, 101 ["consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government"]; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 25-40 (conc. opn. of Scalia, J.) [due process understood with reference to historic practices and traditions].)

This Court has acknowledged that section 1108 "radically changed" the way that evidence may be introduced. (*People v. Loy* (2011) 52 Cal.4th 46, 63, quoting *People v. James* (2000) 81 Cal.App.4th 1343, 1353, fn. 7.) Indeed, the courts of England and pre-Revolutionary America followed a categorical rule holding that character evidence was inadmissible when offered solely to prove criminal propensity. The English and American cases articulating and applying the general rule are legion. (See, e.g., *Hampden's Trial* (K.B. 1684) 9 Cob. St. Tr. 1053; *Rex v. Doaks* (Mass. Super. Ct. 1763) Quincey's Mass. Rpts. 90; *Makin v. Attorney General for New South Wales* (Cr. Cases Res. 1893) 17 Cox. Cr. L. 704 ["It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offense for which he is being tried"].)

Early United States Supreme Court decisions also rejected the use of criminal propensity evidence. (*Boyd v. United States* (1892) 142 U.S. 450, 458.) In *Michelson v. United States* (1948) 335 U.S. 469, the Supreme

Court noted that "courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt." (*Id.* at pp. 475-476.)

Courts throughout the United States also recognize this exact principle. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384 ["drawing propensity inferences from 'other acts' evidence of character is impermissible under an historically grounded rule of Anglo-American jurisprudence"]; *Lovely v. United States* (4th Cir. 1948) 169 F.2d 386, 389 [rule prohibiting introduction of other crimes evidence to prove propensity "arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence"]; *People v. Molineaux* (N.Y. Ct. App. 1901) 61 N.E. 286, 293-294 [the ban on propensity evidence is "universally recognized and [] firmly established in all English-speaking lands and is rooted in that jealous regard for liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Carta"].)

Indeed, this Court has itself recognized that "[t]he rule excluding evidence of criminal propensity is nearly three centuries old in the common law." (*People v. Alcala* (1984) 36 Cal.3d 604, 630-631; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 392 [rule excluding evidence of propensity derives from early English law and is currently in force in every American jurisdiction]. In short, for more than 300 years, the English common law and courts of this country have recognized a categorical rule excluding evidence of uncharged acts when offered to prove a defendant's general criminal disposition. To be sure, such evidence has long been admissible – in California and elsewhere – when offered to prove a fact other than

disposition to commit crime. (See Evid. Code, § 1101, subd. (b).) But it remains that for more than three centuries the uniform practice has been categorically to exclude other crimes evidence when offered to prove a defendant's disposition to commit the charged offense.

Admitting proposensity evidence under section 1108 for the purpose of showing that a defendant committed the charged crime violates the historical prohibition against using evidence of other crimes to prove disposition. Accordingly it violates the Due Process Clause of the federal constitution.

In *People v. Falsetta*, *supra*, 21 Cal.4th 903, this Court rejected a due process challenge to section 1108. After reviewing the historical evidence, *Falsetta* concluded that it was "unclear whether the rule against 'propensity' evidence in sex offenses should be deemed a fundamental historical principle of justice." (*Id.* at p. 914.) This Court reasoned that historically courts "have been considered more 'ambivalent' about prohibiting admission of defendants' other sex crimes in sex offense cases." (*Ibid.*) This was so because courts "permit admission of . . . sexual misconduct [for the purpose of showing] motive, identity, and common plan . . ." (*Ibid.*) Given the conclusion that this Court was unsure whether historical practice reflected a categorical exclusion of such evidence, this Court concluded that the limitations imposed on the admission of section 1108 evidence were sufficient to avoid offending whatever historical practice existed. (*Id.* at pp. 915-918.) The chief limitation to which this Court referred is the fact that trial courts have discretion to exclude propensity evidence under section 352. (*Id.* at p. 917 ["In summary, we think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge"].)

The *Falsetta* reasoning is flawed for three reasons. First, to the extent it relies on a conclusion that historical practice was "ambivalent" about excluding propensity evidence in sexual assault cases, it ignores that for more than a century this Court has consistently applied the rule against disposition evidence even in sexual offense cases. (See, e.g., *People v. Bowen* (1875) 49 Cal. 654, 655; *People v. Stewart* (1890) 85 Cal. 174, 175; *People v. Anthony* (1921) 185 Cal. 152, 157; *People v. Guerrero* (1976) 16 Cal.3d 719, 724.) In fact, the legislative history to section 1108 makes clear that the purpose of section 1108 was to change existing law on this issue. (See Report of Assembly Committee on Public Safety on AB 882, as amended May 4, 1995, p. 1 ["Current law in part bars the admission of evidence of other crimes or acts committed by the defendant when offered to show that the defendant has a disposition to commit sexual offenses, including child molestation"]; Assembly Third Reading of AB 882, as amended May 15, 1995, p. 1, [same].) There would be no need to change existing law unless there were historical prohibitions against the use of such evidence.

Second, although *Falsetta's* observation that evidence of prior sexual offenses has been allowed for reasons other than propensity – like motive, intent, identity or common plan – is true, it is beside the point. This fact does not say anything about the historical exclusion of such evidence for propensity purposes, nor does it demonstrate any widespread rejection of the general rule against propensity evidence. That propensity evidence was used in this case to allow jurors to infer that appellant committed the crime charged goes beyond any such use and implicates fundamental principles of how guilt is to be determined.

Finally, *Falsetta*'s conclusion that "section 352 provides a safeguard that strongly supports the constitutionality of section 1108" is unfounded. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 915.) Section 1108 alters the traditional balancing process of Evidence Code section 352 by establishing a presumption in favor of admissibility of prior sex offenses to prove disposition. (*People v. Loy*, *supra*, 52 Cal.4th at p. 62.) Because section 1108 makes prior sex offenses presumptively admissible, such priors may now be excluded under Evidence Code section 352 only if they are unduly prejudicial for some reason other than their tendency to prove disposition.

As this Court itself noted, propensity evidence has historically been "deemed objectionable, not because it has no appreciable probative value, but because it has too much." (*People v. Falsetta, supra,* 21 Cal.4th at p. 915.) Based on its "appreciable probative value," however, in addition to its presumption of admissibility, it is clear that prior sex offenses will only be excluded under Evidence Code section 352 in the rarest of circumstances. This cannot be considered an adequate "safeguard" against the admission of evidence that has traditionally been considered inherently prejudicial. (See *United States v. Burkhart* (10th Cir. 1972) 458 F.2d 201, 204 ["once prior convictions are introduced, the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality"].) Accordingly, a practice that admits other crimes evidence when offered to prove a defendant's disposition to commit the charged offense – even when

subject to Evidence Code section 352 – violates due process and renders appellant's conviction unreliable.[21/]

### B. Evidence Admitted under Section 1108 Should Be Subject to the Same Evidentiary Standards as Other Evidence Admitted to Establish Guilt

Even assuming that Evidence Code section 1108 is constitutional, the instruction given relating to it allows an inference of guilt to be used by the jurors based on a mere preponderance of the evidence. (CALJIC No. 2.50.01.) Appellant repeatedly objected on state and federal grounds to an instruction based upon the preponderance standard. (See, e.g, 17 RT 3673-3674, 3679, 3776; 19 RT 4169; 23 RT 5305.) The preponderance standard does not reflect the importance of the process necessary to determine whether an individual's character and propensity is such that jurors may infer guilt of the crime charged. It creates a different standard than is applied to other circumstantial evidence that is used to establish guilt and unconstitutionally diminishes the prosecutor's burden of proof in violation of due process and the requirements for a reliable verdict. (U.S. Const, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15; 16 &17; see *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [instructions may violate due process where they are "likely to cause an

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[21/] To the extent that the constitutionality of section 1108 controls resolution of this issue, it is being raised here to preserve appellant's rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be asserted again in order to preserve the issue for federal habeas corpus review]; *People v. Schmeck* (2005) 37 Cal.4th 240, 304 [claims that are presented to this Court to preserve them for review by the federal courts are deemed to be fairly presented if raised in straightforward manner and accompanied by brief argument].)

imprecise, arbitrary or insupportable finding of guilt"]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1044 [proper instructions are essential to reliability under the Eighth Amendment].)

### 1. Proof beyond a reasonable doubt of facts that allow jurors to infer that a defendant committed a charged crime is necessary to protect fundamental interests and reduce the risk of erroneous judgments

In enacting Evidence Code section 1108, the legislature clearly regarded facts relating to past sexual crimes to be significant enough to create an exception to long-standing historical practices barring such evidence. The statute, however, does not specify the burden of proof that must be applied by jurors before evidence of other sexual offenses may be considered.

The CALJIC committee adopted a standard that allows jurors to infer that defendants have a particular character for committing sexual offenses based on a preponderance of the evidence. As given in this case, CALJIC No. 2.50.01, stated in pertinent part,

> Evidence has been introduced for the purpose of showing the defendant engaged in a sexual offense on one or more occasions other than that charged in this case. [¶] If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a predisposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that the was likely to commit and did commit the crimes of which he is accused.
>
> However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine that an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with

> all other evidence, in determining whether the defendant had been provided guilty beyond a reasonable doubt of the charged crime. . . .

(5 CT 1203.)

In addition, the trial court instructed the jurors under CALJIC No. 2.50.1:

> Within the meaning of the preceding instruction, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses other than that for which is on trial.
>
> You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other sexual offenses.
>
> If you find other sexual offenses were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged or any included in crime in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.

(5 CT 1204.) These instructions require jurors only to find that it is more likely than not that a defendant committed acts demonstrating a particular character. (*People v. Johnson* (2008) 164 Cal.App.4th 731, 738 [preponderance standard means "more likely than not"].) Due process, reflecting our standards of fundamental fairness, and the need for reliability in a capital trial, demand more. (Cal. Const, art. I, §§ 7, 15, 16; U.S. Const., 8th & 14th Amends.)

The function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." (*In re Winship* (1970) 397 U.S. 358, 370 (conc. opn. of Harlan, J.).) The standard of proof that is used communicates the degree of confidence that is

expected when a factual determination is made. (*Ibid.*) Preponderance of the evidence is the lowest standard that is used, a "mere" finding indicating the minimal concern that our society has over particular outcomes. (*Addington v. Texas* (1979) 441 U.S. 418, 423.) In contrast, proof beyond a reasonable doubt serves to protect important interests, even without explicit constitutional requirements, so it is deemed necessary to "exclude as nearly as possible the likelihood of an erroneous judgment." (*Ibid.*) It is thus, the prime instrument that is used to prevent factual error. (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The magnitude of the issues involved in this instruction – an inference that a particular defendant has committed the crime charged based on his or her character – is far more than a minimal concern. As discussed above, this Court has recognized the danger with propensity evidence is that it "proves too much." (*People v. Falsetta, supra,* 21 Cal.4th at p. 915; see also *Jones v. State* (Fla. Dist. Ct. App. 2006) 944 So.2d 533, 536 [recognizing risk of prejudice that a conviction will be based on character or propensity rather than proof of the charged offense].) Accordingly, evidence of a defendant's character and disposition was historically prohibited in recognition of a "fundamental demand for justice and fairness." (*Lovely v. United States*, *supra*, 169 F.2d at p. 389; see also *People v. Molineaux*, *supra*, 61 N.E. at pp. 293-294 [ban on propensity evidence "is rooted in that jealous regard for liberty of the individual which has distinguished our jurisprudence from all others" and is the "product of that same human and enlightened public spirit" that required proof of guilt beyond a reasonable doubt].)

The inference of guilt permitted under the instructions is critically important to the ultimate resolution of the trial. It would be a rare juror

who would acquit a defendant after having found that he or she committed sexual crimes that lead to an inference of guilt in the crime charged. The use of disposition evidence cannot but increase the risk of an erroneous judgment unless it is based on the firmest foundation. Thus, the fundamental importance that historically has been given disposition evidence, and the potential for erroneous judgments that such evidence entails, should compel more than a preponderance standard. This Court must adopt a standard of proof designed to protect fundamental demands for justice and fairness: proof beyond a reasonable doubt of the underlying facts used to establish the kind of character and disposition that provides an inference of guilt.

### 2. The disparity in the standards of proof used in appellant's trial likely confused the jurors

In allowing an inference of guilt based on mere preponderance of the evidence, CALJIC No. 2.50.01 singles out propensity evidence from circumstantial evidence that is used to establish guilt. Appellant's jurors were instructed that circumstantial evidence allowing inferences of guilt must be proven beyond a reasonable doubt. As defined under CALJIC No. 2.00, circumstantial evidence is "evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn." (4 CT 1169.) It is the prosecution's burden to prove such facts beyond a reasonable doubt: "before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." (4 CT 1170; CALJIC No. 2.01.) The disparity between this instruction and CALJIC 2.50.01, allowing facts shown by a preponderance of evidence to be used to show that the defendant committed the charged crime, is apparent.

Several courts that initially examined the instructions noted the possibility for confusion that these two standards entail. In *People v. Frazier* (2001) 89 Cal.App.4th 30, the court explained that the inconsistencies between these standards created a direct conflict:

> Adding to the jury's confusion is the inconsistency in the standards of proof described by the instructions. CALJIC No. 2.50.01, permitting the jury to infer defendant's guilt from his prior sex offenses, was immediately followed by CALJIC No. 2.50.1, which told the jury to apply the preponderance of the evidence standard to determine whether defendant had committed the prior offenses. CALJIC No. 2.01, on the other hand, told the jury each fact supporting an inference essential to establish guilt must be proven beyond a reasonable doubt. If the jury believed the propensity evidence was essential to establish defendant's guilt, then CALJIC No. 2.01 was in direct conflict with CALJIC No. 2.50.1.

(*Id.* at pp. 36-37; see also *People v. James, supra,* 81 Cal.App.4th at p.1358 ["the jury would have been confused by the different standards of proof prescribed by these instructions"].)

This Court, however, has ruled that cases upholding the instructions on disposition have the "better view" over *Frazier* and *James*. (*People v. Loy*, *supra*, 52 Cal.4th at pp. 74.) In so doing, the Court distinguished between the inference of guilt based on disposition and facts of the charged crime that must be proved beyond a reasonable doubt. (*Id.* at p. 75.) This opinion should be reconsidered because that distinction in itself is the source of the confusion. It would be difficult for jurors to separate the facts that are introduced to prove that a defendant has the disposition to commit a crime, and "did commit" it, from guilt established through other facts that must be established beyond a reasonable doubt. The underlying facts under either standard may not be sufficient, in themselves, to prove guilt, yet one set of facts need only be shown to be true based on a preponderance

standard, while the other set of facts is held to proof beyond a reasonable doubt.

In this case, the prosecutor argued to the jurors that the evidence admitted under section 1108 was sufficient to establish guilt: "No coincidence could be that fantastic that a serial rapist would live next door to a woman who was murdered during the course of a rape or attempted rape, but yet somebody else could be responsible. We really need to know nothing more." (20 RT 4408-4409.) The assertion that nothing more than the evidence of sexual misconduct was needed marks it as evidence essential to establishing guilt, which otherwise would need to be proved beyond a reasonable doubt. If the prosecutor could not distinguish between the inference of guilt based on a preponderance of evidence and its actual finding beyond a reasonable doubt, it is unreasonable to expect that the jurors could apply the standards any differently. (See *United States v. Sherlock* (9th Cir. 1989) 865 F.2d 1069, 1080 [prosecution's improper use of evidence removed "any reasonable expectation" that the jury would limit their consideration to proper purposes].) This Court should therefore reconsider its opinions and hold that the underlying facts introduced under section 1108 must be proved beyond a reasonable doubt.

### 3. The disparity in the standard of proof affected the jurors' penalty phase deliberations

The confusion between the preponderance standard and the beyond-a-reasonable-doubt standard extended to the penalty phase of appellant's trial. The same facts that allowed jurors to conclude that appellant committed the sexual offenses at guilt under a preponderance standard had to be proven beyond a reasonable doubt during the penalty phase when considered under Penal Code section 190.3, factor (b). The confusion between judging facts that had already been considered under a lesser

standard and applying the higher standard during the penalty phase increased the risk of an arbitrary or erroneous penalty judgment.

In *People v. Williams* (2010) 49 Cal.4th 405, this Court recognized that disparities in the way that evidence is treated during the penalty phase can be confusing for jurors. It held that there was no reason to distinguish the standard of proof governing uncharged crimes admitted in aggravation under Penal Code section 190.3, factor (b), from evidence of past felony convictions admitted under factor (c).

> Upon reflection, we have concluded that as a matter of state law, juries should be instructed upon the beyond-a-reasonable-doubt standard as to section 190.3, factor (c) evidence. The applicability of this standard is well settled with respect to evidence of prior violent criminal activity admitted pursuant to section 190.3, factor (b), and in our view juries may find it difficult to understand the technical distinction between the two types of evidence of prior criminality and to apply differing standards to them.

(*Id.* at p. 459.)

A similar likelihood of confusion is shown in the way that the specific incidents introduced under section 1108 during the guilt phase were used at penalty. During the guilt phase, the jurors only had to find that the underlying facts were true based on a preponderance of the evidence. In the penalty phase, jurors were instructed to consider all the evidence that had been received during both phases of the trial. (23 RT 4925, 4932; 5 CT 1335, 1349 [CALJIC Nos. 8.84.1, 8.85].) The jurors also were instructed that evidence that was introduced to show that appellant committed other criminal acts involving force or violence had to be proven beyond a

reasonable doubt[22]. (23 RT 4934-4935; 5 CT 1352 [CALJIC No. 8.87.) Accordingly, jurors were required to analyze the same piece of evidence that they had previously found to be true by a preponderance standard and then later determine whether it was true beyond a reasonable doubt. Having found appellant guilty of the charged crime based at least in part upon the evidence admitted under section 1108, making any distinction in determining whether the same evidence met the higher standard of proof before it could be considered in aggravation would be a herculean task under any circumstance. "Discrimination so subtle is a feat beyond the compass of ordinary minds." (*Shepard v. United States* (1933) 290 U.S. 96, 104.)

Appellant's jurors were faced with a direct disparity in the way that the section 1108 evidence was used at guilt and at penalty, with little to clarify the specific acts could only be considered during the penalty phase if they were proven beyond a reasonable doubt. Accordingly, this Court should find that applying two different standards of proof to the same factual evidence created a likelihood of confusion affecting the penalty deliberations in violation of due process and Eighth Amendment requirements.

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[22] The trial court did not list the specific criminal acts that were being alleged as aggravating evidence. (23 RT 4834; 5 CT 1352; see *People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 19 [to avoid confusion as to which crimes that are alleged under factor (b), the prosecutor should request an instruction enumerating the specific crimes at issue].) The prosecutor, however, used the evidence admitted under section 1108 as part of his closing argument. (23 RT 4939-4940, 4942.)

### C. The Instructions Unconstitutionally Allowed Jurors to Infer that Appellant "Did Commit" the Crime Charged

Proof beyond a reasonable doubt is the cornerstone of our criminal law. Indeed, the Due Process Clause of the Fourteenth Amendment protects a defendant from being convicted except upon proof 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 Sixth Amendment right to a trial by jury also requires that all facts necessary to constitute an offense be found by a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 483-484; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Jury instructions violate these constitutional principles if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof" less than beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6, 22.) At bottom, any jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence." (*Cool v. United States* (1972) 409 U.S. 100, 104.)

The instruction on the inference of guilt based on disposition to commit sexual crimes in CALJIC No. 2.50.01 (2002 Rev.), as given in this case, lessened the prosecutor's burden of proof by allowing the jurors to infer appellant's guilt based upon his character. The jury was told that the prosecutor only had to prove the other crimes evidence by a preponderance of the evidence. From this predicate fact, the jury was permitted to infer criminal disposition. And from criminal disposition the jury was permitted to infer that appellant "was likely to commit and did commit" the charged offense. This is an irrational inference because disposition relates "directly to the defendant's character" and raises "no rationale inference of any

elemental fact [in connection with the charged offense], much less an inference of guilt." (*People v. James*, *supra*, 81 Cal.App.4th at p. 1356.) Appellant acknowledges that Court has upheld the instruction, finding that *James* and similar cases questioning the inference of guilt did not have the "better view." (*People v. Loy*, *supra*, 52 Cal.4th at pp. 74; see also *People v. Reliford*, *supra*, 29 Cal.4th at p.1016.) These decisions should be reconsidered as a matter of law and under the facts of this case.

In *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, the Ninth Circuit found that a conviction based on a similar jury inference violated the right to a jury trial based upon proof beyond a reasonable doubt. The 1996 instruction at issue in *Gibson* contained the same language as that which was used in the present case:

> If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.

(*Id.* at pp. 821-822.) The court found that this particular wording was unambiguous and that "the burden of proof the instructions supplied for the permissive inference was unconstitutional." (*Id.* at p. 822; see also *Mejia v. Garcia* (9th Cir. 2008) 534 F.3d 1036, 1043 [same].[23/]) .

Under the CALJIC 2002 revision, given in this case, cautionary language was added to the instruction stating that the inference was not

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[23/] *Gibson* found that the error was structural, not requiring harmless error review. (*Id* at pp. 824-825.) That portion of the opinion was overturned in *Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 866 [finding that structural error is not applicable under *Hedgpeth v. Pulido* (2008) 555 U.S. 57 (per curiam)].)

sufficient, in itself, to prove guilt beyond a reasonable doubt. Despite this language, the jury was still told that they may use the facts of prior sexual offenses to infer the fact that the defendant committed the crime charged. (5 CT 1203.)

In *People v. James*, *supra*, 81 Cal.App.4th 1343, one of the initial state courts to review the instructions recognized the problem inherent in this formulation. It noted that section 1108 established an exception to the rules excluding propensity evidence, but found that "it is *not* proper to instruct the jury that if it finds the defendant committed other similar offenses it may infer he was disposed to commit and did commit the current offense." (*Id.* at p. 1353, emphasis in original.) The appellate court noted that the cautionary language in the 1999 CALJIC revision, explaining that the inference of guilt was not sufficient in itself to prove the crime beyond a reasonable doubt, improved the previous instruction, but did not solve the underlying problem:

> We agree the revised instruction is an improvement. However, to the degree it still suggests that other offense evidence is relevant only to infer guilt from propensity, we believe the instruction simultaneously overstates and unduly limits the use of such evidence.

(*Id.* at p. 1357, fn. 8.) The court suggested that, at a minimum, the instruction be revised to eliminate the words "and did commit" from its language, which would remedy the issues it had found. (*Ibid.*)

As *James* recognized, the danger in the instructions given in this case is not simply that a juror will not know that the reasonable doubt standard applies to the final verdict, but that the inference that a defendant "did commit" the crime charged will reduce the prosecutor's practical burden of meeting this standard. Once a juror determines that a defendant actually

committed the crime, it would require extreme mental gymnastics not to believe that an accused is guilty beyond a reasonable doubt.

The prosecutor's argument below proves this very point, "No coincidence could be that fantastic that a serial rapist would live next door to a woman who was murdered during the course of a rape or attempted rape, but yet someone else could be responsible. We really need to know nothing more." (20 RT 4408-09.) The prosecutor invited the jurors to conclude that they really did not need to know anything more about appellant's guilt and sweep any doubts that they had from their minds. The portion of the instruction referring to proof "beyond a reasonable doubt" thus could not dispel the effect that the inference of guilt established.[24/]

A juror who reached the conclusion that appellant committed the crime charged under a preponderance standard would likely believe that any remaining doubt about appellant's guilt was not reasonable. Accordingly, the prosecutor's burden of proving his case beyond a reasonable doubt was unconstitutionally diminished. The resulting verdict

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[24/] In this respect, the limiting portion of the instruction is similar to the kind of limiting instructions that are held to be futile in the face of prejudicial evidence. (See *People v. Antick* (1975) 15 Cal.3d 79, 98, superceded on other grounds by constitutional amendment [a limiting instruction with respect to a uncharged crime calls for "discrimination so subtle [as to be] a feat beyond the compass of ordinary minds"]; *People v. Coleman* (1985) 38 Cal.3d at pp. 85-86 [limiting instruction could not dispel prejudicial effect of prior violence by the defendant]; *People v. Gibson* (1976) 56 Cal.App.3d 119, 130 [bluntly criticizing the "sophistry and lack of realism" in thinking that a limiting instruction "can have any realistic effect" on the jury's use of other crimes evidence; noting that "jurors are mere mortals"]; *Krulewitch v. United States* (1949) 336 U.S. 440, 453, conc. opn. of Jackson, J., [calling it "naive" to assume that "prejudicial effects can be overcome by instructions to the jury, [which] all practicing lawyers know to be unmitigated fiction"].)

in this case was unfair and unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

### D. CALJIC No. 2.50.01 Was Improperly Argumentative in Violation of the Sixth Amendment and Due Process Requirements

CALJIC No. 2.50.01 instructed the jurors that they could use past sexual offenses to infer appellant's disposition to commit sexual offenses and then to infer his guilt in the crime charged. (5 CT 1203.) This was an argumentative instruction that violated appellant's constitutional rights to a properly instructed jury, due process, and a reliable verdict. (Cal. Const, art. 1, §§ 7, 15, 16; U.S. Const., 6th, 8th, & 14th Amends.)

A presumption that is permitted under an instruction may not invade the province of the jury. In *Morissette v. United States* (1952) 342 U.S. 246, 275, the High Court stated that a "presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition." As applied in this case, CALJIC No. 2.50.01 did this very thing in violation of the Sixth Amendment.

Appellant's intent was directly at issue through the allegations of burglary, attempted rape, and felony murder. (See *People v. Montoya* (1994) 7 Cal.4th 1027, 1041 [intent required in burglary]; *In re Smith* (1970) 3 Cal.3d 192, 200 [intent required with attempt]; *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [intent to commit felony in felony murder].) The inferences permitted under the instruction invited the jury to use isolated facts of past sexual offenses to infer appellant's intent in the present case. Indeed, as the prosecutor argued, jurors could believe that appellant entered the victim's apartment intending to rape her because he was a "serial rapist." (See, e.g., 20 RT 4408.) By singling out inferences

that were to be drawn from the evidence, the instruction focused on the prosecutor's use of the evidence and improperly presented it to the jurors with the court's own imprimatur.

Under these circumstances, the instruction was improperly argumentative. (*People* v. *Sanders* (1995) 11 Cal.4th 475, 560 [trial court must refuse to deliver any instruction that is argumentative].) An argumentative instruction presents the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See generally, *People* v. *Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Argumentative instructions unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby, in effect, "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those which "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People* v. *Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People* v. *Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, the instruction that invited the jury to infer that appellant "was likely to commit and did commit" the crime charged was impermissibly argumentative. (5 CT 1203.) Even assuming that appellant's disposition to commit a sexual offense was properly before the jurors, the instruction singled out this evidence and invited the jurors to draw conclusions that appellant was guilty of the charged crime.

Structurally, the instruction was almost identical to a proposed instruction that this Court found to be argumentative in *People v. Mincey*, *supra*, 2 Cal.4th 408. There, the defendant sought instructions that told the jury:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense willful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.) This Court found that the "defendant sought to have the court invite the jury to infer the existence of his version of the facts, rather than his theory of defense." (*Id.* at p. 437.) The instruction at issue here similarly invited the jurors to make factual inferences that appellant entered the victim's apartment with the intent to rape and acted in accordance with that intent to commit the crime charged.

This Court has affirmed instructions that "properly advised the jury of inferences that could rationally be drawn from the evidence." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 128.) However, there is no discernable difference between an instruction that *properly* advises the jury of inferences that could drawn from the evidence and an argumentative instruction that "*improperly* implies certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137, emphasis added).

Although the instruction in this case advised the jurors that they were not required to infer appellant's guilt from the evidence, it nevertheless singled out matters favorable to the prosecution and instructed that jurors could use prior crimes to conclude that appellant had a particular disposition. In short, it focused the deliberations upon the prosecutor's version of the facts and permitted inferences leading the jurors to conclude

that appellant committed the crime in this case. This Court should find that the instruction violated appellant's constitutional rights to a properly instructed jury, due process and a reliable verdict.

**E. Reversal is Required**

Evidence admitted under section 1108 was vital to the prosecutor's case against appellant. As the prosecutor told the trial court, he needed to prove that appellant was a serial rapist in order to prove the likelihood that appellant committed this particular offense. The prosecutor thus regarded the evidence as being "highly relevant and critical" to his case. (16 RT 3547.)

The facts of this case bore him out. Although DNA evidence was used to link appellant to evidence connected with the crime, the jurors could have had serious questions about its reliability. There was no other evidence to link appellant to the crime. Indeed, as an African-American man, any hairs that appellant left would have readily stood out in contrast to what might have been expected to be in the victim's apartment, yet none were found. The prosecutor argued that the crime was committed after a struggle, yet no trace evidence or fingerprints were left anywhere at the crime scene. Appellant worked in a borax plant, which might have been a unique identifier given the prevalence of dust that this product engenders, but there was no evidence found in the apartment relating to borax. There was nothing in the rape kit or on the body of the victim that looked like it would be foreign to her, such as hairs that did not belong to her. (19 RT 4009.) In short, apart from the DNA, there was no other evidence on the bed, on the victim, or in the apartment that connected appellant to the murder.

At the time of the crime itself, the bedspread had been thoroughly inspected for trace evidence, yet no biological evidence was identified. (20 RT 4321-4323.) Twenty-two years later, the sperm on the bedspread was readily apparent in visual observations. (19 RT 4156, 4150.) Although sperm left on the bed sheet and other biological evidence had been subject to serious degradation, the DNA on the bedspread was easily obtained and was very strong, yielding results at eight of the nine loci that were examined. (19 RT 4101, 4105.)

Jurors could have concluded that the investigator's failure to identify biological evidence at the time of the crime, and the relative lack of degradation to the DNA, meant that it had been placed there long after the crime was committed. As appellant argued, if there are two houses painted in the same location – one house is bright and the other faded – common sense indicates that they were not painted at the same time. (20 RT 4462.) Jurors, however, could have dismissed any doubt about the reliability of DNA evidence strictly on the basis of the past sexual misconduct. In the prosecutor's own words, "We really need to know nothing more." (20 RT 4409.)

Moreover, the importance of the sexual misconduct evidence did not extend just to the homicide. The only evidence of a sexual nature concerning the crime was the semen on the bedspread that covered part of the victim's leg. The victim was not injured in any way consistent with a sexual attack. She was not bruised apart from the strangulation. (19 RT 4068-69.) There was no evidence of any foreign hair or other substance in the rape kit. (19 RT 4009.) There was nothing to establish when the semen was deposited or under what circumstances. Nevertheless, the jurors could have used appellant's alleged disposition as a "serial rapist" (20 RT 4408)

to conclude that whatever happened in the room was rape – that appellant did in fact commit the crime for which he was accused. Once this inference was established, any doubts about what had happened in the room would have been swept aside.

Given the ways that the inference of guilt affected the consideration of all of the evidence in this case, this Court can have no doubt that it did not affect the ultimate judgment. If the instructions are viewed simply as a matter of state law, it is it is reasonably probable that the result would have differed in the absence of this error. (*People v. Harris* (1998) 60 Cal.App.4th 727, 741; *People v. Watson* (1956) 46 Cal2d 818.) If viewed as a federal constitutional issue, the error cannot be proved to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is required.

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## III.

## THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF ALLEGED SEXUAL MISCONDUCT AND ERRONEOUSLY INSTRUCTED THE JURORS THAT THEY COULD MAKE PERMISSIVE INFERENCES ON THE BASIS OF THE ALLEGED SEXUAL OFFENSES

This Court has relied upon Evidence Code section 352 to safeguard Evidence Code section 1108 against federal and state due process concerns. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916.) In particular, this Court has emphasized that although trial courts no longer deem propensity evidence unduly prejudicial per se, there must be a careful weighing process.

> Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.

(*Id.* at p. 917.)

In applying these factors to this case, the trial court abused its discretion and allowed five acts of alleged sexual misconduct, involving four complainants, to be admitted against appellant. These acts were insufficiently related to the charged crime and did not show that appellant had the disposition to commit the type of offense at issue. As a result, the instruction given in this case (CALJIC No. 2.50.01) permitted the jurors to make unconstitutional inferences relating to appellant's disposition and

guilt. The trial court's errors violated appellant's Sixth Amendment right to a properly instructed jury, his Eighth Amendment right to a reliable verdict, and his Fourteenth Amendment rights to due process and fundamental fairness.

### A. The Evidence of Sexual Misconduct Should Have Been Excluded Under *Falsetta*

Appellant objected to the introduction of evidence of prior sexual misconduct that was alleged under section 1108, citing Evidence Code section 352 and associated constitutional provisions. (3 RT 845.) The trial court held a hearing under Evidence Code section 402, during which the alleged victims testified in substantially the same manner as they later did at trial. Following the hearing, appellant argued that the evidence should be excluded in its entirety, but if the trial court admitted the evidence, it should allow the incidents closest in time to the crime charged in this case. (16 RT 3542-3543.) The trial court reviewed the evidence, citing this Court's decision in *Falsetta*, and found that evidence of all five acts were admissible. (16 RT 3550-52.)

"Because evidence of other crimes may be highly inflammatory, its admissibility should be scrutinized with great care." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007; *People v. Huy Ngoc Nguyen* (2010) 184 Cal.App.4th 1096, 1115.) This Court should find that the *Falsetta* factors weighed against admission of each of the incidents alleged in this case.

#### 1. Admission of the evidence distracted jurors from their main inquiry

One of the important factors for a trial court to consider in determining the admissibility of evidence under section 1108 is whether admission of the evidence would distract the jurors from their main inquiry. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) Here, the trial court found

that the jurors would not be confused or misled by the evidence because the testimony from the four different 1108 witnesses was separate from evidence concerning the charged offense. (16 RT 3552.) However, the potential for distraction is not simply that the jurors might confuse the actual incidents. Rather, jurors could believe that if appellant had committed repeated sexual offenses he should be convicted of the present crime regardless of any doubts that they might have – as the prosecutor argued, the other sexual crimes were all that they needed to know. (20 RT 4409.) Moreover, jurors could believe that appellant should be punished for the present offense because he escaped punishment for the five alleged sexual assaults. The distinct likelihood of such confusion weighed against admission of the evidence. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 738 [past sexual offenses that were not tried as such were likely to confuse jurors]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [evidence of uncharged criminal conduct increased danger that jurors would confuse the issues by punishing defendant for past acts].)

**2. The past incidents were not sufficiently similar to the crime charged to warrant admission**

Under *Falsetta*, the similarity of past offenses to the charged crime is a factor that should weigh heavily in the balance. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917; *People v. Abilez* (2007) 41 Cal.4th 472, 502 [emphasizing the importance of this factor].)

This Court has analyzed claims pertaining to the admissibility of evidence under section 1108 in much the same fashion as it has claims under Evidence Code section 1101. (See *People v. Abilez, supra,* 41 Cal.4th, at pp. 501-502 [analysis of whether the crimes are similar applied to both evidentiary sections].) That is, before another offense can be admitted, it must share common features that are sufficiently distinctive so

as to support the inference that the same person committed both acts. (*Ibid.*) Accordingly, this Court has explained that it is the "pattern of conduct" for sexual crimes that provides evidence supporting an inference of guilt for a similar offense. (*People v. Story* (2009) 45 Cal.4th 1282, 1297.)

Although the analysis under section 1108 involves the weighing of a number of factors, the similarity of the past incidents to the charged offense is particularly important because it is what makes the alleged offenses relevant to the charged crime. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 989 ["defendant with a propensity to commit acts similar to the charged crime is more likely to have committed the charged crime than another"].) Indeed, if evidence is to be relevant under section 1108 it must show that a defendant is predisposed to engage in the same type of conduct that is charged. (*People v. Earle* (2009) 172 Cal.App.4th 372, 397-398.) Thus, the uncharged or untried acts of sexual misconduct must be substantially similar to the act for which the defendant is being tried. (See *Johnson v. Elk Lake School Dist.* (3d Cir. 2002) 283 F.3d 138, 156 [analyzing Federal Rules of Evidence, sections 413-415, which served as a model for the California statute].)

The trial court found that the uncharged or untried incidents of sexual misconduct involved Caucasian women, all but one in their early 20s, and that the victim was of similar age and race. (16 RT 3550.) Although true, these facts alone are not significant to show the kind of similarity that would make sexual misconduct relevant. (See *People v. Harris*, *supra*, 60 Cal.App.4th at p. 740 [trial court's finding that victims were Caucasian in their 20's or 30's was not important since the wide age group includes the majority of the victims of sexual assaults].) Indeed,

apart from this broad similarity, the incidents introduced in this case substantially varied from the charged crime, making it unlikely that appellant had a disposition to commit to commit the kind or rape and murder at issue.

Appellant had no prior relationship with Tana Woolley, as he did with three of the witnesses who accused him of sexual misconduct. Although appellant lived in an apartment that was within sight of Tana's unit, there was no evidence of any contact between them. Indeed, no trace evidence or fingerprints of appellant were found in Tana's apartment that might have established that the two had prior contact. In contrast, at the 402 hearing, Lenora Bennett stated that she knew appellant from a club where they occasionally danced and talked. (16 RT 3412-3413.[25/]) Karen Schaefer was good friends with appellant's wife and the alleged assault occurred in appellant's trailer, where he lived with his wife. (16 RT 3423, 3425.) Irene Tarbell was married to one of appellant's friends and a business associate. The first incident involving Tarbell occurred in appellant's home, when she came to collect money that appellant owed her. The second incident occurred in Tarbell's home, after appellant asked to come in for coffee. (16 RT 3484-3485, 3488.) The only accuser that did not have a prior relationship with appellant was Sharron Rogers. Even there, however, the incident occurred after she got into his car and they had driven together and talked politely for a period of time. (16 RT 3469.) In none of the incidents alleged under section 1108, then, did appellant attack a complete stranger.

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[25/] The facts used in this section are taken from the hearing conducted under Evidence Code section 402, which was used by the trial court to determine admissibility. Each witness testified in substantially the same way at trial.

Moreover, the facts alleged under section 1108 contrast with the present case. Here, Tana was killed by ligature strangulation. Twenty-two years after the crime, sperm was found on the bedspread that had been wrapped around her legs, but other than that there was no direct evidence of any attack apart from the murder itself. No foreign matter was found on Tana's body. There was no widespread bruising on her body. There was no medical evidence of a sexual attack or struggle. The perpetrator was focused on strangling the victim.

In contrast, Tarbell stated that during the first incident appellant made sexual advances, kissing her and removing her clothes, before there was brief penetration. After she struggled, appellant said that she must not really want to do this and stopped. (16 RT 3486.) During the second incident, Tarbell struggled during the penetration, but after 10 minutes or so, she clawed him with her fingernails and appellant got up and left. (16 RT 3490; see also 17 RT 3834 [trial testimony establishing that appellant left immediately after she dug into him].) These incidents do not show a propensity for the type of violent murder and brutality committed in this case.

Lenora Bennett stated that appellant held her, took off her panties, performed oral sex on her, and penetrated her. (16 RT 3417.) Bennett testified that appellant did not hit her. (16 RT 3820.) Afterwards, she spent some time in the van without any further violence.[26/] (16 RT 3419.) Again, the assault against Bennett showed a far different pattern of behavior than that which occurred in the present crime, and a far different level of force or violence.

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[26/] At trial, Bennett testified that the entire incident lasted several hours. (17 RT 3820.)

Karen Schaefer testified that appellant told her that she "was going to be fucked by a nigger." He forced her into the bedroom where he first performed oral sex on her, before switching positions. As part of the extended sexual contact, appellant bit her on the breast and the inside thigh but she was not otherwise hit or injured.[27] (16 RT 3426-3427.) This incident again bore little resemblance to the strangulation and the specific focus of the violence outside of a sexual act that marked the present case.

The attack on Sharron Rogers was the only incident that showed a level of violence that went beyond a sexual assault. At the 402 hearing, Rogers testified that appellant threatened her if she did not do as she was told; beat her when she refused to give him oral sex; slapped her in the face and kicked her. When Rogers got out of the car, he kicked her in the back and the side. Appellant drove off, leaving her by the side of the road. (16 RT 3461-3462.) Even with this violence, however, the attack was very different than the present crime. Appellant was alleged to have assaulted Rogers in order to have sex. There was a general level of violence associated with the assault upon her – beating, kicking, slapping the victim that left bruises and marks on her body. There was no evidence of such behavior in the present case, where the victim had no bruises apart from the strangulation and there was no direct evidence of sexual assault.

The prosecutor sought to portray appellant as a "serial rapist" who could be presumed to commit murder in the course of any type of sexual

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[27] At trail, Schaefer testified that appellant ended up penetrating her during the incident, which lasted around 90 minutes. (18 RT 3907-3909.)

assault.[28] (16 RT 354; 20 RT 4408.) The incidents that were introduced under section 1108, however, did not show a general propensity to commit any and all sexual assault and then go on to commit murder. Indeed, apart from the race and age of the victims, there were no distinguishing marks to identify the charged murder as being similar to the other crimes introduced under section 1108. In particular, the four incidents alleged by Tarbell, Bennett, and Schaefer were closer to "acquaintance rape" than they are to an unlawful entry and violent offense against a stranger.[29] If anything, the other assaults showed that appellant was not predisposed to enter a stranger's house to commit the specific type of crime alleged. This factor weighed heavily against admission of the evidence.

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[28] This case can be contrasted to others, such as *People v. Story*, *supra*, 45 Cal.4th at p. 1297, where this Court found that the defendant was a "serial rapist." In *Story*, the crimes were marked by distinctive conduct, four other assaults that "were quite similar in a number of respects to each other and to the crime of this case." (*Ibid.*) In each assault, the defendant entered an acquaintance's home at night uninvited, and proceeded to rape or attempt to rape the victim. The defendant used weapons or choked the victims, as was done in the charged crime. The specific pattern of conduct that this established made it likely that the defendant committed the crime. (*Ibid.*) Here, the distinctive conduct in the uncharged assaults make it unlikely for appellant to have entered the home of a stranger to commit a rape and murder.

[29] See *Deborah S. v. Diorio* (New York Civ. Ct. 1992) 583 N.Y.S.2d 872, 876 [defining "acquaintance rape" as physically or emotionally forced sexual intercourse from an assailant who was previously known].) It has been recognized that the traditional paradigm of rape, involving a violent "stranger attack" upon a victim, does not fit the pattern of most acquaintance assaults. (Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex* (2002) 35 Loyola L.A. L.Rev. 845, 865.)

### 3. The incidents posed a considerable burden to the defense

Under *Falsetta*, a court must weigh the burden on the defendant in defending against the uncharged offenses. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) Here, there were five separate allegations that occurred between 1973 and 1982. Although most of the incidents had been reported to the police, none had been taken to trial.[30/] (3 RT 847.) The remoteness of the allegations would have posed an enormous burden upon the defense, but there were additional factors that made some of the incidents particularly troublesome.

Appellant objected that the 1973 incident report regarding Irene Tarbell did not record what she said to the officer at that time, which prevented effective cross-examination. (3 RT 849.) Indeed, Tarbell could not remember when the first incident occurred, which would also make it difficult to investigate. (16 RT 3496-3497.) Most egregious, the police reports taken of the 1976 incidents, involving Sharron Rogers and Karen Schaefer, no longer existed by the time of trial. (3 RT 848.) Before trial, the prosecutor acknowledged that Rogers was not certain about her present identification of appellant. (3 RT 854.) Appellant stated that he believed that Rogers had been unable to identify the race of the perpetrator at the time of the attack upon her. (3 RT 857.) Yet at trial she readily identified appellant (who was the only African American in the courtroom) and testified that she had been shown a photo lineup when she reported the assault. (16 RT 3466, 18 RT 3893.) Without contemporaneous incident reports, it was impossible for appellant to defend himself against Rogers's

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[30/] The 1972 (Tarbell) and 1982 (Bennett) allegations were not prosecuted by the district attorneys; the 1976 allegations (Schaeffer and Rogers) were initially prosecuted but later dismissed. (4 CT 1065.)

allegations. Accordingly, the burden of defending against the uncharged and untried allegations weighed in favor of exclusion.

**4. The prejudicial effects of the testimony outweighed its relevance.**

Under *Falsetta*, the prejudicial effect of the evidence that is being introduced must be considered. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) This Court has explained that under section 1108 the evidence is not "intrinsically prejudicial" and does not require exclusion unless there is a probability of a substantial danger of undue prejudice, something that greatly outweighs the probative value of the defendant's disposition to commit sexual offenses. (*People v. Loy*, *supra*, 52 Cal.4th at p. 62.)

As discussed above, the evidence of predisposition was weak at best. There was no evidence to establish that appellant was predisposed to enter a stranger's house and commit rape. There was no evidence that appellant was predisposed to commit a murder, especially where there was no evidence that the victim had been sexually attacked, no trace evidence that might have shown that there was a struggle over sex, and no general physical assault apart from the strangulation. The charged offense was a far different crime than that which appellant was alleged to have committed in regard to the other incidents, and one that significantly reduced their probative value under section 1108.

Even assuming that there was minimal probative value to the accusations, it has long been recognized that disposition evidence may be prejudicial because it proves too much. (*People v. Falsetta, supra,* 21 Cal.4th at p. 915.) Here, that danger was heightened because the disposition evidence was used not only to prove that appellant committed a rape, but that he murdered. Evidence of sexual misconduct does not show that appellant was predisposed to murder, yet the jurors were invited to

make such a leap. As the prosecutor argued, if the jurors found that appellant committed rape in the past, they would believe that they needed to know nothing more to establish his guilt in the present case. (10 RT 4009.)

Moreover, if the jurors thought that appellant had escaped punishment as a "serial rapist" (20 RT 4408), they would be far more likely to ensure that appellant was punished for the charges that were before them. It is precisely this type of situation where the danger of prejudice is most acute. (*People v. Branch* (2001) 91 Cal.App.4th 274, 286 [evidence is prejudicial if it inflames the emotions of the jurors to create likelihood that it will be used for improper purposes].)

The danger in this case, then, is that disposition evidence likely was used far too expansively. Once jurors concluded that appellant was an unpunished serial rapist, they would put aside any doubts about the validity of the DNA evidence introduced in this case or to wonder why a rape or attempted rape committed in the course of a murder could be accomplished without some general bruising to the victim, some trace evidence on her body or in her apartment, and some direct evidence of sexual trauma. Under these circumstances, the prejudicial effect of the evidence admitted went beyond the narrow disposition that it might have established. This factor also weighed in favor of exclusion.

The factors that weighed in favor of exclusion were far more important than the remaining factors that were before the trial court. Accordingly, this Court should find that the trial court abused its discretion under state law and erred in allowing the evidence to be admitted under section 1108. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 741 [the inflammatory nature of the evidence, its lack of probative value, and the potential to confuse jurors outweighed factors favoring admission].)

### 5. The trial court should have excluded at least two of the alleged assaults

Even if this Court finds that the allegations under section 1108 were generally admissible, courts must consider "the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Appellant argued below that even if the trial court found that section 1108 permitted admission of appellant's other sexual offenses, it should at least exclude the 1973 assaults of Irene Tarbell and the 1982 assault of Lenora Bennett. Appellant contended that these incidents were the most remote, both in time and in probative value. (16 RT 3543.)

As discussed above, the assaults of Tarbell and Bennett were far different than the circumstances alleged in the charged crime. Both accusers were known to appellant. Neither was hit, beaten, or directly threatened with violence beyond the assault itself. Appellant abandoned the first assault against Tarbell when he realized that she did not want to have sex (17 RT 3828) and the second after she dug her fingernails into him (17 RT 3833-3834). The three uncharged sexual assaults bear more similarity with a type of "acquaintance rape" than they have with an unlawful entry and violent offense against a stranger.

Under these circumstances, the probative value of the Tarbell and Bennett assaults were particularly minimal. They were also further in time than the 1976 incidents and were not prosecuted by the district attorneys. These were significant factors that separated these allegations from the 1976 assaults. At bottom, they did not show appellant's disposition to commit the crime charged. Accordingly, the trial court should have granted appellant's request to at least exclude these allegations.

### B. The Instruction was Impermissibly Broad and Allowed Jurors to Make Unconstitutional Presumptions

CALJIC No. 2.50.01 instructs jurors that if they find that a defendant committed a prior sexual offense, they may infer that he or she had a disposition to commit sexual offenses. If jurors then find that a defendant had this disposition, they may infer that he or she was likely to have committed, and did commit, the charged crimes. (5 CT 1203.) The instruction thus establishes a two-step process: first to infer that a sexual offense creates a disposition to commit sexual offenses and then to infer that this disposition makes it likely for the defendant to have committed the crimes at issue. There were insufficient facts to support either inference. As given in this case, the instruction was impermissibly broad and allowed two irrational inferences in violation of appellants rights to a properly instructed jury, due process, and a reliable verdict. (Cal. Const. art. I, §§ 7, 15, 16, & 17; U.S. Const., 6th, 8th, & 14th Amends.)

An instruction allowing a permissive inference cannot stand unless there is a rational connection between the underlying facts and the inference that is permitted to be drawn. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) The rational connection required between a fact and permissive inference is not merely a connection that is logical or reasonable; it is a connection that is more likely than not.

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to follow from the proved fact on which it is made to depend.

(*Leary v. United States* (1969) 395 US 6, 36.) The constitutionality of a permissive inference therefore has to be determined with reference to the facts of the case. (*Ulster County Court v. Allen, supra*, 442 U.S. at p. 157.)

Here, the underlying facts did not show that it was more likely than not that appellant had the disposition to commit the type of crime alleged in this case.

It is evident that not every sexual offense creates a broad disposition to commit sexual offenses in general. As the CALJIC committee explains in the comment to CALJIC No. 2.50.01, the inferences permitted by the instruction turn on the facts at issue:

> [It] would seem that the predatory disposition established would have to be germane to the crime charged. A pedophiliac, for example, might likely commit sexual crimes against children. In the abstract, that person might seem an unlikely person to commit a forcible sex crime against an adult.

(Comment, CALJIC No. 2.50.01 (Spring 2011 ed.), p. 77.) Reviewing courts similarly have recognized that the uncharged crime must directly support the inference of the particular type of disposition that might be shown by the charged crime. (See *People v. Earle*, *supra*, 172 Cal.App.4th at pp. 397-398; *United States v. Guardia* (10th Cir. 1998) 135 F.3d 1326, 1328 [uncharged sexual offenses admitted to prove propensity must be similar to the charged crime].)

As discussed above (section A(2)), the evidence admitted in this case under section 1108 did not support a rational inference that appellant had the disposition to commit the specific type of sexual offense that was charged against him. That appellant may have forced sex upon acquaintances (Tarbell, Schaefer, Bennett) did not show that he entered the home of a stranger to commit rape and murder. That he was accused of assaulting Rogers, after he picked her up when she needed help and drove with her for a period of time, also did not establish the kind of disposition to enter the home of the victim in order to rape and kill. At bottom, it is not

"more likely than not" that a sexual attack upon an acquaintance, or someone known to appellant through other circumstances, created the disposition to rape and kill that was evident in this case. By equating a disposition to commit a specific type of crime with the disposition to commit the type of offense at issue in this case, the instruction unconstitutionally permitted irrational inferences. (*Leary v. United States, supra,* 395 US at p. 36.)

**C. Reversal is Required**

The erroneous evidence and jury instruction were essential to the verdict in this case. The prosecutor recognized the importance of the evidence admitted under section 1108 and argued that it was "critical" to his case: "The People need to prove that Mr. Hazlett is a serial rapist in order to prove that he committed this offense." (16 RT 3547.) Certainly, without it, the anomalies in the DNA evidence and the lack of trace evidence found around the victim or anywhere at the crime scene should have weighed heavily in any juror's deliberations. But the prejudice went beyond this. In admitting evidence of multiple sexual assaults that bore no similarity with the facts of the charged crime, and instructing the jurors that they could infer appellant's guilt from these assaults, the trial court allowed appellant to be portrayed as a serial rapist who was likely to have committed *any* sexual crime. Jurors likely concluded that appellant raped or attempted to rape the victim, regardless of the lack of forensic evidence introduced at trial. Thus, the evidence of other sexual crimes introduced at trial prejudicially proved "too much." (*People v. Falsetta, supra,* 21 Cal.4th at p. 916.)

Under state law, the evidence of other sexual crimes should have been excluded under the factors established in *People v. Falsetta, supra,* 21

Cal.4th at p. 916 and Evidence Code section 352. Appellant also had a federal due process right to evidence being excluded in accordance with these standards. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [due process interest in state procedural requirements].)

Moreover, federal due process guarantees require trial courts to ensure that prejudicial evidence that lacks probative value is excluded. (See *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972 [due process requires court to weigh prejudicial effect of evidence against its necessity]; *Lesko v. Owens* (3d Cir. 1989) 881 F.2d 44, 51-52 [same].) Even "mere" state evidentiary errors can violate federal due process if they render the fact-finding process fundamentally unfair. (*Ballard v. Estelle* ( 9th Cir. 1991) 937 F.2d 453, 456.) Without a rational connection between the evidence of disposition and the nature of the crime charged, the presumption that allowed jurors to infer guilt violated appellant's due process rights and Sixth Amendment right to a properly instructed jury. (See *County Court of Ulster County, N. Y. v. Allen, supra,* 442 U.S. at p. 157.) Under these circumstances, given the sweeping presumption of guilt that the jurors were allowed to make, this Court can have no confidence in the reliability of the verdict. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 [constitutional demands for reliability in capital case extends to guilt determination].)

Using state law standards, it is reasonably probable that the result would have differed in the absence of the trial court's errors. (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 741; *People v. Watson* (1956) 46 Cal2d 818.) Under federal constitutional standards, the errors cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) This Court should reverse the judgment against appellant.

## IV.

## THE TRIAL COURT IMPROPERLY ADMITTED THE DEATH CERTIFICATE AND TESTIMONY BASED UPON THE CORONER'S REPORT USED TO ESTABLISH THE TIME OF DEATH

The time of death was critical to this trial. In order to establish the time, the prosecutor relied upon the death certificate and testimony concerning the coroner's report. The trial court allowed the prosecutor to introduce the death certificate into evidence despite the fact that the doctor who prepared the certificate did not testify. Moreover, another pathologist testified about the time of death listed in the coroner's report, without first-hand knowledge of the procedures and methods used to obtain that estimate. These errors violated appellant's right of cross-examination for all testimonial evidence received under the Confrontation Clause and rendered the judgment against appellant unreliable. (U.S. Const, 6th & 8th Amends.)

### A. Factual Background

During his case-in-chief, the prosecutor introduced the testimony of Dr. Debra Hanks, a pathologist who worked on contract with Kern County. She reviewed the report that had been prepared by Dr. Ambrosecchia, the former coroner, who had since died. (19 RT 4600-4602.) From this report, she testified that the cause of death was ligature strangulation. (19 RT 4063.)

After the prosecution rested its case, appellant stated that he intended to make a motion under Penal Code section 1118.1 to dismiss the burglary allegation because the evidence presented at trial was insufficient to sustain a conviction. (19 RT 4198.) Appellant noted that at the time of the offense, the special circumstance of burglary required that the crime be committed during the nighttime (Former Pen. Code, § 190.2 (1978 stats.); CALJIC No.

8.84.5 (1977 rev.); 1 Supp. Ct. 224-225), yet no evidence had been offered to prove the time of death. The trial court then allowed the prosecutor to reopen his case to establish this crucial matter. (19 RT 4260.)

Dr. Hanks testified that she had reviewed the coroner's report and the photographs that were taken at the time of the autopsy. One of the photographs showed a wound that was consistent with a liver temperature test used to establish the time of death. (20 RT 4301.) She also reviewed the coroner's report that found that the victim's stomach was full of digested food (20 RT 4302), which suggested that the victim died within a few hours of eating. (20 RT 4311.) Dr. Ambrosecchia placed the time of death as between 11:00 p.m. and 1:00 a.m. She concurred with that opinion based on the information contained in the report. (20 RT 4303.)

On cross-examination, Dr. Hanks acknowledged that the coroner's report did not document the temperatures that were found as a result of the liver test. (20 RT 4304.) These numbers are used to estimate the time of death. (20 RT 4306.) Dr. Hanks had to rely on the coroner's procedures and judgments because she had no way of determining the actual numbers that were found. (20 RT 4308.) She did not know any of the numbers that were used to determine the time of death. (20 RT 4309.)

In addition to this testimony, the prosecutor introduced the death certificate, prepared by Dr. Richard Gervais, that listed the time of death as being about 11:30 p.m. (People's Exhibit No. 10.) Appellant objected to admitting that portion of the death certificate that concerned the time of death. (20 RT 4379.) Appellant objected that the death certificate lacked proper foundation. (22 RT 4377.) He also objected that the coroner's report, used to determine the time of death, was hearsay. (20 RT 4376.) The trial court found that the certificate could be admitted as a public

records exception under Evidence Code section 1281. (22 RT 4378-4379.) The trial court erred in its ruling.

### B. Admission of the Death Certificate Violated Appellant's Rights Under the Confrontation Clause of the Sixth Amendment

In *Crawford v. Washington* (2004) 541 U.S. 36, 68, the United States Supreme Court held that admission of testimonial evidence violates the Confrontation Clause of the Sixth Amendment unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination. The Court, however, did not spell out a definition of "testimonial evidence," leaving the exact parameters of its decision open. (*Ibid.*)

After *Crawford*, this Court found that scientific evidence, memorialized in a forensic report, is not testimonial and does not fall within the Confrontation Clause. (*People v. Geier* (2007) 41 Cal.4th 555, 605.) Accordingly, it applied standard rules governing hearsay and held that such reports were admissible under the business records exception. (*Id.* at p. 607.) Recent United States Supreme Court decisions have made clear that this interpretation was erroneous.

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527] (hereafter "*Melendez-Diaz*"), the Supreme Court held that the Confrontation Clause of the Sixth Amendment was violated where certificates of laboratory analysis of drug evidence were admitted without requiring the in-court testimony of the analyst. The High Court's analysis

in *Melendez-Diaz* undermines this Court's reasoning in *Geier* in several significant ways.[31/]

In *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2533, the Court held that the Confrontation Clause applies to all witnesses who testify against the defendant, not just to those who are accusatory. The Court rejected the proposition that evidence of scientific testing is inherently reliable: "forensic evidence is not immune from the risk of manipulation" or incompetence, and cross-examination is the only means to ensure accurate forensic testimony. (*Id.* at pp. 2536-2537.)

The Supreme Court also held that courts should focus on whether the statements in a report "were made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use later at trial." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532.) This is inconsistent with this Court's conclusion that where a statement represents a contemporaneous record of observable events, it is not "testimonial" within the meaning of the Confrontation Clause. (*People v. Geier, supra,* 41 Cal.4th at pp. 606-607.)

Finally, the Supreme Court held that statements in official records produced for use at trial may not be admitted under the hearsay or public records exception without violating the Confrontation Clause. (*Melendez-Diaz*, *supra*, 129 S.Ct at pp. 2538-2540.) In contrast, *Geier* cited with approval case law from other states holding that forensic records are

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[31/] This Court has granted review in the wake of the *Melendez Diaz* decision in the following cases: *People v. Dungo*, No. S176886 [non-testifying pathologist]; *People v. Lopez*, No. S177046 [non-testifying criminalist]; *People v. Anunciation*, No. S179423 [non-testifying criminalist]; *People v. Gutierrez*, No. S176620 [non-testifying nurse practitioner and non-testifying criminalist ]; *People v. Benitez*, No. S181137 [non-testifying criminalist].

admissible as business records. (*People v. Geier, supra,* 41 Cal.4th at p. 606.)

*Melendez-Diaz* was followed by *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705], which resolved whether a forensic laboratory report, introduced to prove a fact in a criminal trial, may be admitted through the in-court testimony of an analyst who did not sign the report or personally perform or observe the performance of the test.

In *Bullcoming,* the United States Supreme Court found that the Confrontation Clause does not allow the testimonial statements of a forensic analyst to be introduced through the trial testimony of a surrogate analyst. (*Bullcoming v New Mexico, supra*, 131 S. Ct. at p. 2710.) The prosecution in *Bullcoming* offered a report of blood-alcohol testing to establish the defendant's state at the time of his arrest, but this was introduced by an analyst who took no part in the actual testing. (*Id.* at pp. 2710-2712.) The Court rejected the argument that the surrogate witness's expertise in blood-alcohol analysis and knowledge of the general procedures used for such tests qualified him to stand in for the actual analyst for purposes of the Confrontation Clause. The Court noted that the "testimony of the kind [the surrogate witness] was equipped to give could not convey what [the actual analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." (*Id.* at p. 2715.) Thus, it did not meet the standards required under the Confrontation Clause. (*Id.* at p. 2716.)

*Melendez-Diaz* and *Bullcoming* therefore make clear that the death certificate was erroneously admitted in this case. The death certificate represented that Dr. Gervais had made specific findings, particularly with

regard to the time of death. It was a legal document, prepared to establish certain facts for official use, which would include trials in which such certificates were expected to be admitted. (See 20 RT 4377 [prosecutor states that certificates "routinely go into evidence"].) The trial court made no finding that Dr. Gervais was unavailable to testify.[32/] Appellant had no opportunity to cross-examine Dr. Gervais about how he arrived at his conclusion, and whether his " honesty, proficiency, and methodology" affected his findings. Therefore, the demands of the Confrontation Clause were not satisfied in this case. (*Melendez-Diaz v. Massachusetts*, *supra,* 129 S.Ct. at 2538; see also *Bullcoming v. New Mexico*, *supra*, 131 S. Ct. at p. 2710.) The certificate should not have been admitted.

### C. The Testimony of Dr. Hanks About the Coroner's Report Violated the Confrontation Clause

In testifying about the time of death, Dr. Hanks used the coroner's report as the basis of her testimony. She was not present when the autopsy was conducted and did not observe the procedures that were used. In regard to the liver test used to estimate the time of death, Dr. Hanks acknowledged that the report only allowed her to establish that a test was conducted. She did not have the necessary information to establish that its methodology, procedures, and conclusions were accurate. (20 RT 4308-4309.) Similarly, Dr. Hanks testified about Dr. Ambrosecchia's findings that the victim's stomach was "filled with a digested cream-tan food residue of no note" (1 CT 242), which she used to substantiate the report's estimate of the time of death. (20 RT 4302-4303.) Appellant, however, had no opportunity to cross-examine Dr. Ambrosecchia about this report. He was unable to

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[32/] Dr. Hanks testified that Dr. Ambrosecchia, who conducted the autopsy had died before trial. (20 RT 4062.) There is no information in the record concerning Dr. Gervais.

question Dr. Ambrosecchia about the actual amount of food that was found in the victim's stomach. Accordingly, the use of the coroner's report to establish the time of death, through the testimony of Dr. Hanks, violated the Confrontation Clause.[33] (*Bullcoming v. New Mexico*, *supra*, 131 S. Ct. at p. 2716.)

The Confrontation Clause does not allow the prosecution to present one person's testimonial statements through the trial testimony of another. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68; *Davis v. Washington* (2006) 547 U.S. 813, 826.) Thus, the right to confrontation does not evaporate merely because an expert witness repeats the testimonial statement during in-court testimony. So long as the testimonial statements are presented for their truth, regardless of the conduit, the analyst becomes a witness the defendant has a right to confront. (*Bullcoming v. New Mexico*, *supra*, 131 S. Ct. at p. 2716.)

The coroner's report prepared in this case was testimonial. (See *State v. Locklear* (2009) 363 N.C. 438, 452 [*Melendez-Diaz* "squarely rejected" the argument that an autopsy report was not testimonial].). It follows that the contents of the report cannot be introduced without the rights to cross-examination protected under the Confrontation Clause. Indeed, Dr. Hanks had no means of determining the time of death apart from reading the coroner's report that she did not prepare and using findings that she did not make or witness. Her opinion was completely

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[33] The United States Supreme Court is now reviewing whether the Confrontation Clause is violated when the prosecution presents, pursuant to a state rule of evidence, the substance of a testimonial forensic laboratory report through the trial testimony of an expert witness who took no part in the reported forensic analysis and was not subject to cross-examination. (*Williams v. Illinois*, United States Supreme Court No.10-8505.)

dependent upon the coroner's findings and was presented for the sole purpose of bringing these findings before the jury for the truth of the matter. Under these circumstances, its admission through Dr. Hanks violated the Confrontation Clause just as certainly as if the report itself had been introduced.

Other states have reached similar conclusions. In *Woods v. State* (Tex.App. 2009) 299 S.W.3d 200, a coroner's report was effectively admitted through the testimony of an expert who had not conducted the autopsy. The expert testified not only to his own opinion, but also disclosed to the jury the testimonial statements in the autopsy report upon which those opinions were based. Because the statements supported the testifying expert's opinion only if true, "the disclosure of the out-of-court testimonial statements underlying [the testifying expert's] opinion, even if only for the ostensible purpose of explaining and supporting those opinions, constituted the use of testimonial statements to prove the truth of the matters stated in violation of the Confrontation Clause." (*Id.* at p. 213; see also *Martinez v. State* (Tex.App. 2010) 311 S.W.3d 104, 111 [same]; *State v. Bell* (Mo.App. 2009) 274 S.W.3d 592, 595 [testimony concerning autopsy report not admissible absent confrontation of pathologist who prepared report].) This Court should similarly find that Dr. Hanks's testimony violated appellant's rights under the Confrontation Clause of the Sixth Amendment.

**D. The Federal Constitutional Issue Was Not Waived**

Appellant objected to the death certificate's estimate of the time of death on hearsay grounds and that it lacked a proper foundation. He did not cite the Confrontation Clause or object to Dr. Hanks's testimony presenting the findings of the coroner's report. This Court, however, should consider all of the issues in this claim on appeal.

An objection to the death certificate on Confrontation Clause grounds would have been futile, because trial counsel could not have anticipated the sea change in the law presented by *Melendez-Diaz* and *Bullcoming*. Indeed, before *Melendez-Diaz*, this Court found that scientific evidence, such as that presented in this case, did not violate the Confrontation Clause. (See *People v. Geier*, *supra*, 41 Cal.4th at p. 605.) Under these circumstances, any constitutional objection would have been denied by the trial court. Appellant's hearsay objection was sufficient to preserve the issue before this Court. (See *People v. Loy* (2011) 52 Cal.4th 46, 69 [federal constitutional issue not waived in light of objection based on state law and new Supreme Court decision in *Bullcoming*]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 809 [confrontation clause issue not waived in light of hearsay objection].)

For similar reasons, this Court should find that appellant's constitutional objections to Dr. Hanks' testimony are not waived. Indeed, the use of an expert to bring in the contents of reports that they did not prepare is pending before the United States Supreme Court (*Williams v. Illinois*, United States Supreme Court No. 10-8505) and therefore could not have been anticipated at the time of trial. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [finding trial counsel's failure to object to object on Sixth Amendment grounds to sentence was not forfeited because counsel could not have anticipated decision in *Cunningham v. California* (2007) 549 U.S. 270].) Accordingly, this Court should reach the merits of each claim.

### E. The Errors were Prejudicial

The death certificate introduced into evidence stated that the time of death was about 11:30 p.m. (1 CT 234; 20 RT 4379.) Dr. Hanks testified that the coroner's report established the cause of death to be between 11:00 p.m. and 1:00 a.m. (20 RT 4303.) In either event, time of death was a crucial matter in this trial because the law in effect at the time of the crime required the special circumstance of burglary to have been committed at night. (Former Pen. Code, § 190.2 (1978 stats.); CALJIC No. 8.84.5 (1977 rev.); 20 RT 4399-4400 [instructions given by trial court].) Here, the victim's body was not discovered until the morning after she was last seen alive, and her death did not necessarily occur at night. Indeed, the prosecutor was allowed to reopen his case to establish the time of death in order to prove that element of burglary. Without the death certificate and Dr. Hanks's testimony regarding the coroner's report, the burglary special circumstance cannot be sustained.

Moreover, the errors went beyond the burglary allegation. The time of death was important to the prosecutor's theory that appellant went into the victim's apartment, hid in the bathtub, and waited for the victim to return home. (20 RT 4415.) This theory supported the allegations that appellant committed burglary by entering the house with the intent to commit rape; that appellant had in fact raped or attempted to rape the victim; and, that the murder had been committed with premeditation and deliberation. Since the victim had returned home after watching a popular television show with her boyfriend, such a scenario might have been possible if she had been killed earlier in the evening, up to 11:30 p.m., as listed in the death certificate. It is far less likely if she had been killed at a later time, since the perpetrator undoubtedly would have been discovered

before then. Accordingly, the time of death was of critical importance to all the charges in this case. The error cannot be shown to be harmless beyond a reasonable doubt so that the judgment be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Even if this Court should find that the error was harmless in the guilt phase it would have undoubtedly affected the juror's penalty determination. (See *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error may be harmless at guilt phase but prejudicial at penalty phase]; *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing error at penalty phase]; *People v. Brown* (1988) 46 Cal.3d 432, 466 [error at guilt phase requires reversal of penalty determination if there is a reasonable possibility the jury would have rendered a different verdict absent the error].)

As discussed above, the time of death alleged in the death certificate and coroner's report supported the prosecutor's argument that appellant entered the victim's house and waited for her to return. Such an image is particularly disturbing. It is one thing for a murder to happen in the course of a rage or a frenzy of violence. It is another thing for a person to enter into an apartment and cooly wait for the victim to return, hiding until the crime could be committed. The image of appellant lurking in the victim's apartment would have been a powerful factor in aggravation – a scenario that was made possible because of the time of death established through the death certificate and the testimony of Dr. Hanks concerning the coroner's report. Under these circumstances, this Court should find it cannot be shown, beyond a reasonable doubt, that the error did not affect the penalty judgment. This Court should therefore reverse the penalty finding even if

the error was otherwise harmless in determining guilt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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## V.

## THE TRIAL COURT'S ADMISSION OF INFLAMMATORY PHOTOGRAPHS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND A RELIABLE VERDICT

It is well settled that a prosecutor may not introduce photographs of victims that are "relevant only on what . . . is a nonissue," or where they "are . . . largely cumulative of expert and lay testimony regarding the cause of death" or ""are . . . unduly gruesome." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137.) Here, appellant objected on both statutory and constitutional grounds to specific photographs: People's Exhibit No. 21, depicting the victim laying on the bed with a sock on her neck; People's Exhibit No. 22, a closeup of the victim from above, with the sock loosely wrapped on her neck; and People's Exhibit No. 34, a closeup of the victim's head and neck taken during the autopsy. (17 RT 3700, 3705-3706.) In addition, appellant objected to People's Exhibit No. 8, a photograph from the time of the autopsy showing the face and upper torso of the victim taken before the sock was removed for the investigation of this case. (18 RT 3997-3998.)

The trial court abused its discretion and erroneously allowed each of these photographs into evidence in violation of Evidence Code section 352, and in so doing violated appellant's state and federal constitutional rights to due process, a fair jury trial and a reliable capital trial. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

### A. The Trial Court Erroneously Admitted Irrelevant Photographs

No evidence is admissible unless it relates to a disputed fact that is of material consequence. (Evid. Code, § 210.) A trial court has discretion in

determining the relevance of evidence, but it lacks discretion to admit irrelevant evidence. (*People v. Cowan* (2010) 50 Cal.4th 401, 482.)

The trial court admitted Exhibit No. 21, which showed the victim on the bed, because it believed that her position was relevant to whether a sexual assault had occurred. (17 RT 3713.) Although the photograph showed that the victim had been strangled on the bed, it did not provide evidence of a sexual assault. Indeed, the investigators at the time of the crime found no evidence of a sexual assault and the coroner did not see any signs of a struggle indicating rape, including evidence of bruising or trace evidence of a sexual attack. (19 RT 4068-4069.) Other photographs established the victim's position, particularly in regard to the only bit of evidence (the semen on the bedspread) that could possibly have established a sexual crime. (See People's Exhibits Nos. 19, 20.) The matter depicted in Exhibit No. 21 – the victim's position, her partial nudity, and the cause of death by strangulation – were not disputed at trial. Accordingly, Exhibit No. 21 was not relevant.

Exhibit No. 22, the close up of the victim as she was found after her death, similarly was irrelevant. The trial court allowed it to be introduced into evidence because it showed how much the sock had been stretched. (17 RT 3713.) There was no dispute that the sock was the murder weapon. (19 RT 4063.) Dr. Hanks testified about not only the cause of death, but what ligature strangulation meant in real terms, including the time it would take for a victim to die. (19 RT 4064-4065.) The sock itself was admitted into evidence. That the sock appeared to be stretched in the photograph would not provide additional information about the force necessary to use it as a weapon since stretching can be accomplished by force short of what is

necessary to strangle a victim. The photograph was irrelevant to any disputed issue at trial.

Exhibit No. 34 showed the injuries to the victim's neck after the sock had been removed. The trial court admitted the exhibit as being relevant to prove premeditation and deliberation. (17 RT 3713.) The photograph did no such thing. The trial testimony of Dr. Hanks expressly told the jury how death by ligature strangulation occurs, which the prosecutor used to argue that the crime was premeditated and deliberate.[34/] The photograph added nothing to this and did not illustrate why ligature strangulation might have proved the perpetrator's mental state. It also was irrelevant to any disputed issue at trial.

Exhibit No. 8 showed the victim again with the sock around her neck. This was irrelevant to the crime itself since it was taken just before the autopsy and there was no testimony to establish that the picture showed how the sock was positioned at the time the body was found. The trial court admitted the photograph in order to show the chain of custody, since appellant's opening statement challenged the veracity of the biological evidence used against him. (19 RT 3997-3998.) Yet, appellant never claimed that the evidence had been tampered with before the body was examined by the coroner – appellant's counsel primarily cast doubt upon the DNA from the bedspread, arguing that the semen stain was not present when the evidence was first examined 22 years earlier. (17 RT 3788.) Indeed, appellant could only have wanted jurors to find that the original investigators were honest, competent, and thorough since they did not

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[34/] In addition to providing a theory of first degree murder, premeditation and deliberation were necessary to establish the special circumstances of rape or attempted rape and burglary under the law in effect at the time of the crime. (See former Pen. Code, § 190.2.)

report any stain on the items that they examined or any foreign matter on the victim. Thus, the photograph was not relevant to any dispute about the DNA or any later alteration in the evidence.

In *People v. Turner* (1984) 37 Cal.3d 302, this Court held that photographs offered to show the position of the victims' bodies and the nature of their wounds were erroneously admitted where "[n]either the court nor the prosecution articulated the relevance of the position of the bodies or the manner of infliction of the wounds to the issues presented." (*Id.* at p. 321; see also *People v. Marsh* (1985) 175 Cal.App.3d 997, 998 [autopsy photographs irrelevant where coroner's testimony was uncontradicted and cause of death undisputed].) The photographs used in this present case were similarly irrelevant and should not have been admitted.

### B. The Photographs Should Have Been Excluded Under Evidence Code section 352

Even if the photographs had some relevance, Evidence Code section 352 provides that a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." This section applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual and that has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative 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, fn. 14.) It is precisely the type of evidence that was at issue in the present case.

#### 1. The photographs were cumulative

This Court has recognized that the prejudicial effect of evidence may outweigh its probative value if the evidence is cumulative to an issue

that was not reasonably subject to dispute. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 406.) "If evidence is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137, quoting *People v. Thompson* (1981) 27 Cal.3d 303, 318. ) At bottom, "the prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant." (*People v. Cardenas* (1982) 31 Cal.3d 897, 905.)

The photographs to which appellant objected should have been excluded under Evidence Code section 352 because they were cumulative to other evidence introduced at trial. The trial court found that Exhibit No. 21 showed the placement of the body (17 RT 3713), yet the photographs admitted in People's Exhibits Nos. 19 and 20 allowed the jury to know the placement of the body, particularly in relation to the green bedspread that provided important DNA evidence, without the gruesome details. Exhibit No. 22 – the close-up of the victim – was not necessary to establish any fact that the other photographs and the testimony of the witnesses had not already shown. Exhibits No. 34 showed the victim at the time of the autopsy and was introduced to show premeditation and deliberation, but Dr. Hanks amply testified about the autopsy, ligature strangulation, and the force that had to be applied. Exhibit No. 8 was introduced to show the chain of custody, but the testimony of Diosi and Laskowski fully established this.

The photographs, then, were cumulative to trial testimony and showed similar things as other photographs, but in increasingly graphic detail. The trial court should have excluded the photographs. (See *People v. Marsh, supra*, 175 Cal.App.3d at p. 998 [jury "was not enlightened one

whit" by seven autopsy photographs]; *People v. Anderson*, *supra*, 43 Cal.3d at p. 1137 [photographs cumulative of expert and lay testimony regarding the cause of death, the crime scene, and the position of the bodies]; *People v. Smith* (1973) 33 Cal.App.3d 51, 69 [finding photographs cumulative to "autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification"].)

**2. The photographs were more prejudicial than probative**

As discussed above, the photographs were marginally relevant at best. Any proper use of the photographs was substantially outweighed by the potential for prejudice inherent in each of the disputed pictures. The repeated portrayal of the injuries inflamed the jury in such a way that they would look beyond what the evidence in the picture established. Jurors likely focused on the nature of the attack and concluded that a sexual assault must have occurred if she was found almost naked in the bed after being killed through ligature strangulation.

All four pictures at issue showed graphic portrayals that went beyond the purpose for which they were admitted. Exhibit No. 21 was admitted to show the victim's position, but went beyond this to show a graphic portrayal of her death. The closeup photograph in Exhibit No. 22 did not show how the sock had been stretched as much as showed a disturbing image of the victim and the blood from her nose. The photograph in Exhibit No. 34 had little to do with premeditation and deliberation, and everything to do with the victim being depicted just before the autopsy. Exhibit No. 8 established nothing about the chain of custody, but presented yet another graphic portrayal of the victim in death. All these pictures would have been disturbing to the jurors, inflaming them against appellant, while contributing little or nothing to the stated purpose for their admission.

The limited nature of the probative value of the photographic evidence at issue was weak but its potential for prejudice was substantial. This Court should find that the trial court abused its discretion and erroneously allowed the photographs to be introduced against appellant.

**C. Reversal is Required**

As discussed above, there was no dispute over the cause of death – the victim was killed by ligature strangulation. The only evidence brought forward to establish rape was the semen on the bedspread, which was also the primary source of the DNA evidence linking appellant to the murder. Appellant's defense was based on challenging this presence of the semen on a bedspread where it had not been seen at the time of the crime. (19 RT 4156, 4150; 20 RT 4321-4323.) There was no general bruising or evidence of a sexual attack on the victim herself. (19 RT 4010, 4068-4069.) There was no trace evidence found on the victim's body, her bedroom, or anywhere else in the the apartment that linked appellant to the crime. (19 RT 4009; 20 RT 4314, 4316.) When criminalists began testing the evidence for DNA, the DNA that was linked to appellant was strong, while substantial degradation occurred to the semen on the bedsheet and other biological evidence. (RT 4093, 4102-4103, 4118, 4135.) These facts could have raised considerable doubt about the reliability of the DNA finding and appellant's involvement in the murder.

The photographs introduced in this case dramatically altered the issues that were in dispute at trial, focusing the jurors' minds on the brutality of the crime rather than the true identity of the perpetrator. The pictures provided multiple exposures of similar views that repeatedly drew the jury's attention to graphic and inflammatory details. These photographs did nothing to refute appellant's defense. However, the pictures would

have swept aside any doubts raised by the lack of any other evidence connecting appellant to the crime. Having inferred that appellant committed the crime based on predisposition evidence under Evidence Code section 1108, the photographs were graphic portrayals that could only have inflamed the jurors against appellant. As has been stated in another case, "Surely, there is a line between admitting a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors. That line was crossed in this case." (*People v. Burns* (1952) 109 Cal.App.2d 524, 542.)

This conclusion is supported by several studies that have demonstrated that jurors are likely to be affected by viewing gruesome photographs. (See Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting many jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the trial's conclusion]; Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photos during medical examiner's testimony were more likely to vote to convict defendant than those not shown pictures]; Note, *A Picture is Worth a Thousand Words - The Use of Graphic Photographs in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197, 208-209 [same]; Douglas, et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Beh. 485, 491-492 [same].) Accordingly, the jurors could not but have been affected by the photographs that were erroneously admitted.

Under these circumstances, following state law, it is reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.) The trial court's error in admitting the photographs also violated appellant's federal constitutional rights to a fair and impartial jury, due process, and to reliable guilt and penalty determinations. (U.S. Const., 6th, 8th & 14th Amends.; see *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972 [due process requires court to weigh prejudicial effect of evidence against its necessity]; *Lesko v. Owens* (3d Cir. 1989) 881 F.2d 44, 51-52 [same].) Under these standards, the errors were not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Even if this Court finds that the errors were harmless during the guilt phase, it should consider their effect on the penalty phase of the trial. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error may be harmless at guilt phase but prejudicial at penalty phase].) The graphic and cumulative portrayal of the photographs surely remained with the jurors throughout their review of the evidence. This could not help but prejudice the penalty determination. (See *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1225-1230 [state's penalty-phase introduction of crime-scene photographs showing victim's mutilated body deprived defendants of a fundamentally fair sentencing proceeding as guaranteed by the Eighth and Fourteenth Amendments].) The judgment in this case must be reversed.

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## VI.

## THE CALJIC INSTRUCTIONS DEFINING THE PROCESS BY WHICH JURORS REACH A VERDICT ON LESSER OFFENSES IMPROPERLY SKEWED THEIR DELIBERATIONS IN FAVOR OF FIRST DEGREE MURDER

The trial court, over appellant's objection, instructed the jurors under the current version of CALJIC No. 8.71. (20 RT 4394-4395; 4 CT 1195.) This required the jurors to "unanimously agree" that there was a reasonable doubt as to the degree of murder before giving appellant the benefit of that doubt and returning a lesser verdict.[35/] The effect of the instruction was exacerbated by CALJIC No. 8.75, which required the jurors to unanimously find that there was a reasonable doubt on first degree murder before convicting appellant on the lesser charge. (20 RT 4395; 4 CT 1196.) Under these instructions, a juror who believed that appellant was guilty of some offense, but not necessarily first degree murder, would find in favor of first degree murder unless there was unanimous agreement that there was reasonable doubt as to that offense. First degree murder thus became the default verdict. The instructions skewed the jury's deliberations toward first degree murder and lowered the prosecution's burden of proof in violation of appellant's rights to due process, a trial by jury, and a reliable verdict. (U.S. Const., 5th, 6th, 8th, & 14th Amends; Cal. Const, art. I, §§ 7, 15, 16.)

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[35/] The trial court instructed in accordance with the 1996 revision to CALJIC No. 8.71: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." (20 RT 4394.)

### A. CALJIC No. 8.71 Erroneously Confused the Jurors About their Individual Judgment

CALJIC No. 8.71 "explains the process jurors must go through to determine the degree of murder." (*People v. Pescador* (2004) 119 Cal.App.4th 252, 256.) Previous versions of the instruction explained to jurors that they were to give a defendant the benefit of the doubt without reference to whether they unanimously agreed. (See 1 Supp. CT 144; CALJIC No. 8.71, 3rd. Ed, 1970.[36]) This was in keeping with this Court's long-standing rule that jurors must be instructed that "if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.)

The 1996 revision significantly changed this process by instructing jurors to vote for a lesser degree or offense only if they unanimously agree that first degree murder has not been proven. In other words, under the revised instructions, before jurors give a defendant the benefit of the doubt, they must first unanimously agree that there is a reasonable doubt as to the greater charge. If some, but not all, jurors believed that there was reasonable doubt about the nature of the offense, the instruction directs them to first degree murder. Thus, first degree murder becomes the default verdict if there is any disagreement.

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[36] CALJIC No. 8.71 formerly provided, "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or second degree, you must give a defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

In *People v Moore* (2011) 51 Cal.4th 386, the defendant argued as does appellant, that the instruction skewed the verdict toward first degree murder, since jurors would apply that in the face of any disagreement, making it the default verdict. (*Id.* at p. 410.) This Court agreed that CALJIC No. 8.71 was erroneous.

> We conclude the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72, as the instructions carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter.

(*Id.* at p. 411.) The court found the error harmless, however, because the jurors had found that the special circumstances of robbery and burglary were true, making it clear that the verdict relied on first degree felony murder. (*Id.* at p. 412.)

Here, appellant's jurors similarly found that the special circumstances of rape and burglary with intent to commit rape were true. However, this does not mean that the instruction had no potential for confusion. Under the law in effect at the time of the crime, special circumstances required both premeditation and deliberation and commission of a rape or attempted rape. (Former Pen Code, § 190.3 [1977 Stats.].) Thus, the premeditated murder theory was essential to the special circumstances, unlike the situation decided in *Moore*. If a juror had doubts about first degree murder, including doubts about either premeditation and deliberation or whether the victim was attacked in the course of a rape or attempted rape, then the instruction encouraged the juror to set aside those doubts unless there was unanimous agreement that there was reasonable doubt about first degree murder. Having done that, the juror would also

have to set aside any doubts about the special circumstances. Under any circumstance, the verdict became skewed in favor of first degree murder.

### B. CALJIC No.8.75 Erroneously Required an Acquittal on First Degree Murder Before Appellant Could be Convicted of Second Degree Murder

This Court has held that a jury must unanimously agree to acquit a defendant of a greater charge before returning a verdict on a lesser charge. (*People v. Fields* (1996) 13 Cal.4th 289, 310-311.) Thus, in *Moore*, it found that any confusion in CALJIC No. 8.71 was harmless because CALJIC No. 8.75 conveyed that the jurors must unanimously agree to not guilty verdicts on the greater homicide verdicts before they return a verdict on the lesser. (*People v. Moore*, *supra*, 51 Cal.4th at pp. 411-12.) This Court should reconsider these holding as it precludes full jury consideration of lesser included offenses, and thereby implicates the due process and jury trial guarantees of the Sixth and Fourteenth Amendments and the Eighth Amendment's requirement for heightened reliability in capital cases. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

"Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." (*Beck v. Alabama* (1980) 447 U.S. 625, 634, emphasis in original.) Because "[s]uch risk cannot be tolerated in a case in which the defendant's life is at stake" (*id.* at p. 637), the United States Supreme Court has held that a defendant accused of capital murder has a due process and Eighth Amendment right to lesser included offense instructions. (*Id.* at pp. 637-638.) "[P]roviding the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the

reasonable-doubt standard." (*Id.* at p. 634.) An instruction that the jury cannot convict on the lesser charge unless it unanimously votes to acquit on the greater charge prevents the jury from making use of lesser included offense instructions in the way contemplated by *Beck,* and subjects jurors to the same pressure to ignore the reasonable doubt standard that they would face if no lesser included offense instruction were given at all.

The unanimity requirement prevents the jury from giving effect to lesser included offense instructions because it encourages false unanimity and coerced verdicts. "Members of the jury who have substantial doubts about an element of the greater offense, but believe the defendant guilty of the lesser offense, may very well choose to vote for conviction of the greater rather than to hold out until a mistrial is declared, leaving the defendant without a conviction of any charge." (*Jones v. United States* (D.C. 1988) 544 A.2d 1250, 1253; see also *United States v. Tsanas* (2nd Cir. 1978) 572 F.2d 340, 346; *Cantrell v. State* (Ga. 1996) 469 S.E.2d 660, 662.)

In *United States v. Tsanas, supra*, 572 F.2d 340, for example, the court recognized the reality that an acquittal-first instruction may result in "the defendant . . . being convicted on the greater charge just because the jury wishes to avoid a mistrial . . . ." (*Id.* at p. 346.) This is so because, "[i]f the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge." (*Ibid.*)

This view was also expressed by the Ninth Circuit in *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, 1469-1470, where the court

explained that if the jury must unanimously agree on acquittal on the greater offense before returning a conviction on a lesser included offense, there is a risk that jurors who have a doubt that the defendant is guilty of the greater offense, but who are convinced the defendant is guilty of some offense, will resolve their doubts in favor of convicting the defendant of the greater offense, rather than holding out and not convicting the defendant of anything. (*Id.* at pp. 1469-1470; see also *Catches v. United States* (8th Cir. 1978) 582 F.2d 453, 459.)

The acquittal-first rule was criticized and abandoned by the Arizona Supreme Court in *State v. LeBlanc* (Ariz. 1996) 924 P.2d 441 because it encourages "false unanimity" and "coerced verdicts." (*Id.* at p. 442.) The court stated that "requiring a jury to do no more than use reasonable efforts to reach a verdict on the charged offense is the better practice and more fully serves the interest of justice and the parties." (*Ibid.*) Instead, the jury should be instructed that it may deliberate on and return a lesser offense "if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge." (*Ibid.*)

The unanimity requirement also prevents the jury from giving effect to lesser included offense instructions because it gives an unfair advantage to the prosecution. (*Cantrell v. State, supra*, 469 S.E.2d at p. 662 [acquittal-first instruction "gives the prosecution an unfair advantage"].) The acquittal-first rule "lends support to jurors who are irrationally holding out for a greater charge" for emotional reasons. (*Ibid.*) Such reasons might include the inflammatory nature of the evidence, or evidence which supports a conviction only for a lesser charge, but which creates such sympathy for the victim that some jurors insist irrationally upon conviction

for a greater charge. (See *People v. Helliger* (N.Y. 1998) 691 NY.S.2d 858, 865; *Jones v. United States*, *supra*, 544 A.2d at pp. 1253-1254.) A rule that does not require unanimous agreement that a defendant is not guilty of the greater charge before convicting of the lesser prevents the State from obtaining a conviction in such circumstances.

Accordingly, the acquittal-first instruction violates the settled principle that "[t]here should be absolute impartiality as between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instruction that favors one party over the other deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.*(1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet* (1972) 405 U.S. 56, 77). The instruction also has the effect of lessening the prosecution's burden of proof. It therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws, his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly instructed jury, and his right to a fair and reliable capital trial.

### C. The Errors Were Prejudicial

The instructions given in this case created the risk that jurors would set aside any personal doubts about the degree of the crime unless there was unanimous agreement. Even assuming that there was sufficient evidence for the jurors to conclude that appellant committed some offense, the degree of guilt was open to doubt. The only evidence of premeditation and deliberation was the time involved in ligature strangulation. (See 20 RT

4421, 4472 [argument of prosecutor].) Jurors also had reason to question the rape allegation. The victim's panties and shorts were lying by the side of the bed, rather than being ripped off in the course of a struggle. (People's Exhibit No. 19.) The coroner found no injury or bruise other than that associated with the homicide itself. (19 RT 4069, 4074.) Dr. Hanks, who reviewed the coroner's report, could not assume that there was even a struggle – there was nothing collected from the victim's fingernails to indicate that she had scratched at her assailant. (19 RT 4069, 4071.) The coroner did not report that there was any trace evidence found on the victim, not even a hair, that looked like it had come from another. (18 RT 4009.) Despite throughly investigating the apartment and the bedspread, investigating officers found no evidence of a sexual crime until 2000, when a criminologist first noticed semen on the bedspread, which was consistent with appellant's DNA. (19 RT 4088, 4107, 4141.) The stain was readily visible in 2000 without enhanced lighting, yet had not been noticed or reported at the time of the crime. (19 RT 4156, 4150; 20 RT 4321-4323.)

Accordingly, a juror may well had doubts about the degree of the offense. Under these circumstances, the instructions may well have encouraged a juror to set aside doubts cast upon the evidence. They cannot be shown to be harmless beyond a reasonable doubt. Reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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## VII.

## THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS 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

At the conclusion of the guilt phase of the trial, the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 2 CT 458; 9 RT 2015-2016) and on felony murder (CALJIC No. 8.21; 2 CT 459; 9 RT 2017). The jury found appellant guilty of murder in the first degree. (2 CT 473; 9 RT 2040.) Appellant contends that the instructions on first degree murder were erroneous, and the resulting convictions of first degree murder must be reversed. The information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder; thus he could not be convicted of first degree murder.[37/]

Count 1 of the information alleges that appellant "willfully, unlawfully, deliberately, and with premeditation and deliberation and malice aforethought" murdered the victim in violation of Penal Code section 187." (2 CT 318.) Both the statutory reference and the description of the crime ("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.

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[37/] Appellant is not contending that the information was defective. On the contrary, as explained hereafter, Count 1 of 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.

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. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)[38/] 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.)[39/]

Because the information charged only second degree malice murder in violation of 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) that charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only

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[38/] 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."

[39/] At the time of the alleged murder in appellant's case, section 189 read in relevant part as follows: "All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under section 288 is murder of the first degree; and all other kinds of murders are of the second degree." (See 1 Supp. Ct. 230.)

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 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, 107-108, 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.[40/] It has many times been decided by this court that it is sufficient to charge the offense

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40/ 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 section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in 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.

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."

The rationale of *People v. Witt*, however, 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 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 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 *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, italics added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* 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, supra,* 15 Cal.4th at p. 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute defining that offense must be Penal Code section 189. No other statute

purports to define premeditated murder or murder during the commission of a felony, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) 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, this Court's conclusion that "[f]elony murder and premeditated murder are not distinct crimes" is not dispositive. (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[41/]

The greatest difference among species of murder is between second degree malice murder and first degree felony murder. By the express terms of section 187, second degree malice murder includes the element of malice

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[41/] 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*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original italics.)

(*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 high court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, 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*, *supra*, 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, italics added, citation omitted.)[42/]

Premeditation and deliberation, and the facts necessary to bring a killing within the first degree felony-murder rule, 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

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[42/] 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.]"

circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

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; *Ex parte 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 appellant of murder without finding 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* (1980) 447 U.S. 625, 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 at pp. 1034-1035.) Therefore, appellant's convictions for first degree murder must be reversed.

## VIII.

## THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CHARGE OF FIRST DEGREE MURDER AND THE SPECIAL CIRCUMSTANCES OF RAPE AND BURGLARY WITH INTENT TO RAPE

The due process clause of the Fourteenth Amendment and article 1, section 15, of the California Constitution require that a conviction be supported by substantial evidence. (*People v. Holt* (1997) 15 Cal.4th 618, 667.) The Eighth Amendment demands for heightened reliability in a capital case also require that this Court carefully review the evidence to ensure that the death sentence is not imposed on the basis of speculative evidence. (See *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 [8th Amendment "mandates heightened scrutiny in the review of any colorable claim of error"]; *Flowers v. State* (Miss. 2000) 773 So.2d 309, 317 [heightened scrutiny requires all bonafide doubts to be resolved in favor of the accused].) Appellant's conviction for first degree murder and the special circumstances of rape and burglary with intent to rape fail to meet these standards. Accordingly, the judgment in this case must be reversed.

### A. Substantial Evidence Requires More Than Speculation and Conjecture

The United States Supreme Court in *Jackson v. Virginia* (1979) 443 U.S. 307, announced the constitutionally-mandated rule for the review of the sufficiency of the evidence supporting a state criminal conviction. Rejecting the previous "no evidence" rule of *Thompson v. Louisville* (1960) 362 U.S. 199, the Court held "instead, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt." (*Jackson*, *supra*, 443 U.S. at p. 319, original

italics.) Any such doubt must be reasonable only; it need not be "grave" or "substantial." (*Cage v. Louisiana* (1990) 498 U.S. 39, 40-41 (per curiam), *overruled on another ground, Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) What is required is "evidentiary certainty." (*Id.* at p. 41.)

This Court has applied a similar state standard to a sufficiency of the evidence challenge. On appeal, this Court must "review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – 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; see also *People v. Holt* (1997) 15 Cal.4th 619, 667.)

As this Court has repeatedly held, it is the exclusive province of the fact finder to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. If the verdict is supported by substantial evidence, the court must accord due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal. 3d 557, 578.) If, however, the evidence in support of the convictions is not "of ponderable legal significance . . . reasonable in nature, credible and of solid value" (*Johnson*, *supra*, 26 Cal.3d at p. 576), it is the responsibility of the reviewing court to set aside the verdicts. As the United States Supreme Court has recognized, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of

fact could find guilt beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at p. 317.)[43/]

In this regard, it is important to note that the evidence must point to more than suspicion. "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Kunkin* (1973) 9 Cal.3d 245, 250 (quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) In *People v. Morris* (1968) 46 Cal.3d 1, *overruled on other grounds in In re Sassounian* (1995) 9 Cal.4th 535, 545, fn.6, this Court added:

> We may *speculate* about any number of scenarios that may have occurred on the morning in question [when the victim was murdered with no eyewitnesses present]. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." [Citations.]

(*Id.* at p. 21, italics and ellipses in original; see also *People v. Holt* (1944) 25 Cal.2d 59, 83-90 [it is the jury's duty to avoid fanciful theories and unreasonable inferences and not to resort to imagination or suspicion]; (*People v. Bender* (1945) 27 Cal.2d 164, 186, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110 ["Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof"].)

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[43/] The standard of review for sufficiency of the evidence with regard to a finding of special circumstances is the same as with the guilt verdict. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; *People v. Alvarez* (1996) 14 Cal.4th 155, 224-225; *People v. Clair* (1992) 2 Cal.4th 629, 670.)

In this case, in order for appellant to be guilty of first degree murder, he had to have killed in the perpetration or the attempted perpetration of rape or burglary or the murder must have been willful, deliberate, and premeditated. (Pen. Code, § 189.) In order to be convicted of the special circumstances of rape or burglary, appellant must also have committed the murder with premeditation and deliberation. (Former Pen. Code, § 190.2.) The evidence admitted at trial fails to support these allegations.

### B. Lack of Substantial Evidence of Deliberate Premeditated 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.) Apart from the felony- murder rule, 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, 362-363; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-490 [state must prove every element that distinguishes a lesser from a greater crime].) Moreover, under the law in effect at the time of the crime, the murder had to be found to be premeditated and deliberate before a special circumstance based upon an enumerated felony could be imposed. (Former Pen. Code, § 190.2, subd. (c)(3) [1977 Stats.].)

Here, the prosecutor simply relied upon the type of killing to show that the crime was premeditated and deliberate, arguing that the time it took

to strangle a victim was enough to establish these elements.[44/] (20 RT 4421, 4472.) This argument was based on the testimony Dr. Debra Hanks, who spoke about the time it takes to strangle a victim in general terms, rather than as something unique to this case. (19 RT 4064-4069.) Yet if the length of time it took to commit the crime and the method were enough to establish first degree murder, then every ligature strangulation would be premeditated and deliberate. This is not the law.

Strangulation may show an intent to kill, but deliberate and premeditated murder requires more than intent. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.) The state also must show that the killing was deliberate (i.e., the result of a careful weighing of considerations) and premeditated (i.e., thought of in advance). Deliberate and premeditated murder arises out of a cold, calculated judgment, rather than a rash impulse. (*Ibid.*)

In *People v. Rowland* (1982) 134 Cal.App.3d 1, the victim was murdered through ligature strangulation with an electrical cord. The prosecution argued that this was enough to show first degree murder through a deliberate intent to kill. The reviewing court agreed that it showed an intent to kill, but found that it did not establish first degree murder:

> A deliberate intent to kill, however, is a means of establishing malice aforethought and is thus an element of second degree murder in the circumstances of this case. In order to support a

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[44/] While it is true that the prosecutor's argument is not evidence and that the jury may consider theories other than those put forth in the argument, as this Court noted in *People v. Perez* (1992) 2 Cal.4th 1117, 1162, it is also true that the prosecution theory is a logical place to look for an explanation for a finding of premeditation. (*Id.* at p. 1144 (disn. opn. of Mosk, J.).)

> finding of premeditation and deliberation the manner of killing must be, in the words of the *Anderson* court, "so particular and exacting" as to show that defendant must have "intentionally killed according to a 'preconceived design' . . . ." ([*People v. Anderson*, *supra*, 70 Cal.2d] at p. 27.) The ligature strangulation in this case fails to show that defendant must have premeditated and deliberated the killing.

(*Id.* at p. 9.) Accordingly, ligature strangulation does not, in itself, establish premeditation and deliberation. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1345 [ligature strangulation "does not obviate the conclusion that defendant might not have premeditated or deliberated before killing the victims"].).

In *Anderson*, this Court 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. (*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 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.) The record in the present case contains insufficient evidence of planning, motive and manner of killing to support a finding a premeditation and deliberation.

**1. Insufficient evidence of planning**

Planning activity – "facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing" (*People*

*v. Anderson*, *supra*, 70 Cal.2d at p. 27) – is the most important of the three *Anderson* guidelines. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018.)

A defendant's actions just prior to the murder are often utilized to demonstrate the steps taken toward the act of killing the victim. Examples of planning activity have included the fact that defendant did not park his car in the victim's driveway, he surreptitiously entered her house, and he obtained a knife from the kitchen before attacking her as she entered (*People v. Perez*, *supra*, 44 Cal.3d at p. 1126); defendant's act of retrieving the murder weapon from the garage (*People v. Wharton* (1991) 53 Cal.3d 522, 547); and defendant's actions before crashing through living room window of victim's house demonstrate he planned his entry. (*People v. Young* (2005) 34 Cal.4th 1149, 1183.)

Here, there was no evidence that appellant carried any weapon to suggest that he planned to harm the victim. To the contrary, the crime was carried out with a sock that the victim had been wearing that night. The perpetrator grabbed the nearest item available, which suggests that the crime occurred in an outburst of unplanned violence. It does not indicate an act that was "so particular and exacting" as to show that defendant must have "intentionally killed according to a preconceived design." (*People v. Anderson, supra*, 70 Cal.2d at p. 27; see *People v. Rowland. supra*, 134 Cal.App.3d at p. 8 [use of cord already at crime scene to strangle victim does not support finding of premeditation and deliberation].) This factor, then, does not support a finding of premeditation and deliberation.

**2. Insufficient evidence of motive**

Evidence of motive similarly is lacking. Motive evidence generally 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." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) The motive offered by the prosecutor was that appellant killed the victim to cover up a rape. According to his theory, the victim was killed because she could have identified appellant and there were no circumstances under which he could claim that sex was consensual. (20 RT 4474-4475, 4480.)

The prosecutor's assertion of a motive to cover up a rape is speculative at best. It is true that all reasonable inferences must be drawn in support of the judgment, but substantial evidence requires more than speculation:

> This rule . . . does not permit us to go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed.

(*People v. Rowland, supra*, 134 Cal.App.3d at p. 8; see also *People v. Felix* (2001) 92 Cal.App.4th 905, 912 ["the prosecution may not fill an evidentiary gap with speculation"]; *People v. Moore* (2011) 51 Cal.4th 386, 406 [narrative theories in a capital crime must not be based upon speculation].)

As demonstrated below, there is no direct evidence that the victim was raped. There were no signs of sexual trauma, trace evidence on the victim, medical evidence to show sexual penetration, or bruises that resulted from an act other than the killing itself. The only evidence of a sexual nature is that semen was found on the bedspread years after the murder. The lack of any injury indicating a struggle or a sexual assault would have reduced the need to "cover up" an underlying rape. Without evidence of a sexual attack or any generalized assault on the victim, appellant would have felt no need to kill to cover up something that could not be proven.

Even assuming *arguendo* that the killing involved an attempt to rape, appellant would not have had a motive to kill in the course of an attempt, since that would have defeated the asserted primary sexual intent. He would have been trying to "cover up" something that had not yet occurred. This gave him no motive to kill.

Moreover, any distinction between this crime and the incidents alleged under section 1108 did not provide a motive to kill. Certainly, the other witnesses could (and did) identify appellant. Indeed, Sharon Rogers not only identified appellant as her rapist, but she suffered a significant beating and incurred bruises during the incident. Appellant could not have claimed this act was consensual. This would have made a strong rape case, yet appellant left her to identify him as the assailant rather than killing Rogers to cover up the crime.

That appellant did not face trial in regard to any of the incidents alleged under section 1108 would have reduced the motive alleged by the prosecutor. If anything, he prior incidents would have made it appear that appellant could commit any sexual offense without fearing prosecution. Given the lack of physical evidence to support rape, he had no reason to think otherwise in this case.

In the end, the evidence for motive rests upon questionable logic. To establish rape the prosecutor speculated that the perpetrator could have no other motive but rape, and to establish premeditation and deliberation the prosecutor speculated that the victim was killed in order to cover up a rape. The prosecutor bootstrapped one upon the other and used circular thinking to prove them both. Ultimately, the allegation of motive rests upon pure speculation and is not supported by substantial evidence.

### 3. Insufficient evidence of manner of killing

This Court in *Anderson* described the manner-of-killing factor as facts about the nature of the killing from which a juror could infer that the manner 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]." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.)

In this case, the cause of death was ligature strangulation. As discussed above, the manner of death may establish an intent to kill, but it does not establish premeditation or deliberation. (*People v. Rowland, supra*, 134 Cal.App.3d at p. 9.) Such an attack is equally consistent with a sustained emotional outburst as it is with the kind of deliberate consideration necessary to sustain the verdicts in this case. As in *Rowland*, the manner of killing only indicates that the perpetrator took whatever item was available and used that to kill. Premeditation and deliberation must require more.

In sum, there is simply no evidence that is reasonable, credible and of solid value to support a finding that the killing was deliberate and premeditated first degree murder or that the murder was committed with the premeditation and deliberation necessary for the special circumstances. The actions depicted in the record in no way suggest the killing "was 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." (*People v. Rowland, supra,* 134 Cal.App.3d at p. 7, citing *Anderson, supra*, 70 Cal.2d at p. 26.) Accordingly, a first degree verdict based on premeditation and deliberation cannot be sustained and the special circumstances must be set aside.

### C. Lack of Substantial Evidence of Rape or Attempted Rape

Appellant was not charged with the crime of rape or attempted rape, but the prosecutor argued that appellant committed first degree felony murder and charged appellant with this special circumstance.[45/] (Pen Code, § 190.2, subd. (c)(30(iii) [1977 Stats.].) The jury found the special circumstance to be true. (5 CT 1220.) There is insufficient evidence to support this verdict.

#### 1. Lack of Evidence of Rape

To support the rape allegation the prosecutor had to prove that appellant committed an act of sexual intercourse where the victim's resistance was overcome by force or she was prevented from resisting through force or violence. (Pen Code, § 261, subd. (2), (3).) The victim in this case died of ligature strangulation. (19 RT 4063.) The coroner found no other injury or bruise. (19 RT 4069, 4074.) Dr. Hanks, who reviewed the coroner's report, could not assume that there was even a struggle – there was nothing collected from the victim's fingernails to indicate that she had scratched at her assailant. (19 RT 4069, 4071.) The coroner did not report that there was any trace evidence found on the victim, not even a hair, that looked like it had come from another person. (18 RT 4009.) The

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[45/] Murder committed in the perpetration of certain felonies constitutes murder of the first degree. (Pen. Code, § 189.) Under the felony-murder doctrine, the jury must find that the perpetrator had the specific intent to commit one of the felonies enumerated in section 189. The killing need not occur in the midst of the commission of the felony, so long as the felony is not merely incidental to, or an afterthought toto, the killing. (*People v. Proctor* (1992) 4 Cal.4th 499, 532.) The only criminal intent required is the specific intent to commit the particular felony. The killing is first degree murder "regardless of whether it was intentional or accidental." (*People v. Coefield* (1951) 37 Cal.2d 865, 868.)

criminalist similarly did not find any foreign material or hair in the rape kit that he examined. (19 RT 4009.)

The crime scene itself revealed little about the nature of the event. The victim's body was found, dressed in a blue plaid shirt that was unbuttoned. Her shorts and panties were neatly laid near the bed. Her left foot was on a green bedspread and her leg was entangled in it. Other than that, she was laying on the sheet. (18 RT 3949; People's Exhibit No. 19.) Her clothes were not torn or cut in the course of a violent attack. Investigating officers had no evidence of a sexual crime until 2000, years after the killing, when a criminologist first noticed that semen was visible on the bedspread. (19 RT 4088, 4107, 4141.) Although DNA identified appellant as the source of the semen, it was not enough to support the rape allegation.

As the prosecutor acknowledged, much of what occurred during the crime cannot be known. There is no evidence to establish how the perpetrator entered the victim's apartment. (See 20 RT 4414 [perpetrator may have entered apartment through a broken window or simply knocked on the door].) It could not be determined how the perpetrator left the apartment or the extent to which the crime scene investigation itself might have affected the condition of the apartment. (See 20 RT 4416 [acknowledging that the refrigerator could have been moved as part of the investigation].) Nor could the prosecutor determine if appellant had actually raped the victim or when the semen was deposited on the bedspread. (20 RT 4415.)

The prosecutor therefore had to rely on speculation about the nature of the crime. He argued that rape was the only reason that the perpetrator had to enter the victim's apartment. (See, e.g., 20 RT 4480-4481.) This is

not the case. Indeed, the Court has held that sexual interest in a victim, even when accompanied by a brutal attack, cannot establish rape. (*People v. Granados* (1957) 49 Cal.2d 490, 493-497; *People v. Craig* (1957) 49 Cal.2d 313, 318-319; see also *People v. Anderson* (1968) 70 Cal.2d 15, 35-36 [interpreting *Granados* and *Craig* to have established the defendant's sexual interest in the victim].)

In *People v. Craig*, *supra*, 49 Cal.2d 313, this court reversed a felony murder conviction for insufficient evidence of either an attempted rape or an actual rape despite substantial evidence suggesting a sexual assault of some kind had occurred. The evidence established that Craig had told someone earlier on the evening of the murder of his general desire to "have a little loving." (*Id.* at p. 315.) Later that same evening, he quarreled with a woman who would not dance with him at a bar. After leaving the bar, he attacked and killed a different woman by strangling and hitting her. (*Ibid.*) The victim's body was found the following morning beneath an automobile that had been jacked up at a gas station. She was lying on her back with her legs spread apart and she was wearing a raincoat over nothing but a nightgown and panties. Her raincoat had been ripped open, and her nightgown and panties had also been torn so that the "front part of her body was exposed." (*Id.* at p. 316.) She had suffered multiple contusions and lacerations of her face, breasts, neck and lower abdomen. (*Id.* at pp. 315-316.) The victim's body, however, showed no evidence of sexual molestation. (*Id.* at p. 317.)

This Court rejected the prosecution's argument that the torn clothing, position of the victim's legs, Craig's abusive conduct toward the woman at the bar, and his statement about wanting "a little loving" proved that he had raped or attempted to rape the victim. (*People v. Craig*, *supra*, 49 Cal.3d at

p. 318.) There was "[a] complete absence of any evidence in the record to show that he had had an intent to commit rape." (*Ibid.*) The Court further observed that there was

> a complete lack of satisfactory evidence that this killing was committed during either an attempt to commit rape or in the commission of rape; that the evidence shows no more than the infliction of multiple acts of violence on the victim, and even though the killing was an extremely brutal one, the People have only proved that the defendant was guilty of second-degree murder.

(*Id.* at 319)

In *People v. Anderson, supra*, 70 Cal.2d 15, a ten-year-old victim was found naked under a pile of boxes and blankets next to her bed. There were over 60 wounds on her body, including repeated cuts and lacerations on her thighs and vaginal area. A knife had been thrust into her vagina so deeply that it cut through into the anal canal. (*Id.* at pp. 20-21.) Only defendant's socks and shoes had blood on them, suggesting he was partially nude during the attack. (*Id.* at pp. 24, 34.) In addition, the victim's torn and bloody dress had been ripped from her and was under her bed. (*Id.* at pp. 21, 24.) There was a large bloodstain found in the center of her mattress (*id.* at p. 37), the crotch of her blood soaked underpants had been ripped out, and her slip, with the straps torn off, was found under the bed in the master bedroom of the house. (*Id.* at p. 24.) The window blinds were down and the doors were locked. (*Ibid.*) This Court concluded that the evidence as a whole was insufficient to show that the defendant had the necessary intent to commit a sexual assault on the victim. The prosecution had failed to present any evidence relating to a possible Penal Code section 288 offense other than the murder itself. (70 Cal.2d at pp. 35-36.)

In *People v. Granados*, *supra*, 49 Cal.2d 490, the defendant had been convicted of first degree felony murder on the theory that the homicide was committed in perpetration of a child molestation. The defendant had lived in a common-law relationship with the mother of his victim, a 13-year-old girl. (*Id.* at p. 492.) After the defendant called the mother to tell her that the victim had poisoned herself, the mother returned home to find her daughter's body lying on the bedroom floor. Her skirt was pulled up exposing her private parts and an apron over the dress was pulled down below them. There were bloodstains on the wall, the floor and the decedent's head. A blood-covered machete was lying in a corner of the living room. (*Id.* at p. 493.) An autopsy failed to show any evidence of injury to the victim's vaginal area, and "a microscopic examination disclosed no spermatozoa." (*Id.* at p. 497.)

The defendant had previously been accused of sexually molesting the victim, and, at trial, the defendant testified that on the day of the killing he asked the victim if she was a virgin. (*People v. Granados*, *supra*, 49 Cal.2d at pp. 494-495; see also *People v. Anderson*, *supra*, 70 Cal.2d at p. 31.) Nevertheless, this Court concluded that there was "a total absence of evidence that defendant violated or attempted to violate section 288 of the Penal Code." (*People v. Granados*, *supra*, 49 Cal.2d. at p. 497.)

This Court reaffirmed the principle underlying these cases in *People v. Johnson* (1993) 6 Cal.4th 1, where the defendant had been convicted of killing a mother and a daughter. There, the defendant admitted having sex with the daughter, whom he encouraged to drink to the state of intoxication. (*Id.* at p. 39.) He told the police that "rape is hard to prove" even before that charge was mentioned to him. (*Ibid.*) The mother was dressed only in a sweatshirt and bra; she was naked from the waist down. She had been

severely beaten. However, no evidence was introduced to show any sexual trauma or other evidence of penetration. The only possible evidence of attempted rape was the victim's unclothed body and the defendant's prior sexual activity with the daughter. (*Id.* at pp. 39-40.) This could have supported at least some inference that the defendant had an intent to commit rape. However, more was "required to sustain a finding of rape or attempted rape on appeal." (*Id.* at p. 41.) Without specific evidence of a sexual assault, it was insufficient to support a charge of felony murder in the course of an attempted rape. (*Id.* at p. 41-42.)

Here, the only wounds on the victim were those that were inflicted through ligature strangulation. Years later, a sperm stain was found on the bedspread that was wrapped around the victim's legs, but there was no evidence of vaginal trauma, bruising, or sperm on the victim herself. The rape kit revealed no trace of even a foreign hair on the victim.

The prosecution acknowledged that the jurors had no evidence to determine when the stain was deposited. He argued that it could have been left during a rape, or as part of an uncompleted attempted rape. (20 RT 4415.) But it also could have been part of an act that occurred after the crime itself, which would not make the act rape. (*People v. Kelly* (1992) 1 Cal.4th 495, 524.) Moreover, it could have been part of an act other than vaginal intercourse, which was necessary for the crime of rape and the attendant special circumstance.[46/] (See Pen Code, § 261; *People v. Holt* (1997) 15 Cal.4th 619, 676.)

That there was semen left on the bedspread does not by itself indicate that an actual rape occurred. If anything, it suggests that something

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[46/] The witnesses who testified under Evidence Code section 1108 alleged the importance of oral intercourse in each of the incidents.

other than actual sexual intercourse with the victim occurred. The evidence in this case relies upon suspicion and conjecture, which is not enough to support a rape conviction. (See *People v. Raley, supra,* 2 Cal.4th at 890-891 [even evidence of a forcible sexual attack does not support the offense of forcible oral copulation charged in that case]; *People v. Timothy Craig* (1994) 25 Cal.App.4th 1593 [*Raley* jury had to speculate on whether defendant's conduct was consistent or inconsistent with charged offense].)

**2. Lack of Evidence of Attempted Rape**

To be convicted of attempted rape, there must be a "direct but ineffectual act" towards the commission of that crime. (Pen. Code, § 21a.) "To amount to an attempt, the act or acts must go further than mere preparation; they must be such as would ordinarily result in the crime except for the interruption." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements § 54.)

> Preparation alone will not establish an attempt. There must be " 'some appreciable fragment of the crime committed [and] it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter. . . .' " (*People v. Camodeca* (1959) 52 Cal.2d 142 . . . .; 1 Witkin & Epstein, Cal. Criminal Law, *supra*, Elements, § 54, p. 263.)

(*People v. Sales* (2004) 116 Cal.App.4th 741, 749.)

Although the law does not impose punishment for guilty intent alone, "it does impose punishment when guilty intent is coupled with action that would result in a crime but for the intervention of some fact or circumstance unknown to the defendant." (*People v. Camodeca*, *supra*, 52 Cal.2d at p. 147.)

In *People v. Anderson* (1934) 1 Cal.2d 687, this Court explained the difference between preparation, looking toward the commission of an

offense, and an actual attempt to commit that offense: "The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after preparations are made, and must be manifested by acts which would end in the consummation of the particular offense unless frustrated by extraneous circumstances." (*Id.* at p. 690.)

In *People v. Buffum* (1953) 40 Cal.2d 709, 718, overruled on other grounds in *People v. Morante* (1999) 20 Cal.4th 403, this Court further clarified the difference between acts of preparation and those of an attempt: "This court has held that two elements are necessary to establish an attempt, namely, a specific intent to commit a crime and a 'direct' ineffectual act done towards its commission." The crime of an attempt requires that there be "some appreciable fragment of the crime committed." (*Ibid.*)

Here, it appears that the prosecutor charged attempted rape because he could not prove that an actual rape occurred. (See 20 RT 4415 [acknowledging that it cannot be determined if appellant succeeded in raping victim].) The only evidence that could be used to establish attempted rape is the presence of semen on the bedspread and the allegations of past crimes under Evidence Code section 1108. This evidence may raise suspicion, but it is not sufficient to prove that there was a direct but ineffectual act amounting to an attempt to commit rape.

As discussed above, there was no signs of sexual bruising or any trauma on the victim's body apart from the homicide itself. No foreign matter was spotted in the rape kit. There were no signs of struggle to indicate that the perpetrator was unable to complete a rape due to the victim's resistance. The crime was not interrupted in any way as to prevent a rape from being accomplished. The evidence here simply is not as strong

as other cases, where the intent of the attacker was made known and there was direct evidence of a sexual attack. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387 [attempted rape established where defendant pointed gun at victim and said, "I want to rape you," and on two other occasions did rape victims]; *People v. DePriest* (2007) 42 Cal.4th 1, 48, 49 [evidence was sufficient to show attempted rape where defendant forced victim into secluded area, tore off her pants without stealing money from pocket, unzipped his own pants, and left pubic hair near victim's body, which was found partially nude with dirt on back, with legs in partially open position, with vaginal trauma, and with facial and neck injuries indicating possible struggle]; *People v. Rundle* (2008) 43 Cal.4th 76, 140 [evidence was sufficient to show attempted rape where deceased victim's nude and bound body was found in remote area, defendant admitted having had sex with her, evidence of nature of sexual assault was inconclusive due to decayed condition of body, and defendant confessed to raping and killing another young woman in similar circumstances not long before crime charged here took place].)

In *People v. Guerra* (2006) 37 Cal.4th 1067, this Court found that there was sufficient evidence of an attempted rape even though there was no evidence of a sexual assault. This Court noted the defendant's escalating sexual interest in the victim, coupled with the nature of stabbing wounds to the victim's breasts, and found that this was sufficient to support a finding that the victim was killed during an attempted rape. (*Id.* at pp. 1131-1132.)

Here, the victim had no prior relationship with appellant and she was not attacked in any way outside of the strangulation itself. There is no way to determine when the semen was deposited or under what circumstances, including whether it was before or after the homicide. There is no evidence

to show that vaginal sexual intercourse was intended. The evidence presented in this case simply was not sufficient – "that is, . . . reasonable, credible, and of solid value" – to support a finding of attempted rape. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

### 3. Past Crimes are not Sufficient Proof of Rape

At trial, the prosecutor presented four witnesses who testified pursuant to Evidence Code section 1108 that appellant sexually attacked them. The prosecutor argued that he needed no evidence other than this to establish that appellant committed the alleged crimes, including rape. (20 RT 4408, 4412.) However, proof that appellant committed prior sexual offenses is not a proxy or substitute for proof of the ultimate fact that appellant is guilty of the charged offenses. (*People v. Vichroy* (1999) 76 Cal.App.4th 92, 99; see also *People v. James* (2000) 81 Cal.App.4th 1343, 1356-1357 [propensity evidence relates to the defendant's character and cannot replace proof of the ultimate charges].)

In *People v. Raley* (1992) 2 Cal.4th 870, this Court distinguished between the kind of suspicion that other sexual crimes can engender and the evidence necessary to sustain a conviction. The evidence in *Raley* showed that the defendant locked two teenage girls in a basement and made them remove their clothing. He brandished a knife, handcuffed the girls and told them he would release them after they "fooled around" with him. He first led one of the girls, Jeanine, into a separate area. She returned about 15 minutes later with her clothes on, but looking very frightened. (*Id.* at p. 882.) The defendant then led the other girl, Laurie, to the kitchen and forced her to orally copulate him and manipulate his penis. After sexually assaulting Laurie, defendant stabbed and beat both girls, put them in the trunk of his car and eventually threw them down a ravine. Laurie managed

to climb up to hill to get help. (*Id.* at p. 883.) Jeanine was still alive when help arrived, and she explained that she had not been raped, but that defendant had made her remove her clothes and "fool around" with him. (*Id.* at p. 884.) Jeanine later died in the emergency room. (*Id.* at p. 884.)

The defendant was convicted of capital murder as well as other offenses, including attempted oral copulation by force against Jeanine. (*People v. Raley*, *supra*, 2 Cal.4th at pp. 889-890.) This Court reversed this conviction, stating that, while there was "substantial evidence of a forcible sexual attack of some kind on Jeanine and of a forcible oral copulation on Laurie," to infer that because Raley had committed a forcible oral copulation against Laurie, he attempted to commit the same offense against Jeanine would be applying "layers of inference far too speculative to support the conviction." (*Id.* at pp. 890-891.)

As the Court reaffirmed, a reasonable inference "'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" (*People v. Raley*, *supra*, 2 Cal.4th at p. 891, quoting *People v. Morris*, 46 Cal.3d at 21).

Use of evidence of past crimes to establish guilt in the present offense suffers from the same infirmity. The past crimes may show certain predispositions or raise a suspicion, but they cannot be used as a substitute for other evidence. The prosecutor was wrong – he needed more than the evidence under section 1108 to establish rape or attempted rape in this case. Accordingly, appellant's conviction and the special circumstances in this case must be set aside.

### D. The Special Circumstance of Burglary Must be Set Aside

The jurors found appellant guilty of the special circumstance of burglary by entering an inhabited dwelling at night with the intent to commit rape. (5 CT 1221.) It has long been established that in a burglary charge, the prosecution must "prove that at the very moment of entering the building in question there was an intent to commit theft or some felony." (*People v. Hamilton* (1967) 251 Cal.App.2d 506, 508.) In burglary cases, "intent must usually be inferred from all of the facts and circumstances disclosed by the evidence." (*People v. Matson* (1974) 13 Cal.3d 35, 41.) Nevertheless, for defendant's burglary conviction to stand, this intent must be supported by evidence that "reasonably inspires confidence and is of solid value." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.) The evidence in this case is not sufficient to establish burglary.

As discussed above, it could not be determined how the perpetrator entered the victim's apartment, nor can the purpose of that entry be ascertained. Even assuming that the perpetrator had a sexual intent, this cannot be equated with an intent to commit rape.

In *People v. Tidmore* (1963) 218 Cal.App.2d 716, the defendant was charged with burglary based upon an entry with an intent to commit rape. The defendant came to the victim's home at night. He acknowledged that he had long admired her and wanted to persuade her to have sex. (*Id.* at p. 718.) The court of appeal found that there was insufficient evidence to support a conviction based on attempted rape:

> An analysis of the evidence in the light most favorable to the People compels the conclusion that nothing more was shown as to the defendant's intent than that he desired to have sexual intercourse with [the victim]. While his conduct was reprehensible, there was no proof that he intended to accomplish his purpose by use of force rather than by

> persuasion. Apropos are the words of this court in *People v. Blackwell*, 193 Cal.App.2d 420, at page 425: "That the circumstances were suspicious may be conceded, but mere surmise and conjecture are not enough." Since the evidence falls short of the quantum necessary to overcome the presumption of innocence and to meet the burden resting on the prosecution to establish guilt beyond a reasonable doubt, the conviction cannot stand.

(*Id.* at p. 720.)

In short, burglary must be established by something more than sexual interest or the suspicion that a defendant intended to have sexual relations by force if he could not have it by any other means. Here, as in *Tidmore*, suspicion, surmise, and conjecture were not enough to establish burglary. For all the reasons that there was insufficient evidence of rape, it is equally true that burglary cannot be supported. This special circumstance must be set aside.

### E. Conclusion

Viewed in the light most favorable to the judgment, the evidence presented at trial does not support a finding that appellant premeditated and deliberated the killing, nor that the murder was committed with premeditation and deliberation during the commission of a felony. (*People v. Anderson, supra*, 70 Cal.2d at pp. 34-35.) Moreover, the evidence does not establish that the special circumstances are true. The improper conviction 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"]) and to a reliable verdict. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15,

16 & 17.) Thus, the special circumstances must be set aside and the first degree murder conviction must be vacated.

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## IX.

## DURING THE PENALTY PHASE, THE TRIAL COURT IMPROPERLY ADMITTED RECORDS PERTAINING TO APPELLANT'S 1971 MISDEMEANOR CONVICTION AS AN AGGRAVATING FACTOR AND IMPROPERLY INSTRUCTED THE JURY REGARDING IT

During the penalty phase, the trial court improperly admitted records certifying that appellant had suffered a 1971 misdemeanor conviction of assault with intent to commit great bodily injury as evidence to establish a factor in aggravation under former Penal Code section 190.3, factor (b)[47]. (People's Exhibit No. 14; 22 RT 4671-4672.) Appellant objected that the exhibit was hearsay and violated appellant's federal constitutional rights to confrontation, due process, and a reliable penalty verdict. (19 RT 4595.) The trial court erroneously found otherwise and instructed the jurors that the evidence had been introduced to show that appellant had been convicted of the crime. (23 RT 4934; 5 CT 1351.) These errors, both singularly and cumulatively, violated appellant's rights to due process and a reliable penalty verdict. (U.S. Const., 8th & 14th Amends.)

### A. The Exhibit was Inadmissible Hearsay

Under the law in effect at the time of appellant's crime, the fact of a criminal conviction was not at issue, only actual criminal conduct that involved force or violence was an aggravating factor. (Former Pen Code, § 190.3, factor (b).) Admission of appellant's conviction to show that appellant had committed a misdemeanor involving force or violence was hearsay.

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[47] The trial court found that this conviction was a misdemeanor. (21 RT 4592.) It instructed the jurors accordingly.

Under the current law, this Court has long differentiated between evidence admitted to prove criminal conduct involving force or violence under Penal Code section 190.3, factor (b), and use of a felony conviction pursuant to factor (c). The fact of a conviction of an offense is permissible aggravating evidence only if the conviction is for a felony under factor (c). Circumstances relating to a misdemeanor conviction may be independently admissible under factor (b), but the fact of conviction is not admissible. (*People v. Montiel* (1993) 5 Cal.4th 877, 936; see also *People v. Osband* (1996) 13 Cal.4th 622, 735 [misdemeanor conviction may not be introduced in aggravation].) As this Court has stated, it is "not the fact of conviction which is probative in the penalty phase, but the conduct of the defendant which gave rise to the offense." (*People v. Gates* (1987) 43 Cal.3d 1168, 1203.) The same reasoning should apply in regards to the 1977 law that applied at the time of appellant's crime, which did not make the fact of a conviction admissible for any purpose.

Here, the trial court admitted the record of appellant's conviction as the only evidence to show that appellant had committed assault by means of force likely to inflict great bodily injury. It is without question that a judgment that is offered to prove the underlying matters determined by the verdict is hearsay. Therefore, unless there is an exception to the hearsay rule, a judgment is inadmissible if offered to prove matters determined by it. (Evid. Code, § 200; *People v. Wheeler* (1992) 4 Cal.4th 284, 298.)

In *Wheeler*, this Court found that evidence of a misdemeanor conviction was inadmissible hearsay when used to establish criminal conduct for the purpose of impeachment, since no exception at that time

allowed a misdemeanor conviction to be used for that purpose.[48] (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 297-298.) As in *Wheeler*, there was no statutory authorization to use appellant's misdemeanor conviction as proof of criminal conduct. Since the conviction itself was not admissible as aggravation, the exhibit was hearsay when offered to prove specific conduct and should have been excluded.

**B. The Exhibit Violated Appellant's Right of Confrontation**

The use of the exhibit violated appellant's rights under the Confrontation Clause of the Sixth Amendment. In *Crawford v. Washington* (2004) 541 U.S. 36, 68, the United States Supreme Court held that testimonial hearsay may not be admitted at trial unless the defendant has had the right to confront the evidence against him or her. This rule applies to documentary evidence that was prepared for use at trial. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 2538-2540].)

Here, the trial court admitted the record of appellant's conviction under Evidence Code section 1280, which allows a trial court to admit records made by a public employee within the scope of his or her duty. Convictions are often proven through documentary evidence alone. (*People v. Prieto* (2003) 30 Cal.4th 226, 258.) However, the certified record of appellant's conviction was not admitted to prove the fact of the conviction, but appellant's underlying conduct. (Former Pen Code, § 190.3, factor (b).)

Even if a certified court record may sometimes be introduced under the Confrontation Clause, the United States Supreme Court has made clear

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[48] The holding in *Wheeler* was superceded by a statutory amendment allowing certain misdemeanor convictions to be used for impeachment. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) However, the rationale behind *Wheeler* remains the same.

that a clerk's authority to certify an official record is extremely circumscribed. *Melendez-Diaz* noted that a clerk has been permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538; citing *State v. Wilson* (1917) 141 La. 404, 409; *State v. Champion* (1895) 116 N.C. 987 [21 S.E. 700, 700-701].) Thus, a trial court could not admit into evidence a clerk's certificate providing substantive evidence against a defendant without the right of confrontation. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2539.)

Appellant similarly had no ability to confront the evidence that was introduced against him to show his underlying conduct. Accordingly, the use of the certified record violated the Confrontation Clause.

### C. The Trial Court Erroneously Instructed Appellant's Jurors That They Could Consider the Fact of Appellant's Misdemeanor Conviction.

The errors in receiving the evidence were exacerbated by an instruction informing appellant's jurors that "evidence has been introduced for the purpose of showing that the defendant has been convicted of the crime of misdemeanor assault by means of force likely to inflict great bodily injury." (23 RT 4934; 5 CT 1351 [CALJIC No. 8.86].) The instruction told the jurors before they may consider "the alleged crime as an aggravating circumstance" they must first be satisfied beyond a reasonable doubt that appellant "was in fact convicted of the prior crime." (23 RT 4934; 5 CT 1351 [CALJIC No. 8.86].)

This instruction was designed for use with the current Penal Code section 190.3, factor (c), allowing jurors to consider felony convictions in

aggravation. (See CALJIC No. 8.86 [Use Note].) As discussed above, this factor was not part of the 1977 law and the fact of appellant's misdemeanor conviction was not relevant to factor (b) under that law. (See *People v. Montiel*, *supra*, 5 Cal.4th at p. 936; *People v. Osband*, *supra*, 13 Cal.4th at p. 735.) Accordingly, the trial court erred in giving the instruction to the jurors.

The instruction was particularly erroneous because it described the "alleged crime" as an aggravating circumstance and allowed the jurors be satisfied beyond a reasonable doubt as long as appellant had been convicted of the misdemeanor. Since the language of the instruction was different from the instruction regarding criminal activity as an aggravating factor (5 CT 1349), jurors may have believed it to be a separate circumstance . Moreover, because it required jurors to find only the fact of the crime, and not any specific criminal activity, it changed the underlying issue that was before the jurors and improperly focused on conviction rather than conduct.

### D. The Error Violated State and Federal Constitutional Standards, Requiring Reversal

The errors in admitting the exhibit and instructing the jurors to consider the fact of appellant's conviction violated state and federal constitutional standards for the penalty phase of a capital trial. Under the Eighth Amendment, the jurors' discretion must be limited "so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1975) 428 U.S. 153, 189.) A death sentence "must be tailored to the [defendant's] personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801.) Improper consideration of aggravating factors "has a tendency to skew the weighing process and creates the risk that the death penalty will be imposed arbitrarily and thus,

unconstitutionally." (*United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111; cf. *Stringer v. Black* (1992) 503 U.S. 222.)

Evidentiary and instructional errors also violate due process if they render a trial fundamentally unfair. (*Cupp v. Naughten* (1973) 414 U.S. 141, 147.) In addition, since California law bars the use of non-statutory aggravation, the arbitrary deprivation of appellant's right to have his sentence determined without consideration of such evidence deprived him of a state-created liberty interest in violation of due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

In *People v. Montiel*, *supra,* 5 Cal.4th at p. 936, the error in admitting evidence of the defendant's conviction was harmless in light of other properly introduced evidence to establish criminal conduct under factor (b). Here, the erroneous record was the only evidence of past criminal conduct. Under these circumstances, the simple fact of conviction allowed appellant's jurors to consider the conduct underlying the assault in whatever way they might have imagined it occurring. The jurors had no other means to determine the severity of the facts at issue and whether it aggravated the homicide.

Moreover, the conviction was also the earliest evidence introduced of past criminal conduct. Appellant's jurors could have concluded that appellant not only had a long-standing history of violence, he also did not take advantage of the lesson that arrest and conviction should have taught. At bottom, the erroneous instruction highlighted the conviction so that it stood out from any other criminal activity before the jurors in this case. Without knowing the circumstances at issue, jurors could have speculated about what the crime meant and how serious it might have been. All of this rendered the use of the conviction prejudicial.

Under state law, any error that has a substantial effect upon the penalty phase requires reversal. (*People v. Robertson* (1981) 33 Cal.3d 21, 54.) Federal constitutional standards require reversal unless the prosecution can show that an error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Given the normative measure of the penalty decision, it cannot be said that this error was not substantial and did not contribute to the verdict. Under either standard, reversal is required.

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## X.

## VICTIM IMPACT EVIDENCE WAS ERRONEOUSLY ADMITTED AND THE JURORS WERE NOT PROPERLY INSTRUCTED REGARDING ITS USE

The prosecution presented testimony from six members of the victim's family who not only described the impact of the victim's death upon themselves, but on each other. Witnesses testified about how they or other family members had a deep hatred for appellant (22 RT 4649, 4661); suffered severe psychological problems as a result of the crime (22 RT 4643, 4647, 4653, 4656); and implied that the appellant was responsible for the death of a family member that occurred within ten years of the crime (22 RT 4666). The impact of this testimony, the failure of the trial court to instruct the jurors regarding it, and instructions that excluded victim impact testimony from standard evidentiary considerations rendered appellant's penalty phase fundamentally unfair and his death sentence arbitrary and unreliable in violation of federal and state constitutional standards. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 8th & 14th Amends.)

### A. The Applicable Legal Principles

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. at p. 358). "It is a hallmark of a fair and civilized justice system that death verdicts be based on reason, not emotion, revenge, or even sympathy." (*Le v. Mullin* (10th Cir. 2002) 311 F.3d 1002, 1015.) "If, in a particular case, a witness'[victim impact] testimony . . . so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment." (*Payne v. Tennessee* (1991) 501 U.S. 808, 831 (conc. opn. of

O'Connor, J.).) Evidence that improperly encourages the jury to impose a sentence of death based on considerations of sympathy for the victims may constitute due process error. (*Le v. Mullin*, *supra*, 311 F.3d at p. 1015.)

The United States Supreme Court banned the use of victim impact evidence in *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805. These decisions were largely overturned in *Payne v. Tennessee*, *supra*, 501 U.S. 808, where the Court held that States could permit victim impact evidence at capital trials without violating the Eighth Amendment. In particular, the Court approved two types of victim impact evidence: that relating to the life of the victim and that focusing on the specific harm caused by a defendant. (*Id.* at pp. 822, 823, 825.) "Specific harm" evidence is admissible to allow a jury "to assess meaningfully the defendant's moral culpability and blameworthiness." (*Id.* at p. 825.) However, the Court cautioned that victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair. . . ." would violate the Due Process Clause of the Fourteenth Amendment. (*Ibid.*)

*Payne* did not hold that all victim impact evidence is admissible *per se*. Victim impact evidence is relevant to assess "the defendant's moral culpability and blameworthiness," but only if the proffered evidence shows "the specific harm caused by the defendant." (*Payne v. Tennessee*, *supra*, 501 U.S. at 825.) Thus, victim impact evidence is "potentially relevant." (*Id.* at p. 831 (conc. opn. of O'Connor, J.).)

Following *Payne*, this Court decided in *People v. Edwards* (1991) 54 Cal.3d 787, 833, 835, that Penal Code section 190.3, factor (a), allows victim impact evidence and argument on the specific harm caused by the defendant, including the impact of the death on the victim's family. This

Court, like the Court in *Payne*, did not conclude that victim impact evidence is admissible in every capital case, but found that such evidence may "materially, morally, or logically" surround the crime. (*Id.* at p. 833.) To that extent, victim impact evidence may be admitted that logically shows the harm caused by the defendant." (*People v. Edwards*, *supra*, at p. 835.)

### B. *Payne* Was Wrongly Decided And The Eighth Amendment Should Preclude Admission Of Victim Impact Evidence

At trial, appellant presented a brief overview of the law pertaining to victim impact evidence, citing *Payne v. Tennessee* (1991) 501 U.S. 808, which overturned prior decisions that had banned such evidence in a capital penalty trial. (See 5 CT 1262 [motion to limit victim impact evidence].) Appellant conceded that victim impact evidence was admissible under current law, but objected to it. (21 RT 4551.) Appellant recognizes that *Payne*, of course, is binding on this Court, but presents this claim on appeal in order to exhaust his state remedies and, if necessary, assert the claim in a federal petition for writ of habeas corpus and obtain the benefit of any new rule of law on this question by the United States Supreme Court. (See 28 U.S.C. §§2254(b)(1), 2254(d)(1).)

*Payne* was wrongly decided because it is contrary to the dictates of the Eighth Amendment, as Justice Stevens and Justice Marshall explained in their dissenting opinions. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 856-866 (dis. opn. of Stevens, J.); *id.* at pp. 844-856 (dis. opn. of Marshall, J.) First, victim impact evidence is inconsistent with the Eighth Amendment principle that the decision to impose the death sentence should be based solely on an assessment of the defendant's blameworthiness, as informed by the character of the offense and the character of the defendant, and not on evidence that "serves no purpose other than to appeal to the

sympathies or emotions of the jurors. . . ." (*Id.* at pp. 856-857 (dis. opn. of Stevens, J.).) Second, victim impact evidence is not necessary to avoid a sentencing proceeding that is unfairly imbalanced against the state. The Constitution does not require parity between the defendant and the state, but rather grants rights to the criminal defendant and imposes special limitations on the state designed to protect the individual from overreaching by the disproportionately powerful state. (*Id.* at pp. 859-860 (dis. opn. of Stevens, J.); see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements* (1996) 63 U. Chi. L. Rev. 361, 401 [disputing the assumption in *Payne* that without victim impact evidence, the defendant has the advantage at the penalty phase].) Third, the admission of victim impact evidence introduces a substantial risk of arbitrary results by permitting the jury to impose a death sentence on the basis of the character or reputation of the victim or the grief of his or her survivors. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 864-866.) Although, as noted above, *Payne* envisioned that the due process clause would protect against evidence that renders the trial fundamentally unfair (*id.* at p. 825), that limitation has proved an ineffective remedy. (See Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials* (1999) 41 Ariz. L. Rev. 143, 175-186.)

For these reasons, *Payne* was wrongly decided, and the admission of victim impact evidence at appellant's penalty phase violated his Eighth Amendment and Fourteenth Amendment rights.

### C. The Trial Court Failed to Instruct the Jurors on How Circumstantial Evidence Received During Victim Impact Testimony Was to Be Evaluated

As part of the penalty phase instructions, the trial court modified CALJIC No. 2.01, instructing the jurors on the sufficiency of circumstantial

evidence, to refer only to testimony offered to prove "criminal acts" committed by appellant. (5 CT 1355.) Appellant objected that this instruction should apply to any other circumstantial evidence offered in the penalty phase. (23 RT 4922-4924.) In particular, appellant was concerned that the trial court's modification affected the juror's consideration of victim impact evidence, which was the only type of evidence to which appellant's objection and proposed instruction would apply. (See 5 CT 1496 [motion for new trial discussing modification of instruction as it related to victim impact evidence].) The trial court denied this request and limited the instruction to refer only to "criminal acts" alleged against appellant. (23 RT 4924.)

The trial court's modification effectively precluded the jury from receiving any guidance as to how circumstantial evidence of victim impact should be considered. Accordingly, it violated appellant's right to due process and a reliable penalty verdict. (U.S. Const., 8th & 14th Amends.)

**1. Circumstantial evidence of victim impact should be considered as any other circumstantial evidence**

This Court has held that victim impact evidence extends to that which surrounds the crime materially, morally, or logically. (*People v. Edwards, supra,* 54 Cal.3d at p. 835.) The determination of what constitutes such a link is therefore a factor for the jurors to consider in weighing the testimony of victim impact witnesses. If evidence of a misfortune suffered by a victim is not sufficiently linked to the crime, then jurors should disregard it. It follows that if circumstantial evidence is presented to show a particular harm, the testimony should be evaluated under standard evidentiary principles: aggravating evidence of victim impact should not be considered unless jurors find that it is consistent with the theory that a defendant caused the harm, the underlying facts are proved

beyond a reasonable doubt, and the aggravation cannot be reconciled with any other conclusion. (See CALJIC No. 2.01[circumstantial evidence of guilt]; CALJIC No. 8.83 [circumstantial evidence used to show special circumstances].)

Each of these principles is important in evaluating circumstantial victim impact evidence. Under the federal Constitution, victim impact evidence is relevant to assess "the defendant's moral culpability and blameworthiness," but only if the proffered evidence shows "the specific harm caused by the defendant." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) *Payne* did not hold that all misfortune suffered by a victim should be attributable to the crime, but rather that victim impact evidence is "potentially relevant." (*Id* at p. 831 (conc. opn. of O'Connor, J.).) Thus, if circumstantial evidence is offered to show victim impact, the jurors must evaluate whether it supports the conclusion that the defendant caused the particular harm alleged or whether there is an alternative explanation that does not make the defendant morally responsible. In short, jurors must apply the standards for reviewing circumstantial evidence that are given in other instructions, including CALJIC No. 2.01.

Circumstantial evidence offered to show that a crime caused a harm should also be subject to the same standard of proof as the underlying crime or other aggravating evidence of criminal acts – that is, proof beyond a reasonable doubt. In *People v. Williams* (2010) 49 Cal.4th 405, this Court recognized that disparities in the way that evidence is treated during the penalty phase can be confusing for jurors. It held that evidence of other crimes admitted as aggravation under separate factors of Penal Code section 190.3 should be subject to a uniform evidentiary standard of proof beyond a reasonable doubt. (*Id.* at p. 459.) For similar reasons, victim impact

evidence should be subject to the same standard. An instruction that circumstantial evidence of harm must actually be proven beyond a reasonable doubt before it can be used to aggravate appellant's crime was essential to limit and guide the jurors' consideration.

### 2. The trial court's instruction precluded the jury from applying principles governing circumstantial evidence as it related to victim impact testimony

There can be no doubt that the jurors believed that the trial court's modification of CALJIC No. 2.01 excluded victim impact evidence. Appellant's jurors were instructed to apply the law only as given to them in the penalty phase instructions. (5 CT 1335 [CALJIC No. 8.84.1].) Accordingly, jurors would have followed this instruction and concluded that other applications concerning the sufficiency of circumstantial evidence were not at issue.

Moreover, in both law and logic there is a principle that the specific overrides the general. (See, e.g., *Peoplev. Trimble* (1993) 16 Cal.App.4th 1255, 1259.) Related to this is the idea that the inclusion of a specific item will exclude its application in other general contexts: *inclusio unius est exclusio alterius*. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) ["Although the average layperson may not be familiar with the Latin phrase *inclusio unius est exclusio alterius*, the deductive concept is commonly understood . . . ."]; *Alcaraz v. Block* (9th Cir. 1984) 746 F.2d 593, 607 ["maxim *expressio unius* is a product of logic and common sense"].) Thus, appellant's jurors certainly understood that the specific limitation on the instruction on the sufficiency of circumstantial evidence would have applied only to "criminal acts" alleged under factor (b).

### 3. Failure to instruct on circumstantial evidence relating to victim impact was prejudicial

An instruction concerning the use of circumstantial evidence of victim impact was critical in this trial. Sharon Sizelove testified that Tana's death affected her grandmother, and that "within 10 years she was gone, too." (22 RT 4666.) It is likely that jurors understood this testimony to mean that appellant was responsible for the grandmother's death. (See *People v. Hamilton* (2009) 45 Cal.4th at 863, 926-928 [evidence of victim impact can extend to death of victim's husband from natural causes 16 years after crime].)

There is a substantial difference between testimony establishing that a homicide affected the family of the victim and that which invites jurors to find that the crime caused a second death. Evidence of the pain of the survivors is a "consequence of a successful homicidal act so foreseeable as to be virtually inevitable." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 838 (conc. opn. of Souter, J.).) Evidence asserting that the pain of the crime was so great that it led to another person's death, significantly after the crime, goes considerably beyond this. In this case, it was important that the jurors evaluate Sizelove's testimony in keeping with the principles of CALJIC No. 2.01, which would have given jurors a framework to determine if appellant was responsible for the death, if the underlying facts were proven beyond a reasonable doubt, and whether there were other interpretations of the testimony that would not aggravate the crime.

The trial court's modification of CALJIC No. 2.01 excluded its principles from the jury's consideration of victim impact evidence. Without an instruction explaining how this evidence was to be evaluated, jurors could have concluded that because the pain of the crime affected the victim's grandmother, and that she died "within ten years," that the two

events were related and attributable to appellant. It would have increased appellant's moral blameworthiness beyond other testimony relating to the effect of the crime. Given the importance of such evidence to jurors, the sheer emotional impact that it encompasses, and the normative decision that jurors must make in a capital case, this Court should find the error to be prejudicial.

Under state standards, this is substantial error affecting the penalty judgment, which requires reversal. (*People v. Robertson* (1981) 33 Cal.3d 21, 54.) Under federal law, reversal is required because the prosecution cannot show that the error in excluding circumstantial victim impact evidence from the protections afforded under CALJIC No. 2.01 is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

### D. The Trial Court Failed to Instruct the Jurors Sua Sponte on the Appropriate Use of the Victim Impact Evidence in this Case

It is settled law that the trial court is responsible for ensuring that the jury is correctly instructed on the law. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The trial court must instruct sua sponte on the principles that are openly and closely connected with the evidence presented and necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Appellant acknowledges that this Court has held that a sua sponte instruction on victim impact is not required. (*People v. Murtishaw*

(2011) 51 Cal.4th 574, 595.) However, the issue should be reconsidered in light of the practices in other states and the facts of this case.

In this case, the family members of the victim presented broad testimony about the effect of the crime upon each other. Helen Wooley, Tana's mother, testified about how she and her husband became despondent, her other children moved away from the area, and her son Hal was sullen, bitter, and distant. (22 RT 4642-4643.) Tana's father, Wayne Woolly, stated that the death tore the family apart to the extent that he thought he might lose his wife. (22 RT 4647.) Jurors were told that Tana's brother Hal carried a deep hatred for appellant and a desire for vengeance. (22 RT 4649, 4661.) Tana's family members each testified vividly about how the murder affected them, including Sharon Sizemore's testimony that implied the crime might have caused the eventual death of the grandmother. (22 RT 4666.) The prosecutor recognized the importance of the victim impact testimony and used it as the centerpiece of his argument, contrasting his view that sympathy for appellant's family could not be considered while arguing that the suffering felt by the victim's family warranted a death sentence. (23 RT 4938-4939; 4940-4944.)

Although appellant had concerns about the broad reach of the victim impact evidence (see, e.g., 21 RT 4549-4552 [appellant seeks to limit victim impact evidence]; 23 RT 4922-4924 [appellant seeks to apply circumstantial evidence instruction to victim impact testimony]), he did not request a specific instruction. It is precisely in this situation where the duty of the trial court to provide jurors with a proper understanding of the case is most important. (See generally *People v. Murtishaw*, *supra*, 48 Cal.3d at p. 1022; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1085; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; see also *People v. Stewart* (1976)

16 Cal.3d 133, 138-140 [defendant's request for an instruction that was an incomplete statement of the law was sufficient to alert the trial court to give, sua sponte, a correctly worded instruction on defendant's theory].)

Other states have required instructions on the use of victim impact evidence. "Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that whenever victim impact evidence is introduced the trial court must instruct the jury on its appropriate use, and admonish the jury against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829 ; *State v. Koskovich*, *supra*, 776 A.2d at p. 181;[49/] *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d 839,

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[49/] In *State v. Koskovich*, *supra*, the New Jersey Supreme Court held:

> We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(776 A.2d at p. 177.)

842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required cautionary instruction varies in each state, depending on the role victim impact evidence plays in that state's statutory scheme, common features of those instructions include an explanation of how the evidence can properly be considered, and an admonition not to base a decision on emotion or the consideration of improper factors. An appropriate cautionary instruction would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider the harm caused by a defendant in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(See *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159; see also *State v. Koskovich*, *supra*, 776 A.2d at p. 177.)[50/]

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[50/] The first four sentences of this instruction come from the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at page 159. The last sentence is based on the decision of the New Jersey Supreme Court in *State v. Koskovich*, *supra*, 776 A.2d at page 177.

In *People v. Ochoa* (2001) 26 Cal.4th 398, 455, this Court addressed a different proposed limiting instruction, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, which was also given in this case (5 CT 1335).[51/] However, CALJIC No. 8.84.1 does not cover any of the points made by the instruction proposed here. For example, it does not tell the jury why victim impact evidence was introduced, and does not caution the jury against an irrational decision.

CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow the victim impact evidence encompassed in this case. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victims' relatives.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Ultimately,

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[51/] CALJIC No. 8.84.1 reads in relevant part:

> You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

the penalty decision must be a reasoned moral response, rather than an emotional reaction to the evidence. (*Saffle v. Parks* (1990) 494 U.S 484, 493.) The limiting instruction appellant proposes here would have conveyed that message to the jury; none of the instructions given at the trial did that. Consequently, there was nothing to stop raw emotion and other improper considerations from tainting the jury's penalty decision. The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that they affected the penalty verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) The emotion that victim impact evidence engenders, and the testimony about the family's hatred, desire for vengeance, and the grandmother's death, makes it likely that the victim impact evidence had a profound effect upon the jurors and influenced their deliberations. The prosecutor's closing argument vividly illustrated the importance of victim impact evidence to this penalty determination. Under these circumstances, the trial court's failure to instruct on victim impact evidence cannot be considered harmless under either the federal or state standards, and therefore reversal of the death judgment is required.

## XI.

## THE TRIAL COURT ERRONEOUSLY LIMITED RELEVANT MITIGATING EVIDENCE CONCERNING APPELLANT'S UPBRINGING AND HIS FAMILY LIFE WHEN HE WAS A CHILD

The trial court erroneously restricted testimony concerning appellant's childhood that would have corroborated appellant's penalty phase expert and provided substantial mitigation in its own right. The trial court's erroneous ruling prohibiting this testimony violated appellant's rights to due process and a reliable penalty verdict. (U.S. Const, 8th & 14th Amends.)

A defendant's right to due process and compulsory process under the federal Constitution includes the right to present witnesses and evidence in his own defense. (*Washington v. Texas* (1967) 388 U.S. 14, 18-19.) "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law." (*Id.* at p. 19.) The rights to present witnesses and evidence are also guaranteed by the California Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 638 (dis. opn. of Kennard, J.).)

Of course, the right to present defense witnesses and testimony is not absolute and in appropriate circumstances must "bow to accommodate other legitimate interests in the criminal trial process." (*Michigan v. Lucas* (1991) 500 U.S. 145, 149, quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 55, and *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) However, the state may not arbitrarily deny a defendant the ability to present testimony that is "relevant and material, and . . . vital to the defense." (*United States*

*v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, quoting *Washington v. Texas*, *supra*, 388 U.S. at p. 16.) Moreover, the state may not apply a rule of evidence "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; see also *Green v. Georgia* (1979) 442 U.S. 95, 97 [exclusion of reliable hearsay mitigating evidence violated due process].)

The Ninth Circuit has outlined the test to be applied in evaluating whether the exclusion of defense evidence amounts to a due process violation under *Chambers*. (*Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 530.) The reviewing court must first consider whether the evidence: 1) has probative value on the central issue; 2) is reliable; 3) can be evaluated by the trier of fact; 4) is the sole evidence on the point or "merely cumulative"; and 5) constitutes a major part of the defense. Finally, the court must "balance the importance of the evidence against the state interest in exclusion." (*Ibid.*) These factors supported the admission of the excluded testimony in the present case.

### A. The Trial Court Erred in Excluding Statements Made by Leonard Hazlett

Appellant sought to present certain statements made by appellant's brother Leonard Hazlett concerning their upbringing. Leonard died before trial, but had spoken to investigators about the violence that he and appellant faced while growing up. (See 5 CT 1253-1255 [investigative reports regarding Leonard's statements].)

Leonard and appellant had a special bond because they both had the same parents, unlike appellant's other siblings who testified at trial. Leonard told his wife, Patricia, about the beatings that he and appellant had endured, sometimes being awakened by beating at the hands of their step-father. He said that appellant had resented that there were so many children

in the blended family since that meant that there was less for them. Leonard felt that this was one of the reasons why appellant appeared to be reserved towards his family. (5 CT 1253.) Leonard did not recall his biological father ever being around, and he and appellant never really talked about their father. (5 CT 1255.)

Leonard corroborated Dan Snowden's testimony that their mother had poked her husband's eye out with a can opener. (5 CT 1254; see also 22 RT 4383 [testimony of Dan Snowden].) However, Leonard's statements revealed that appellant had actually watched the incident and saw the father's eye come out between his fingers as he raised his hand to cover it. (5 CT 1254.) Leonard also described other incidents of violence in the home that he and appellant witnessed, including when they saw an aunt being assaulted by an uncle, who knocked the aunt to the floor and shredded her face with a knife. (5 CT 1255.) Leonard stated that he and appellant felt helpless to protect their mother and this shamed appellant. (5 CT 1255.)

The trial court excluded the testimony as hearsay. (21 RT 4581.) Yet, as appellant contended at trial (2 CT 1248), the application of hearsay rules does not preclude admission of this testimony. It has long been established that a mechanical application of state evidentiary rules, including hearsay, does not preclude relevant evidence that is necessary for the ends of justice. (*Green v. Georgia*, *supra*, 428 U.S. at p. 97; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.)

Here, Leonard's statements went beyond the testimony of other witnesses and provided important mitigating evidence. The bond between Leonard and appellant was a unique part of the family experience since the two shared a biological father. As the older children in the family, they

experienced things differently than the younger siblings, including a sense of shame at not being able to do more to help their mother. Moreover, Leonard offered specific evidence, such as the story of how his aunt was attacked, that went beyond other witnesses to establish how pervasive the culture of violence was in their home. Thus, the evidence was not merely cumulative. (See *Tinsley v. Borg*, *supra*, 95 F.2d at p. 530.)

Leonard's statements were also reliable. They were largely made to his wife, Patricia, before appellant was charged in this case. (21 RT 4535.) The prosecutor was fully capable of cross-examining Patricia about the circumstances under which they were made or her observations about how Leonard's family upbringing affected his life. Accordingly, the prosecutor would not have been prejudiced by the admission of the statements, and the statements could be fairly evaluated by the jurors and taken into consideration as part of appellant's mitigation. (See *Tinsley v. Borg*, *supra*, 95 F.2d at p. 530.) Under these circumstances, the trial court erred in excluding them.

### B. The Trial Court Erred in Excluding Testimony from Appellant's Siblings Regarding Their Upbringing and the Effect It Had upon Them

Appellant sought to present testimony of various siblings regarding various experiences that they had growing up in the family home and how that affected them. The trial court erroneously ruled that any testimony that did not relate directly to what appellant experienced was irrelevant. (22 RT 4769-4770, 22 RT 4798-4799.) The ruling violated appellant's constitutional right to due process and a reliable penalty verdict. (U.S. Const, 8th & 14th Amends.)

Specifically, the trial court excluded testimony from the following witnesses as being irrelevant:

- Dan Snowden, Jr. was appellant's younger half-brother. (22 RT 4772.) Appellant sought to present testimony about an incident that involved the father and a bottle of syrup in the kitchen. Dan could not remember if appellant was present during this incident. The trial court ruled it was irrelevant. (22 RT 4784.)
- Kevin Snowden, another sibling, testified that he considered their father to be an evil man because of things that Kevin saw and incidents between himself and his father. The trial court sustained the prosecutor's objection as to any incident where appellant was not present. (22 RT 4789.)
- The trial court sustained an objection to Kevin Snowden testifying about how he experienced the father's violence. (22 RT 4790.)
- Kevin Snowden was not allowed to testify about the circumstances that led him to leave his home in Rosamond when he was only 15 years old. (22 RT 4794.)
- The trial court sustained the prosecutor's objections to testimony about whether Kevin Snowden committed crimes involving domestic violence or had verbally or emotionally abused his own children. (22 RT 4794.)
- David Snowden, another sibling, was not permitted to testify about his own problems as an alcoholic and drug addict. (22 RT 4806.)
- The trial court prohibited David Snowden from testifying about his mother's use of prescription pills and his own use of these pills to numb himself from the problems at home. (22 RT 4808; 5 CT 1499.)

In *Edwards v. State* (1999) 737 So.2d 275, the defendant contended that his problems were the result of an abusive upbringing and that he had not been properly treated at a mental health center. The defendant intended

to show that his older brother had also fared badly in life, but that his younger brother had done better because he received treatment. The trial court, however, prohibited him from introducing evidence about the effect of the abusive upbringing upon his brothers. The Mississippi Supreme Court held that this evidence was relevant: "An important component of this showing was to establish that Edwards' problems were not the result of an inherent character flaw, but of his abusive upbringing." (*Id.* at p. 297.) Failure to admit this evidence at trial was reversible error. (*Ibid.*)

Here, the excluded testimony similarly was relevant not only to document the general problems that existed for everyone in the home in which appellant was being raised, but to show that appellant's problems – any rage and violence – was not simply because he was evil. It also would have mitigated the crime by showing that appellant was able to stop that cycle of violence in his own home by not perpetuating it upon his children – even when other siblings had been unable to do that. In short, it would have shown the seriousness of the problems that appellant faced, the results of violence in his home, and put appellant's life and upbringing into its full context. The nature of appellant's home life and how it affected other siblings was therefore part of appellant's "character and record." (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [mitigating evidence includes any aspect of a defendant's character and record that is offered as a basis for a sentence less than death].)

This testimony was probative, reliable, and an important part of appellant's penalty phase defense. (See *Tinsley v. Borg*, *supra*, 95 F.2d at p. 530.) Accordingly, the trial court's error deprived appellant of his constitutional right to present relevant mitigating evidence. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4.)

### C. The Trial Court Erroneously Limited the Testimony of Dr. Minagawa

Appellant presented an expert witness, Dr. Rahn Minagawa, to testify about the effect that domestic violence has on children. Doctor Minagawa testified that children who experience domestic violence will be affected it, some more than others, but problems often include substance abuse, rage, damaged relationships, or cycles of violence. (22 RT 4823-4824.) The doctor testified that the Snowden family was a "textbook case of domestic violence gone amok" and that appellant and his siblings faced problems that were entirely consistent with such a violent upbringing. (22 RT 4828.)

The trial court sustained objections to testimony about various facts that Dr. Minagawa had considered in reaching this conclusion, including consideration of Kevin Snowden's problems with alcohol and drugs (22 RT 4830, 4833) and David Snowden's use of drugs at an early age (22 RT 4833). The trial court again found that any experience that happened to appellant's siblings was irrelevant to appellant. (22 RT 4834.)

Appellant contended that without this testimony the prosecutor could argue that some members of appellant's family did not have problems as a result of the violent upbringing, making it relevant to show that other siblings had problems consistent with the effects of domestic violence.[52/] (22 RT 4838.) He argued that the specific testimony about such problems was important to corroborate Dr. Minagawa's research about how domestic violence affected everyone in the family, not just appellant. (22 RT 4841.)

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[52/] The prosecutor made this very argument, telling the jurors that other family members became successful and dismissing the evidence of domestic violence as simply being an excuse. (23 RT 4941.)

It is well settled that an expert witness is entitled to base an opinion on any relevant fact, including reliable hearsay. (Evid. Code, § 801, subd. (b); *People v. Carpenter* (1997) 15 Cal.4th 312, 403 [expert may base opinion on any matter known to him]; *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1325.) This is particularly important because an expert's opinion is "no better than the facts on which it is based." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Therefore, Dr. Minagawa's reliance on various facts concerning appellant's siblings and the problems that they faced was important evidence to corroborate and support his conclusions about domestic violence. He could rely on their experience to form a conclusion that the Snowden family was a "text book case" of domestic violence. Without having the full information about what Dr. Minagawa considered and what appellant's family suffered, it would have been easy for the jurors to dismiss his testimony, just as the prosecutor argued. The trial court therefore erred in concluding that any experience apart from appellant's own was irrelevant.

**D. The Errors were Prejudicial**

Mitigating evidence is relevant as long as a sentencer could find that it warrants a sentence less than death. (*Tennard v. Dretke* (2004) 542 U.S. 274, 285.) The importance of presenting evidence of family history as part of mitigation is firmly established. Indeed, it can be ineffective assistance of counsel not to present family history to jurors during a penalty phase case. (*Hamblin v. Mitchell* (6th Cir. 2003) 354 F.3d 482, 486 [citing ABA guideline 11.8.6, on the importance of family and social history].)

Here, the full family history, including testimony about how domestic abuse affected appellant's siblings, was important. Dr. Minagawa testified that domestic violence affects people in different ways, but that

there may be deep underlying ramifications. Indeed, the evidence was important enough for the prosecutor to minimize its impact. The prosecutor argued to the jurors that other family members were successful and that appellant did not display all the possible effects of domestic violence, such as not committing domestic violence himself. (23 RT 4941-4942.) Given this, it was critical to show that appellant was not alone and that other family members suffered a great deal from domestic violence. Far from being an excuse, as the prosecutor maintained (23 RT 4941), the effects of the violence on appellant's family was relevant and important mitigating evidence to show why appellant may have had problems that led to the crime itself.[53/] (*Edwards v. State*, *supra*, 737 So.2d at 297 [family member's history relevant to show defendant's problems were not the result of an inherent character flaw but of an abusive upbringing].)

Within the normative nature of the penalty decision, this Court cannot know how much this evidence might have affected the jurors. But it can be sure that under state law, the error was a substantial one. (*People v. Robertson* (1981) 33 Cal.3d 21, 54.) Under federal law, the prosecution cannot show that the error in denying mitigating evidence is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18,

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[53/] As this Court has explained, it would be rare to find mitigating evidence that could excuse someone who committed a capital crime, so mitigation must be considered in the context of whether it weighs in favor of life rather than death. (*People v. Brown* (1985) 40 Cal.3d 512, 541, fn. 13.) Under this standard, the excluded evidence was not offered to excuse appellant, but to provide a context to show how the violence might have affected him, making him more deserving of life.

24.) Using either standard, reversal of the penalty judgment is therefore required.

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## XII.

## THE TRIAL COURT ERRONEOUSLY PRECLUDED THE JURORS FROM CONSIDERING SYMPATHY FOR APPELLANT'S FAMILY DURING THE PENALTY DELIBERATIONS

Appellant's jurors were instructed that they were only permitted to assign moral or sympathetic value to "each and all of the various factors" that they were "permitted to consider." (5 CT 1365 [modified CALJIC No. 8.88].) The prosecutor argued to the jurors that sympathy for appellant's family could not be considered under the law. (23 RT 4938.) During the penalty deliberations, however, appellant's jurors asked the trial court if they could consider sympathy for appellant's family: "We are questioning if we can consider sympathy to Larry Hazlett's family, not just Larry (i.e., son, daughter, wife, etc.)." (23 RT 4973; 5 CT 1374.)

Appellant argued that under the 1977 law, the answer to this question simply should be "yes." (23 RT 4978.) The trial court instead instructed the jurors that "sympathy for the family of the defendant is not a matter which you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive aspect of the defendant's background and character." (23 RT 4985; see CALJIC No. 8.85.) The trial court erred because the 1977 law did not limit the jurors' deliberations to enumerated factors, thus sympathy for appellant's family could have been considered. The instruction violated appellant's federal and state constitutional rights to a properly instructed jury, due process, and a reliable penalty verdict. (Cal. Const., art. 1, §§ 7, 16, 17; U.S. Const., 6th, 8th, & 14th Amends.)

This Court has found that under the current state law, sympathy for a defendant's family is not a separate mitigating factor. (*People v. Ochoa*

(1998) 19 Cal.4th 353, 455-456.) In so doing, this Court specifically relied upon the 1978 statutory language that allows jurors only to consider certain factors, including "the defendant's character, background, history, mental condition and physical condition." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 455, citing Pen. Code, § 190.3, *People v. Brown* (1985) 40 Cal.3d 512, 542.) *Ochoa* distinguished sympathy for a defendant's family from consideration of these statutory factors and held that the former was not relevant except to the extent that it illuminated "some positive aspect of the defendant's character." (*Id.* at p. 456.[54/])

The trial court noted that *Ochoa* held that "sympathy for a defendant's family is not appropriate," but asked the parties if that was the law in 1977. (23 RT 4973.) The prosecutor argued that there was no difference between the 1977 version of Penal Code section 190.3 and the current statute. He stated that because the law had not changed, *Ochoa* should be followed. (23 RT 4974, 4981-4982.) Appellant argued that the 1977 statute was more flexible and permitted consideration of family sympathy (24 RT 4975), but the trial court rejected this argument and instructed the jurors that they could consider sympathy for appellant's family only to the extent that it reflected a positive aspect of appellant's character. (23 RT 4985.)

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[54/] *Ochoa* also held that prohibiting consideration of sympathy for a defendant's family did not violate federal constitutional standards, which require that jurors consider any aspect of a defendant's character or record that is offered as a basis for a sentence other than death. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 456, citing (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305.) Even assuming that this Court was correct that prohibition of sympathy for a defendant's family does not violate constitutional minimums under the Eighth Amendment, appellant demonstrates below that state law and federal due process require more.

The trial court erred because the 1977 law substantially differed from the current statute in pertinent part. Under the law in effect at the time the crime was committed, jurors were simply to "consider, take into account and be guided by the aggravating and mitigating circumstances." (Former Pen Code, § 190.3 [Stats. 1977].) The 1978 law instead requires jurors to weigh the specific factors to determine the appropriate penalty. (Pen Code, § 190.3 [Stats. 1978].)

The two laws are similar, but there is one "crucial change" between them. (*People v. Boyd* (1985) 38 Cal.3d 762, 773.) As this Court explained:

> The [1977] statute . . . provided no further guidance or limitation on the jury's sentencing discretion. In the absence of such a limitation, the jury was free, after considering the listed aggravating and mitigating factors, to consider any other matter it thought relevant to the penalty determination

(*Ibid.*; see also *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1026 [*Boyd* reasoned that the sentencer was free to consider any nonstatutory matter deemed relevant in penalty determination]; *People v. Brown*, *supra*, 40 Cal.3d at p. 544 [the one distinction between the 1977 and 1978 laws is that under the 1978 law jurors are to limit their consideration to the specific statutory factors].)

In short, the 1978 law addressed in *Ochoa* did not permit consideration of family sympathy because it was not within the statutory

framework. However, the 1977 law was not so limited.[55/] Appellant was correct. The answer to the jurors's question should have been "Yes." (23 RT 4978.) Accordingly, the trial court should have instructed the jurors that they were free to consider sympathy for appellant's family if they believed that it was relevant to their determination.

Federal due process guarantees should have compelled the trial court to instruct appellant's jurors pursuant to the 1977 law. In *Hicks v. Oklahoma* (1980) 447 U.S. 343, the Supreme Court held that a state law guaranteeing a criminal defendant procedural rights at sentencing may create a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Under state law, Hicks had a right to a jury determination of sentence as well as guilt. Pursuant to Oklahoma's habitual offender statute, Hicks's jury was directed to impose a 40 year sentence if he was found guilty. Following his conviction, the state court held that the habitual offender statute was unconstitutional, but refused to set aside Hicks's sentence, reasoning that it was within the range of punishment the jury could have selected if permitted to exercise its discretion. The Supreme Court held that the state's action violated due process and reversed, explaining:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The

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[55/] The modified version of CALJIC No. 8.88 given by the trial court erroneously incorporated limitations under the 1978 law and instructed that jurors were free to assign moral or sympathetic value only to "the various factors that [jurors] are permitted to consider." (5 CT 1365.) It is apparent that appellant's jurors asked the question that they did because they did not otherwise understand that they could consider any matter deemed relevant to the penalty determination.

> defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [citations omitted] and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Citations omitted.] In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

(*Hicks*, 447 U.S. at p. 346; emphasis in original.) Following *Hicks*, courts have found due process violations where a defendant was denied his full allotment of peremptory challenges under state law (*Van Sickel v. White* (9th Cir. 1999) 166 F.3d 953, 957), and where the state court failed to make the findings necessary to support a sentence under the state's habitual offender law (*Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 672-673).

*Hicks* has also been applied to capital sentencing. In *Rust v. Hopkins* (8th Cir. 1983) 984 F.2d 1486, 1492, the sentencing panel failed to apply the subsequently-established state law requirement that aggravating circumstances be found beyond a reasonable doubt. That standard was first applied by the state reviewing court, which affirmed the conviction. (*Ibid.*) The Eighth Circuit Court of Appeals set aside the death judgment, holding that Rust had a liberty interest in the application of the correct sentencing law by the sentencing panel that was protected by the Due Process Clause. "The sentencing panel's use of an improper standard contaminated all its findings regarding aggravating circumstances. Rust simply never had an opportunity to be sentenced by a panel as contemplated by the Nebraska statute." (*Id.* at p. 1493.) The court further held that the deprivation of

Rust's state law right to be sentenced by the sentencing panel under the right law was too serious to be cured by appellate review or reweighing.

Similarly, in *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, the trial court did not weigh the aggravating and mitigating circumstances in the manner required by Idaho law. (*Id.* at p. 1299.) The Ninth Circuit Court of Appeals held that the state law created a liberty interest protected by the Due Process Clause. Paraphrasing *Hicks*, the court explained:

> [W]here the state has provided a specific method for the determination whether the death penalty shall be imposed, "it is not correct to say that the defendant's interest" in having that method adhered to "is merely a matter of state procedural law." [*Hicks*, 447 U.S.] at 346 . . .

(*Id.* at p.1300.) Accordingly, the Ninth Circuit has held that a penalty instruction under CALJIC No. 8.88 violates *Hicks* if it applies the wrong law to a defendant's detriment. (*Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 969-971.)

*Hicks* compels the conclusion that the trial court's failure to instruct the jurors about consideration of family sympathy under the 1977 law was constitutional error. The answer to the juror's question should have been governed by the language of the 1977 law, as explained in *Boyd*, rather than the 1978 law addressed in *Ochoa*.

Moreover, under constitutional standards requiring fundamental fairness and a reliable penalty verdict, this Court should find that the jurors should have been instructed that they could consider sympathy for appellant's family, even as the prosecutor urged them to consider sympathy for the victim's family. (23 RT 4938-4939; 4940-4944.)

In *Payne v. Tennessee* (1991) 501 U.S. 808, the prosecution introduced testimony from the murder victim's mother about the impact the murder of her daughter and granddaughter had upon her surviving

grandson. (*Id.* at pp. 814-815.) In affirming the Tennessee Supreme Court's decision to permit the introduction of victim impact evidence for aggravating purposes, the Supreme Court found that "the sentencing authority has always been free to consider a wide range of relevant material." (*Id.* at pp. 820-821) The Court went on to find that "a State may legitimately conclude that evidence about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827.)

Following *Payne*, this Court has permitted the introduction of victim impact evidence for aggravating purposes as a circumstance of the crime. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) Sympathy is the byproduct of the empathy a jury develops for the impact that the offense had on the lives of the families involved. Thus, in this case the prosecutor argued that jurors should consider the impact that the crime had on the victim's family, which entails a considerable amount of natural sympathy. The prosecutor specifically argued that jurors were not to consider appellant's family, but that they could consider the victim's family. (23 RT 4398-4399.) The prosecutor graphically described the effect of the crime upon the Woolley family. (23 RT 4940-4941.) He urged the jurors to consider the Woolley's grief and all that was taken from them when Tana was killed. (23 RT 4942-4943.)

Due process requires a balance of forces between the accused and his accuser. (*Wardius v. Oregon* (1973) 412 U.S. 5470, 473, fn 6.) Given the fact that sympathy for a victim's family is relevant and may be used by a prosecutor for aggravating purposes, so too should sympathy for a defendant's family be considered relevant and weighed by the jury as mitigating evidence. Accordingly, this Court should allow jurors to consider

sympathy for a defendant's family, even as victim impact evidence creates sympathy for the family of the victim.

Answering a juror question correctly is a critically important duty of a trial court since the answer has a direct effect on deliberations. (See *Bollenbach v. United States* (1946) 326 U.S.607, 612-613 [duty of trial court to answer questions with "concrete accuracy"]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212 [duty to "clear up any instructional confusion expressed by the jury"]; Pen Code, § 1138 [duty to respond to jury's questions].) This duty was all the more crucial here because the instructions given by the trial court (modified CALJIC No. 8.88) and the argument of the prosecutor (23 RT 4938) undoubtedly confused the jurors and left them to question whether family sympathy was a legitimate consideration. This question affected central issues in this case. Indeed, before this Court's decision in *Ochoa*, sympathy for a defendant's family was an important part of many capital cases. (See *Cullen v. Pinholster* (2011) ___ U.S. ___ [131 S.Ct. 1388, 1404] [recognizing importance of family sympathy to California defense bar at the time of defendant's trial].) Here it was of the upmost importance.

Appellant presented significant testimony showing the love between him and his family. It was evident that his execution would have a profound effect upon them. The prosecutor apparently agreed that family sympathy could be important to the jurors because he erroneously stressed that they should not consider it under the law. (23 RT 4938.) Despite this blanket assertion, the issue remained in the jurors's minds so much that it was the one question that they asked during their deliberations. Indeed, the question was all the more remarkable because instructions given by the trial court had erroneously limited the juror's consideration to"the various factors you are

permitted to consider." (5 CT 1365 [modified CALJIC No. 8.88].) Therefore, even though the jurors had been told not to consider sympathy for appellant's family, it apparently was the crucial point upon which the jurors' deliberations turned. The jurors reached their verdict within an hour of the trial court's answer. (23 RT 4987.)

Given the importance that this issue had to the jurors, this Court cannot assume that the trial court's erroneous answer had no effect upon the verdict. Under state law, the error was substantial since it precluded consideration of matters that the jurors believed was relevant to the determination. Reversal is required. (*People v. Robertson* (1981) 33 Cal.3d 21, 54 [substantial error in penalty trial mandates reversal].)

This Court should also find that the error violated appellant's federal constitutional rights to due process and a properly instructed jury. Moreover, an erroneous answer to a question during the crucial point of deliberations implicates the very reliability of the penalty verdict. In light of the importance given the issue by the jurors in this case, the error cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under either the federal or state standard, this Court must reverse the penalty judgment.

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## XIII.

## CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

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

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. These claims of error are cognizable on appeal under Penal Code section 1259, even when appellant did not seek the specific instruction or raise the precise claim asserted here. Moreover, some of these claims uniquely affected appellant's trial and should be considered in light of his case. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

### A. The Broad Application of Section 190.3, Subdivision (a), Violated Appellant's Constitutional Rights

Former section 190.3, factor (a), directed the jury to consider in aggravation the "circumstances of the crime." (Former CALJIC No. 8.88.1; 12 RT 2784.) Prosecutors throughout California have argued that the jury

could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the impact of the victim's death, the method of the homicide, the motive for the homicide, the time of the homicide, and the location of the homicide.

This Court has never applied any limiting construction to factor (a) under either the 1977 or 1978 law. (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, the 1977 statute violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permitted the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

## B. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

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

Under both the 1977 and 1978 laws, California does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) Accordingly, appellant's jury was told that it only had to consider, take into account, and be guided by the applicable factors without regard to any burden of proof. (5 CT 1349 [modifying CALJIC No. 8.85]; 5 CT 1365 [modifying CALJIC No. 8.88].)

*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v.* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings regarding the presence or absence of aggravating and mitigating factors. As discussed in Argument XI [victim impact evidence], it was particularly important in this case that the jurors receive guidance about the burden of proof that should be applied to all evidence received in the penalty phase. However, appellant's jurors were given no guidance whatsoever.

Because additional factual findings were to be considered and weighed as part of the juror's sentencing decision, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds, *People v. Flannel* (1972) 25 Cal.3d 668, 684, fn. 12; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* in light of the facts of this case so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment due process guarantee or the Eighth Amendment requirement for heightened reliability in capital proceedings requires that the jury be instructed that it must decide beyond a

reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

### 2. Some Burden of Proof is Required is Required to Guide the Juror's Discretion

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, how aggravating and mitigating factors were to be considered, and the ultimate penalty decision.

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) However, a normative decision is not a standardless one and should be made in accordance with a burden of persuasion. Appellant was entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider this issue.

### 3. The 1977 statute fails to provide guided discretion

Appellant's jurors were instructed under that they were "to consider, take into account, and be guided by" the applicable aggravating and mitigating factors during their penalty deliberations.[56] (5 CT 1349 [modified CALJIC No. 8.85]; 5 CT 1365 [modified CALJIC No. 8.88].) This language was taken from the 1977 law, which provided that jurors were to use this process to determine whether the penalty should be death or life without parole. (Former Pen. Code, § 190.3 [Stats. 1977)].) This Court has interpreted the statute to provide no guidance or limitation on the juror's sentencing discretion, other than that they are to consider the appropriate factors as part of their deliberations. (*People v. Boyd* (1985) 38 Cal.3d 762, 773.) It has found that the 1977 statute is constitutional in several respects, including that it provides sufficient guidance of the juror's discretion. (*People v. Frierson* (1979) 25 Cal.3d 142, 176.)

This issue should be reconsidered both as a matter of statutory law and in light of the specific instructions given in this case. *Furman v. Georgia* (1972) 408 U.S. 238, and its progeny mandate that "discretion must be suitably *directed* and *limited* so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 (opinion of Stewart, Powell, and Stevens, JJ.), emphasis added.) The failure

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[56] The jurors were further instructed under language adopted from the current law, that "weighing" of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors or "the arbitrary assignment of weights to any and all of them." (5 CT 2365 [modified CALJIC No. 8.88].)

to provide any guidance regarding the standards that the jurors are to use to make a penalty determination violated this principle in several respects.[57/]

First, a death penalty scheme must be within a constitutionally permissible range of discretion in imposing the death penalty. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) There must be a "*measured*, normative process in which a jury is constitutionally tasked to engage when deciding the appropriate sentence for a capital defendant." (*Kansas v. Marsh* (2006) 548 U.S. 163, 180, emphasis added.) Here, appellant's jurors were given no guidance that would have allowed them to make a measured determination in any of the instructions or the argument of counsel. Indeed, under the 1977 law, jurors could consider any matter it deemed relevant to the penalty determination regardless of whether it was enumerated in the statute. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 773.) This lack of guidance failed to direct and limit the imposition of the death penalty in violation of Eighth Amendment.

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[57/] The drafters of the 1978 law (Proposition 7) appear to have construed the "consider, take into account and be guided by" language in the 1977 law as being insufficient to meet constitutional guidance. In the ballot pamphlet, the supporters of Proposition 7 explained that the addition of the "aggravating vs. mitigating circumstances" provision was required by the federal Constitution.

> The opposition can't understand why we included the aggravating vs. mitigating circumstances provision in Proposition 7. Well, . . . [any] first year law student could have told them this provision is required by the U.S. Supreme Court. The old law does not meet this requirement and might be declared unconstitutional.

Appellant submits that the drafters were correct in their assessment of the constitutional problems at issue. Guidance in determining the appropriate penalty after considering the factors is required.

Second, adherence to a defined procedure for imposing death is necessary to comply with the Eighth Amendment's requirement of heightened reliability in the determination that death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305 [plurality opinion of Stewart, Powell, Stevens, JJ.].) "States may impose the ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations." (*Barclay v. Florida* (1983) 463 U.S. 939, 958-959 [concurring opinion of Stevens, J.].) Reliability is required in part to ensure "that the aggravating and mitigating circumstances "present in one case will reach a similar result to that reached under similar circumstances in another case." (*Id.* at p. 954.) The 1977 statute undermines the goal of uniform sentencing by failing to limit discretion or provide any standard that must be found before a death sentence is imposed. It simply does not provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 303.)

Even assuming that the statue is constitutional, the instructions given pursuant to it lacked sufficient guidance. Jurors are instructed under the 1978 statute that they must determine that aggravation is so substantial in comparison to mitigation that the crime warrants death instead of life without parole. (CALJIC No. 8.88; *People v. Brown* (1985) 40 Cal.3d 512, 540-542, & fn. 13; *People v. Murtishaw* (1983) 48 Cal.3d 1001, 1027.) The 1977 statute is couched in different terms, using "consideration" rather than "weighing," but the process remains the same. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 589 [equating the process used to determine the appropriate punishment to be the same under either the 1977 or 1978 statute, even if the statutes are couched in different terms].) The standard explained in *Brown*

and *Murtishaw* are a necessary part of the 1977 statute and the jurors should have been instructed accordingly.

No instruction or argument of counsel explained this process to appellant's jurors. Indeed, the jurors were instructed by an amalgam taken from the 1977 law and current version of CALJIC that combined the 1977 instruction to consider the applicable circumstances with wording equating this to a "weighing of aggravating and mitigating circumstances." (5 CT 1365 [modified CALJIC No. 8.88]) Jurors were given no guidance on what they could consider apart from the listed factors and provided no standard that must be found before a death sentence was warranted. Both as a matter of statutory law and under the instructions given in this case, jurors did not receive sufficient guidance to ensure a reliable penalty determination under the Eighth Amendment and due process standards.

### 4. Appellant's Death Verdict was Not Premised on Unanimous Jury Findings

#### a. Aggravating Factors

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona* (2002) 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the

overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

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

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

**b. Unadjudicated Criminal Activity**

Appellant objected to unadjudicated criminal activity being admitted in the penalty phase. (5 CT 1227 [motion to exclude unadjudicated criminal activity]; 20 RT 4510.) The trial court admitted the evidence, which was limited to the allegations of sexual offenses that had been introduced in the guilt phase pursuant to Evidence Code section 1108. (20 RT 4513.)

Even assuming that these acts were otherwise admissible, appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (5 CT 1352 [CALJIC No. 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578[overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence of appellant's alleged prior criminal activity under factor (b) and substantially relied on this evidence throughout his closing argument (23 RT 4937-4944).

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the

Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

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

### 5. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation.

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

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

### 6. The Penalty Jury Should Have Been Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. 14), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. 8th, 14th), and his right to the equal protection of the laws. (U.S. Const., Amend, 14th).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California'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 in all cases.

### C. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Prevented the Jury from Giving Full Effect to Appellant's Mitigating Evidence

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CT 1339 [modified CALJIC No. 8.85]; former Pen. Code, § 190.3, factors (c) and (g) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument in other cases under both the 1977 and 1978 laws (see, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration in this case.

The United States Supreme Court has reaffirmed that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246.) Indeed, it has long been recognized:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from

> giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio* (1978) 438 U.S 586, 605; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 323 [jury must be able to give a reasoned moral response to defendant's mitigating evidence].)

This Court has assumed that the general considerations of sympathy and mitigation under Penal Code section 190.3 and CALJIC No. 8.85 allow meaningful penalty determinations based on all mental states because jurors will somehow understand that a defendant's less-than-extreme mental or emotional disturbance is mitigating evidence. (See,. e.g., *People v. Wright* (1990) 52 Cal.3d 367, 443-444.) That assumption should be reconsidered in the present case.

As Dr. Minagawa testified, domestic violence can have profound consequences leading to rage and violence. (22 RT 4823; 23 RT 4872.) Jurors in this case could have believed that appellant suffered from an emotional disturbance resulting from exposure to domestic violence , which would provide an explanation for the crime and the sexual offenses introduced under Evidence Code section 1108. But consideration of this mitigating evidence was limited to the extent that the emotional disturbance may not have been considered to be "extreme" because of all the other ways that appellant was able to cope with his circumstances and raise his own family.

The jurors were instructed to consider "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a

basis for a sentence less than death. . . ." (5 CT 1349.) However, there was no reason a juror would necessarily interpret a mental disturbance as an "aspect of his character." A juror more likely believed that factors (d) and (k) dealt with different subjects. This Court should therefore reconsider how consideration of mental disturbances that are less than "extreme" are limited by this instruction.

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

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

### E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

Many of the sentencing factors set forth by the trial court were inapplicable to appellant's case (5 CT 1349 [modified CALJIC No. 8.85]), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

Moreover, the instructions the instructions did not identify which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (5 CT 1349-1350.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in the instruction – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's jurors, however, were free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors, thus precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

### F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable

manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

### G. California's Capital-Sentencing Scheme Violates The Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider its ruling.

## H. California's Use Of The Death Penalty As A Regular Form Of Punishment and Based Upon the Facts of this Case Falls Short Of International Norms

The United States Supreme Court has recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana* (1900) 175 U.S. 677, 700; see also *United States v. Pink* (1942) 315 U.S. 203, 230-231["state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement"]; *Murray v. Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 118 [courts must interpret domestic law consistently with international law] .) Thus, international law has provided an important basis for determining how our own constitution is to be interpreted, including the evolving standards that inform the interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment. (See *Roper v. Simmons* (2005) 543 U.S. 551, 575 [citing international abolition of juvenile death penalty]; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn . 21 [citing practices of the world community in prohibiting death penalty for mentally retarded offenders]; *Trop v. Dulles* (1958) 356 U.S. 86, 102 [referring to unanimity of the "civilized nations"].)

In particular, Eighth Amendment jurisprudence must recognize that the standards of decency have evolved internationally, and in so doing re-examine the use of the death penalty in this country. Indeed, he use of the death penalty in this country is increasingly at odds with other nations:

> The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . [and] with China, Iran, Nigeria, Saudi Arabia, and South Africa [under the former *apartheid* regime] as one

> of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions.

(*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *Ring v. Arizona*, *supra*, 536 U.S. at p. 618 (conc. opn. of Breyer, J.) [other nations have abolished capital punishment].) Indeed, the nations of Western Europe are uniform in not using the death penalty (see, e.g., Stanford v. Kentucky (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.)); Cokley, *Whatever Happened to That Old Saying "Thou Shalt Not Kill?": A Plea for the Abolition of the Death Penalty* (2001) 2 Loy. J. Pub. Int. 67, 119-120.) Appellant recognizes that this Court has rejected arguments contending that capital punishment violates international law. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1164.) Appellant submits that in light of the rising tide against the death penalty, both internationally and among the states in this country, that these decisions should be reconsidered.

Even assuming that international law does not prohibit the imposition of the death penalty, it imposes a particularly high standard that must be met in such cases. The standard adopted by the United Nations Economic and Social Council allows a death verdict only if there is clear and convincing evidence "leaving no room for alternative explanation of the facts." ("Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (1984) ECOSOC Res. 1984/50, endorsed by the General Assembly in res. 39/118 of Dec 14, 1984, ¶ 4; see also *Albert Wilson v. Philippines*, United Nations Human Rights Committee, Communication No.

868/1999, adopted Oct. 30, 2003, p. 5 [applying standard]; European Union, "Policy Towards Third Countries on the Death Penalty," General Affairs Council, June 29, 1998 [adopting standard].) Accordingly, this standard is part of the international customary and decisional law that this Court should apply.

As discussed above in Argument VIII [insufficient evidence], there was room in this case for an alternative explanation of the facts. In particular, the evidence of premeditation and deliberation necessary for the special circumstances in this case was based solely upon the length of time it took to commit ligature strangulation, but this does not preclude other explanations for the crime, including that the crime was committed in an outburst of violence without such forethought. (See *People v. Rowland* (1982) 134 Cal.App.3d 1,9 [ligature strangulation does not necessarily prove premeditation and deliberation].) Under these circumstances, international law does not permit the death verdict to be imposed. (*Albert Wilson v. Philippines,* United Nations Human Rights Committee, Communication No. 868/1999, *supra*, at p. 5.) This Court should accordingly find that the death sentence does not meet Eighth Amendment standards reflecting an evolving sense of what constitutes cruel and unusual punishment. (See *Roper v. Simmons*, *supra*, 543 U.S. at p. 575.)

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## XIV.

## CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED

Even assuming that none of the errors identified by appellant is prejudicial standing alone, the cumulative effect of these errors undermines confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438- 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["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"].) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace*, *supra*, 848 F.2d at p. 1476.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

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.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 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].)

Other courts similarly have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Irving v. State* (Miss.1978) 361 So.2d 1360, 1363.) Accordingly, even if the individual errors are harmless on their own, the cumulative effect

of these errors upon the penalty verdict must be examined with special caution. (See *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

Here, appellant's trial was fundamentally flawed the use of testimony that was improperly admitted under Evidence Code section 1108, the error in admitting the death certificate, and instructional errors at guilt. During the penalty phase, the trial court admitted improper records of a misdemeanor conviction and modified the one instruction that would have provided guidance in considering crucial victim impact testimony. Finally, at a critical part of the juror's deliberations, the trial court erroneously answered the one question that the jurors had posed. The cumulative impact of these errors led to a guilt conviction based upon conjecture and surmise and the penalty of death. This Court must find that the cumulative effect of the errors require reversal of both the guilt and penalty judgments. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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## CONCLUSION

For all the reasons stated above, the judgment this case must be reversed.

DATED: 3-2012

Respectfully submitted,

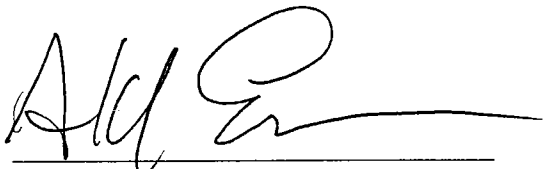
MICHAEL J. HERSEK
State Public Defender

ARNOLD ERICKSON
Senior Deputy State Public Defender

**CERTIFICATE OF COUNSEL**
**(CAL. RULES OF COURT, RULE 36(B)(2))**

I, Arnold Erickson, am the Senior Deputy State Public Defender assigned to represent appellant, Larry Kusuth Hazlett, 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 60,226 words in length excluding the tables and certificates.

Dated: March 1, 2012



Arnold Erickson

## DECLARATION OF SERVICE

Re: People v. Larry Hazlett, Jr. Case No. S126387
Superior Ct. No. BF100925A

I, JON NICHOLS, am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105; that I served a true copy of the attached:

## APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
RYAN MCCARROLL
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550

Kern County Superior Court
ATTN: Clerk of the Court
1415 Truxtun Ave.
Bakersfield, CA 93301

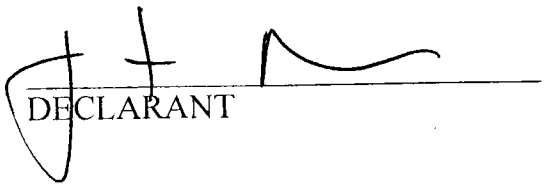
Larry Hazlett, Jr.
San Quentin State Prison
P.O. Box V-42368
San Quentin, CA 94974

James Edward Coker, Esq.
12301 Portebello Dr.
Bakersfield, CA 93312

Each said envelope was then, on March 1, 2012, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on March 1, 2012, at San Francisco, California.



DECLARANT