No. S029551

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOE EDWARD JOHNSON, Defendant and Appellant.	(Sacramento County Sup. No. 58961)

APPELLANT'S OPENING BRIEF

Appeal from the Judgement of the Superior Court of the State of California for the County of Sacramento

HONORABLE PETER MERING, JUDGE

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DEATH PENALTY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONS

CALIFORNIA STATUTES AND COURT RULES

TABLE OF AUTHORITIES

OTHER STATE STATUTES

TABLE OF AUTHORITIES

JURY INSTRUCTIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)[1] The appeal is taken from a judgment which finally disposes of all issues between the parties.

STATEMENT OF THE CASE

This capital case has a convoluted procedural history stretching back to 1979 when appellant was charged in Sonoma Superior Court with murdering Aldo Cavallo around July 24, 1979. The Information also

[1] All statutory references are to the Penal Code unless otherwise indicated.

charged him with raping and assaulting Mary Siroky in Sonoma County several days after the Cavallo homicide. Following a change of venue to Sacramento County, appellant was tried and convicted of the Cavallo murder, the rape of Siroky and of offenses related to each of those incidents. Burglary and robbery special circumstance allegations under section 190.2, subdivisions (a)(17)(A) and (G) were found true, and the jury rendered a verdict of death at the penalty phase trial.

On appeal, this Court initially held that the trial court had committed reversible error under *People v. Shirley* (1982) 31 Cal.3d 18 by allowing into evidence the hypnotically-induced identification by Mary Siroky of appellant as the perpetrator of the attack on her. The Court found this error infected both the murder and the rape convictions, because that identification was also used to establish appellant's identity as the perpetrator of the Cavallo offenses. As a result, all the convictions and the death sentence were reversed.

Respondent petitioned for rehearing, and during the pendency of that petition, three justices of this Court were removed from office in the election of 1987. This Court subsequently granted rehearing and, in its opinion following rehearing, affirmed the murder and special circumstance convictions while reversing only the convictions on the Siroky crimes. (1 CT 2.) The death sentence was set aside based on error under *People v. Ramos* (1984) 37 Cal.3d 136, 153-154. (1 CT 2.)

The prosecutor elected to seek the death penalty again through a penalty phase retrial. However, he decided not to retry the charges as to the Siroky crimes. He chose instead, over appellant's objections, to present those crimes as evidence in aggravation under section 190.4, factor (b) at the penalty retrial.

Retrial began on November 13, 1990. (2 CT 573.)

After nearly three months of trial, the jury began deliberating on February 1, 1991. (4 CT 972.) On February 7, after the jury had indicated numerous times it was deadlocked, the court granted appellant's motion for a mistrial. (4 CT 984.)

The prosecutor again decided to retry the penalty phase. On February 11, 1991, he filed a new notice of evidence in aggravation. (4 CT 987.) On the same day, defense counsel declared a conflict with appellant. (4 CT 1000.) The matter was returned to Sonoma County Superior Court for the purpose of determining the conflict issue. On May 2, 1991, the trial court found a conflict as to Sonoma Deputy Public Defender Elliot Daum, who had represented appellant at the first retrial, but not as to the entire office of the Sonoma Public Defender. (4 CT 1036.)

On May 7, 1991, the matter was transferred back to Sacramento Superior Court for trial. (4 CT 1039.) The court set a trial date of September 23, 1991. (30 RT 10077.)

In July, 1991, the Sonoma Public Defender assigned Charles Ogulnik to be appellant's attorney. (49 RT 10542.) In August, a Sacramento attorney, Donald Masuda, was appointed as second counsel. (30 RT 10080-10084.)

On August 19, the trial was continued to November 18, 1991. (30 RT 10085-10086.) On November 15, 1991, the trial was continued again, this time until June 22, 1992. (30 RT 10092.) No other proceedings were scheduled before the June 22 date.

On June 8, 1992, appellant moved to discharge appointed counsel due to a conflict of interest. (4 CT 1122.1-1122.11.) That motion was denied on July 7, 1992. (5 CT 1139; 49 RT 10621.) Also on June 8,

appellant filed a motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806. (4 CT 1123.) That motion was denied over six weeks later, on July 21, 1992. (6 CT 1148.) Appellant filed additional information relevant to the *Faretta* motion on July 23. (6 CT 1149.1-1149.52.) The court considered this additional information on July 28, 1992, but did not change its decision. (6 CT 1152.)

By pretrial motion, appellant again sought to exclude or limit the use of the crimes against Siroky as evidence in aggravation. (5 CT 1138.55-1138.59.) The trial court denied appellant's motion and allowed the prosecutor to use evidence of the Siroky crimes as aggravating evidence. (6 CT 1148.)

Trial began with jury selection on July 28, 1992. (6 CT 1152.) The trial court denied appellant's *Batson-Wheeler* motions[2] concerning the prosecutor's use of peremptory challenges to strike three African-American jurors. (40 RT 13112-13113; 13125-13130.)

Opening statements were heard August 25, 1992. (6 CT 1180.) The prosecutor rested his case on September 1, 1992. (6 CT 1194.) The defense completed its case on September 11, 1992, and the prosecution completed its rebuttal case the same day. (6 CT 1209.)

On September 16, 1992, final arguments were heard and the jury retired. (6 CT 1324.) On September 22, the fifth day of deliberations, the jury returned a verdict of death. (6 CT 1330.)

On October 28, 1992, appellant's motion for a new trial was heard and denied. (6 CT 1362.) The court conducted its automatic review under

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[2] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1979) 22 Cal.3d 258.

section 190.4, subdivision (e) and determined that the jury verdict was not contrary to the law and evidence presented. (6 CT 1362.) The court then imposed a sentence of death. (6 CT 1368, 1370-1374.)

This appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

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STATEMENT OF FACTS

A. The Prosecution Case

1. The Cavallo Homicide

The prosecution theory of the underlying capital crime was that appellant was burglarizing a house when he discovered that someone was home, and murdered him.

Aldo Cavallo was found dead on July 26, 1979, by Santa Rosa Police Officer Gregory Root. Root had responded to a call regarding suspicious activity around Cavallo's condominium in the Los Alamos Apartment complex in Santa Rosa. (41 RT 13391.) When Root arrived, he first looked through Cavallo's kitchen window to see what was going on inside. (41 RT 13392.) The outside door to the kitchen was ajar, although the screen over the door was closed. (41 RT 13397.) He drew his gun and entered and began searching the apartment. (41 RT 13393.) In the bedroom, he saw what appeared to a person in bed under the bedspread. Root believed he had interrupted a burglary in progress and that the burglar was attempting to hide. (41 RT 13393.) He pulled back the covers and discovered the body of a man, later identified as Cavallo, lying in the bed. (41 RT 13394.) The body was cold and stiff and there was blood on the head. (41 RT 13394, 13400.)

Gary McMahon was the Santa Rosa Police Detective sent to the Cavallo homicide scene following Root's discovery of the body. (42 RT 13560.) Near the foot of the bed where the body lay, McMahon found a dumbbell with traces of blood and hair on it. (42 RT 13562.) That blood was later tested and found to be consistent with Cavallo's blood type. (42 RT 13693-13694.)

Pathologist David Clary conducted the autopsy on July 27, 1979.

(43 RT 13849.) He concluded the cause of death was a blow to the right temporal area of the head. (43 RT 13853-13854.) Clary believed Cavallo's major injury was caused by a single blow. (43 RT 13882.) The injury was consistent with being caused by the dumbbell found at the scene. (43 RT 13867.)

The prosecution contended that Cavallo was killed on the night of July 24. One of Cavallo's neighbors, Bill Jones, called Cavallo on Tuesday evening, July 24, between 7:45 and 8:00 to talk about the stock market. The call ended between 8:30 and 9:00 p.m. (43 RT 13893-13895.) Two newspapers – the San Francisco Chronicle and the Santa Rosa Press-Democrat – dated July 25 and July 26 were found in Cavallo's patio area. (41 RT 13473.)

There were signs that there had been a burglary. A television was out of place in the hallway. (41 RT 13347.) There were two guns on the floor – one was a shotgun and the other was a shotgun or rifle. (41 RT 13348.) A box of .22-caliber Monark ammunition was found in the closet of the master bedroom and another like it was found on the kitchen table. (41 RT 13348-13349, 13467-13568.)

There was a screen which appeared to have been removed from the kitchen window leaning against a patio table. (41 RT 13341.) Latent fingerprints lifted from the screen were identified as belonging to appellant. (41 RT 13342.) A left-handed black glove was found in a carpeted area next to the closet leading to the front door of the Cavallo residence. (41 RT 13471, 13546.) No matching glove was found. (41 RT 13471.) The glove was too small to fit appellant's hand. (46 RT 44966; 47 RT 15008.)

McMahon also found paperwork in Cavallo's house that went with a Bohsei portable television set, although no such television was found in the

house.[3] (42 RT 13565-13566.) He later obtained registration and warranty card information from the Bohsei company and obtained a serial number for the television. (42 RT 13566.)

On August 9, 1979, the police searched appellant's home, looking for a television and for clothing the suspect in the Siroky assault had worn. (42 RT 13573-13574, 13646.) They found a small Bohsei color television. The television (Peo. Exh. 48) was the same model as one Cavallo bought in Santa Rosa in 1978. (43 RT 13889-13891.) One of Cavallo's neighbors, Mary Olson, had seen a television in Cavallo's kitchen which looked like People's Exhibit 48. (42 RT 13764.) Detective McMahon learned, however, that the television had been delivered to appellant's home by James Curry only about an hour before the parole search. (42 RT 13605.) Ollie Mae Smith, Curry's girlfriend, told the police that Curry had brought the same television to her house about a week before Curry's birthday, which was August 3. (42 RT 13605-13606.) Nevertheless, the police never treated Curry as a suspect in the Cavallo murder case. (42 RT 13607.) Appellant was in jail at the time his home was searched and the television seized. (42 RT 13603.)

McMahon recognized that Curry had a "connection" with the television set but was "cleared" based on the statements of two witnesses who saw how he obtained the television set. (42 RT 13608, 13609.) Curry said he obtained the television from appellant. (42 RT 13613.) Curry's supervisor, Chris Christiansen, said he saw the transaction. (42 RT 13613.) Christiansen saw appellant take a television from his car and put it in the trunk of Curry's car. (42 RT 13649.) This occurred during the morning

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[3] This was not the television found in the hallway.

break from work at Sonoma State Hospital, around the end of July or the beginning of August, 1979. (42 RT 13649-13650.) McMahon also learned from Bob Ferroggiaro that Ferroggiaro delivered a message from appellant to Curry to return the television appellant had previously purchased from Curry, and take it to appellant's wife. (42 RT 13614, 13645-13646.) Curry did so on August 9, the day of the parole search. (42 RT 13646.)

2. The Siroky Assault

On Saturday morning, July 28, 1979, Mary Siroky attended Mass by herself at St. Eugene's Cathedral in Santa Rosa. (41 RT 13274.) She remained in her pew afterwards as did a few other people. (41 RT 13275.) A man approached her and asked where the priest's house was – he said he had not been to church in a long time. (41 RT 13279.) Siroky gave him directions. He started to walk away, then returned to where Siroky was. (41 RT 13279.) He was a tall black man with a "scraggly" beard. He was at least six feet tall and wearing blue jeans and a blue jacket. (41 RT 13295-13296.) Siroky saw that his jacket was open and he was holding a gun. He told her, "Keep quiet and you won't get hurt, and come back with me." (41 RT 13279.)

Siroky walked with the man to the back of the church and into a side room called the "baby room" or "crying room." (41 RT 13280.) He then took her into the bathroom adjoining that room. (41 RT 13280.) In the bathroom, he fired the gun. Siroky was so scared that she did not notice what he had shot at. (41 RT 13286.) The man told her to take off her pants, and she did. He told her to get on the toilet, and she did. Then he raped her. (41 RT 13286.)

After he finished, Siroky put her pants back on. The man asked if

she had any money and she gave him her purse, saying that she only had some change. (41 RT 13287.) He looked inside the purse and then returned it to Siroky. (41 RT 13287.) The man told Siroky to put her sweater over her head so she did not see him. She did so. (41 RT 13288.) She did not know what happened next; she recalled standing and finding her way into the church where she asked for help. (41 RT 13288.) A woman helped walk her to the rectory. She did not remember an ambulance coming, but vaguely remembered waking up in the hospital. (41 RT 13288.)

Siroky had been hit on the head. She had a depressed skull fracture three centimeters in diameter with a ½ inch depression. (41 RT 13381.) Neurosurgeon David Sheetz treated Siroky and counted 10 wounds on her skull, both blunt force and sharp force wounds. (41 RT 13383.) Siroky suffered some permanent loss of smell, some post-operative vertigo and amnesia as to events surrounding the incident. (41 RT 13385.)

Detective Peruzzo visited Siroky in the hospital on the morning of July 28 to try to get a description of the assailant. At that time, Siroky described the man as a black male, about six feet tall, with a husky build. She said his hair was "sort of straight." She could not remember if he had a moustache but said he had "a short goatee, a little beard, a little stubble" and sideburns. He wore a blue jacket and possibly blue pants. (41 RT 13482.) Siroky was shown a photographic lineup which included appellant. She did not pick appellant out of this lineup. (41 RT 13546.) Siroky helped prepare a composite picture of the man who attacked her. (41 RT 13291, 13311-13313.) She believed that the composite, which was printed in the local newspaper, resembled her assailant but was not as exact as she wanted it. (41 RT 13317.)

The prosecutor's theory was that the assailant had hit Siroky on the

head with his gun, which had then broken apart. Pieces of the weapon were found at the scene. Criminalist Richard Waller identified the pieces as being from a .22 caliber semi-automatic handgun manufactured by High Standard. (42 RT 13659-13660.)

Among the pieces of the gun was the clip, [4]which held the ammunition. A single fingerprint was found on the clip. (41 RT 13412.) Fingerprint analyst Angelo Rienti compared the latent print found on the gun clip to known prints in People's Exhibits 14 and 17. (41 RT 13405-13412.) Rienti believed these prints came from the same person. (41 RT 13412.) People's Exhibits 14 and 17 were Department of Justice records of appellant's fingerprints. It was impossible to tell whether the print on the clip was hours, days or weeks old. (41 RT 13363.)

Only two latent prints were found in the baby room area of the church itself. (41 RT 13361.) One was from the door to the bathroom and the other from the top edge in the rear of the toilet seat. (41 RT 13357.) These prints were never identified as belonging to any particular individual. (41 RT 13532.)

Both appellant and Siroky had type O blood. (41 RT 13690.) After testing a vaginal smear taken from Siroky and other items taken from the Siroky crime scene, criminalist Richard Waller was unable to draw a conclusion as to the identity of the assailant. (41 RT 13695-13696.) No semen stains were found at the scene of the assault. (41 RT 13361.)

The first person the police detained in the Siroky matter was a man named Walker. Walker was taken in for questioning on the evening of July

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[4] At trial, the parties and witnesses variously referred to the piece holding ammunition which is inserted into a semi-automatic weapon as a clip or a magazine; it is called a clip in this brief.

28 based on his physical appearance and clothing. (41 RT 13486, 13535.) Walker was a black male at least six feet tall and was wearing a blue jacket and blue jeans on the evening of the rape when he was detained. (41 RT 13533, 13535.) He had a substance on his jacket which could not be identified at the time. (41 RT 13486.) Walker told different stories about this stain. One time he said it was a ketchup stain and another time he said it could be ketchup or blood from a cut on his finger. (41 RT 13534.) A sample taken of this substance was contaminated and not successfully tested for anything. (41 RT 13487.) Roy Fain, another fingerprint analyst, tried to match Walker's fingerprints to the latent prints found at the scene, but failed to do so. (41 RT 13488.) [5]

Subsequent to appellant's arrest, a woman named Marilyn Swift reportedly was raped by a tall black man in the Spring Lake area of Santa Rosa. (41 RT 13548.) Swift described the perpetrator as at least six feet tall, 160 to180 pounds, with facial hair. (41 RT 13549.) He displayed a handgun, forced her to drink alcohol and made racial slurs. (41 RT 13549.)

The prosecutor sought to link the Siroky crime to the Cavallo murder through the gun and ammunition found at the Siroky crime scene. Waller compared the cartridges in the magazine and the spent cartridge found in the church to those taken from boxes of Monark ammunition found at Cavallo's house. (42 RT 13666.) The type, caliber and overall physical characteristics were the same. (42 RT 13667.) Waller also compared the "F" logo headstamp on the cartridges – indicating it was

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[5] There was a question as to whether Fain actually made a comparison of Walker's prints to the prints in the church. Detective Peruzzo claimed that when he said that no comparison was made, it meant that no match was made. (41 RT 13529-13532.)

manufactured by Federal Cartridge Company – and found correspondence between six of the live rounds, as well as the spent cartridge, and a bullet or bullets found in one or both of the boxes of ammunition taken from Cavallo's house. (42 RT 13668.) Waller concluded these headstamps had been struck by the same tool. (42 RT 13668.) One of the cartridges, shown in Exhibit 54-C, was struck by a different tool. (42 RT 13687.) The box of ammunition from Cavallo's kitchen table (Exh. 20) also included cartridges where the F stamp did not match. (42 RT 13700.)

John Kuntz, testified for the prosecution as an expert on .22 caliber ammunition. (42 RT 13706-13709.) Kuntz had never been employed in any capacity regarding the manufacturing of .22 caliber ammunition; he was a hobbyist with a particular interest in ammunition. (42 RT 13709.) Kuntz identified the ammunition found on Cavallo's kitchen table as Monarch brand .22 caliber long rifle ammunition manufactured by Federal Cartridge Company. (42 RT 13711.) He believed that this particular ammunition was manufactured in April, 1952. (42 RT 13713.) Each round of a cartridge manufactured by Federal has an "F" stamped on it by a tool called a bunter. (42 RT 13719.) Kuntz did not know how many cartridges a particular bunter might stamp before it wore out (42 RT 13720), and he did not know how the bunters were made at Federal in the 1950's (42 RT 13723).

No .22 caliber handgun was found in Cavallo's house. The prosecutor's theory was the gun used in the Siroky crime had belonged to Cavallo, and that appellant had taken it while committing the Cavallo burglary-homicide. His evidence that Cavallo owned such a gun, however, was thin.

First, he had the testimony of Ludwig Saccomano and his son, Paul Saccomano. The Saccomonos were distantly related to Cavallo by marriage

– Ludwig's brother married Cavallo's sister. (43 RT 13923.) The Saccomanos were unavailable to testify at the time of the retrial, so their previous testimonies from the 1981 trial and the 1991 penalty retrial were read to the jury. At some time years before the homicide, the Saccomanos went target shooting with Cavallo. In his 1981 testimony, Ludwig placed the target shooting in 1965 or 1966. (43 RT 13910.) Ludwig at the time owned a .22 High Standard semi-automatic. (43 RT 13917.) Cavallo owned a weapon that looked similar to Ludwig's, but Ludwig was "fuzzy" on whether Cavallo's gun was a revolver or a semi-automatic. (43 RT 13910-13911.) In his 1991 testimony, Ludwig believed the target practice occurred about 15 years – and no more than 20 years – previous, placing the incident no earlier than 1971. (43 RT 13928.) Furthermore, in 1991 he believed Cavallo's gun was a semi-automatic, but was not sure about the caliber. (43 RT 13935.)

Paul Saccomano remembered this target practice occurring when he was eight or nine years old, which would have been 1965 or 1966. (43 RT 13940-13941.) He helped load his father's gun, but not Cavallo's. (43 RT 13945, 13948.) He remembered both his father and Cavallo using .22 caliber ammunition. (43 RT 139433, 13946.)

The prosecution also had the testimony of Richard Canniff, who was a friend of Cavallo's. Caniff and Cavallo taught at the same school. (43 RT 13898.) Canniff testified at the 1981 trial, but died before the retrial. The prosecutor introduced his prior testimony which was intended to show Cavallo's habit of keeping a gun for protection. Canniff and Cavallo had discussed and disagreed about home security. Cavallo told Canniff that he believed guns were necessary for protection and that he kept a gun for that purpose. Canniff thought Cavallo may have indicated that he kept the gun

in his nightstand. (43 RT 13900-13902.) Canniff never saw a handgun at Cavallo's home, but he did see a shotgun in a gun case there. (43 RT 13902.) There was no record of Cavallo ever registering a handgun. (42 RT 13610.)

3. Prior Convictions

The prosecutor presented evidence that appellant had been convicted of felonies within the meaning of section 190.3, factor (c) in four separate incidents.

a. Appellant was convicted of assault with intent to commit murder against Florence Morton in an incident which occurred in 1971. (Peo. Exh. 65; 40 RT 13207.) Appellant was living with his half-brother, Priestley Morton, and Priestley's wife, Florence. (42 RT 13802-13803.) Florence was pregnant and on maternity leave from her job. (42 RT 13802.) On December 7, 1971, a dispute arose over the use of the telephone. Florence was talking on the phone to her friend and appellant wanted to make a call. Florence told him to wait until she was finished. Appellant locked the front door, got a knife from the kitchen, and stabbed Florence a number of times. (42 RT 13809-13811.) Morton was in the hospital for eight days. (42 RT 13812.)

Nine days later, California Highway Patrol Officer Lance Erickson detained appellant in a traffic stop that resulted in appellant's arrest for grand theft auto. (42 RT 13672.) While detained, appellant told Erickson he had stabbed his sister-in-law and thought he had killed her. (42 RT 13673.) He said she "was coming on to him" and that they had an argument. (42 RT 13673-13674.)

b. In 1973, appellant was an inmate housed at the state prison in Vacaville. He became involved in a dispute with another inmate, Thomas

Scott. Appellant believed Scott owed him something for cleaning up the dormitory they shared. Appellant hit Scott over the head with a chair, causing injuries to Scott's head and left eye. (43 RT 13975-13979.) Appellant was convicted of assault in this incident. (Peo. Exh. 61; 40 RT 13204-13205.)

c. Appellant was an inmate housed at the state prison in Chino in 1974. On April 24, 1974, he was part of a three-person work detail outside the buildings but inside the fenced perimeter of the prison grounds. (42 RT 13767-13768.) Correctional officer Steven Laughlin was assigned to supervise the detail. While the detail was returning from working, Laughlin was hit in the back of the head. He did not see who hit him. While on the ground, appellant approached Laughlin and hit him several times in the face with his fist. (42 RT 13769.) Appellant pled guilty to escape with force following this incident. (Peo. Exh. 60; 40 RT 13204.)

d. Verna Lynette Olsen worked as a janitor at Sonoma State Hospital in 1978, where she met appellant. (42 RT 13726.) Appellant moved in with her, and they developed a relationship. (42 RT 13726.) But after about two weeks, Olsen wanted appellant to move out. (42 RT 13727.) On December 2, 1978, Olsen was at home with her friend, Lisa. They had been drinking. (42 RT 13736.) Olsen had been expecting to spend the night with her daughter while appellant had some friends over. (42 RT 13729.) However, she and appellant got into an argument and Olsen said she was not going to leave. (42 RT 13729.) Appellant hit her, stabbed her in the neck and chest and told her she would die soon. (42 RT 13730-13731.) Olsen asked him to leave, and he did. (42 RT 13731.) Lisa took Olsen to the hospital. (42 RT 13731.)

Appellant was convicted of assault with a deadly weapon in this

incident. (Peo. Exh. 76; 42 RT 13825.)

4. Other Acts of Violence

Aside from the Siroky assault, the prosecution also presented evidence that appellant had committed one other previously uncharged aggravating act of criminal violence under section 190.3, factor (b): After Florence Morton was released from the hospital, she went to stay at her sister's house. According to Morton, appellant telephoned her there and threatened to hurt her if she testified against him regarding the December 1971 assault. (42 RT 13814.)

B. The Defense Case

The defense case focused on five themes: lingering doubt regarding appellant's participation in the homicide; the effects of appellant's childhood and background on his behavior; the failure of the juvenile court system to help appellant during his youth; appellant's mental illness and abnormal brain activity; and appellant's positive adjustment to prison.

1. Lingering Doubt

Appellant presented evidence to show that one of his co-workers at the Sonoma State Hospital, James Curry, was implicated in the Cavallo murder by showing his connection to the Bohsei television that purportedly was taken from Cavallo's house.

Robert Ferroggiaro, a correctional officer at San Quentin at the time of trial, worked at Sonoma State Hospital in 1979. (44 RT 14129.) He knew both appellant and James Curry. (44 RT 14129-14130.) On August 2, 1979, Ferroggiaro received a collect telephone call from appellant in the Sonoma Jail County asking him to pick up a television that appellant said he bought from Curry. (44 RT 14130.) Ferroggiaro contacted Curry. He told Curry that appellant wanted him to pick up the television that appellant

bought from Curry. (44 RT 14131.) Curry indicated he would get the television for Ferroggiaro. He did not assert to Ferroggiaro that appellant did not buy the television from Curry. (44 RT 14131.)

Curry dropped the television off at Ferroggiaro's job site at Sonoma State Hospital. (44 RT 14132.) Ferroggiaro identified People's Exhibit 48 – the television seized from appellant's home – as looking like the television Curry brought to work. (44 RT 14132.) After work, Ferroggiaro took the television to the home of appellant and Ruth Johnson. Later that day, Ruth Johnson called to tell Ferroggiaro that the police had come and taken the television away. (44 RT 14132.) He called the police and informed them that appellant had asked him to pick up a television from Curry that appellant had purchased from Curry. (44 RT 14133.)

When Curry delivered the television, he was with another person who was driving. (44 RT 14134.) Ferroggiaro subsequently heard that appellant had previously delivered the television to Curry, but did not know if this was actually true. (44 RT 14136.)

Ollie Mae Smith was one of James Curry's girlfriends in 1979. She lived with him that summer, although Curry had other girlfriends with whom he stayed. (43 RT 14020.) Curry's birthday was August 3, and Smith remembered Curry bringing home a television about a week before his birthday, which he said he received from someone named Joe Johnson. (43 RT 14018.) Smith knew a Joe Johnson in 1979 but it was not appellant. (43 RT 14019.) Smith did not know where the television came from – she just knew that Curry said he got it from his friend Joe. (43 RT 14025.) The television worked, but there was something wrong with it. (43 RT 14025.)

The defense also undercut the prosecution's evidence linking appellant to the Cavallo and Siroky crimes through the gun and ammunition

evidence. Geraldine Lawson married Aldo Cavallo in 1957. They divorced about three years later. (43 RT 14031-14032.) At the time they were married, Lawson owned two guns, including a High Standard .22 caliber revolver which she used for target shooting. (43 RT 14033.) During the marriage, Cavallo bought a gun just like Lawson's High Standard revolver – which he used when they went target shooting together. They wanted to have equal weapons to see who was best at hitting the targets. (43 RT 14037.) It was the only handgun Cavallo bought during the marriage, as far as Lawson knew. (43 RT 14034.)

Lawson still had ammunition for her revolver that was in the bottom of her gun cabinet that she had not used for years. (43 RT 14036.) It was purchased in the 1950's. (43 RT 14037.) Cavallo kept his gun after the divorce. (43 RT 14037.)

Gerald Gourley was an expert on the manufacturing of .22 caliber cartridges. (43 RT 14105.) He worked for the Federal Cartridge Company for 24 years. (43 RT 14103.) Federal cartridges were marked with an "F" stamp known as a hob mark. The mark is made by a tool called a bunter. Even an "F" stamp with a distinctive characteristic, made by a single bunter, could be one of 100 million cartridges like it. (43 RT 14108.) Cartridges produced by different machines become commingled after being stamped and before being boxed. (43 RT 14110.) It is also possible that a box of ammunition purchased in Santa Rosa, and one purchased in Sacramento around the same time, could have the same hob mark. (43 RT 14112.) The cartridges essentially have an unlimited shelf life if stored correctly. (43 RT 14116.)

2. Social History

The defense presented appellant's social history through Addison Somerville, a social psychologist with a particular specialty in the structure and makeup of the African-American family. (44 RT 14223.) He conducted a psychosocial evaluation of appellant. (44 RT 14226.) This meant he looked at the family from a sociological, cultural and economic point of view, and assessed how these factors influenced appellant's personality development. (44 RT 14227.)

Appellant's family was from Canton, Mississippi, but over time they migrated north to Detroit, Michigan, to live with the oldest of appellant's 10 siblings, McClenton. (44 RT 14243.) Appellant moved north to live with McClenton when he was two years old. (44 RT 14243.) Appellant's parents were not married, and Somerville found that appellant did not have a significant father figure in his life at this time. (44 RT 14250.) Also, his mother was gone much of the time. (44 RT 14249.)

Somerville learned that the family was exposed to syphilis. (44 RT 14244.) It appears that they were part of the infamous government-sponsored program known as the Tuskegee experiment, in which African-Americans with syphilis were informed they had "bad blood" and were injected with placebos rather than treating the syphilis. (44 RT 14244.) The syphilis affected people in different ways – for example, one of appellant's sisters was retarded and had epilepsy. (44 RT 14244.)

Appellant suffered emotional and physical deprivations at an early age. The family did not have enough food, and they survived by eating biscuits. (44 RT 14246.) The children were told to drink lots of water. (44 RT 14246.) When Joe was three or four years old, he was referred to as the "little alien" because he had a big head and a protruding stomach. The

protruding stomach could have been caused by malnutrition. (44 RT 14246.)

McClenton was the family disciplinarian even though he was only 22 years old. He resented being in the caretaker role. He physically punished appellant by stripping him, beating him with a belt, slapping him so hard that he became dizzy, and bouncing his head on the floor. (44 RT 14247.) McClenton claimed the children needed discipline "to learn the city ways." (44 RT 14247.)

According to Somerville, the lack of a consistent parental bond created "a tremendous amount of emotional deprivation" and feeling of rejection in appellant. (44 RT 14248.) As a result, appellant acted in a manner to gain attention. (44 RT 14248.)

By age six, appellant was stealing property. He collected money with an Easter Seal container and kept the money to get food for the family. He stole food and hid it in the basement. (44 RT 14249.) By age eight or nine appellant was frequently truant from school, often because he was working odd jobs. (44 RT 14249.)

Appellant's first sexual experience was at age eight, and he had intercourse and casual relationships since then. (44 RT 14251.) By age nine he was getting into fights at school and at age 10 was suspended from school for three days for "cussing the principal out." (44 RT 14251.) Also by age 10 appellant was engaging in substance abuse, smoking four to five marijuana cigarettes a day, and using alcohol. (44 RT 14251.) One of appellant's sisters, Mattie, attempted to help support the family financially through prostitution. (44 RT 14252.) Appellant lived with Mattie at times. (44 RT 14253.)

At age 11, appellant was committed to the Ypsilanti State Hospital.

Somerville believed the environment at the hospital was good for appellant, and that things might have turned out differently for appellant if he had been allowed to stay there. (44 RT 14253.)

Somerville concluded that the combined effects of various physical, psychological, cultural and economic factors may have contributed to the development of inadequate or inappropriate social and personal values. (44 RT 14255-14256.) Most of appellant's early life centered on survival and he developed a lifestyle characterized by self-concern. Because he felt his actions in most cases were necessary and therefore justified, he learned a variety of defenses which enabled him to experience only minimal guilt or remorse. (44 RT 14256.) The insecurity which he felt as a child permanently damaged his self-concept so he lacked the confidence to attempt to make changes in his behavior and attitudes. Instead, when threatened with failure or rejection, he felt intolerable anxiety and then acted out impulsively in an unpredictable manner. (44 RT 14256.) When confronted with inappropriate behavior, he would be unable to give a rational explanation and therefore would simply deny it. Denial is a defense which is often combined with lying and manipulation. (44 RT 14257.) Appellant was also isolated. He never learned how to function in a reciprocal relationship. (44 RT 14257.)

Somerville concluded that appellant needed to be confined to protect society because he does not have the controls to adhere to its laws and mores. The cumulative effects of social, cultural, psychological and economic factors contributed to his criminal behavior, and he had the misfortune to have had exceptionally stressful experiences in all aspects of his life. (44 RT 14258.)

3. Failure of the Juvenile Court System

Appellant came to the attention of juvenile authorities at an early age. Dwayne Martin was a teacher at the Ypsilanti State Hospital where appellant resided for several years in the early 1960's. (42 RT 13742, 13744.) The facility was a secure psychiatric hospital that provided psychiatric care to children, adolescents and adults. (42 RT 13746.) Appellant was 11 or 12 years old at the time Martin taught him at the hospital. (42 RT 13745.) Martin remembered appellant as someone who performed at a much higher level than other kids in his class, and was therefore moved to another classroom. (42 RT 13745.) He also recalled that appellant became a Boy Scout, and a patrol leader of the Scouts. (42 RT 13745, 13750.)

Some of the children housed at the hospital were mentally ill and some were delinquent. (42 RT 13746.) Martin did not know whether appellant was borderline psychotic or delinquent. (42 RT 13746.) He was aware that appellant had congenital syphilis. (42 RT 13749.) Appellant became less aggressive during his stay at Ypsilanti. (42 RT 13750.) Martin believed this was because appellant found a place that he could be respected by his peers, and was treated warmly and well by the staff. (42 RT 13750.) Appellant spent close to three years at the hospital. (42 RT 13754.)

Margaret Yates was another teacher at the Ypsilanti State Hospital. She taught appellant for a year beginning in 1962. (45 RT 14676-14678.) Appellant was 12 years old, going on 13. After a period of acting out and testing behavior, appellant became very motivated. He became interested in learning and there was improvement in his academic performance. (45 RT 14679-14680.) He also became interested in caring for the animals in the classroom. (45 RT 14680.)

Kenneth Peterson was formerly a social worker at the Clinic for Child Study in Wayne County, Michigan, which was in the psychiatric division of the juvenile court in Detroit. (44 RT 14344.) The clinic was a diagnostic clinic for children and their parents, and made recommendations to the court. (44 RT 14347.) There were only two hospitals at the time which accepted juveniles with psychological or psychiatric problems, and the backlog to be admitted to these hospitals was so great that children had to wait a year to be placed there. (44 RT 14350.) Appellant was caught in that backlog. He was sent to the Youth Home – Detroit's juvenile hall (44 RT 14346) – on March 18, 1964, and the clinic had arranged for him to be committed to Island View Hospital (one of the two hospitals referred to above) on August 5, 1964. But eight months later, appellant was still at the Youth Home. (44 RT 14352.) Peterson wrote a letter on April 14, 1965, urging the hospital to accept appellant. (44 RT 14351-14452.) The Youth Home did not have the facilities for treating seriously ill youths. (44 RT 14352.)

Peterson's letter described appellant as having difficulties with the other boys, but indicated he did respond to controls. (44 RT 14357.) Appellant was hyperactive and expressed paranoid thinking, and spoke of having auditory hallucinations. He believed his mother could predict his future. (Def. Exh. N; 44 RT 14358 .)

Richard Komisaruk was a psychiatrist. (44 RT 14378.) In the 1960's he was the director of the Clinic for Child Study. (44 RT 14378.) He worked with Kenneth Peterson, who was the chief social worker at the clinic. (44 RT 14379.) The Youth Home was essentially a jail. (44 RT 14379.) At that time, the referrals to the Youth Home included both delinquent and dependent children. According to Komisaruk, while it is no

longer possible to hold children in a locked facility when they had not committed some criminal offense, that was not the case back when appellant was committed to the juvenile system. (44 RT 14380.) It was possible for children to be held for months at the Youth Home who were truant, runaways, or who had disobeyed they parents. (44 RT 14381.) There were also children who had psychiatric illnesses whose families could no longer handle them. (44 RT 14382.)

The clinic Komisaruk directed did both diagnosis and treatment, but primarily diagnosis. (44 RT 14382.) If the child needed hospitalization, the clinic tried to arrange and facilitate that. (44 RT 14383.) Around 1965 or 1966, the clinic set up its own hospital because the wait to get a child into a state hospital had become extremely long. (44 RT 14385.) Komisaruk corroborated Peterson description of how some children who needed psychiatric treatment in a hospital were required to wait for as long as a year while confined in juvenile hall. They were simply being warehoused. (44 RT 14385.)

Furthermore, there was racial bias in the system of admissions to the state hospitals; white children were accepted at a much higher rate than black children. (44 RT 14386.) Also, the staff at the state hospitals were under pressure to move children through the system, so the doctors would "re-diagnose" children to say that they were not really mentally ill and should be treated as having behavioral problems. (44 RT 14388.) Minorities were disproportionately subjected to such re-diagnosis with the result that they were relegated to treatment in the criminal justice system – sent to juvenile hall or the Boys Training School, which was comparable to the California Youth Authority. It was essentially prison for children. (44 RT 14388-14390.)

Komisaruk identified appellant's mental health file from 1961 through 1965, although he had only a limited recollection of appellant personally from that period. (44 RT 14391-14392.) There were three attempts to commit appellant to a psychiatric hospital in this period, but appellant was only actually hospitalized once for an extended period. A second hospitalization lasted only two or three days. (44 RT 14394.) The hospital spaces available were disproportionately given to white children at the expense of black children. (44 RT 14386.)

Appellant was first evaluated in Komisaruk's clinic in 1960 when appellant was about 10 years old. He was evaluated for incorrigibility at home and at school, attempting to drive away in a car, and seven other contacts with the police for breaking and entering. (44 RT 14402.) The diagnostic impression of the psychiatrist who evaluated him, Dr. Siegel, was that appellant was very disturbed. He was unable to stand any frustration and could not control his impulses. (44 RT 14403.)

Charles Miller was a prison warden from Indiana. (45 RT 14644.) He had worked at the Indiana State Reformatory from 1967 through 1982. (45 RT 14645-14646.) During that period the reformatory housed people as young as 13 and as old as 60. (45 RT 14646-14648.) Appellant was sent to the Reformatory in 1966 at the age of 16 for "misbehavior." (45 RT 14655-14656.)

Although it was called a reformatory, it was really a maximum security prison. (45 RT 14646.) The reformatory housed people convicted of a full range of offenses, from burglary to child molesting to murder; everything except people sentenced to death. (45 RT 14647.) The staff was brutally punitive. They beat inmates for punishment and then took them to the hospital. (45 RT 14650.) Miller also saw inmates chained to the bars

and beaten. (45 RT 14650.) He also saw inmates hanging from the bars. (45 RT 14650.)

Despite indications that appellant had psychological problems even before getting to the Reformatory, there is no indication that appellant received any psychiatric assistance during his time there – over two years. (45 RT 14657-14660.) Ultimately appellant was transferred to state prison after a series of disciplinary problems, and was paroled in 1971. (45 RT 14658-14659.)

4. Evidence of Mental Illness and Brain Abnormality

Appellant was treated for paranoid schizophrenia as early as 1974. Appellant had been sent to Patton State Hospital for a competency evaluation under section 1370. James Kerns was the staff psychiatrist at Patton who admitted appellant. (45 RT 14423, 14426.) Kerns recorded his diagnostic impression of appellant at the time of admission. (45 RT 14427-14428.) Kern's impression was that appellant was suffering from schizophrenia, paranoid type. (45 RT 14430.)

Richard Finner was a psychiatrist and a neurologist who worked at Patton in 1974 and 1975. (45 RT 14595.) In the course of his work there, he evaluated appellant in July, 1974. (45 RT 14602-14604.) His impression then, as reflected in his notes, was that appellant suffered from "schizophrenia reaction paranoid form." (45 RT 14604.)
At the time he testified, Finner believed that it would be more accurate to describe appellant's mental illness as schizophrenia, undifferentiated type. (45 RT 14605.)

Appellant was medicated with anti-psychotic medications – Thorzaine and Stelazine – while at Patton. (45 RT 14431.)

Grant Hutchinson was a psychologist specializing in

neuropsychology. (44 RT 14281.) Appellant was referred to Hutchinson in 1980 for a neuropsychological examination. (44 RT 14283.) Hutchinson was asked to determine if there was evidence that appellant had a brain injury, and to assess appellant's personality and emotional function. (44 RT 14284.) To make his assessments, Hutchinson gave appellant a battery of neuropsychological tests and personality tests. (44 RT 14284-14286.) Appellant's personality profile was atypical. The results of a Minnesota Multiphasic Personality Inventory (MMPI) showed elevated scores on the mania, schizophrenia and paranoia scales. (44 RT 14296.)

As a result of the testing, Hutchinson had three impressions: first, appellant seemed to be of average intelligence and memory functioning; second, there was no evidence of significant organic brain damage; third, that appellant had "probable paranoid schizophrenia, chronic, residual phase" meaning that appellant had a long-standing major mental disorder which was not active at that time. (44 RT 14298.) Hutchinson noted that appellant could have organic brain damage, but that the tests he gave appellant had not been sufficiently sensitive to detect it. (44 RT 14299.) He also noted that stress or going off medication could cause inactive paranoid schizophrenia to become active. (44 RT 14303-14305.)

Hutchinson acknowledged that the field of schizophrenia had been in a state of flux for a long time, and that there have been different standards for making the diagnosis. (44 RT 14315.) He did not recall appellant reporting any hallucinations. (44 RT 14323.) Appellant reported having suffered a number of head injuries. At age 10 he was thrown off his bike and hit his head. At age 13, he hit his head on a door jamb and was dazed. At 14 he was hit with a blackjack in the occipital region and was unconscious for several minutes. (44 RT 14329.) At 18 he was knocked

out by a blow to the right temporal region while boxing. He was dazed many times while boxing between the ages of 17 and 20. (44 RT 14330.) At age 26 he accidentally hit himself with a 45-pound dumbbell while lifting weights. (44 RT 14328.)

The defense also presented contemporary evidence showing appellant had abnormal brain activity. Neurologist Sidney Kurn conducted a neurological examination of appellant in 1991. (46 RT 14698, 14702.) That examination revealed some mild abnormalities. Appellant did not feel a pin prick on his right side as well as he did on the left, and his reflexes were slightly depressed in the legs. (46 RT 14704.) A blood test indicated that appellant previously had syphilis and had been treated. (46 RT 14707-14708.)

An MRI revealed several abnormalities in appellant's brain. There was a lesion in the basal ganglia, an area of the brain that is connected to planning motor activity. (46 RT 14712, 14716-14717.) There was also an abnormality in another area of the brain called the pons. (46 RT 14719.) The pons is a connecting area – motor fibers run through the pons that bring sensation from the body to the brain, and motor fibers that make a person move connect the top of the brain to the limbs also run through the pons. (46 RT 14720.)

Kurn had a computerized EEG – also known as a BEAM test – done on appellant. (46 RT 14721-14722.) Appellant had Alpha brain wave activity in the frontal lobes. (46 RT 14724.) Kurn said this was "very unusual;" usually Alpha wave activity appears in the back of the brain. (46 RT 14724.) The amplitude of appellant's Alpha wave was also higher than normal, meaning that there was greater activity in the frontal lobes. (46 RT 14728-14729.)

The frontal lobes control decision-making, judgment and motivation. (46 RT 14729.) The BEAM test also revealed an unusually strong and slow response to an auditory stimulus. (46 RT 14731-14732.) This kind of response could show up in a person who is brain-damaged, has structural abnormalities in the brain, has epilepsy, or has problems with the neurotransmitters in the brain. (46 RT 14731-14732.) Episodic dyscontrol is associated with a large number of brain abnormalities, and having too much Alpha wave activity in the frontal lobes may correlate with difficulty in self-control. (46 RT 14733.)

These abnormalities mean that appellant had encephalopathy – something wrong with his brain. (46 RT 14742.) Encephalopathy is associated with abnormal behavior. (46 RT 14743.) The abnormalities in appellant's brain suggest that his nervous system did not function normally and that certain functions of the brain such as judgment, foresight, and self-control were impaired. (46 RT 14743.)

Appellant was diagnosed with syphilis at age 11. The most reasonable assumption would be that he was born with it, although sexual activity before age 11 could mean it was acquired rather than congenital syphilis. (46 RT 14750.)

Doctor Robert Bittle described for the jury the various part of the brain and how they function. Bittle had subspecialties in psychiatry and neurology and considered himself a neuropsychologist or neuropsychiatrist. (46 RT 14757.) He confirmed that appellant had structural abnormalities in the basal ganglia and the pons – that "something is wrong structurally" in appellant's brain. (46 RT 14791-14792.)

Bittle reviewed appellant's BEAM test results and concluded that the abnormal electrical activity in the frontal lobes translated clinically into an

individual who would likely have impulse control problems – he would have disinhibition. Such people tend to be hyperactive, emotionally over-responsive and have low stress tolerance. (46 RT 14795.)

The brain mapping (BEAM) and MRI were not available at the time of appellant's first trial. (46 RT 14797.) According to Bittle, appellant's brain abnormalities were involved to some degree in his violent outburst. Appellant had structural and functional abnormalities in his brain which created problems for him in controlling and inhibiting his impulses. (46 RT 14797-14798.) Bittle believes appellant has paranoid schizophrenia and an antisocial personality disorder. (46 RT 14799.)

5. Adjustment to Prison

Jerry Enomoto was a former Director of the California Department of Corrections (CDC) and had a lengthy history of working in corrections. (47 RT 14973-14985.) He testified as an expert in inmate management, inmate control, and CDC generally. (47 RT 14985.) Enomoto had reviewed appellant's CDC file from 1979 to the time of the 1992 retrial. He found that appellant did not have many problems in prison. (47 RT 14986.)

Inmates with long sentences become institutionalized – they adjust to life in prison. (47 RT 14989.) Institutionalized inmates become less of a behavior problem. (47 RT 14990.) Appellant had adjusted to prison; he conformed his behavior in the period from 1981 to 1992. (47 RT 14990-14991.)

C. The Prosecution Rebuttal Case

Ronald Byledbal was a psychiatrist. (46 RT 14849.) He had been appointed in 1979, after appellant had been charged in the Lynette Olsen incident, to assess appellant's sanity. (46 RT 14853-14854.) Byledbal concluded appellant had an anti-social personality disorder but did not

believe he had paranoid schizophrenia. (46 RT 14867-14868.)

Donald Apostle was also a psychiatrist. (46 RT 14892.) Like Dr. Byledbal, Apostle had been appointed in 1979 to assess appellant's sanity with regard to the 1979 Olsen incident. Apostle concluded that appellant was sociopathic but did not suffer from paranoid schizophrenia. (46 RT 14905, 14908.)

James Curry was unavailable as a witness. The prosecutor read to the jury his 1981 trial testimony. According to Curry in that previous testimony, he worked at the Sonoma State Hospital with appellant in 1978 and 1979. (47 RT 15010-15011.) In July, 1979, Curry was working as a janitor. His supervisor was Chris Christiansen. (47 RT 15011.) At some point near the end of the month, appellant came to the hospital when Curry was in the lounge area on a break. (47 RT 15012.) Appellant asked Curry to hold a television for him. (47 RT 15013.) Curry agreed. (47 RT 15013.)

Curry identified People's Exhibit 48, the Bohsei television set, as looking "somewhat" like the one appellant asked him to hold. (47 RT 15013.) Curry took the television to his girlfriend's house. (47 RT 15014.) Appellant asked Curry to return the television, and Curry did so by bringing it to work and giving it to Bob Ferroggiaro, a friend of appellant's. (47 RT 15015.)

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THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT'S MOTION TO REPRESENT HIMSELF AT THE SECOND PENALTY RETRIAL

The trial court erred in denying as untimely appellant's motion under *Faretta v. California* (1975) 422 U.S. 806 ("*Faretta*") to represent himself at the second penalty retrial. In early July, 1991, appellant first met with his assigned counsel, Sonoma County Deputy Public Defender Charles Ogulnik. Within the first few months thereafter, appellant developed concerns about the lack of investigation being done on matters he felt were important, and became frustrated by the lack of communication with Ogulnik regarding developments in the case. Appellant's mistrust over the months was occasionally assuaged by the advice of other attorneys to give Ogulnik some time to prove himself. Around January 1992, appellant learned that Ogulnik had been disciplined by the State Bar for failing to provide adequate legal representation to clients, and by May he had confirmed that Ogulnik had served a suspension of his license in 1990 and 1991, only returning to practice in March 1991.

After failing to resolve satisfactorily various problems with Ogulnik, and faced with an approaching trial, appellant filed both a *Marsden* motion and a *Faretta* motion on June 8, 1992. (4 CT 1122.1, 1123.) That was 50 days before jury selection began, and 78 days before opening statements were made and the first witness heard. (6 CT 1180.) In fact, the motion was made before a trial judge had been assigned to the case, and was not denied until July 21 – 43 days after it was filed. The *Faretta* error violated appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and requires an automatic reversal. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177.) The judgment of death therefore must

be reversed.

A. Factual and Procedural Background

Appellant's first penalty retrial ended in a deadlocked jury on February 7, 1991. (4 CT 984; 30 RT 10034.) Prior to the penalty phase being retried a second time, there was a long period of uncertainty as to who would represent appellant. On February 11, appellant's attorney, Deputy Public Defender Elliott Daum, declared a conflict. (30 RT 10038-10040.) The matter was continued until February 25. On that date, Sonoma County Public Defender Marteen Miller appeared and requested additional time to determine whether a conflict existed. The matter was continued to March 25, 1991. (30 RT 10047.) On March 29, the court determined that the matter should be returned to the Sonoma County Superior Court for pretrial matters, including determination of the conflict issue. (30 RT 10070.) On May 2, 1991, the Sonoma County court found a conflict as to Daum, but not as to the entire office of the Sonoma County Public Defender. (4 CT 1036.)

On May 7, 1991, the matter was transferred back to Sacramento County Superior Court for trial. (4 CT 1039.) On May 17, the court set a trial date of September 23, 1991. (30 RT 10077.)

On August 19, 1991, the defense moved for a continuance of the trial date. Ogulnik had been assigned on or about July 3 (49 RT 10542),[6] but did not appear at this hearing. (30 RT 10079.) The court was also informed

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[6] On July 20, 2011, this Court granted appellant's Motion to Unseal Nonpublic Records, and directed the clerk to unseal Reporter's Transcripts, Volume 49, pages 123 to 258, and Volume 50, pages 259 to 267. These pages also bear the sequential pagination of the entire Reporter's Transcript – volume 49, pages 10538 to 10714, and Volume 50, pages 10981 to 10989. In this brief appellant relies on this latter pagination when citing to the record of the formerly sealed proceedings.

that Donald Masuda, a Sacramento attorney who had done some work on the first retrial with Elliott Daum, was appointed as *Keenan*[7] counsel by a Sonoma County judge in August. (30 RT 10080-10084.) On August 19, the court granted the defense motion and ordered the trial date continued to November 18, 1991. (30 RT 10085-10086.) On November 15, 1991, the defense moved for a continuance of the trial date to June 22, 1992. (30 RT 10092.) That motion was not opposed by the prosecutor, and the motion was granted. (30 RT 10092.) No further proceedings were scheduled at that time until June 22, 1992. (30 RT 10093.)

On June 8, 1992, appellant filed a written motion to proceed in pro per under *Faretta*. (4 CT 1123.) At the same time he filed a *Marsden*[8] motion (4 CT 1122.1), a motion to continue (4 CT 1136) and a motion for discovery of documents on a California State Bar disciplinary hearing regarding Ogulnik (4 CT 1125).

The prosecutor filed opposition to appellant's *Faretta* and continuance motions on June 12. (4 CT 1137.3.) Also on June 12, during a hearing on discovery, the court mentioned that the *Faretta* motion was set to be heard June 22. (30 RT 10106.) But on June 22, the master calendar judge did not hear the motion, and informed the parties that the case would trail until July 6, when it would be assigned for trial to Judge Peter Mering. (30 RT 10108-10109; 4 CT 1137.14.) Appellant waived time and agreed to have Judge Mering hear his *Marsden* and *Faretta* motions. (30 RT 10109.)

On July 6, Judge Mering was still familiarizing himself with the case, and claimed to have made only a hurried review of some of the case

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[7] *Keenan v. Superior Court* (1982) 31 Cal.3d 424

[8] *People v. Marsden* (1970) 2 Cal.3d 118

files which he had received. (31 RT 10502.) The court and parties reviewed the numerous pending motions by both the defense and prosecution, including the four pro per motions filed by appellant, without addressing them on the merits. Masuda suggested that the court might want to address the pro per motions first. (31 RT 10509.) The court agreed to make an initial evaluation of them in the afternoon session. (31 RT 10533.)

The court first heard appellant's *Marsden* motion in camera on the afternoon of July 6, 1992. Appellant informed the court that Ogulnik had been assigned to his case around July 3, 1991. (49 RT 10542.) The initial problem appellant had with Ogulnik was a violation of trust. Appellant said Ogulnik had promised not to contact family members without appellant's permission, but then made such contacts and lied to appellant about it. (49 RT 10545-10546.) An additional source of conflict was that appellant was not interested in what he called a "sympathy" defense. Instead he wanted to attack the guilt phase evidence. (49 RT 10547.) He explained that he was not opposed to sympathy evidence, but he believed there were better ways to present the defense case. (49 RT 10550.)

Appellant said that most of the witnesses Ogulnik planned to call would support a sympathy defense. (49 RT 10553.) He acknowledged, however, that recently there had been a great deal of effort put into investigating the guilt phase evidence. (49 RT 10554.)

Appellant said that at the time the *Marsden* motion was filed he and Ogulnik were having a personality conflict. Miller, Masuda, and Gary Dixon (the defense investigator) resolved the personality issue. (49 RT 10558-10559.) That did not resolve all the issues – there were still areas they disagreed on. (49 RT 10559.) Appellant said he had regained some confidence in Ogulnik. (49 RT 10559.) Appellant said he was still making

his motion to represent himself, however. (49 RT 10559.) He said, "I still feel I can do a better job than anybody at the table." (49 RT 10560.)

The in camera *Marsden* hearing continued the next day, July 7. (49 RT 10569.) Although the inquiry was directed toward whether appellant should be appointed a different attorney, some of the discussion informed the court on the *Faretta* issue. The court questioned appellant regarding his contentions that he had not been permitted to assist in his own defense and had been denied copies of investigative materials that his attorneys had obtained. (49 RT 10570.) Also, appellant had claimed that investigations he had requested had been delayed or not done at all. (49 RT 10570.) Appellant acknowledged that work on these investigations had increased since he filed the *Marsden* motion, and even before then. (49 RT 10571.) He said he had also been kept better informed by his attorneys than he had earlier. (49 RT 10574.)

The court asked for counsels' response to appellant's complaints. Ogulnik said there may have been an innocent misunderstanding about whether he had appellant's consent to talk with family members. (49 RT 10578.) Regarding the delayed investigations, Ogulnik agreed that it probably seemed to appellant that they spent a lot of time at first working on areas that did not go to lingering doubt. (49 RT 10584.) They spent a lot of time working on the "psych defense." According to Ogulnik, appellant knew his attorneys were obligated to do that work even though he did not want them to. (49 RT 10585-10586.)

Appellant said he had written Ogulnik a letter in April, 1992, describing the matters that needed investigating that had not been dealt with at that time, despite the closeness to a trial date. (49 RT 10600.) In the letter, appellant also was concerned that Ogulnik's planned

psychiatric/psychological defense might conflict with the lingering doubt defense appellant favored, and that no meeting had taken place to resolve that conflict. (49 RT 10600.) The court asked Ogulnik if he had any response to the information appellant provided. Ogulnik said that his strategic decisions depended on how the prosecution case went. (49 RT 10602.)

Appellant told the court that "right now" he knew what his best defense was, and what was not going to work. "I discussed it with Mr. Ogulnik. He wants to go this way. I want to go this way. He wants to investigate this. I don't think it's worth anything. I believe there is a manner in which we should pursue this." (49 RT 10613.)

The court denied appellant's *Marsden* motion (49 RT 10621) and indicated that it would have to address the *Faretta* issue in open court on Thursday, July 9, with the prosecutor present. (49 RT 10622-10623.)

On July 9, the court acknowledged it was "a little overwhelmed by the volume of motions" and proceeded to review the status of those motions with the parties. (31 RT 10626.) As to the *Faretta* motion, the court wanted to know how much time appellant would need to prepare if the motion was granted. Appellant said it would be premature to give a specific time period. (31 RT 10645.) The court expressed its belief that appellant would need many months at a minimum. (31 RT 10648.) The prosecutor argued that the need for a continuance distinguished appellant's case from *Faretta* cases in which the motion was not accompanied by a request for a continuance. (31 RT 10650.)

The court decided it needed to ask certain questions on the *Faretta* issue that required yet another in camera hearing. At that July 9 hearing the court asked appellant whether he had considered moving to discharge

Ogulnik or to represent himself prior to when he filed his motions in June. (49 RT 10651-10652.) Appellant cited two such instances. He said that in September 1991, he had drafted a *Faretta* motion but decided against filing it at that time. (49 RT 10652, 10657.) He gave several reasons why: First, he felt that he and his attorneys had worked out some of the problems. Specifically, he said they "worked out a foundation from which we would confer and how we would from that point investigate and search out new avenues of approach to the case." (49 RT 10652.) Appellant also consulted with his previous appellate attorney, Robert Bryan, who was aware of the problems appellant was having with his attorneys and advised him to be patient. "He advised me to sit back and be a lot more patient, okay, and see how things develop, okay, with the case, and the investigation, and my relationships and communications with Mr. Ogulnik and Mr. Dixon, which I did." (49 RT 10653.)

The second time he considered filing a *Faretta* motion was in January or February 1992. Appellant said Masuda realized appellant was again thinking of filing a *Faretta* motion and urged appellant to wait another couple of months. (49 RT 10654.) Marteen Miller also advised appellant to wait a couple months. (49 RT 10654.) When nothing changed in the next few months, appellant felt he could best represent himself, so he filed the *Faretta* motion. (49 RT 10654.) In both instances in which he considered filing the motion, he did not do so because of the advice from these attorneys. "It was good advice from good attorneys, and I waited." (49 RT 10654.) He summed up: "The only reason I delayed that was as a result of people asking me because they felt that I was being somewhat over judgmental as to Mr. Ogulnik and everybody else involved in [the] case." (49 RT 10655.)

Following the July 9 in camera hearing, the court said that it needed some additional time to review the law on self-representation motions and expected to rule on Tuesday, July 14. (31 RT 10658, 10662.) On July 14, the court said it had still more questions on the *Faretta* and *Marsen* issues which needed to be addressed in camera. (31 RT 10671.) The court wanted to know more about investigations appellant believed needed to be done. Appellant described various matters he wanted investigated. For example, he expressed particular concern about testing done on the gun clip found at the scene of the Siroky assault. That investigation had been done by the defense team in the previous three weeks, although "to a degree unsatisfactory" to appellant. (49 RT 10678.) Appellant recognized that he and his attorneys had different priorities in terms of the amount of time to be spent on various matters (49 RT 10682), but appellant understood Ogulnik to have agreed to give as much attention to the issues appellant was concerned with as to the social history evidence that Ogulnik wanted to develop. (49 RT 10682-10683.) After this hearing, the court reaffirmed its July 7 *Marsden* ruling but did not decide the *Faretta* issue. (49 RT 10714.)

On July 17, during hearings on other motions, Masuda asked the court if it has decided the *Faretta* motion. The court responded that it had not had time to do so. (32 RT 10914.) Later the court said it would use Monday, July 20, to complete its review of the transcripts relevant to the *Faretta* issue and be ready to rule on Tuesday, July 21. (32 RT 10951.)

On July 21, the court held another in camera hearing. The court questioned Masuda about appellant's representations regarding why he had not filed a *Faretta* motion earlier. (50 RT 10981-10982.) Masuda noted that one of his roles on the case was to act as a liaison between the Sonoma County Public Defender's office and appellant. (50 RT 10983.) Between

November 1991 and February 1992 Masuda visited appellant between two and four times without Ogulnik being present. (50 RT 10983-10984.) Appellant wrote Masuda a series of letters expressing concern regarding Ogulnik's representation. There were times when Masuda told appellant to wait because everybody does trial preparation differently. He advised appellant to wait and see what efforts were made and what the results were. (50 RT 10984.)

Although Masuda did not have a specific recollection of telling appellant not to file a *Faretta* motion earlier, he did remember telling him to wait with respect to deciding whether to "fire" Ogulnik. (50 RT 10985-10986.) He made sincere efforts to assure appellant that everything that needed to be done was being done. (50 RT 10985.) The relationship between appellant and Ogulnik, Masuda and Dixon was "up and down;" there were times when they all got along very well, and other times of confrontation between appellant and Ogulnik or Dixon. (50 RT 10985.) In April the relationship between Ogulnik and appellant deteriorated to the point where Masuda was the only one contacting appellant for a period of weeks. (50 RT 10985.)

Appellant addressed the court at the July 21 hearing. He told the court that when his relationship with Ogulnik deteriorated in April, he called Marteen Miller and wrote him a letter. Appellant acknowledged that he could become very emotional. (50 RT 10987.) But things got "smoothed over" a bit. Miller suggested appellant give him (Miller) time to work things out. (50 RT 10988.)

Masuda and appellant agreed that there had never been a conflict between themselves. (50 RT 10988.)

Back in open court on July 21, the court finally ruled:

I will deny the Faretta Motion as untimely in this case. I have considered the factors in the Windham Case, which provides that such a motion, if it is untimely, it ceases to be made as a matter of right, and as I say, I conclude this is untimely being made, approximately, two weeks before the commencing of the trial.

Granted the cases have not discussed what period of time is involved in an 'untimely' motion. There is case authority. I think it is Ruiz that was six days before trial was not timely. Most of the other cases are the day before trial or the day of trial or even in trial. Those have been ruled untimely.

I think we have to, in looking at timeliness, look at the periods of time preceding the trial at which the defendant had the opportunity or the ability to evaluate his satisfaction or dissatisfaction with counsel. Most trial proceedings occur within three or four months of arrest, and once a case is in superior court, it is set for trial in 60 days as a general rule. And so, we're talking about short time periods, and while in the case of that type, two weeks before trial might be and could well be considered timely.

Here we have the defendant who was represented by Mr. Ogulnik from July of '91, and the motion comes eleven months later. I find no, in reviewing his – the information provided to this Court, I find no persuasive reason why the motion was not made substantially earlier in the proceedings if, in fact, he was of a mind to discharge Mr. Ogulnik, and in the alternative, if that he didn't get a new lawyer, to represent himself.

The factors that concern him that he recited in criticizing the performance of Mr. Ogulnik were known to him for a substantial period of time. Those factors, very frankly, are in many rather striking ways similar to the objections he had against the earlier attorney, Mr. Daum.

So, one would expect having had a series of difficulties

> with Mr. Daum, which caused him to be dissatisfied and actually made two Marsden Motions, one in January and one in – filed in April, that those factors would have caused him to file his Marsden Motion earlier and his alternative motion for self-representation earlier than two weeks before this trial.
>
> He indicated he had contemplated a motion as far back as September, October of '91and then decided to allow some more time. As I say, one would have expected in view of this substantial similarities in his objections that he would have taken this action earlier, and the strong suspicion arises that the whole process, at least, has an element in it of interrupting the orderly processes and bringing about delays.
>
> In this case, of course, he has filed contemporaneously with the Marsden and Pro Per Motion, a Motion to Continue, in which he indicates in his pleadings that a substantial significant time period would be required for him to prepare himself for trial. So, the result of granting this motion would be a disruption of this trial for an extended period of time. That from his motion, certainly, many months would of necessity be what he is seeking and very likely what would be required for him to prepare himself for presenting this trial.

(32 RT 10955-10957.)

The court went on to analyze the case under *People v. Windham* (1977) 19 Cal.3d 121, and refused to exercise its discretion to allow appellant to represent himself. (32 RT 10957-10960.)

On July 23, appellant filed 52 pages of letters and documents as support for his statements to the court at the *Marsden* and *Faretta* hearings. These items, described more fully below, were mostly correspondence with his attorneys and defense team members; and documents relating to the 1989 State Bar disciplinary case against Ogulnik, including this Court's 1990 order suspending Ogulnik from the practice of law; some of which appellant had referred to at the July 14 in camera hearing. (6 CT 1149.1-

1149.52.) The filing included the following:

– A letter from Addison Somerville, the defense social historian, to appellant dated October 9, 1991, in which Somerville apologizes for not getting permission in-person from appellant to speak with his family members, and referencing the mis-communication between appellant and Ogulnik that appellant described to the court. (6 CT 1149.7.)

– Letters from appellant to Ogulnik and Gary Dixon dated July 3 & 4, 1991, which express his hope that they will be able to work together, and informing Ogulnik that he expected to be kept informed about developments in the case. (6 CT 1149.9, 1149.10.)

– A letter from appellant to Masuda dated October 23, 1991, thanking Masuda for his work on the case and expressing concern about whether the court would grant the trial continuance that was being requested. Appellant also complains about the lack of consideration shown to him by others involved in the case, and expresses his belief that there was a need to start investigating the evidence used by the prosecution at the guilt trial. He continues to assert that he expects to have the final say in what defense is presented at trial. (6 CT 1149.11-1149.12.)

– A letter dated January 30, 1992, from appellant to Masuda telling him that appellant had recently learned about a State Bar investigation of Ogulnik for providing inadequate legal representation. Appellant asks for Masuda's help in getting information about the investigation. (6 CT 1149.14.)

– A letter dated February 10 from appellant to Robert Bryan, appellant's prior appellate attorney, seeking help getting information about the State Bar disciplinary case against Ogulnik. (6 CT 1149.14.)

– A letter from appellant dated April 10, 1992, to the State Bar

counsel, Hans Uthe, seeking information about the case against Ogulnik. In it he asks to have the information before his June 22 trial date "so that I might be able to make a rational determination as to whether or not I desire to go any further with this attorney." (6 CT 1149.16.) Appellant received a response letter dated April 16 from Uthe indicating his letter had been forwarded to Richard Harker, the Assistant Chief Trial Counsel in the Office of Trial Counsel at the State Bar. (6 CT 1149.17.)

– A letter dated April 14, 1992, from appellant to Ogulnik informing him that appellant had written to the State Bar regarding the disciplinary case against Ogulnik and indicating dissatisfaction with their relationship and Ogulnik's work on the case.[9] (6 CT 1149.18-1149.20.)

– A letter dated April 19, 1992, from appellant to Richard Harker at the California State Bar, reiterating his request for records of the disciplinary proceedings against Ogulnik. (6 CT 1149.21.)

– A letter dated May 2, 1992, from appellant to Ogulnik expressing concern that appellant had not received all the information that had been developed in the case or a list of witnesses the attorneys intended to call. He also complained that he had repeatedly asked Ogulnik for the information about the State Bar matter but had not received anything. (6 CT 1149.46.)

– A letter dated May 3, 1992, from appellant to Masuda complaining about a meeting with Ogulnik and Dixon on May 1. In the letter appellant says, "The meeting did not go as I would have wanted to, but then since being saddled with the public defender that I have, that is not suprising [sic]

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[9] The first page of this letter is difficult to read because it is a palimpsest, written over a page of reporter's transcript.

to me." Appellant expresses frustration over the failure of his defense team to investigate aspects of the case he feels are important. (6 CT 1149.48.)

– A letter to appellant dated May 5 from Scott Drexel, Chief Court Counsel for the State Bar regarding the discipline case against Ogulnik. Drexel said Ogulnik was suspended from practice of law for three years, but that this Court had stayed execution of the suspension and placed him on probation for three years on numerous conditions, including actual suspension from practice for six months. The letter indicates Ogulnik was authorized to resume practicing March 21, 1991, which was a little over three months before he was assigned to appellant's case. (6 CT 1149.22-1149.23.)

– Twenty-two pages of documents pertaining to the State Bar proceeding against Ogulnik, which were apparently provided to appellant by Drexel with his letter. These documents include a Stipulation as to Facts and Discipline which establish, inter alia, that on multiple occasions between 1983 and 1987 Ogulnik wilfully failed to competently perform legal services for clients. (6 CT 1149.24-1149.45.)

– A letter dated May 8 from appellant to Ogulnik, Dixon, Marteen Miller, and Masuda which further discusses the breakdown in communications, and shows appellant still attempting to work with his attorneys. Appellant writes that he believes no intelligent decision could be made about the best approach for the defense until all the appropriate information has been obtained. He wrote, "I know that with the time left befor[] my next court appearance, we must all concentrate on gathering the information required to make an intelligent evaluation of the information, how it can be used in destroying the state[']s case. To do this, we all must have the information needed to [?] this evaluation and build the correct

decision as to how we can counter it. . . . I will not go into court again without all of the information requested or with a defense team that has an agenda, that is self serving and excludes any input by me. I know that isn't to[o] much to ask for or expect from your attorney." (6 CT 1149.50; emphasis in original.)

– A letter dated May 9 from appellant to Ogulnik and Masuda stressing that they could not afford to fail to raise everything possible to get a favorable outcome. (6 CT 1149.51.)

– A letter dated June 1, 1992, from appellant to Masuda. This letter is apparently the cover letter to the various pro per pleadings which appellant sent to Masuda for filing, and which were subsequently filed June 8. Appellant sent this letter from San Quentin, and in it he asks Masuda to file the pro per motions for him: "I'm asking you to file these write [sic] with the superior court, because you are close to the court and [i]t would take me at least two weeks to get them certified and then mailed to the court. I do not see where I'll be placing you in a ackward [sic] positions by doing so." (6 CT 1149.52.)

Shortly after the beginning of jury selection on July 28, the court returned to the *Faretta* issue. It noted the letters and documents appellant had filed, and said it had read and considered those submissions, but did not change its decision. (34 RT 11341-11342.) Regarding the State Bar disciplinary matter against Ogulnik, the court offered appellant an opportunity to explain how that affected Ogulnik's competence to handle his case. Appellant indicated the documents were for the court's information and that no comment was needed. (34 RT 11342.)

The court then returned to jury selection. Opening statements and the beginning of the prosecutor's case-in-chief finally began August 25,

1992. (40 RT 13286; 41 RT 13274.)

B. Appellant Had a Right to Represent Himself

A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. (*Faretta v. California* (1975) 422 U.S. 806; *People v. Halvorsen* (2007) 42 Cal.4th 379, 434.) The right to defend is personal. (*Faretta*, at p. 834.) "It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." (*Ibid.*) The right to self-representation is implicit in the Sixth Amendment, and can be traced back to pre-colonial times. In *Faretta*, the Supreme Court described this history and noted that the early colonists "brought with them an appreciation for the virtues of self-reliance and a traditional distrust of lawyers." (*Id.* at p. 826.) The times in which the Constitution was drafted was a period of the revival "'of the old dislike and distrust of lawyers as a class.'" (*Id.* at p. 827, quoting C. Warren, A History of the American Bar (1911) 212 , fn. 30.) *Faretta* applies to capital, as well as non-capital, cases. (*People v. Lynch* (2010) 50 Cal.4th 693, 725 ("*Lynch*"); *People v. Dent* (2003) 30 Cal.4th 213, 218, 222; *People v. Joseph* (1983) 34 Cal.3d 936, 944-945.)

The right of self-representation, however, is not an unqualified one. (*Faretta*, at p. 835; *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 162.) The defendant must be mentally competent (*Indiana v. Edwards* (2008) 554 U.S. 164, 177-178), and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation (*Faretta*, at p. 835; *People v. Bloom* (1989) 48 Cal.3d 1194, 1224-1225). He also must make his request unequivocally. (*Faretta*, at p. 835; *People v. Clark* (1992) 3 Cal.4th 41, 98.)

Appellant's request was unequivocal. The fact that the motion was made at the same time he requested new counsel through a *Marsden* motion did not make the *Faretta* motion equivocal. There is nothing equivocal in a request that counsel be removed, and that if not removed, that appellant wants to represent himself. (*People v. Michaels* (2002) 28 Cal.4th 486, 524; *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1390 [defendant's repeated requests for self-representation were not equivocal although defendant sought pro per status only after trial court's refusal to grant *Marsden* motion].)

Courts have additionally qualified the right to self-representation with requirements that it be invoked in a timely manner. As will be shown below, the trial court's determination that appellant failed to assert his right to self-representation in a timely manner was an unconstitutional infringement on appellant's Sixth and Fourteenth Amendment rights.

C. Appellant's *Faretta* Motion Was Timely

Appellant's written motion to represent himself was filed 50 days before the beginning of jury selection. It was timely regardless of whether timeliness is assessed under the timeliness standard relied on by this Court or the standard relied on by the federal courts.

1. The Timeliness of *Faretta* Motions Is Not Assessed by the Same Test in All Jurisdictions

Faretta does not expressly limit when a motion for self-representation can be made. Rather, the Court cautioned that self-representation "is not a license to abuse the dignity of the courtroom" and suggested that the right can be terminated if defendant "deliberately engages in serious and obstructionist conduct." (*Faretta* at p. 834, fn. 46.) Nevertheless, courts in both the state and federal jurisdictions have denied

motions for self-representation on the basis that they were not timely.

This Court has developed a standard for determining whether a defendant has invoked his right to self-representation in a timely manner that differs substantially from the one used by the federal courts. The various federal courts have consistently agreed that unless the motion is made for the purpose of delay, an assertion of the right to self-representation is timely as a matter of law if it is made before trial. In the Ninth Circuit, a demand for self-representation is timely "if made before meaningful trial proceedings have begun." (*United States v. Schaff* (9th Cir 1991) 948 F.2d 501, 503.) Trial proceedings begin when the jury is empaneled. (See *Avila v. Roe* (9th Cir. 2002) 298 F.3d 750, 752; *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784.) In the Fifth Circuit, the unequivocal assertion of the right prior to when the jury is empaneled is not untimely where there is no indication that the assertion of *Faretta* rights was designed to achieve delay or tactical advantage or that it would in fact have resulted in any delay. (*Chapman v. United States* (5th Cir.1977) 553 F.2d 886, 894.) Other circuits use the same rule or a similar one. (See e.g., *Buhl v. Cooksey* (3d Cir. 2000) 233 F.3d 783, 795; *Williams v. Bartlett* (2d Cir.1994) 44 F.3d 95, 99 [right is unqualified if request made before start of trial]; *United States v. Lawrence* (4th Cir. 1979) 605 F.2d 1321, 1325 [right of self-representation must be asserted before meaningful trial proceedings have commenced; thereafter its exercise rests within the sound discretion of the trial court]; *United States v. Beers* (10th Cir. 1999) 189 F.3d 1297, 1303 [right is unqualified if unequivocally demanded before trial]; *United States v. Noah* (1st Cir. 1997) 130 F.3d 490, 497 [defendant's right to self representation is absolute if invoked prior to the beginning of trial; right is qualified once trial is underway]; *United States v. Webster* (8th Cir. 1996) 84

F.3d 1056, 1063, fn. 3 [right is unqualified if demanded before trial].)

Under the federal cases, an otherwise timely *Faretta* motion may be denied as untimely if the defendant's request for self-representation is merely a tactic designed to cause delay. (*United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167.) But the fact that trial may be delayed by a defendant's assertion of his right to represent himself is not itself a sufficient ground for denying a defendant's *Faretta* motion. (*Fritz v. Spalding, supra*, 682 F.2d 782 at p. 784.)

This Court has taken a different approach in determining the timeliness of *Faretta* motions. In *People v. Windham, supra*, 19 Cal.3d at p. 128, it first held that to be timely a defendant should make a request for self-representation "within a reasonable time prior to the commencement of trial." If the request is made a reasonable period before trial, the trial court has no discretion to deny a valid waiver of the right to counsel. (*People v. Bloom, supra*, 48 Cal.3d at p. 1219; *People v. Dent, supra,* 30 Cal.4th at p. 217.) A timeliness requirement cannot, of course, be used as a means of limiting a defendant's constitutional right to self-representation. (See *People v. Windham, supra*, 19 Cal.3d at p. 128, fn. 5.) Rather, its purpose is only "to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton* (1989) 48 Cal.3d 843, 852.)

This Court long ago acknowledged that its "reasonable time" test differs from the bright line test used by the federal courts, but suggested then that the federal rule "may in practice differ little from our own rule" because the federal court may deny a *Faretta* motion made before the jury is empaneled if the motion was made for the purpose of delay. (*People v. Burton, supra*, 48 Cal.3d at p. 852.)

Under the federal rule, the fact that granting the motion will result in a continuance of the trial that would prejudice the prosecution may be considered as evidence of defendant's dilatory intent. (*People v. Burton, supra*, 48 Cal.3d at p. 852, citing *Fritz v. Spalding*, *supra*, 682 F.2d at p. 784.) Unlike under the federal rule, however, this Court has placed the burden on the defendant "to explain his delay when he makes the motion as late as defendant did here." (*People v. Burton*, *supra*, 48 Cal.3d at p. 854.) Burton filed his motion on the day set for trial, which was the day before jury selection began. Whatever the merits of a rule shifting the burden to defendant in cases involving a motion filed on the eve of trial, the rule does not apply here where the motion was filed substantially before the beginning of trial.

The relevant test under this Court's authorities is found in *Lynch*, which describes a new test for determining what constitutes a reasonable period of time before trial for filing *Faretta* motions. *Lynch* held that a trial court should consider the totality of the circumstances at the time the self-representation motion was made in determining whether a defendant's pretrial motion for self-representation is timely. (*Id.* at p. 726.) "Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation." (*Ibid.*)

As will be shown below in Sections C.3 and C.4, appellant's *Faretta* motion was timely whether analyzed under this Court's test or the federal test.

2. The Standard of Review

Faretta error is reviewed de novo by the appellate court. (*People v Stanley* (2006) 39 Cal.4th 913, 932 [de novo review of whether invocation of right was knowing and intelligent]; *People v. Marshall* (1997) 15 Cal.4th 1, 23 [de novo review of whether request unequivocal]; *People v. Danks* (2004) 32 Cal.4th 269, 295 [same]; *People v. Watts* (2009) 173 Cal.App.4th 621, 629 [de novo review of validity of exercise of *Faretta* rights].) This Court should therefore apply a de novo review standard in determining whether appellant's *Faretta* motion was timely. Review is based on the facts as they appear at the time of the hearing on the motion, rather than on what subsequently develops. (*People v. Moore* (1988) 47 Cal.3d 63, 80; *People v. White* (1992) 9 Cal.App.4th 1062, 1072.)

3. The Trial Court Erred Under *Lynch* in Denying Appellant's *Faretta* Motion as Untimely

Appellant's *Faretta* motion was timely under the totality of the circumstances test described in *Lynch*. Considered individually and collectively, each of the five circumstances set out in *Lynch* support appellant's timeliness argument.

1. *The time between the motion and the trial date.* Appellant's *Faretta* motion was filed on June 8, 1992, and jury selection began on July 28. For purposes of assessing timeliness under *Faretta*, this Court has determined that trial begins with the start of jury selection. (*People v. Clark*, *supra*, 3 Cal.4th at pp. 99-100 [jury selection marks the start of trial]; see *People v. Jackson (Michael Anthony)* (2009) 45 Cal.4th 662, 688-689 [motion after a day of voir dire untimely].) Thus, fifty days passed between

the filing of appellant's motion and the beginning of trial.[10]

The trial date of June 22, which had been set six months earlier, is of little significance here. At the hearing to compel discovery on June 12, it is clear neither party anticipated beginning jury selection on June 22. (30 RT 10099-10107.) On June 22, the master calendar judge ordered that the case would trail, and assigned it out to Judge Mering's court with a first appearance date of July 6. (30 RT 10108-110110.) Nevertheless, even two weeks is "well before trial." (See *Faretta* at p. 807 [characterizing Faretta's motion several weeks before trial as "well before" trial].)

In *Lynch*, this Court surveyed its prior cases involving timeliness. At one extreme, the defendant in *People v. Halvorsen*, *supra*, 42 Cal.4th 379 made his *Faretta* motion seven months before trial, which was considered clearly timely. (*Lynch* at p. 723.) At the other extreme were various cases in which the defendant made his motion on the eve of trial (See e.g., *People v. Frierson* (1991) 53 Cal.3d 730, 742 [motion filed two days before trial]; *People v. Horton* (1995) 11 Cal.4th 1068, 1110 [motion filed the date

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[10] The fact that this was a penalty phase retrial following a trial and retrial in which appellant was represented by counsel did not make appellant's motion untimely. It is true that a motion for self-representation made between the guilt and penalty phases of a capital trial is deemed to be made mid-trial, and therefore may be untimely, on the theory that the two phases are simply stages of a unitary trial. (See *People v. Hamilton* (1988) 45 Cal.3d 351, 369.) The rationale behind that rule is inapplicable, however, where the motion is made following a penalty phase mistrial where the retrial will be held before a new jury. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 434.) That is the situation here, where a mistrial was declared in the first penalty phase retrial on February 7, 1991, and the motion was made June 8, 1992, almost two months before the second retrial began.

of trial]; *People v. Valdez* (2004) 32 Cal.4th 73, 102 [motion filed moments before jury selection was to begin]; see generally, *Lynch* at pp. 723-725.)

The facts in *Lynch* put it between these extremes. Lynch filed his first *Faretta* motion on September 27, 1991, when pretrial motions were scheduled for October 21 and jury selection was expected to begin about three weeks later. Thus, Lynch's motion was approximately 45 days before trial was expected to begin – still a shorter period than the time between the filing of the motion and the beginning of jury selection in the present case.

2. *Whether trial counsel was ready to proceed.* The defense was not ready to proceed to trial on June 8. On June 12, the defense still had not complied with the court's order that they provide discovery to the prosecutor 30 days before trial. (30 RT 10097-10105.) On June 22, appellant waived time for trial. (30 RT 10109.) In July, the defense was still filing new pretrial motions. (31 RT 10503-10506.) According to appellant on July 6, his defense team was still conducting substantive investigations weeks after he filed his *Faretta* motion. (49 RT 10554, 10559.) In fact, when the court asked counsel on July 7 – a month after appellant filed his motion – if the defense had exhausted all its investigative leads, Ogulnik replied, "No. I could investigate this case for the next two years, absolutely." (49 RT 10586.) Ogulnik did say that day, however, that he believed the case had been investigated "in an appropriate manner at this point" and that he was prepared to try the case. (49 RT 10587.)

3. *Number and availability of trial witnesses.* In *Lynch*, the prosecution's case consisted of 65 witnesses at the guilt phase alone. Furthermore, the prosecutor there complained that the surviving victims and certain other witnesses were elderly. He characterized Lynch's *Faretta* motion as "a cruel blow to all the victims" in the case. (*Lynch* at p. 718.)

By contrast, in the present case the prosecutor presented only 17 live witnesses in its case-in-chief, most of whom were law enforcement officers or expert witnesses. The prosecutor made no showing that any of its witnesses were at risk of dying or would otherwise be unavailable if the trial was continued, or that any of his witnesses were reluctant to testify. In fact, subsequent events showed that the prosecutor had three witnesses who were not available for the second retrial who might have been available if the case had been continued. Paul and Ludwig Saccomano, who both testified at the 1981 trial and the 1991 penalty retrial were leaving on vacation, so the parties stipulated that their prior testimonies could be read to the jury. (43 RT 13836.) Lance Erickson was also going on vacation and the prosecutor agreed to limit the scope of his testimony to accommodate that witness. (42 RT 13590.)

In his opposition to appellant's *Faretta* motion and request for continuance, the prosecutor did claim that the state would be prejudiced by delay. (4 CT 1137.12.) But the reason he gave was that two witnesses had died since the original 1981 trial and that one other witness could not be located, which necessitated the use of the prior testimony of those witnesses. (4 CT 1137.12.) He made no claim that there was any current urgency to try appellant's case, and a later trial date would have given him extra time to locate the missing witness. Furthermore, none of his witnesses were relatives or friends providing victim-impact evidence as to the homicide victim.[11] Also, the prosecutor used prior testimony for seven witnesses in its case in chief, including the Saccomanos. His ability to

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[11] There were some lay witnesses who testified to prior crimes by appellant under section 190.3, factors (b) and (c).

present evidence through prior testimony would obviously not have been affected by a further continuance.

Finally, of the three main parts of the prosecutor's case – the circumstances of the crime (§190.3, factor (a)), appellant's prior acts of violence (§190.3, factor (b)), and appellant's prior felony conviction (§190.3, factor (c)) – the prior convictions are properly proven entirely by documentary evidence which would not be affected by a later trial date. (See *People v. Balderas* (1985) 41 Cal.3d at p. 202.)

4. *The complexity of the case.* The present case was a sentencing retrial, not a full capital trial like *Lynch.* The jury was informed that appellant had already been convicted of the murder of Cavallo, and most of the prosecutor's case-in-chief went to establish the circumstances of that crime.

5. *Any ongoing pretrial proceedings.* There were extensive pretrial proceedings going on while appellant's *Faretta* motion was pending. On July 6, the court received six motions filed by the defense: Notice of Motion and Motion to Determine Admissibility of the testimony of Florence Morton (31 RT 10503), Notice of Motion and Motion to Oppose Introduction of Prior Acts in Aggravation (31 RT 10503), Notice of Motion and Motion to Bar Evidence of the July 18th, 1979 Rape of Mary S. (31 RT 10503), Motion in Limine to Preclude Testimony of Witness Richard Canniff (31 RT 10504), Notice of Motion and Motion to Preinstruct Prospective Jurors on Parole Misconception (31 RT 10504), and a Motion to Dismiss Based Upon Double Jeopardy CT (4 CT 1138.22). The defense indicated it also intended to file a discriminatory prosecution motion. (31 RT 10505.) That motion was filed July 9. (4 CT 1140.1.) The prosecutor noted that there were also matters pending from before the time Judge

Mering was assigned to the case. There were various pleadings related to prosecutorial discovery including a Motion for Order to Compel Compliance with Discovery Order that was filed June 12. It was this flurry of pretrial activity that caused the court to comment on July 9 that it did not have time to address appellant's *Faretta* motion because it was "a little overwhelmed" by the volume of pretrial motions to be heard. (31 RT 10626.) The court would not have been idle had it granted appellant's motion around the time it was made in June.

6. *Whether appellant had earlier opportunities to assert his* Faretta *rights.* The "reasonable time" requirement is intended to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice. (*People v. Burton*, *supra*, 48 Cal.3d at p. 852.) A defendant is not permitted to wait until trial to make his request without showing a reason for the lateness of the request. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) In *Burton*, defendant had "several opportunities" – court appearances – in the six months between the preliminary hearing and the case being called for trial to move to represent himself, and failed to show why he delayed making the request until the day before trial. (*People v. Burton*, *supra*, 48 Cal.3d at pp. 853, 854.) From this failure to explain the Court determined Burton's *Faretta* motion was untimely. (*Id.* at p. 854.) Missed opportunities to make the self-representation motion therefore may support an inference that a defendant is intentionally seeking to delay the trial or obstruct the orderly administration of justice. *Faretta* "did not establish a game in which defendant can engage in a series of machinations." (*People v. Clark* (1992) 3 Cal.4th 41, 115.)

Any determination that a defendant is engaged in tactical delay, however, must be based on the assumption that he has already determined

he is going to make a *Faretta* motion and is simply putting it off to obstruct or delay. But no such deliberate manipulation can be assumed where the defendant simply has not made the decision to represent himself. That is the case here. The record could not support any finding that appellant had made the decision to represent himself substantially prior to the time when he actually filed the motion. As Masuda noted, appellant and his attorneys had an "up and down" relationship. (50 RT 10985.) Appellant had frequent conflicts with counsel over control of the case and strategy, but even as late as May, appellant was fully engaged with them, trying to get matters investigated that he believed were important.

The trial court specifically asked appellant why he had not filed his *Marsden* and *Faretta* motions earlier. Appellant said that in September he felt that he and his attorneys had worked out some of their problems. (49 RT 10652.) He also consulted with his prior appellate attorney, who advised him to be patient and to see how matters developed. In January or February, when appellant again began thinking about the need to change counsel, Masuda and Miller convinced him to wait "a couple months." He considered this "good advice from good attorneys, and I waited." (49 RT 10654.) Far from engaging in deliberate delaying tactics or obstructing trial, appellant attempted to work with his assigned attorneys, and when he decided his best option was to represent himself, he filed a *Faretta* motion in a timely manner.

Furthermore, by the time he made his motion, appellant had obtained the disturbing information that Ogulnik had admitted to multiple instances of failing to do adequate legal work on behalf of clients, and had been disciplined by the State Bar as a result of those failures.

In *Lynch*, by contrast, the defendant had no substantial explanation

why he had not made his *Faretta* motion earlier. His reason for filing the motion was that his life was "on the line" and he offered what this Court characterized as the "feeble explanation" that ""[i]t's just now that I've recently seen that what I have been seeing [makes]. . . me want to exercise my Sixth Amendment rights. . . ."" (*Lynch* at p. 727.)

Finally, there is evidence that appellant's ability to assert his *Faretta* rights earlier was impaired by the absence of court appearances between November 23, 1991, and the time appellant filed his motion on June 8, 1992. (Compare, *People v. Burton*, *supra*, 48 Cal.3d at pp. 853 [defendant failed to take opportunities to raise *Faretta* claim at court appearances in time leading up to trial].) In fact, appellant showed extraordinary diligence by bringing the matter to the court's attention before the next scheduled court date by mailing his motion to Masuda on June 1, asking Masuda to file the motion for him because if he sent it through the regular mail from San Quentin State Prison to Sacramento it would take longer to get to the court. (6 CT 1149.52.) Appellant did not deliberately delay filing his motion. (See *Chapman v. United States*, *supra*, 553 F.2d at p. 888 [defendant did not have opportunity to make his motion to the court earlier because he was in prison].)

Overall, the totality of the circumstances show that appellant's *Faretta* motion was made a reasonable time before trial, and was not being made for the purpose of interfering with the orderly processes of the court by delaying the trial. Appellant spent months attempting to work with his new attorney, Charles Ogulnik. Despite entreaties from *Keenan* counsel Masuda, and other attorneys appellant consulted, not to be hasty and to give Ogulnik a chance to prove himself, appellant ultimately came to the decision he needed to represent himself. When he made that decision, he

informed the court in a timely manner through a written motion to represent himself.

Although appellant told the court he would need a continuance in order to prepare, there is no evidence that any specific harm would have resulted from any delay in the trial that might have resulted from granting appellant's motion. The court made no finding as to how long a continuance appellant would have need if it granted the *Faretta* motion and gave appellant time to prepare, and in fact there is nothing to indicate that the trial would have been substantially delayed. Appellant's motion was filed on June 8. Jury selection began on July 28, and continued through most of August. Opening statements were made, and the first witness called, on August 25. (6 CT 1180.) Thus, eleven weeks passed between the time appellant filed his motion and the first witness was called. It is therefore unclear that any substantial delay would have occurred had the motion been granted, and it is even less clear that any harm would have resulted from such delay.

If appellant is not entitled to relief under the totality of the circumstances test described in *Lynch*, then California's standard for timeliness unconstitutionally infringed upon appellant's federal constitutional right to self-representation, and this Court should abandon its totality of the circumstances test and adopt the test relied on by the federal courts.

4. Appellant's *Faretta* Motion Was Timely under the Test Used in the Federal Courts

Appellant's motion 50 days before jury selection was clearly timely under federal case law. In *Faretta*, the Court noted that Faretta's request was "[w]ell before the date of trial," and "weeks before trial." (*Faretta* at

p. 807.) The Ninth Circuit has held that the Court's acknowledgment of the time of Faretta's request is properly considered necessary to the Court's decision and is therefore a holding. (*Moore v. Calderon* (9th Cir. 1997 108 F.3d 261, 265.) This holding may be read "to require a court to grant a *Faretta* request when the request occurs 'weeks before trial.'" (*Marshall v. Taylor* (9th Cir. 2005) 395 F.3d 1058, 1061.) Accordingly, appellant's *Faretta* request over seven weeks before trial was timely.

Even if this Court does not accept the Ninth Circuit's reading of *Faretta*, under the general rule applied in the federal courts appellant's motion is timely because it was made before trial began. (See Section C.1 above.) A motion that would otherwise be timely may still be denied if it is made for purposes of delay. But as previously noted, under the federal authorities a defendant does not bear the burden of proving the absence of delay. A defendant may have a bona fide reason for not asserting his right earlier and he may not be deprived of that right absent an affirmative showing that his purpose was to secure delay. (*Fritz v. Spalding*, *supra*, 682 F.2d at p. 784.)

Here, the record does not support an inference that defendant's motion was made with the intention to delay the trial. The court did comment that appellant's failure to act earlier gave rise to a "strong suspicion" that "the whole process, at least, has an element in it of interrupting the orderly process and bringing about delays." (32 RT 10957.) The court's suspicion is not a factual finding, and even the suspicion is not well-founded. Rather, as shown above, appellant spent months attempting to work out his problems with Ogulnik, but ultimately was unable to do so. Appellant acted responsibly and brought the motion in a timely manner after deciding, for better or worse, that he could best represent himself at

trial.

Furthermore, under the federal authorities a defendant must have a last clear chance to assert his constitutional right. (*Chapman v. United States, supra,* 553 F.2d 886 at p. 895.) If there must be a point beyond which the defendant forfeits the unqualified right to represent himself, that point should not come before meaningful trial proceedings have commenced.(*Ibid.*) Appellant had no such last clear chance if his right to self-representation was extinguished weeks or months before trial. Also, this Court's totality of the circumstances test – which calls upon to the trial court to balance multiple factor in determining timeliness – allows a defendant to lose his right to self-representation before trial begins and without any fair warning his right is being extinguished. For example, a defendant may be completely unaware of the number of witnesses the prosecution is planning to call, and any limitations on their availability. Yet the trial court could find that to be the determinative factor in deciding that appellant's motion, made weeks or even months before trial, was untimely.

Appellant's motion was made well before trial and should be deemed timely.

D. The Error was Prejudicial

When a defendant is compelled to accept counsel after asserting an unequivocal desire to represent himself, the error "taints the criminal trial process to the core." (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) The improper denial of a *Faretta* motion is not subject to harmless error analysis. (*Flanagan v. United States* (1984) 465 U.S. 259, 268; *McKaskle v. Wiggins, supra,* 465 U.S. at p. 177, fn. 8.) Because appellant's motion to represent himself was erroneously denied, the judgment of death must be reversed.

2

THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT HAD NOT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION IN THE PROSECUTOR'S EXERCISE OF PEREMPTORY CHALLENGES ON THE BASIS OF RACE

During jury selection, the prosecutor used three of his first 15 peremptory challenges to strike three of the five African-Americans who had been seated. These challenges drew a *Batson-Wheeler* [12] motion from appellant, who argued that the prosecutor was engaged in improper race-based exclusion of prospective jurors. Despite the significant disparity between the small percentage of African-Americans on the jury panel and the percentage struck by the prosecutor, the trial court found that appellant had not even established a prima facie case of race-based exclusion. The trial court's finding that no prima facie case existed was constitutional error, and requires reversal of the judgment of conviction and sentence in this case. (*Johnson v. California* (2005) 545 U.S. 162; *J.E.B. v. Alabama ex rel. T.B.*(1994) 511 U.S. 127; *Batson v. Kentucky*, *supra*, 476 U.S. 79 ("*Batson*"); *People v. Wheeler*, *supra*, 22 Cal.3d 258 ("*Wheeler*"); *People v. Snow* (1987) 44 Cal.3d 216, 226-227; U.S. Const. Amend XIV; Cal. Const., Art. 1, §§ 7, 16.)

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[12] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

A. Proceedings Below

1. Investigation of African-American Prospective Juror Malloy

Appellant's suspicions that the prosecutor might be engaged in race-based jury selection practices were first raised well before the peremptory challenge stage. Immediately preceding the voir dire of prospective juror Kenneth Malloy, who was African-American, the prosecutor revealed that he had run a computer check which revealed that Malloy had suffered two misdemeanor convictions for driving under the influence, and had been arrested for domestic violence, which was inconsistent with Malloy's answer on his questionnaire that he had never been arrested for a crime. (39 RT 12804-12805.) While defense counsel agreed that the court should look into the inconsistency, counsel also wanted to know whether the prosecutor had "just checked all the Black prospective jurors" for criminal records. (40 RT 12807.) The prosecutor replied that he did not have to answer that inquiry. (39 RT 12807.) Defense counsel reiterated that he was "curious" why the prosecutor would run a check on Malloy when his questionnaire, by itself, did not provide any information suggesting he was lying about his answers. (39 RT 12808.) The court declined to compel the prosecutor to answer, but explained that if "there is some issue of *Wheeler*-type concerns, then the state of mind and the purpose of the prosecutor would become relevant." The court added, "I must express some interest in this general issue." (39 RT 12808.)

The court then asked whether the defense had similar access to computer checks, and when counsel informed the court that it did not, the prosecutor said he "would be happy to check anybody" the defense requests. (39 RT 12808.) The defense asked instead that the prosecutor

provide "the information as to all the jurors that [the prosecutor] ran." (39 RT 1209.) Counsel added, "We're only interested in the jurors that he ran and the information that he obtained. With respect to the jurors he didn't run, as long as he doesn't run them, we don't care. . . . That way we will be on par with them with respect to the information that he's obtained." (39 RT 1209.) The prosecutor responded that this request was inappropriate, and explained that he checked only those jurors whom had "spark[ed] [his] interest." Defense counsel replied that *Wheeler* concerns are always present in cases like this one, and added, "I don't see why [the prosecutor] would object to informing us as to which jurors he ran a check on so that we have the same information with respect to those jurors." (39 RT 12809-12810.) Rather than reveal which jurors he had checked, the prosecutor said he did not have to disclose which jurors he investigated because the defense had not made out "a prima facie case." (39 RT 12810.) Ultimately, the court ordered the prosecutor to provide the defense with any information he discovered that conflicted with jurors' questionnaires or voir dire, but did not order him to reveal which jurors he had investigated. (39 RT 12810.) The record does not indicate that the prosecutor provided any additional such information.

During Malloy's voir dire, after the court explained that the question about arrests was intended to encompass major traffic violations and driving under the influence, Malloy explained that he had pleaded no contest to driving under the influence charges the preceding year. (39 RT 12990-12991.) He also explained that he had been arrested during a dispute with his wife because he had yelled, which scared their children, but that the charges were dropped after he completed a diversion program. (39 RT 12995.) After additional questioning of Malloy, neither side challenged

Malloy for cause. (39 RT 13005.)

2. Peremptory Strikes, *Wheeler* Motions, and Related Proceedings

Fifty-six prospective jurors remained in the pool after hardship excusals and challenges for cause. Of these, seven identified themselves on their questionnaires as African-American or black: Danella Daniel (14 CT 4044), Hazel Densby (14 CT 3929), Lois Graham (15 CT 4275), Sharon Harrison (15 CT 4343), Shanna Holmes (15 CT 4393), Wade Byrd (14 CT 3901), and Kenneth Malloy (16 CT 4533).[13]

As the peremptory challenges began, none of the first 12 jurors seated were African-American. (40 RT 13096-13097.) After the prosecutor exercised his first peremptory strike, the first black juror, Danella Daniel, was seated. (40 RT 13103.) After both sides had exercised a total of four peremptory strikes each, and while Daniel was still seated, the prosecutor for the first time passed. (40 RT 13103-13107.) The defense then exercised a strike, and the prosecutor again passed. (40 RT 13107.) The defense exercised another strike, and the prosecutor struck a juror on whom he had twice passed previously. (40 RT 13108.) After the defense exercised another strike, a second black juror, Hazel Densby, was seated. The prosecutor again passed. (40 RT 13108-13109.)

After both sides exercised two more strikes each, the defense passed.

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[13] During discussion of the *Batson-Wheeler* motions there was no dispute that these seven constituted the African-American prospective jurors in the pool. (See e.g., 40 RT 12114-12115 [trial court notes that there are a total of seven African-Americans in the jury pool]; 40 RT 13126 [prosecutor acknowledges striking three of five black jurors at time of second motion]; 40 RT 13144 [court agrees Graham, Daniel and Densby are black]; 40 RT 13158 [court notes that Byrd and Malloy are black].)

(40 RT 13109-311.) The prosecutor's next two strikes resulted in the seating of a third black juror, Lois Graham. (40 RT 13111-13112.) After each of those two strikes, the defense passed. (40 RT 13111-13112.) The prosecutor then struck Graham, and defense counsel objected under *Wheeler.* (40 RT 13112-13114.)

The court denied the motion. At that point the prosecutor had exercised only one of his ten peremptory strikes against one African-American juror. The court noted that the venire contained a total of seven African-American jurors, and that two of those seven were still seated in the jury box. (40 RT 12114-12115.) The court did not see a pattern of discrimination from these facts and informed defense counsel, "You have to give me some good reason why I should require the People to explain to me why they chose to exclude this particular juror." (40 RT 12115.)

The process resumed with the defense and the prosecutor each exercising two strikes. (40 RT 13119-13121). The fourth black juror, Sharon Harrison, was then seated. (40 RT 13121.) The defense passed, and the prosecutor struck Harrison. (40 RT 13121.) The fifth black juror, Shanna Holmes, was seated after three more challenges by the defense and one by the prosecutor. (40 RT 13122-13124.) The prosecutor exercised his next strike – his 15th – against Holmes. (40 RT 13124, 13130.) At this point, appellant had used 14 strikes and the prosecutor had used 15. A total of 40 jurors had been in the box – five who were black, 35 who were not. Three of the prosecutor's 15 strikes had been against African-Americans.

The defense made a second *Wheeler* motion after the challenge to Holmes. It is the court's denial of this second motion that is the focus of this argument. (40 RT 13125.) Counsel informed the court that Graham, Harrison and Holmes all had stated in their questionnaires that they could

vote for the death penalty. None of them indicated that they would lean toward a life sentence. Counsel argued that the challenges against Graham, Harrison and Holmes were part of a systematic process of excluding blacks from the jury, and that this was true even though two blacks remained on the jury. As counsel put it, he "did not believe that merely because the prosecutor keeps one or two blacks, that he then can systematically exclude all other Blacks as they appear." (40 RT 13125.) The prosecutor disagreed: "Before they can argue that I am systematically excluding race, your Honor, I think I['ve] got to exclude them all, or at least . . . [m]ore than half." (40 RT 13126.) He then backtracked, offering that a requirement that he "exclude them all" was not "quite correct." (40 RT 13126.) He suggested that if he had excluded three out of four, "maybe there would be an argument," but that as to striking three out of five, "I don't think that quite reaches a prima facie case yet." (40 RT 13126.) Defense counsel responded that the prosecutor at that point had exercised strikes on 60 percent of the African-Americans who had been seated, which was enough to establish a prima facie case. (40 RT 13126.)

The court hypothesized that "in a case where each side has 20 challenges, everybody is going to exclude more than 50% of every group, assuming one does it on a color-blind basis."[14] (40 RT 13126.) The court then said,

> Three out of five, before we're through, if we even at this rate go up to fifteen challenges. Fifteen challenges have been exercised roughly on each side, twelve slots. That means that

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[14] This was not true at this point, however; the prosecutor had excluded 34 percent of all jurors who were not African-Americans who made it into the box, and the defense had excluded no African-Americans at all.

> two-thirds of any group on a random basis, two thirds, 66 percent, would be excluded on a totally random basis, because two out of three are leaving.

(40 RT 13127.)

The court continued,

> "Every seat we have had three people or more than three people. I mean, consider overall twelve plus fifteen plus fifteen, we have gone through forty people for twelve seats. So like I say...that's about 70 percent of the people who have gotten into the box have been excluded. I don't know that that's a showing that there is something other than a random process going on, not totally random, but I mean a rather neutral process going on.

(40 RT 13127-28.) The court added, "[I]f you compute the number of Caucasians that were available, his exclusion rate for them would be the same or greater than for the Black persons who have come to the jury box."[15] (40 RT 13127.)

Defense counsel also argued that the court should consider the fact that appellant was African American. (40 RT 13129.) The court, however, did not agree that the race of the defendant was relevant to a *Wheeler* analysis – it was "a side issue that we need not get into." (40 RT 13129.) The court reiterated that the removal of three out of five jurors was not statistically significant and then offered this confused statement: "We still have two out of twelve in the jury box, which is 60 percent of Blacks in the

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[15] This also was not accurate; at this juncture, the prosecutor had excluded 34 percent of the non-African American prospective jurors who came into the box, but had excluded 60 percent of the African-Americans, which was almost double the strike rate for jurors who were not African-Americans.

jury box , which is equal to the Blacks to jury panel, and substantially above black percentage in the community, but we're looking at our panel more directly." (40 RT 13129.) Thus, the court concluded that no explanation from the prosecutor was necessary. (40 RT 13130.)

When jury selection resumed, the defense and the prosecutor each exercised one more strike, and then both sides accepted the jury. (40 RT 13130-13132.) Before the jury was sworn, however, prospective juror Shahina Haq informed the court that she did not want to decide whether appellant would receive the death penalty. (40 RT 13133-13134.) After a further inquiry, the court and the parties agreed that the prosecutor would be permitted to reopen the selection process and exercise a peremptory strike against Haq. (40 RT 13137-13147.) The defense then exercised four peremptory strikes against the jurors who were seated in Haq's place. (40 RT 13148-13150.) Ultimately, Wade Byrd, the sixth of the seven African-Americans on the panel, was seated, and both sides accepted the jury as constituted. (40 RT 13150.)

After the court swore in the jury, selection of alternates began. (40 RT 13150, 13154.) The prosecutor used his second strike to remove Kenneth Malloy, the last African-American on the panel. (40 RT 13155-13156.) The defense counsel then made its third *Wheeler* motion. The court concluded that the defense had failed to establish a prima facie case. (40 RT 13157.)[16]

In sum, before the exercise of any strikes, the entire venire consisted of 56 prospective jurors, seven of whom were African-American. (40 RT 13090, 13114.) Thus, the entire venire was 12.5 percent African-American.

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[16] No alternate jurors were used in the second retrial.

Once both sides had finished exercising peremptory strikes and had accepted the panel, 54 jurors had been called into the jury box, including all seven African-Americans. At the time of the second *Batson-Wheeler* motion, 40 jurors had been called into the box, including 5 who were African-Americans and 35 who were not. At that time the prosecutor had used 20% of his strikes (3 of 15) against African-Americans, who constituted only 12.5% of the jurors that had been seated in the box (5 of 40). Furthermore, he had excluded 60% of the African-Americans and only 34.2% of the rest of the panel (12 of 35).

B. The Applicable Law

Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race. (*Batson*, *supra*, 476 U.S. at p. 97; *J.E.B. v. Alabama ex rel. T.B.* , *supra*, 511 U.S. at pp. 130–131; *People v. Bonilla* (2007) 41 Cal.4th 313, 341; *Wheeler*, *supra*, 22 Cal.3d at pp. 276–277.) Specifically, the prosecutor's use of peremptories on the ground of group bias violates a defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution, and violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 341.)[17]

The defendant has the initial burden of raising an inference that the

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[17] In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge, and therefore an objection based on *Wheeler* is sufficient to preserve both the state and federal constitutional claims. (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1075; *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

prosecutor used peremptory challenges for discriminatory reasons. (*Johnson v. California*, *supra*, 545 U.S. at p. 167; *Batson*, *supra*, 476 U.S. at pp. 93-97; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) Once the defendant makes a prima facie showing that the prosecution has excluded one or more jurors on the basis of group or racial identity, the burden then shifts to the prosecution to show that it had genuine nondiscriminatory reasons for the challenges in question. (*People* v. *Fuentes* (1991) 54 Cal.3d 707, 714; *Wheeler*, at pp. 280-28; see *Batson*, at pp. 97-98.)

The defendant's burden of establishing a prima facie case, however, is not "so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination." (*Johnson v. California*, *supra*, 545 U.S. at p. 170.) Rather, the defendant need only present evidence "sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Ibid.*) Before *Johnson v. California*, *supra*, 545 U.S. 162, California litigants alleging a prima facie case under *Batson-Wheeler* had to show that their opponents "more likely than not" had engaged in discrimination. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1316.) But in *Johnson v. California*, *supra*, the United States Supreme Court held that this "strong likelihood" test was an "inappropriate yardstick by which to measure the sufficiency of a prima facie case" for equal protection purposes (545 U.S. at p. 168), and was "at odds" with the determination of a reasonable inference of discrimination under *Batson*. (*Id.* at p. 172.)

A defendant may establish a prima facie case of purposeful discrimination in selection of the jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.

(*Batson*, 476 U.S. at p. 94, quoting *Avery v. Georgia* (1953) 345 U.S. 559, 562.)

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the 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." Finally, 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.

(*Ibid.*)

Such facts and circumstances may include, but are not limited to, evidence that (1) the prosecutor struck most or all of the members of the identified group from the venire, (2) the prosecutor used a disproportionate number of her peremptories against the group, and/or (3) the jurors in question share only their membership in the group under scrutiny, but in all other respects they are as heterogeneous as the community as a whole. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 342.) A defendant can supplement this showing with evidence that the prosecutor failed to engage the jurors at issue in more than desultory voir dire. (*Ibid.*) "'Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; *yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong*, these facts may also be called to the court's attention.'" (*Ibid.*, quoting *Wheeler*, *supra*, 22 Cal.3d at pp. 280–281.)

The fact that members of the relevant group remain on the jury is

insufficient, standing alone, to defeat a prima facie showing of discriminatory challenges. Simply because the prosecutor accepted a jury containing African-Americans does not end the inquiry, "for to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." (*People v. Snow* (1987) 44 Cal.3d 216, 225; see also *People v. Motton* (1985) 39 Cal.3d 596, 607-608.) While leaving one or more members of the group in question is a relevant circumstance for the trial court to consider, it does not negate a showing of discrimination in the prosecution's exercise of peremptory challenges against other prospective jurors of the relevant group. (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813 (overruled on other grounds by *Tolbert v. Page* (9th Cir.1999) 182 F.3d 677 (en banc); *Cochran v. Herring* (11th Cir. 1995) 43 F.3d 1404, 1412; *United States v. Omoruyi* (9th Cir. 1993) 7 F.3d 880, 881-882; *Abshire v. State* (Fla. 1994) 642 So.2d 542, 544.)

Finally, the unlawful exclusion of members of a cognizable group from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630; *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing to *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].)

C. The Challenged African-American Jurors

The three prospective jurors stricken by the prosecutor prior to appellant making his second *Batson-Wheeler* motion were Graham, Harrison and Holmes.

1. Lois Graham

Lois Graham was a 59-year-old African-American widow with two grown children. She worked as a school administrator and was pursuing her doctorate in education. (15 CT 4275.) She claimed on her questionnaire that she was neither for nor against the death penalty; she had no biases regarding the death penalty and "would listen and try to be fair in [her] assessment." (15 CT 4283-4284.) She had twice served on a jury that reached a verdict, one of which was a homicide case. She had friends who were police officers, and had also been the victim of a burglary and a car theft. In general, Graham thought courts were fair in sentencing criminal defendants. (15 CT 4278-4281.)

On voir dire, Graham agreed that the decision to sentence a person to death or life without the possibility of parole was very serious. (37 RT 12307.) She confirmed that she was not predisposed to vote for or against the death penalty. (37 RT 12308.)

As "vice president" of a middle school, Graham handled class scheduling and student discipline, which often involved contact with the police. (37 RT 12309.) Graham believed that psychological evidence would be helpful in making a decision or at least in thinking about the evidence, but she emphasized the need to look at the facts rather than placing too much weight on an opinion. She felt that focusing on facts rather than on opinion helped to avoid bias. (37 RT 12317-13318.)

Graham belonged to the Comstock Club, a networking organization similar to San Francisco's Commonwealth Club, that hosted speakers such as local politicians and state officers. (37 RT 1238.) She explained that she was comfortable interacting with people from all different backgrounds and did that as part of her job. (37 RT 12319-12320.)

2. Sharon Harrison

Sharon Harrison was a 39-year-old African-American woman with no children. She worked for Pacific Bell and was also the executive director of an organization called the Zelshar Foundation. She had plans to get an MBA. (15 CT 4345.) Harrison stated that she usually agreed with the sentences people received for their crimes, though she was not always sure that the verdicts are correct. She would not automatically vote for either death or life without the possibility of parole, and her general feelings about the death penalty were that "some crimes warrant it [and] some don't." (15 CT 4351-4352.) She had no religious objections to the death penalty. (15 CT 4352.)

Harrison said during voir dire that she would consider both the aggravating and mitigating facts about appellant in deciding punishment. (38 RT 12651-12562.) She explained that she asked a lot of questions when making decisions, meaning that when she makes a decision, "[e]verything has to be considered," and she was "willing to make a constant effort at doing that." (38 RT 12652-12653.)

Harrison held an administrative position with Pacific Bell. (38 RT 12664.) She explained that the Zelshar Foundation was a nonprofit agency that she had started which housed abused children. (38 RT 12653, 12657, 1258.) The children were referred to the Foundation by the juvenile court. (37 RT 12659.) She believed, however, that some kids exhibit too much criminal behavior to remain in a residential setting. (38 RT 12660.) Harrison had substantial contacts with psychologists and psychiatrists through her work with troubled children, and believed that some of them are "right on target," while others "don't have a clue." (38 RT 12654.)

Harrison thought the category of aggravating evidence she would be

most interested in would be the circumstances of the crime. (38 RT 12662-12663.) Regarding mitigating evidence, she would be interested in appellant's background. (38 RT 12662-12663.)

3. Shanna Holmes

Shanna Holmes was a 40-year-old African-American woman with two adult children and one adolescent. She was married, but going through a divorce. She was a tax auditor for the State Franchise Tax Board, and had an Associate's degree in accounting. Holmes had twice been the victim of burglaries. She believed the death penalty should be used "in cases where another life was taken" or in cases involving "any crimes committed against children and senior citizens." (15 CT 4402.)

Holmes' 19-year-old son had been arrested or accused of a crime twice, for drug possession, and for rape. (15 CT 4398.) On voir dire, Holmes said her son entered a plea bargain in his rape case. He served a sentence and was on probation. (39 RT 12750-12751.) She felt the plea bargain process had been unfair; that it was a situation where her son was made such a lenient offer that it was almost impossible to turn down, given the risks of trial. (39 RT 12751-12752.) She assured the court that she would not hold a grudge against the prosecutor in this case (who was from another county) for what happened to her son. (29 RT 12752-12753.) She explained that she was neither an automatic life nor automatic death juror because as a tax auditor, she knew that "every case stands on its own merit. You have to deal with the facts." (39 RT 12754.) She would consider both the death penalty and LWOP for first degree murder. (39 RT 12756.)

Holmes said that she would be interested in all three categories of aggravation presented – the circumstances of the crime, prior felony convictions, and prior violent conduct that has not resulted in a conviction.

(39 RT 12759-12780.) She said she could keep separate her feelings about her son's case and evidence of appellant's prior alleged rape, because "it's two separate incidents," and she knew "how to draw the line." (39 RT 12761.)

Holmes had been able to hold her job at the state while going to school at night and raising her family, all at the same time. (39 RT 12762.) She added, "It wasn't a burden or a strain. It was something that needed to be done." (39 RT 12762-12763.) Holmes did not anticipate that her divorce would interfere with her duties as a juror if she were selected because it was a straightforward matter and was what she wanted. (39 RT 12763.)

D. The Trial Court Erred In Finding that A Prima Facie Case Had Not Been Established

1. The Trial Court's Ruling is Subject to De Novo Review by This Court

At the time of appellant's penalty retrial in 1992, this Court required a defendant making a *Batson-Wheeler* motion to show a "strong likelihood" that the prosecution was exercising its peremptory challenges in an improperly discriminatory manner in order to make out a prima facie case for relief. For example, in *People v. Sanders* (1990) 51 Cal.3d 471, 500-501, this Court concluded that although the prosecution's removal of all members of a certain group "may give rise to an inference of impropriety," defendant still "failed to demonstrate a strong likelihood" of discrimination and therefore no prima facie case had been established.

Similarly, in *People v. Howard* (1992) 1 Cal.4th 1132, this Court observed that "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant

belongs to the same group, the inference is not conclusive." (*Id.* at p. 1156.) Applying the prima facie standard that the defendant must show "from all the circumstances in the case . . . a *strong likelihood*" of discrimination *(id.* at p. 1154 [emphasis in original]), the Court concluded that the trial court had not erred in finding no prima facie case. (*Id.* at p. 1156; see also *People v. Sims* (1993) 5 Cal.4th 405, 428; *People v. Garceau* (1993) 6 Cal.4th 140, 170-173.) In short, in both *Howard* and *Sanders*, which were controlling at the time appellant's jury was selected in August 1992, this Court had held that demonstrating an "inference of impropriety" in the exercise of peremptory challenges was not sufficient by itself to meet the first step of the *Batson* test.

Later, in *People v. Johnson*, *supra*, 30 Cal.4th 1302 (reversed in *Johnson v. California*, *supra*), this Court reiterated that the terms "reasonable inference" and "strong likelihood" denoted the same standard, and noted that "[t]his has always been true . . . ." (*Id.* at pp. 1314, 1318, quoting *People v. Box* (2000) 23 Cal.4th 1153, at p. 1188, fn. 7.) The Court also explained that the terms "reasonable inference" and "strong likelihood" meant that "to state a prima facie case, the objector must show that it is more likely than not the other party's challenges, if unexplained, were based on impermissible group bias." (30 Cal.4th at p. 1318.) Thus, until *Johnson v. California* (2003) 545 U.S. 162, any California court applying a "reasonable inference" standard was necessarily applying its then interchangeable counterpart, the erroneous "strong likelihood" standard.

In this case, the trial court did not cite any particular test when it found that appellant had failed to establish a prima facie case, except to say that the defense must provide the court with "some good reason" to move to step two of the *Batson-Wheeler* analysis. (40 RT 12115.) This language, as

well as the court's conclusion that no prima facie case existed despite statistical evidence to the contrary, indicates that the court apparently followed California precedent and applied the "strong likelihood" test. (See *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [trial court presumed to follow the law without explicit statement to the contrary]; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 3432 [trial court is presumed to know and follow the law].) In any event, unless the record affirmatively demonstrates that the court in fact applied the correct standard (which did not exist in California until *Johnson v. California*, *supra*, 545 U.S. 162) this Court reviews the issue de novo without deference to the trial court's findings. (*People v. Bonilla, supra*, 41 Cal.4th at p. 342; see *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1195 [de novo review conducted after California courts applied *Wheeler* standard to *Batson* claim].)

Further, where the trial court bases its findings on "a mistaken impression of applicable legal principles," deference to those findings is not appropriate. (*Inwood Laboratories, Inc. v. Ives Laboratories, Inc.* (1982) 456 U.S. 844, 855.) Here, the trial court applied an erroneous legal principle when it concluded that appellant's race was "a side issue" that it did not "need not get into," when analyzing appellant's *Wheeler* motions. (40 RT 13129.) This Court, however, had stated the opposite in *Wheeler*, concluding that the defendant's membership in the excluded group is a relevant fact for the trial court to consider. (*Wheeler*, *supra*, 22 Cal.3d at pp. 280–281.)

Given the court's erroneous application of the governing legal principles and its apparent application of the wrong legal standard, this Court should review de novo the *Batson-Wheeler* issue in this case.

2. The Record Establishes an Inference of Discrimination in the Prosecutor's Exercise of Peremptory Challenges.

The record, considered in its entirety, shows that appellant established a prima facie case of discrimination. First, the prima facie case can be shown based solely on a statistical analysis of the prosecutor's peremptory strikes. As previously noted, at the time of the appellant's second motion, 40 jurors had been called into the jury box, 5 of whom were African-American. The prosecutor had used 3 of 15 peremptory challenges against African-Americans. Whether analyzed using the "strike rate" or the "exclusion rate," these numbers establish a prima facie case of discrimination.

The "strike rate" (sometimes called the "challenge rate") is computed by comparing the number of peremptory strikes used by the prosecutor to remove black potential jurors with the prosecutor's total number of peremptory strikes exercised. This differs from the "exclusion rate" which is calculated by comparing the percentage of exercised challenges used against black potential jurors with the percentage of black jurors in the venire. (See *Overton v. Newton* (2d Cir. 2002) 295 F.3d 270, 278, fn. 9.)

Here, the prosecutor had a 20% strike rate (3 of 15) despite the fact that African-Americans were only 12.5% of the panel (5 of 40). He had an exclusion rate of 60% of African-Americans (3 of 5) whereas his exclusion rate for the rest of the panel was 34.2% (12 of 35). These rates alone were sufficient to raise an inference of discrimination.[18]

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[18] At the end of voir, after the alternates had been selected, these numbers had not changed substantially. At that point, the prosecutor had stricken four of seven African-Americans from a panel of 54 potential

(continued...)

On similar statistics, the Ninth Circuit found a prima facie case of discrimination in *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1075-78. In *Fernandez*, the court reiterated the well-established rule that "[a] pattern of exclusionary strikes is not necessary for finding an inference of discrimination," but "'[a] pattern of exclusion of minority venire persons provides support for an inference of discrimination.'" (*Id.* at p. 1078, quoting *Turner v. Marshall, supra*, 63 F.3d at p. 812.) In *Fernandez*, the prosecutor used 21 percent of his strikes to remove 57 percent of Hispanics (4 out of 7), who otherwise comprised only 12 percent of the venire. (*Id.* at p. 1078.) Looking at the rate of exclusion alone, the court explained that the removal of 57 percent of Hispanics "support[ed] an inference of discrimination." (*Ibid.*) The court also found that because Hispanics comprised "only about 12% of the venire" but the prosecutor had used 29 percent of his strikes against Hispanics at the time of the first motion, and 21 percent of his strikes against Hispanics at the time of the second motion, "the prosecutor disproportionately struck Hispanics from the jury box . . . ." Accordingly, "[t]hose challenges, standing alone, [were] enough to raise an inference of racial discrimination." (*Ibid.*)

In *Turner v. Marshall, supra*, 63 F.3d at p. 812, the prosecution struck five out of a possible nine African-American jurors (56%), and used five of its nine strikes (56%) to do so. African-Americans comprised only 30 percent of the venire. In holding that defendant had established a prima facie case of discrimination, the court relied on "two different statistical measures – the percentage of available African-Americans challenged, and

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[18] (...continued)
jurors who had been called to the box.

the percentage of peremptory challenges used against African-Americans." (*Turner v. Marshall, supra*, 63 F.3d at p. 813.) Those same measures applied to the present case – the exclusion rate and the strike rate, as discussed above – also support an inference of discrimination.

These kind of statistical disparities are inconsistent with a neutral, nondiscriminatory purpose in exercising strikes. For example, "if the minority percentage of the venire was 50, it could be expected that a prosecutor, acting without discriminatory intent, would use 50 percent of his challenges against minorities." (*United States v. Alvarado* (2d. Cir. 1991) 923 F.2d 253, 255, cited with approval in *Fernandez v. Roe, supra*, 286 F.3d at p. 1078.) Conversely, "a rate of minority challenges significantly higher than the minority percentage of the venire would support a statistical inference of discrimination." (*Id.* at pp. 255-256.) Thus, in *Alvarado*, defendant established a prima facie case where the minority percentage of the venire was deemed to be 29 percent, and the prosecutor's exclusion rate for that group was 50 percent (three of six) in the selection of 12 jurors, and 57 percent (four of seven) in the selection of 12 jurors plus alternates. (*Ibid.*) In our case, the percentage of African-Americans on the venire (12.5%) was much lower than in *Alvarado*, but the exclusion rate was even higher (60%), making this an even stronger prima facie showing of discriminatory challenges.

In sum, based on the above statistics alone, appellant established a prima facie case of discriminatory use of strikes against African Americans. (*Fernandez v. Roe, supra*, 286 F.3d at p. 1078; *Turner v. Marshall, supra*, 63 F.3d at p. 812; *United States v. Alvarado, supra*, 923 F.2d at pp. 255-256; see, e.g., *United States v. Lorenzo* (9th Cir.1993) 995 F.2d 1448, 1453-1454 [three of nine Hawaiian jurors stricken]; *United States v. Bishop*

(9th Cir.1992) 959 F.2d 820, 822 [two of four African-American jurors stricken].)

Moreover, other circumstances in the record support a finding of a prima facie case of discrimination. First, this Court has noted that the race of the victim and the race of the defendant are highly relevant to establishing a prima facie case of discrimination. (*Wheeler, supra,* 22 Cal.3d at pp. 280-281.) The fact that appellant is black and the homicide victim, Aldo Cavallo, was white adds substantially to appellant's prima facie case. (See *Simmons v. Beyer* (3d. Cir. 1995) 44 F.3d 1160, 1168 [fact that crime was the murder and robbery of a white man by a black man contributed significantly to prima facie case].)

Second, the prosecutor's investigation of prospective juror Kenneth Malloy without any apparent justification raises a suspicion that the prosecutor was attempting to limit the participation of African-Americans on the jury. Although the prosecutor apparently investigated more than one juror – at one point he objected to "disclosing why I checked certain jurors and which ones I checked" (39 RT 12808) – the only one of whom the court was made aware out of the 56 members of the pool was Malloy, who happened to be one of the seven black prospective jurors. The prosecutor's explanation that he might investigate a particular juror if "something on the questionnaire sparks my interest" (39 RT 12809) does nothing to dispel the suspicion that race played a role in what sparked his interest. This episode therefore also supports an inference of discrimination in the jury selection process.

Third, "challenging particular members of a protected group who might otherwise be expected to favor the proponent of the challenge because of their backgrounds might raise an inference of discrimination."

(Gershman, *Trial Error and Misconduct* (Lexis 1997) 266 fn. 163, citing *People v. Bolling* (N.Y. 1992) 591 N.E.2d 1141) [two of four black potential jurors removed by prosecutor had favorable prosecution backgrounds].) The fact that a juror has police officer friends is not a reason that the *prosecution* would be expected to cite for peremptorily excusing such juror. (*People v. Turner* (1968) 42 Cal.3d 711, 719.) Here, Lois Graham had friends who were police officers. (15 CT 4279.) Her school employed its own police force and Graham found them to provide "excellent assistance." (37 RT 12322-12323.) Malloy wanted to study the administration of justice. (16 CT 4535.)

Also, three of the four stricken jurors had been crime victims or had close family members who had been crime victims. Graham was the victim of a burglary and a separate car theft. (15 CT 4280.) Holmes had twice been the victim of a burglary (15 CT 4398), and Harrison's sister had been a burglary victim (15 CT 4348). (See *People v. Turner*, *supra*, 42 Cal.3d at p. 719 [crime victims not likely to be stricken from jury by prosecution]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215 ["a *defendant* may suspect prejudice on the part of one juror because he has been the victim of crime" (emphasis added)].) In this case, where the murder took place during a burglary, the jurors who had been victims of burglary, or had a relative who had been a victim, would likely have been favorable to the prosecution. Also, three of these jurors – Malloy, Harrison and Holmes – said they had taken "extraordinary security precautions" against home burglaries. (15 CT 4347, 4397; 16 CT 4538.)

Moreover, although the prospective jurors at issue had their race in common, they were otherwise a heterogeneous group, which is a factor that supports a prima facie case. (*People v. Bonilla*, *supra*, 41 Cal.4th at p.

342.) The prospective jurors at issue varied in age from 37 to 59: Graham was 59 (15 CT 4275), Harrison was 39 (15 CT 4343), Holmes was 40 (15 CT 4393), and Malloy was 37 (16 CT 4533). As for marital status, Graham was widowed (15 CT 4275), Harrison was single (15 CT 4343), Malloy was married (16 CT 4533), and Holmes was married but in the process of divorcing (15 CT 4393). They also came from diverse employment and education backgrounds. Graham was a school administrator (15 CT 4275) who was pursuing her doctorate; Harrison had a college degree, worked for the telephone company and ran a residential home for at-risk youth (15 CT 4343); Holmes was a tax auditor for the State with an associate's degree in accounting (15 CT 4393); and Malloy was a janitor who had a high school degree. (16 CT 4533, 4535.) Thus, the African-Americans who were removed shared their race in common, but were otherwise as diverse as the community as a whole, which supports an inference of discrimination. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 342.)

In addition to relying on the statistical evidence and other facts in the record supporting a prima facie case, appellant also 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* , *supra*, 476 U.S. at p. 96 [citation omitted].) Given the record in this case, appellant met his burden of raising an inference of discriminatory exercise of peremptory strikes.

Finally, the fact that the final makeup of the jury included African-Americans does not preclude finding a prima facie case. That some members of the relevant group remain on the jury is insufficient, standing alone, to negate a prima facie showing of discriminatory challenges. (*People v. Snow*, *supra*, 44 Cal.3d at p. 225.) Otherwise, a litigant intent on

discriminating would have "an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." (*Ibid.*) While the fact that members of the relevant group remain on the jury may be a circumstance for the trial court to consider, it does not bar a finding of discrimination in the prosecutor's exercise of peremptory challenges against other prospective jurors of the group. (*Turner v. Marshall, supra*, 63 F.3d at p. 813 [four African-American jurors remaining on jury did not defeat prima facie case of discrimination]; *Cochran v. Herring , supra*, 43 F.3d at p. 1412 [two African-American jurors not stricken, one of whom was an alternate, did not defeat evidence that race was a determining factor in prosecution's exercise of peremptory strikes]; see also *United States v. Battle* (10th Cir. 1987) 836 F.2d 1084, 1086.) The trial court's principal reliance on the makeup of the sworn jury was therefore erroneous.

E. Conclusion

As shown above, appellant established a prima facie case that the prosecutor had engaged in improper race-based exclusion of African-American prospective jurors. The trial court's decision that no prima facie case existed was erroneous given the statistical disparities discussed above, as well as the other facts and circumstances in the record as a whole. The record establishes a reasonable inference that the prosecutor's challenges of each of the African-American prospective jurors discussed herein were discriminatory. The trial court's finding that appellant failed to establish a prima facie case was therefore erroneous.

The prosecutor's discriminatory use of peremptory challenges against African-Americans deprived appellant of his rights under the Equal Protection Clause of the federal Constitution, as well as the right to a trial

by a jury drawn from a representative cross-section of the community, under the California Constitution. The error is structural and requires automatic reversal because it infects the entire trial process. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].) The remedy for such an error is reversal of sentence and judgment of death. (See *Batson, supra*, 476 U.S. at p.100; *People v. Fuentes* (1991) 54 Cal.3d 707, 720; *People v. Snow, supra*, 44 Cal.3d at pp. 226-227; *People v. Turner* (1986) 42 Cal.3d 711, 728; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1261.) Accordingly, appellant's sentence and judgment of death must be set aside.

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THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR LAURA COLOZZI FOR CAUSE BASED ON HER OPINIONS AND BELIEFS REGARDING THE DEATH PENALTY

The trial court erred when it granted the prosecutor's challenge for cause to prospective juror Laura Colozzi based on her attitudes and beliefs about the death penalty. Colozzi was opposed to the death penalty, but stated repeatedly and without equivocation on her juror questionnaire and during voir dire that she could set aside her personal beliefs and follow the law. The court's grant of the prosecutor's challenge was based on Colozzi's responses to misleading questions and inaccurate statements by the court regarding the nature of a penalty phase juror's sentencing discretion. Nothing Colozzi said gave the court a legitimate basis to grant the prosecution's motion to excuse Colozzi. The excusal was a violation of appellant's rights to due process and a fair penalty trial by an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution (see *Witherspoon v. Illinois* (1968) 391 U.S. 510 [*"Witherspoon"*]; *Wainwright v. Witt* (1985) 469 U.S. 412 [*"Witt"*]) and article I, section 16 of the California Constitution. The death judgment therefore must be reversed.

A. The Questionnaire

Laura Colozzi was a 45-year-old legal secretary who worked for the State of California. (15 CT 4216.) She was Catholic and had previously served on a criminal jury. (15 CT 4219.)

Colozzi provided her views on the death penalty in response to the following four questions in the questionnaire:

Question 48A asked whether she would automatically refuse to vote

in favor of the penalty of death and automatically vote for life imprisonment without considering the evidence or the aggravating and mitigating factors. She answered, "No. As a fair-minded person and legal secty familiar with legalities I would make a judgment based on all factors before making any decision." (15 CT 4224.)

Question 48B asked the related question whether she would automatically refuse to vote in favor of a penalty of life imprisonment and automatically vote for death without considering the evidence or the aggravating and mitigating factors. She answered, "No. (Same answer as (48)A. above." (15 CT 4225.)

Question 49 asked "What are your general feelings regarding the death penalty?" Colozzi answered, "I would prefer a society where people lived happily together and no crimes ever happened – but that is not the real world – so I understand that for those people who commit crimes or who think about it, the death penalty must be there as a reminder of what the consequence might be because of their actions – this penalty thus protects the peaceful people." (15 CT 4225.)

Question 50 asked, "Do you have any religious objections to the death penalty?" Colozzi answered, Yes/No – I believe people should live their lives for as long as God lets them, despite what kind of life that may be – a person should experience his whole life – however, I believe the death penalty needs to be a reminder to all who would endanger others." (15 CT 4225.)

None of the responses in the rest of Colozzi's questionnaire (15 CT 4214-4227) contradicted these answers.

B. Voir Dire

Colozzi appeared for voir dire on August 6, 1992. (37 RT 12330.)

This is the portion of her examination relevant to the challenge for cause:

> THE COURT: Okay. I asked the jurors to reflect a little when they were here on whether their thinking about the death penalty and whether they might prejudge this case because of their views on the death penalty.
>
> There are, at least, two ways that jurors might do that. We have discussed, and we have interviewed some jurors who are adamantly opposed to the death penalty and would, basically, say, "I will not vote for the death penalty[."] " I don't care what the aggravating factors were in the case."
>
> Then, on the other hand, we have had jurors who say – who have indicated that their feelings on the death penalty are pretty fixed and pretty strong to the extent that if it's been, as it's been proven this is a first-degree murder case, and that's enough for them. That settles it. They don't – they aren't concerned about mitigating factors. Their mind is made up on just that fact.
>
> On both sides of it, those jurors would not be able to follow the law, which says you look at the aggravating and mitigating factors, and you weigh them, and you come up with what you consider the most appropriate sentence.
>
> Okay. Now, you have had a week to think about this.
>
> PROSPECTIVE JUROR COLOZZI: Yes.
>
> THE COURT: Obviously, when you walked in here last week it was probably a surprise that we were going to be talking about this issue.
>
> PROSPECTIVE JUROR COLOZZI: Uh-huh.
>
> THE COURT: And sometimes jurors reflect on it, and their position shifts a little as they start to realize this is a responsibility they may have.

Do you think that your answers you gave us here on the – on the questionnaire last week pretty accurately reflect the way you feel about this issue?

PROSPECTIVE JUROR COLOZZI: Yes, they do. They do.

THE COURT: All right. And, while on the one hand, you have concerns about the death penalty. On the other hand, you feel it can be appropriate in certain cases; is that kind of the way you come down?

PROSPECTIVE JUROR COLOZZI: Well, the way I feel is being a legal secretary, as well, and being in certain legal situations, myself, I understand that the law is the law. We live in a society. Laws are there for a reason, and I respect the law. Despite sympathies I may have one way or the other, I understand the law must prevail.

THE COURT: Okay. And you would be willing to follow the guidelines and the guidance that the law gives to the jurors?

PROSPECTIVE JUROR COLOZZI: I can do that. I respect that.

THE COURT: Okay. All right. You understand the law does not – well, in a sense it mandates a result in some situations.

If you find that the mitigating circumstances are substantial, that they outweigh the aggravating or that they're equal to the aggravating, they are balanced. Then, in that situation, the law says you cannot return a death penalty, but you can only return life without parole.

PROSPECTIVE JUROR COLOZZI: Yes. I am happy for that.

THE COURT: Okay.

PROSPECTIVE JUROR COLOZZI: That's fine.

THE COURT: If, on the other hand, the aggravating circumstances substantially outweigh the mitigating, at that point, the law does not mandate the death penalty, but it says the jurors at that point may impose the death penalty, but they still have the option of choosing not to impose the death penalty, if they feel that that is not the most appropriate penalty. Okay.

PROSPECTIVE JUROR COLOZZI: Okay.

THE COURT: Now, is there anything in that structure that would cause you any problems?

PROSPECTIVE JUROR COLOZZI: No.

(37 RT 12330-12333.)

After the court inquired into matters which Colozzi had requested to be private, defense counsel asked some questions about the death penalty.

MR. OGULNIK [defense counsel]: In looking through your questionnaire, and I am still a little bit confused about under attitudes regarding the death penalty.

What are your feelings regarding the death penalty?

And the judge went through this with you, and what you did was you marked "Yes" and then slash "No", and you underline both, and your comment to the right says, "I believe people should live their lives for as long as God lets them, despite what kind of life that might be. A person should experience his whole life."

And then you go on, "However, I believe the death penalty needs to be a reminder to all who would endanger others".

Are you of the belief that only God can take a life?

PROSPECTIVE JUROR COLOZZI: That would be my

number one belief.

MR. OGULNIK: Okay. Well, but that's not the state of the law in California.

PROSPECTIVE JUROR COLOZZI: That's correct. I have tried to integrate my Christian beliefs with the real live world that we live-in.

It has been very hard for self-examination to put it altogether for me to tie it in because I never thought about this issue, the death penalty, until today. I really had to sit down and think about it this last week.

If you don't mind me going on.

MR. OGULNIK: Oh, absolutely not, this is very important.

PROSPECTIVE JUROR COLOZZI: But, I feel that, first of all, everyone should live their life until the end, regardless of what has been given to them, whatever mistakes they have made. They should live out that life the best they can.

But, on the other hand, I do believe that society will have – society there are rules. We need the rules to protect everyone. We can't let just a few endanger the others, and so, I live in the real world, too. This is society. There are laws. Regardless if I believe in them or not, they have to be followed to protect everyone.

And so, I believe that when there is a law, and I need to decide on that law, I do use my Christian values, too, my civic responsibility, you have Christian responsibility to be true to your decision, to be fair to, not only my Christian values, but also to society. It's a very hard thing to integrate, but somehow I feel that I am able to do that.

MR. OGULNIK: The judge, a little bit earlier, told you that even if you found the evidence that the district attorney put on was – was substantially greater, the aggravating evidence

was substantially greater than the mitigating evidence, you could still return a life without possibility of parole verdict, and that would still be following the law.

Do you feel comfortable with that concept?

PROSPECTIVE JUROR COLOZZI: Yes, I do.

MR. OGULNIK: And if eleven other jurors were to tell you quite candidly, and with no reservation, that the district attorney has proven – has met his burden, and they all feel the death penalty is appropriate, and that's the way they desire you to vote or give your individual opinion.

If you still felt that this was a life without possibility of parole, could you stand by your individual conviction?

PROSPECTIVE JUROR COLOZZI: I am glad you brought that up because I would, of course, very candidly take the lesser, life imprisonment without parole. I would like – I would prefer that judgement over the death penalty in this particular situation if aggravating circumstances were more, so, and I have that choice.

I have the freedom of choice, and that's not against the law. I have that choice, and it's legal, and I would go for the life imprisonment.

MR. OGULNIK: So, no matter what evidence the district attorney put on, you would only feel life without possibility of parole would be suitable?

PROSPECTIVE JUROR COLOZZI: If that is my legal choice, if I have a choice legally to do that, that's the way I would vote, yeah.

MR. OGULNIK: Okay. I thought we kind of worked around that a little bit earlier, and you said you'd also feel comfortable following the law because the law is there for [a] particular reason.

Let me ask you this: There are some circumstances where you would apply the death penalty, correct?

PROSPECTIVE JUROR COLOZZI: I would apply the death penalty?

I see what you are saying. If it lent more over to the aggravating side, and that's a very good question, possibly not. I would prefer the life imprisonment without parole.

MR. OGULNIK: Let me just ask a couple other questions:

If you had to make an argument in favor of the death penalty, could you make one?

PROSPECTIVE JUROR COLOZZI: Not a very good one. I thought about the death penalty, and I don't know that it's really a deterrent to society. I feel a lot of people who find themselves in situations where the death penalty may come against them aren't even aware of the laws.

I know they are aware of the death penalty, but it doesn't make an impact. They don't live with these values and the laws that most of us, most mainstream people do, so, I just don't think it's a deterrent.

I believe that we need a severe penalty like that where people did see it, just in case, just to make them think.

MR. OGULNIK: To be a reminder –

PROSPECTIVE JUROR COLOZZI: Yes.

MR. OGULNIK: – is the word you want?

PROSPECTIVE JUROR COLOZZI: As a reminder. It has to be there. Whether it works or not, I am doubtful.

MR. OGULNIK: Well, a couple minutes ago we talked about, maybe I talked about it, that society provides certain

laws, and it's because without laws people wouldn't probably be civil to each other in the manner you and I would want other people to be. In other words, I guess one of the commandments is essentially treat others the way we, ourselves, want to be treated.

PROSPECTIVE JUROR COLOZZI: That's true.

MR. OGULNIK: Without laws, everyone or most people in society wouldn't work within the structure.

PROSPECTIVE JUROR COLOZZI: Uh-huh.

MR. OGULNIK: We have laws in the State of California pertaining to when the death penalty is appropriate, and you told me if you found a law you didn't agree with or were not prepared to follow, that what you do is work to change that law?

PROSPECTIVE JUROR COLOZZI: That's correct.

MR. OGULNIK: And here we have a death penalty. There may very well be evidence that would lend [sic] you to say "This is an appropriate case to apply the death penalty".

Are you prepared to follow that law?

PROSPECTIVE JUROR COLOZZI: Yes, I am.

(37 RT 12350.)

The defense passed the juror for cause. The prosecutor said he had no questions for the juror, and challenged her for cause. (37 RT 12350.) The court then conducted additional questioning:

THE COURT: Ms. Colozzi, correct me if I am wrong, but I get the impression from the discussion we've had here, this morning, that you could return a death penalty if the law basically compelled it?

PROSPECTIVE JUROR COLOZZI: (Nods head.)

THE COURT: Because you're willing to and feel the obligation to follow the law?

PROSPECTIVE JUROR COLOZZI: That's right.

THE COURT: Okay. But in this case, in fact, in any death penalty case, the law does not ever compel a death verdict. Even when the aggravating factors clearly and substantially outweigh the mitigating factors, the law allows the juror – the law says jurors may impose the death penalty, but the law does not compel it.

It allows a juror to or a jury to decide, in spite of the heavy aggravating factors that for whatever reason might be mercy, they choose to give life without the possibility of parole, so, there is always an option. The law never compels the death penalty.

PROSPECTIVE JUROR COLOZZI: Okay.

THE COURT: And what it strikes me is since you prefer, you made it clear you prefer, significantly prefer, life without the possibility of parole to the death penalty, and if the law is never going to force you, or direct you, or compel you to return a death penalty, is it true that, in effect you would be returning a life without possibility of parole?

That would be your vote in virtually every case?

PROSPECTIVE JUROR COLOZZI: I would have to say, yes.

THE COURT: You have to say "Yes" to that?

PROSPECTIVE JUROR COLOZZI: Yes, uh-huh.

THE COURT: Okay.

PROSPECTIVE JUROR COLOZZI: I didn't realize that, you know. It went over my head that there isn't a law that said that compels you. There are not guidelines. There are no factors.

THE COURT: There are guidelines, but they don't reach the level of compulsion. It just permits it. The guidelines tell you when you can't give it, and it tells you when you may consider it, and possibly give it, but it never compels you to do it.

PROSPECTIVE JUROR COLOZZI: I see. Okay.

THE COURT: Okay.

PROSPECTIVE JUROR COLOZZI: My answer is just, yes.

THE COURT: It's a complex thing. It's not that simple thing. It takes amounts [sic] working through.

(37 RT 12352.)

The prosecutor again challenged the juror for cause and the court granted the challenge without further comment or explanation. (37 RT 12352.)

C. The Trial Court Erred in Excusing Colozzi

A prospective juror in a capital case may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless that juror's[19] views would prevent him or her from judging guilt or innocence or would cause the juror to reject the death penalty regardless of the evidence. (*Witherspoon*, *supra*, 391 U.S. at p. 522.) *Witherspoon* is not a ground for challenging any prospective juror; it is a limitation on the state's

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[19] For readability, prospective jurors in the argument are sometimes referred to simply as "jurors."

power to exclude prospective jurors. (*Adams v. Texas* (1980) 448 U.S. 38, 47-48.) The *Witherspoon* standard was refined in *Witt* to permit the state to excuse a prospective juror based on the juror's opposition to the death penalty only where the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Witt*, *supra*, 469 U.S. at p. 424.)

Under the *Witherspoon-Witt* standard, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting the *Witt* test for California death cases].) Prospective jurors who are opposed to the death penalty may remain qualified to sit as a juror under the standard set out in *Witt*. (*People v. Stewart* (2004) 33 Cal.4th 425, 448.)

It is the party seeking exclusion who must demonstrate that the prospective juror lacks impartiality. (*Witt*, *supra*, 469 U.S. at p. 423; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270.) The prosecutor's duty here was to demonstrate that Colozzi's views about capital punishment would prevent or substantially impair her ability to return a death verdict in this case. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.) A challenge for cause will not lie if a juror's responses indicate that she could and would follow the law. (*People v. Jones* (1997) 15 Cal.4th 119, 163, fn. 13.) The record here does not support a conclusion that Colozzi's beliefs would have prevented or substantially impaired her ability to serve as a juror and return a death verdict.

Colozzi recognized that there was a conflict between her personal and religious beliefs about the death penalty and the requirement that a juror follow the law. Every time she was asked, Colozzi indicated she would resolve this conflict in favor of following the law. First, the answers in her questionnaire made it clear that Colozzi could set aside her opposition to the death penalty. She stated that she would not automatically refuse to vote in favor of the death penalty without considering the evidence. (15 CT 4224.) She further stated affirmatively that she would make her judgment based on all the factors. (*Ibid.*)

When she appeared for *Hovey*[20] voir dire, the court made a point of asking Colozzi whether, after a week of reflection, her questionnaire answers accurately reflected the way she felt about the death penalty. Colozzi said that they did, and reaffirmed that she would set aside her personal beliefs about the death penalty and follow the law. (37 RT 12331-12332.) She explained that as a legal secretary she understood that "the law is the law. We live in a society. Laws are there for a reason, and I respect the law. Despite sympathies I may have one way or the other, I understand the law must prevail." (37 RT 12332.) Under questioning by defense counsel Colozzi explained that she tried to integrate her Christian beliefs with "the real live world we live in." (37 RT 12346.) She recognized that there are laws in society and that regardless of whether she believed in them or not, they had to be followed. (37 RT 12347.) She concluded that "I believe that when there is a law, and I need to decide on that law, I do use my Christian values, too, my civic responsibility, you have Christian responsibility to be true to your decision, to be fair to, not

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[20] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

only my Christian values but also to society." (37 RT 12347.) She said that she was able to integrate these conflicting values. (37 RT 12347.) At the end of defense counsel's questioning Colozzi affirmed again that she was prepared to follow the law and vote for death if the evidence led her to the conclusion that this was an appropriate case to apply the death penalty. (37 RT 12350.)

1. The Prosecutor's First Challenge for Cause

The prosecutor challenged Colozzi for cause without questioning her. He did not state the basis of the challenge, but it was likely based on two statements Colozzi made in response to defense counsel's questions. First, she alluded to the difficulty of integrating her Christian beliefs with her civic responsibility (37 RT 12347) and later indicated she would "prefer" a judgment of life over death if she had the legal choice. (37 RT 12348.) Neither of these statements were the proper basis for an excusal for cause. A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt* unless the juror was unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law. (*People v. Stewart* (2004) 33 Cal.4th 425, 447.) The fact that a juror may find the experience unpleasant or difficult to impose a penalty of death "cannot be equated with a refusal" by the juror to impose death under any circumstances. (*People v. Stanworth* (1969) 71 Cal.2d 820, 837 [applying *Witherspoon*].)

So even if Colozzi's religious beliefs – that people should live their lives "for as long as God lets them" (15 CT 4225) – caused the court to draw an inference that Colozzi was reluctant to serve, that reluctance was

not a legitimate basis for disqualification. Even "abhorrence or distaste" for sitting on a capital jury cannot be the basis for exclusion. (*People v. Lanphear* (1980) 26 Cal.3d 814, 84.) Furthermore, Colozzi made clear during voir dire that she was able to integrate her Christian beliefs with her sense of civic responsibility in a way that allowed her to apply the death penalty. (37 RT 12346-12347.) Nothing Colozzi said about integrating here views with her civic responsibilities disqualified her. (See *Clark v. State* (Tex.Cr. App. 1996) 929 S.W.2d 5, 9 [prospective juror who preferred to let God make the penalty decision, but could follow the law, was wrongly excluded].)

Regarding Colozzi's preference for a life sentence, it is virtually axiomatic that a person opposed to the death penalty would prefer a sentence of life to one of death. Because mere opposition to the death penalty alone is not a basis for excusal, neither is a mere preference for a sentence of life imprisonment. The question is always whether the juror can set aside her beliefs – which would include her preferences – and apply the law. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 103 [allowing jurors to serve who preferred death to life was proper where they said they could follow the law]; see also *Duke v. State* (Ala. Crim App. 2002) 889 So.2d 1, 25 [preference in favor of the death penalty where the potential juror indicates that he or she could consider life sentence does not indicate juror is biased]; *Crowe v. State* (Ga.1995) 458 S.E.2d 799, 807 [jurors who merely state a strong preference for a death sentence when presented with a hypothetical situation are not subject to being stricken for cause in a

capital case].) [21] Colozzi qualified her statement of preference by saying she would only act on that preference where doing so was within the law: "I have the freedom of choice, and that's not against the law. I have that choice and it's legal and I would go for the life imprisonment." (37 RT 12348.)

Even if the court inferred from these statements that Colozzi would be less likely than other prospective jurors to choose a sentence of death because of her preference for life, such an inference would not support excusing her for cause. "A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

As former Justice Moreno has noted, "if we can imagine a hypothetical system in which jurors serve on multiple capital juries, and their voting records can be discovered, juror A, who voted 5 times for life imprisonment without parole and 5 times for death, would not necessarily be a more objective or conscientious juror than juror B, who served on the same 10 juries but voted for death 9 times out of 10, or juror C, who voted for life imprisonment without parole 9 out of 10 times. Although juror B may be strongly predisposed to vote for the death penalty, and juror C

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[21] Although these cases address the possible bias of a juror based on favoring the death penalty, the *Witt* standard applies equally regardless of whether the inquiry is to whether the juror would automatically vote for death or automatically vote for life. (*Morgan v. Illinois* (1992) 504 U.S. 719, 728-729.)

against, each would be following his or her oath as long as he or she followed the statutory directive to choose a penalty by weighting aggravating and mitigating circumstances, even though their attitudes toward the death penalty would cause them to differ from each other, and from juror A, as to the weights given." (*People v Martinez* (2009) 47 Cal.4th 399, 460 (dis. opn. of Moreno, J.).)

Nothing Colozzi said to this point provided the basis for a challenge for cause.

2. The Prosecutor's Second Challenge for Cause

The court did not immediately rule on the prosecutor's first challenge, and instead engaged Colozzi in a further colloquy regarding the nature of the discretion afforded a juror at the penalty phase. Following this exchange, the prosecutor again challenged Colozzi for cause. (37 RT 12352.) The court granted the challenge, apparently based on a determination that Colozzi would never return a verdict of death. But this determination was not supported by the evidence, and depended on Colozzi's answers to misleading and inaccurate statements by the court. Specifically, the court's statements regarding the scope of a juror's discretion allowed Colozzi to believe that if she determined that death was the appropriate verdict, she could still vote for life without violating her oath as a juror to follow the law. As will be discussed below, this is incorrect, and granting the prosecutor's challenge was therefore erroneous.

First, it is true that a juror who would never return a verdict of death may be excused for cause. A juror who will automatically vote for either life or death automatically in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require her to do. (See *Morgan v. Illinois* (1992) 504 U.S. 719,

729 [re juror who would automatically vote for death].) The presence or absence of aggravating or mitigating circumstances is entirely irrelevant to such a juror. (*Ibid.*) When a prospective juror indicates an inability to vote for death she implicitly acknowledges an unwillingness to subordinate her conscientious objections to the death penalty and follow the law as given to her. (*People v. Ghent*, *supra*, 43 Cal.3d at pp. 768-769.) Similarly, a prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is subject to challenge for cause. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005; see *People v. Livaditis* (1992) 2 Cal.4th 759, 772-773; *People v. Pinholster* (1992) 1 Cal.4th 865, 917-918.) Such a juror may be excused because she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an "open mind" on the penalty determination. (*People v. Clark* (1990) 50 Cal.3d 583, 597.) Thus, when a juror indicates that she would always return a life verdict, the court can draw an inference that the juror would be unable to perform her duties as a juror to follow the law, and would therefore be excludable under *Witt*.

But such an inference was not warranted here. In questioning Colozzi the court first ascertained that "if the law basically compelled it" Colozzi could return the death penalty, and that this was so because Colozzi was willing to follow the law and felt an obligation to do so. (37 RT 12351.) The Court then told Colozzi that the law does not ever compel a death verdict. It then went on to say that "what it strikes me is since you prefer, you made it clear you prefer, significantly prefer, life without the possibility of parole to the death penalty, and if the law is never going to

force you, or direct you, or compel you to return a death penalty, is it true that, in effect you would be returning a life without possibility of parole? [¶] That would be your vote in virtually every case?" (37 RT 12351.)

Colozzi said it would, but explained, "I didn't realize that, you know. It went over my head that there isn't a law that said that compels you. *There are not guidelines. There are no factors.*" (37 RT 12351, emphasis added.) The court recognized that it needed to correct the juror's understanding at that point, but what it next said to Colozzi was both misleading and incorrect: "There are guidelines, but they don't reach the level of compulsion. It [sic] just permits it. The guidelines tell you when you can't give it, and it [sic] tells you when you may consider it, and possibly give it, *but it never compels you to do it.*" (37 RT 12352, emphasis added.) This significantly overstated the scope of a juror's discretion. While it is true that there are no specific factual circumstances that require jurors to reach a death verdict, it is not true that jurors have complete freedom to choose a life verdict. There are both guidelines which must be followed and factors which must be considered in choosing a verdict of life or death.

Under California's guided discretion system, penalty phase jurors are given the task of weighing the aggravating circumstances and the mitigating circumstances and determining – after setting aside any personal opposition to the death penalty – if death is the appropriate verdict. A juror is not free to ignore the weighing process. (See § 190.3 [trier of fact shall take into account the relevant factors in aggravation and mitigation].) Furthermore, for a juror who has determined through the weighing process that the appropriate sentence is death, that juror is then compelled to vote to select death as the punishment rather than a sentence of life that she might

choose if she were not required to subordinate her feelings against the death penalty. This is so because a juror who cannot do this is a juror who is unable to set aside her personal feelings against the death penalty, and consequently would be excludable on that basis. Such was not the case with juror Colozzi.

In *People v. Solomon* (2010) 49 Cal.4th 792, jurors were told in the questionnaire and in introductory remarks that they were never required to vote for death, even if he or she found that aggravation substantially outweighed mitigation. During voir dire, the court informed juror C.G. that if she "intellectually, morally, and otherwise concluded this [was] an appropriate case for the death penalty, then it would be her obligation to bring back the death penalty in that situation." (*Id.* at p. 833.) On appeal, Solomon contended that this was new and contradictory information that justified C.G. taking a long pause before answering. This Court disagreed, noting that, "There is no conflict between the principles that a juror is not required to find death the appropriate penalty but that, if she does conclude that death is appropriate, she must return a verdict of death." (*Id.* at p. 834.) Appellant agrees that there exists no conflict between these principles as stated in *Solomon*.

Stated otherwise, a penalty phase juror's freedom of choice is not the completely unfettered freedom to choose life or death. It is the freedom to assign weight to the aggravating and mitigating circumstances according to his or her own values, and choose the appropriate sentence in light of that weighing process. As part of that choice, a juror has the further freedom to determine that death is not the appropriate verdict even if the aggravating evidence outweighs the mitigation evidence substantially. But a juror is not free to choose life or death without engaging in the weighing

process to decide which sentence is appropriate. Furthermore, a juror who has engaged in the weighing process and determined that death is the appropriate verdict is not free simply to reject that verdict and choose a life sentence. (See *People v. Holt* (1997) 15 Cal.4th 619, 652 [test for excusal is whether juror, having properly weighed the evidence, would be unable or unwilling to impose death penalty].)

The *Witherspoon-Witt* cases recognize that for a juror personally opposed to the death penalty there is a fundamental conflict between those personal beliefs and the law which permits capital punishment. As set forth above, Colozzi recognized this conflict and – prior to the court's remarks about the scope of a juror's discretion – had repeatedly affirmed that she would resolve it by setting aside her beliefs regarding the death penalty and apply the law. This was credible, clear, and uncontradicted evidence that Colozzi was qualified to serve.

Against this, there was no substantial evidence that Colozzi could not follow the law. As already discussed, a juror's statement that she will never vote for death may be evidence supporting a challenge for cause because the inference can be drawn from such a statement that the juror is unwilling to subordinate her conscientious objections and follow the law. In short, she would resolve the tension between the law and her beliefs in favor of her beliefs. But such an inference could not properly be drawn here because the trial court misled the juror to believe that in fact no tension existed between her beliefs and the law. Colozzi believed that she could, regardless of the evidence, indulge her preference for imposing a life sentence without violating her oath to follow the law. Accordingly, Colozzi's statements in response to those remarks did not support an inference that Colozzi would not follow the law. Therefore, the court's

determination that Colozzi was excusable for cause was unsupported by the evidence. The only credible evidence was that Colozzi could set aside her beliefs regarding the death penalty and follow the law.

On appeal, this court will uphold the trial court's ruling on a challenge for cause only if it is fairly supported by the record. (*People v. Heard* (2003) 31 Cal.4th 946, 958.) The Court will accept as binding the trial court's determination as to a prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous. (*People v. Mayfield* (1997) 14 Cal.4th 668, 727; *People v. Mincey* (1992) 2 Cal.4th 408, 456-457; see *Witt*, *supra*, 469 U.S. at pp. 425-426 [explaining need for deference to trial courts].) But here there is no conflict or ambiguity to resolve. The statements that Colozzi made that she would always choose a life sentence were based on the erroneous direction from the court that the law permitted her to do so. The trial court must conduct voir dire with "special care and clarity" in death penalty cases to ensure that the jury is selected in a manner consistent with the constitutional requirements. (*People v. Heard*, *supra,* 31 Cal.4th at p. 967; see also *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-736 [trial court questioning insufficient to determine if juror disqualified].) The trial court's decision to excuse Colozzi was based on her answers to misleading and inaccurate questions; it was not based on a finding that was the result of resolving ambiguous or conflicting statements. Therefore, no deference is due the trial court's decision. If there is no inconsistency in the prospective juror's responses, the only question is the purely legal one of whether the court's decision is supported by substantial evidence. (*People v. Cooper* (1991) 53 Cal.3d 771, 809.) There was no substantial evidence supporting the court's decision to excuse the juror, and this Court must

therefore find that the excusal was erroneous.

D. The Error Requires Reversal of the Death Judgment

The erroneous excusal of Colozzi requires reversal of the penalty phase judgment without consideration of prejudice. The improper exclusion of even one juror based on their opposition to the death penalty is reversible penalty phase error. (*Davis v. Georgia* (1976) 429 U.S. 122; *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *People v. Heard*, *supra*, 31 Cal.4th at pp. 966.) The judgment of death must therefore be reversed.

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THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER UNDER SECTION 190.3, FACTOR (B) EVIDENCE THAT APPELLANT ASSAULTED MARY SIROKY

In his 1980 trial, appellant was charged with committing four non-capital crimes against Mary Siroky on July 28, 1979, which was four days after the Cavallo homicide. As to those charges, he was found guilty of rape (§ 261), robbery (§ 211) and assault with intent to commit murder (former § 217), and was acquitted of assault with a deadly weapon (§ 245, subd. (a)). The prosecutor's evidence that appellant was the perpetrator was based on Siroky's identification of appellant in a lineup several weeks after the crime, and on a single fingerprint on the clip of a broken gun found at the crime scene. (1 CT 4-7.) On appeal, this Court reversed the convictions under *People v. Shirley* (1982) 31 Cal.3d 18 because Siroky had identified appellant only after being hypnotized. (1 CT 33-39.) On remand, the prosecution elected not to retry the Siroky charges, and instead gave notice that it would present evidence of that incident as aggravating evidence under section 190.3, factor (b) at the penalty retrial of the capital case. (4 CT 987.)

In the first penalty retrial, appellant unsuccessfully sought to have the Siroky evidence excluded or tried by a separate jury. On July 6, 1992, prior to the second retrial, appellant again filed a motion to limit the prosecutor's use of the Siroky incident as factor (b) evidence. (5 CT 1138.55-1138.59.) Appellant claimed in part that the prosecutor did not have sufficient evidence to prove beyond a reasonable doubt that appellant was the perpetrator of the attack on Siroky. (5 CT 1138.56.) The trial court denied appellant's motion and ruled that the prosecutor could use evidence

of the Siroky incident at the penalty retrial. (32 RT 11017.)

The evidence that the prosecutor subsequently produced at the second retrial was not sufficient to establish appellant as Siroky's assailant. Unlike at the 1980 trial, there was no evidence of Siroky's tainted post-hypnotic identification of appellant. Evidence of her pre-hypnotic recollections of the incident was admitted, but Siroky had been unable to identify appellant as the perpetrator prior to being hypnotized, despite having the opportunity to do so: a few days after the incident, she had been shown two arrays of photographs, one of eight pictures (Peo. Exh. 4) and the other of six (Peo. Exh. 4-A). People's Exhibit 4 contained two pictures of appellant, People's Exhibit 4-A had none. Siroky failed to identify a suspect after viewing these photo arrays. (41 RT 13484-13485.)

Without the hypnotically-induced identification, the prosecution was dependent on the single fingerprint on the gun clip to tie appellant to the Siroky crimes. At the end of the prosecution case, appellant again raised the issue of the sufficiency of the evidence as to the crimes against Siroky for factor (b) purposes, characterizing its motion as being like a motion for acquittal under section 1118.1. The trial court ruled that there was sufficient evidence connecting appellant to the rape and denied the motion. (43 RT 13974.) The court's rulings were incorrect, and the evidence of the crimes against Siroky should have been excluded before trial or stricken at the end of the prosecution case. These errors violated appellant's state statutory rights and his rights under both the state and federal Constitution to due process, a fair trial and a reliable penalty verdict. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th and 14th Amends.)

A. There Was Insufficient Evidence That Appellant Was the Perpetrator of the Siroky Assaults

Under section 190.3, factor (b), the jury is permitted to consider in aggravation evidence "of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Evidence of criminal activity under section 190.3, factor (b) must be limited to conduct that demonstrates the commission of a violation of a penal statute. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 [construing 1977 death penalty statute]; *People v. Boyd* (1985) 38 Cal.3d 762, 776-778.) Furthermore, jurors may only consider evidence of a crime under factor (b) if they find it proven beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280; *People v. Caro* (1988) 46 Cal.3d 1035, 1057.) The prosecution must establish each element of the offense beyond a reasonable doubt. (See *People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) To find that the prosecutor's evidence is sufficient to go to the jury, the trial court must determine that the evidence offered would allow a rational trier of fact to make a determination beyond a reasonable doubt that the defendant committed the criminal activity alleged under factor (b). (See *People v. Clair* (1992) 2 Cal. 4th 629, 676.)

As this Court noted in its 1988 opinion, Siroky provided the only direct evidence linking appellant to the crime through her identification at the 1980 trial of appellant as her assailant. (1 CT 36.) Left without Siroky's identification in the present retrial, the prosecutor had only the disputed evidence of appellant's fingerprint on the gun clip which was found in the room of the church where Siroky was assaulted. That fingerprint by itself, even assuming it was appellant's, was insufficient to prove appellant was Siroky's assailant.

There is no question that fingerprints can be persuasive evidence of identity. (*People v. Riser* (1956) 47 Cal.2d 566, 589.) The inferences which can be drawn from that identification evidence is another matter. "[T]here is a limit to the mileage that can be obtained from . . . fingerprint evidence. The only fact directly inferable from the presence of the fingerprints is that sometime, somewhere defendant touched [the object where his print was found]." (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584.)

In *People v. Flores* (1943) 58 Cal.App.2d 764, 769 the Court of Appeal held that the presence of the defendant's fingerprint on the back of the rearview mirror inside a stolen car identified defendant as a person who had been inside the car, but it was insufficient evidence to prove that he was the person who had stolen the car. Similarly, in *Birt v. Superior Court* (1973) 34 Cal.App.3d 934, 937, the defendant's fingerprint on a cigarette lighter in a rented vehicle that contained property taken in a residential burglary was insufficient even to bind the defendant over for trial. The court held that at most the fingerprint showed that at some unknown time and place, defendant had been inside the van, but there was no evidence to show when or where that had happened. (*Id.* at p. 938.) Evidence of a fingerprint identified as appellant's on the gun clip left at the Siroky crime scene might be persuasive evidence that he touched the clip at some unknown time or place. Without more, however, it is not sufficient to show he was Siroky's assailant.

Fingerprints are only circumstantial evidence of identity. (*People v. Gardner* (1969) 71 Cal.2d 843, 849.) Under California's circumstantial evidence rule, to justify a conviction on circumstantial evidence in a criminal case the facts and circumstances must not only be entirely

consistent with the theory of guilt but must be inconsistent with any other rational conclusion. (*People v . Bender* (1945) 27 Cal.2d 164, 175; *see People v. Yrigoyen* (1955) 45 Cal. 2d 46, 49.) Since proof of violent criminal activity under section 190.3, factor (b) requires the same standard of proof as for a criminal conviction (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72), the circumstantial evidence rule logically applies to proof of factor (b) evidence in aggravation.

In *People v. Jenkins, supra,* 91 Cal.App.3d at pp. 581-586, defendant was charged with manufacturing PCP and possession of certain chemicals with the intent to manufacture PCP. In a garage located behind his brother's house, defendant's fingerprints and a palm print were found on three containers holding various chemicals which were constituents of a PCP laboratory. The Court of Appeal found the evidence insufficient where there was not evidence of the age of the prints lifted from the containers; there was no direct evidence where the containers were when defendant touched them; and there was no direct evidence of what was in the containers when defendant touched them. (*Id.* at p. 585.)

In *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353, relied on by appellant in the trial court, the Ninth Circuit reviewed a California murder conviction and reversed for insufficient evidence where the prosecution presented evidence of defendant's fingerprints on the murder weapon. In *Mikes*, the victim Hansen was found dead in his fix-it shop. Around him were parts of a disassembled turnstile that Hansen had purchased at a hardware store going-out-of-business sale four months prior to his death. There were 46 fingerprints found at the crime scene, including some on chrome posts that were part of the turnstile. Five of Mikes' prints were found on parts of the turnstile, including the post which was identified as the murder weapon.

None of the fingerprints found elsewhere on the premises were identified as belonging to the defendant. (*Id.* at p. 355.) The government's theory depended on showing that Mikes' fingerprints were impressed on the post during the commission of the crime. The Ninth Circuit held that in fingerprint-only cases in which the prosecution theory is that the defendant handled certain objects while committing the crime in question, the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date. (*Id.* at p. 361.)

This Court's decision in *People v. Trevino* (1985) 39 Cal.3d 667 is similar to *Mikes* in carefully limiting the inferences which can be drawn from fingerprint evidence. There, co-defendants Trevino and Rivas were charged with murder and robbery at a home in which they had previously been guests. Although there was little question that there was substantial evidence that Trevino was one of the perpetrators, the case against Rivas was based on his thumbprints being found on a dresser drawer in the house. The age of the print could not be established and the fact the print was there was therefore "susceptible to various interpretations." (*Id.* at p. 696.) Under these circumstances, this Court found that the fingerprint evidence could not be considered substantially incriminating. (*Id.* at p. 697.)

With the exclusion of Siroky's hypnotically-induced identification, the present case became essentially a fingerprint-only case like *Mikes* and *Trevino*. The prosecutor's theory in this case was that appellant bludgeoned Siroky with a gun which held the clip with one of appellant's fingerprints on it. (5 CT 1139.32.) The prosecutor conceded that the clip, like the turnstile post in *Mikes*, was a moveable object. The prosecution fingerprint expert acknowledged that he could not determine the age of the fingerprint

on the clip. (41 RT 13417.) He said it was possible a fingerprint on a gun clip could remain intact for a long time, possibly a year. (41 RT 13418.)

Like *Mikes* and *Trevino*, the record in the present case does not contain sufficient evidence from which a juror could reasonably infer that the fingerprint was impressed at the time of the crime and not at some earlier date. Just as the turnstile pieces were moveable objects which Mikes could have handled at a time prior to the murder, so too a handgun and an ammunition clip are objects which are easily passed from person to person. Appellant's print could have been impressed on the clip earlier and brought to the crime scene by someone other than appellant. Accordingly, the fingerprint on the clip alone provided insufficient evidence that appellant was the perpetrator of the Siroky crimes.

The prosecutor tried to distinguish the present case from *Mikes* by arguing the possibility that appellant had obtained the gun in the Cavallo homicide four days before the Siroky crimes, and was therefore the perpetrator of both crimes. The prosecutor acknowledged that there was no direct evidence that appellant obtained a gun in this manner. (43 RT 13968.) Instead, he tried to tie three pieces of weak evidence together to show the gun came from Cavallo's house: the testimony of the Saccomanos that Cavallo had a .22 High Standard handgun when they went target shooting with him over a decade before the homicide; hearsay statements of Cavallo's deceased friend, Richard Canniff, who remembered Cavallo saying he owned a handgun for protection; and .22 caliber ammunition found at the Cavallo home which was the same brand as, and shared production marks with, ammunition found in the clip at the Siroky crime scene.

None of this evidence, however, established that there was no other

reasonable explanation how appellant's fingerprint came to be impressed on the clip. The jury heard Ludwig Saccamono's 1981 testimony that said he was "fuzzy" on whether the gun Cavallo used when they were target shooting was a revolver or semi-automatic. (43 RT 13910-13911.)[22] Canniff had testified at the 1981 trial that Cavallo told him the gun was a revolver, although in subsequent testimony he said that was just his own word for a small gun. (43 RT 13901-13902.)[23] Finally, the prosecutor made much about the similarities in the ammunition found in the gun clip and at Cavallo's home. But even the prosecutor's expert – a hobbyist with a special interest in .22 caliber ammunition – could not say how many similarly marked cartridges were produced. (42 RT 13720.) Gerald Gourley, who later testified as a defense expert, and had actually worked at the Federal Cartridge Company where the ammunition was manufactured, said that there could be 100 million such cartridges. (43 RT 14103-14108.) None of this provided sufficiently substantial evidence linking appellant to the gun. "[A]n incriminating circumstance from which guilt may be inferred must not rest on conjecture. And by the same rule it is not permissible to pile conjecture upon conjecture." (*People v. Flores*, *supra*, 58 Cal.App.2d at p. 769-770.)

In the trial court, the prosecutor relied on *People v. Bean* (1988) 46 Cal.3d 919, 932-34, as support for the sufficiency of the fingerprint

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[22] Cavallo's ex-wife, Geraldine Lawson, later testified for the defense that Cavallo bought a .22 caliber High Standard *revolver* when they were married in the late 1950's. (43 RT 14034.) She owned such gun and said Cavallo purchased one just like hers so they could compete fairly at target shooting. (43 RT 14037.)

[23] Appellant contends that Cavallo's statements to Canniff were inadmissible hearsay. (See Argument 5.)

evidence on the Siroky crimes. That reliance was misplaced. Bean was convicted of two separate murders based in part on fingerprint evidence. In the first murder, defendant's fingerprint was found on the window screen of the victim's house, and his palm print was found on the kitchen sink. Unlike appellant's case, where the fingerprint could have been impressed on the gun at some other location, the finger and palm print evidence clearly placed Bean at the scene of the crime. Additionally, Bean made admissions that supported his identity as the perpetrator. (*Id.* at p. 933.)

In the second murder, a pair of sunglasses with Bean's fingerprints was found next to the victim's body, and Bean admitted owning a pair of similar sunglasses. There was additional evidence that Bean had been watching the house where the murder occurred and was familiar with the area where some of the loot from the burglary-murder was discarded. Although the sunglasses were a moveable item, Bean's admission gave the jury sufficient evidence to find the sunglasses were Bean's and there was evidence placing him around the scene of the crime. (*People v. Bean, supra*, 46 Cal.3d at pp. 933-934.) In appellant's case there was no similar evidence placing appellant at the scene of the crime, and nothing suggesting that the gun was his.

The prosecutor below also relied on *People v. Preciado* (1991) 233 Cal.App.3d 1244. This case too is distinguishable. In a case of residential burglary, the defendant's fingerprints were found on a wristwatch box. The owner did not know defendant, and the box – which held a watch the victim received as a gift 18 months earlier – had never left his home. "Preciado either touched the item during an uninvited foray or – miracle of miracles – he did so some 18 months earlier, before the victim received the gift, and the fingerprints endured. Enough inferences were negated here." (*Id.* at p.

1247.) Unlike in *Preciado*, it is not so unlikely that appellant would handle a gun which was subsequently used in a crime by someone else. The box in *Preciado* had been in the home for 18 months; the prints were substantial evidence of defendant's presence inside the house. Appellant's prints on the gun clip were not substantial evidence of his presence in the church at any time, including the time when the Siroky crimes occurred.

B. Prejudice

This Court has acknowledged that there is an inherent risk in permitting evidence of uncharged crimes under factor (b) that jurors, even though not convinced of defendant's guilt of the uncharged crimes, will be influenced by the prejudicial effect of such evidence. (*People v. Yeoman* (2003) 31 Cal. 4th 93, 132; *People v. Caro*, *supra*, 46 Cal.3d at p. 1057.) The seriousness of the Siroky crimes would make jurors particularly susceptible to such influence, and more likely to vote for a verdict of death.

This was a close case. There was persuasive mitigating evidence that appellant had suffered from an emotionally and physically abusive upbringing. He was diagnosed with mental illness as an adult and was afflicted with abnormal brain activity which severely affected his behavior. (See generally, Statement of Fact, pp. 19-31.) The first penalty retrial jury was unable to reach a verdict (4 CT 984); the jury in this case deliberated over the course of five court days (6 CT 1330). In such a close case, the error must be deemed prejudicial under either a state law or federal constitutional standard. Under the state law standard of *People v. Brown* (1988) 46 Cal.3d 432, 446-448, there is a reasonable possibility that the jury would have reached a verdict more favorable to appellant if it had not heard the evidence of the crimes committed against Siroky.

Allowing the jury to rely on evidence of the Siroky assaults as

evidence in aggravation also violated the Eighth Amendment by undermining the reliability in the determination that death is the appropriate verdict. (See *Gardner v. Florida* (1977) 430 U.S. 349, 363-364; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Decisions based on evidence totally irrelevant to the sentencing process are unconstitutional. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885, 887, n. 24; *Johnson v. Mississippi* (1978) 486 U.S. 578, 585-587.) Under the standard of review for federal constitutional error (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the prosecution cannot prove beyond a reasonable doubt that allowing the jury to hear this evidence was not prejudicial.

The sentence and judgment of death must therefore be reversed.

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THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS OFFERED TO SHOW CAVALLO OWNED A HANDGUN WHICH HE KEPT IN HIS BEDROOM NIGHT STAND

The trial court erred in permitting the prosecutor to introduce statements of the victim, Aldo Cavallo, about keeping a handgun in his home. The statements were admitted as evidence of habit under Evidence Code section 1105. In fact, the statements were inadmissible hearsay and were not otherwise admissible as evidence of habit.

A. Introduction and Procedural History

Appellant filed a written motion to exclude evidence of the prior testimony of Richard Canniff regarding certain statements made by Cavallo which the prosecution claimed were admissible under Evidence Code section 1105 as evidence of Cavallo's habit and custom. Specifically, the prosecutor sought to admit through Canniff certain statements by Cavallo that he (Cavallo) had a weapon near him in his home, and that he kept it in the night stand in his bedroom. Appellant argued that the statements were inadmissible hearsay and were not evidence of habit. (5 CT 1138.67-1138.70.)

Canniff testified at appellant's 1981 trial, but died before either of the penalty retrials.[24] At the first penalty retrial, the prosecutor sought to have Canniff's prior testimony read, but the trial court excluded it, ruling that the prior testimony did not establish a habit. (22 RT 7978.) At the second retrial – the present case – the court admitted Canniff's prior

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[24] Appellant does not contend that it was error to admit Canniff's former testimony based on his unavailability. It is only the hearsay statements of Cavallo to which Canniff testified that are at issue here.

testimony over appellant's objection. (40 RT 13188.)

Canniff and Cavallo were teachers who taught at the same school. They had also been friends for four or five years prior to Cavallo's death. (3 CT 681; 43 RT 13898.) The portion of Canniff's testimony at issue concerns statements purportedly made by Cavallo to Canniff regarding home security and a gun Cavallo kept. The prosecutor in the original trial elicited this testimony from Canniff, which was read to the jury in the present case:

Q [By the prosecutor Michael Mullins] Now, a different subject, if you will. Did you ever discuss with Mr. Cavallo the subject of security of the home, and in relation to that, weapons kept in the home?

A Yes, we did.

Q Did you?

A Because we disagreed.

Q You disagreed. What was – what was your point of view and what was his point of view? What was the disagreement?

A Well, I'm opposed to guns of any description, and Al took the opposite stance. He felt that they were necessary for his own protection.

Q Did you discuss this subject more than once?

A Yes, we did, and he used to mention it frequently in the staff room at the school.

Q Did he ever make any statements in those discussions to you about having any particular type of weapon near him in his home?

A Well, my recollection is he said revolver.

Q Okay. Did he say where he kept it?

A In nightstand, I thought. It could have been under his pillow, but that's not logical to me. It would have to have been in a nightstand. It had to be close to his bed.

Q Is that what he talked about?

A He was never – he said repeatedly to me and others that he was never going to be caught off guard by anyone.

Q Did you ever actually see this handgun, whatever it was?

A No, I didn't. (3 CT 684-685; 43 RT 13900-13902.)

On cross-examination, the defense elicited some additional information about Cavallo's guns:

Q [By defense counsel Richard Freeman] Do you remember that Mr. Cavallo used that word "revolver"?

A No, I don't remember him using that word. That's – that's my word. To me, it's – it's a small gun. I don't know what else to use. Revolver is my term. No I don't remember anything.

Q Now, on any of the occasions when you were at his home, for instance did he show you any weaponry?

A I remember a shotgun, I think, in the living room.

Q Was it on some type of a rack or sitting on a bookcase?

A In a – I think it was in like a guncase.

Q Do you remember about when it was that you saw that?

A It would be June of a year and a half ago.

(43 RT 13902.)

The prosecutor wanted to introduce this testimony because it helped tie together the Cavallo homicide and the Siroky assault. His theory was that the .22 caliber High Standard automatic used in the Siroky assault was taken from Cavallo's home by appellant during the burglary and homicide. But there was little other evidence that Cavallo owned that gun:the best the prosecutor could produce was the prior testimony of Paul and Ludwig Saccomano from the 1981 and 1991 trials. The Saccomanos had gone target shooting with Cavallo in the mid-1960's. (43 RT 13915, 13944.) In 1981, Ludwig was "a little fuzzy" whether Cavallo used a revolver or an automatic. (43 RT 13911.) He remembered Cavallo's gun being similar to his own High Standard .22. (43 RT 13917.) In his 1991 testimony, Ludwig again recalled Cavallo's gun being similar to his own (43 RT 13925), although subsequently he said he felt that the gun was a semi-automatic but did not know what caliber it was. (43 RT 13935.) Paul Saccomano, Ludwig's son, was only 8 or 9 years old when he and his father went target shooting with Cavallo. Paul remembered Cavallo's gun being similar to a High Standard automatic .22. (43 RT 13939, 13946.)

The prosecutor also presented evidence that some old .22 caliber ammunition was found in Cavallo's house. (42 RT 13567.) Whatever weak inference this testimony provided that Cavallo owned a High Standard .22 caliber *automatic* weapon was undercut by Cavallo's ex-wife, Geraldine Lawson. Lawson testified that Cavallo bought a High Standard .22 caliber *revolver* when they were married in the late 1950's. (43 RT 14034.) The prosecutor therefore needed Cavallo's statements to Canniff in order to place the gun used in the Siroky assault in Cavallo's house at the time of the homicide.

B. The Statements Were Inadmissible Either as Hearsay or as Evidence of Habit

Cavallo's statements to Canniff that he kept a revolver near him in his home and that he kept it in his bedroom night stand were inadmissible to prove the truth of those statements or to establish any purported habit of Cavallo. Furthermore, even if the statements were admissible to show habit, Canniff's testimony as a whole was insufficient to establish that Cavallo had a habit of possessing a handgun and keeping it nearby.

First, the statements were inadmissible as hearsay. Hearsay evidence is evidence of a statement that was made by someone other than by a witness while testifying and that is offered to prove the truth of the matter stated. (Evid. Code § 1200, subd. (a).) Except as provided by law, hearsay evidence is inadmissible. (Evid. Code § 1200, subd. (b).) Exceptions to the hearsay rules are set out in sections 1220 through 1370 of the Evidence Code and do not include an exception for habit and custom evidence. (Evid. Code, § 1220 et seq.)

Second, the statements were not admissible as evidence of habit or custom under Evidence Code section 1105. A person's "habit" is their regular or consistent response to a repeated situation. "Custom" means the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an individual. (*People v. Memro* (1985) 38 Cal.3d 658, 681, fn. 22.)[25] Habit or custom can be established by evidence of repeated instances of similar conduct. (*People v. McPeters* (1992) 2 Cal. 4th 1148, 1178; *People v. Memro*, *supra*, 38 Cal.3d at p. 681.) A

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[25] Although the prosecutor's pleading refers to "habit and custom" (5 CT 1139.1), this is clearly an issue involving evidence of an individual's habit, not the custom of a group or organization.

challenge to the admission or exclusion of evidence of habit or custom is reviewed under the abuse of discretion standard. (*People v. Hughes* (2002) 27 Cal.4th 287, 337.)

Evidence Code section 1105 provides that, "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom." As discussed above, Canniff's testimony that Cavallo told him that (1) Cavallo kept a revolver near him in his home and (2) he kept it in his night stand – offered for the truth of the matters asserted – was hearsay, and not admissible under any recognized exception to the hearsay rule. As such, this testimony did not meet the threshold test under section 1105 of being "otherwise admissible," and could not be used to establish Cavallo's purported habit. The court therefore erred in admitting Canniff's prior testimony as to Cavallo's statements about the gun.

The prosecutor relied on *People v. Wein* (1977) 69 Cal.App.3d 79 as authority for the use of hearsay to establish habit. (5 CT 1139.2.) To the extent *Wein* is authority for such a proposition, this Court should reject its holding. In *Wein*, the district attorney sought to prove the robbery component of a robbery-murder charge by showing that the victim kept money hidden in her bedroom, and that no money was actually found in the bedroom. The evidence was in two forms: (1) members of the victim's family testified that she had a habit of keeping money hidden there and (2) family members testified that the victim testified that she intended to make certain purchases in the future. As to the first – which appears to be the basis for the prosecutor's citation in the present case – the Court of Appeal accepted the relevance of family members' statements to prove habit without addressing the fact that they were otherwise inadmissible hearsay.

(*Id.* at p. 91.) This was clearly wrong, because under Evidence Code section 1105 evidence of habit must be otherwise admissible. Justice Jefferson analyzed *Wein* extensively on this issue and reached the same conclusion: the victim's statement of her habit of hiding money was a hearsay statement of a declarant that did not qualify for admissibility under any hearsay exception, and was therefor inadmissible under section 1105. (Jefferson, Cal. Evidence Benchbook (Supp. 1978) § 33.6, p. 407.) Jefferson concluded that *Wein*'s holding "is clearly erroneous and represents fallacious reasoning." (*Id.* at p. 408.)

Appellant is unaware of any other cases that provide authority for the proposition that it is proper to use hearsay to establish habit or custom. (See *Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 767 [failure to show a "custom and common knowledge" exception to the hearsay rule].) This Court should make clear that under the express language in Evidence Code section 1105, hearsay is not admissible to show habit or custom.

Regardless of the applicability of *Wein*, there was insufficient evidence to establish a habit or custom on the part of Cavallo. The prosecutor failed to present evidence of a regular or consistent response to a repeated situation. (*People v. Memro*, *supra*, 38 Cal.3d at p. 681.) Examples of habit include a car owner regularly locking the doors of his vehicle (*In re Charles G.* (1979) 95 Cal.App.3d 62, 64-68); a bookkeeper routinely mailing bills (*Lucas v. Hersperia Golf & Country Club* (1967) 255 Cal.App.2d 241, 247); and a judge regularly informing indigent defendants of their right to counsel (*In re Lopez* (1970) 2 Cal.3d 141, 146). Here there was no regular response to a repeated situation. Rather than providing evidence of habit, the prosecutor attempted to transform hearsay

evidence of ownership into evidence of habit in the hope of bringing it within the flawed logic of the *Wein* case. At the first penalty retrial, he acknowledged as much. Before granting the defense motion to exclude the Canniff testimony at that retrial, the court asked the prosecutor, "You are saying that because he [Cavallo] told him [Canniff] he had a gun, or he believed in having a gun and that he owned a gun, that that, in and of itself, constitutes a habit? ¶A [By Prosecutor Mullin]: Yes. That's exactly what I'm saying." (22 RT 7938.)

Other cases are instructive on how habit evidence can be used properly to show robbery or theft during the course of a murder. In *People v. Webb* (1993) 4 Cal.4th 494, 529, the prosecution supported its theory that defendant stole money from the murder victim's home through testimony of the victim's mother that the victim had a habit of storing money in baby food jars and envelopes. Empty baby food jars marked "spending money" were found in the victim's home and defendant when arrested was in possession of cash-filled envelopes. (*Ibid.*) There was similar habit evidence in *People v. McPeters*, *supra*, 4 Cal.4th at p. 1178 where the charges included murder and robbery occurring in the victim's home, and there was testimony about the victim's habit of regularly putting small amounts of cash in envelopes as a means of earmarking funds for special purchases. The prosecution used this evidence of habit, together with evidence that such envelopes were not found in the home, to prove the victim had been robbed as well as murdered. (*Ibid.*) The present case had no similar evidence of habit.

Furthermore, there was insufficient evidence in Cavallo's statements as to when he possessed the gun to establish any habit as being relevant to the time of the crime. Habit evidence must not be too remote from the time

of the specified occurrence. (*Webb v. Van Noort* (1966) 239 Cal.App.2d 472, 478 [general question as to how person drove a car did not elicit habit evidence].) The only evidence as to when Cavallo made these statements to Canniff was that they were made during the time that they knew each other, which was never defined except that it was longer than the approximately five-year period they taught together at the same school. (43 RT 13897-13898.) Therefore, whatever habit might have been shown was insufficiently linked to the time of the crime to permit an inference that Cavallo was keeping a gun in his nightstand.[26]

In addition to violating state law, the erroneous admission of Canniff's testimony also violated appellant's federal constitutional rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments. Permitting Cavallo's hearsay statements into evidence was also incompatible with the Eighth Amendment requirement of heightened reliability in capital trial procedures. (*Murray v. Giarratano* (1989) 492 U.S 1; *Johnson v. Mississippi* (1988) 486 U.S. 578; *Beck v. Alabama* (1980) 447 U.S. 625.) Additionally, the evidence of Cavallo's statements was so unreliable as to violate appellant's rights under the Sixth and Fourteenth Amendment. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66;

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[26] Canniff stated that some of his conversations with Cavallo about security took place in the staff room of the school where they taught together. (43 RT 13901.) Such conversations would have been within the last three years of their relationship. (43 RT 13897-13898 [Canniff began working at Sequoia School five years before his 1981 testimony].) But there is no evidence indicating that the statements at issue were made in the staff room rather than elsewhere, and at an earlier time in their relationship. Even if there were such evidence, however, the time frame – some time between 1974 and 1979 – would still be too vague for the statements to be material evidence of habit at the time of the homicide.

United States v. Franklin (6th Cir. 2005) 415 F.3d 537, 546; *Howard v. Walker* (2d Cir. 2005) 406 F.3d 114, 127-128.)

The prosecutor relied on Canniff's testimony to persuade the jury that a gun was missing from Cavallo's home. (47 RT 15260.) He told the jury that the gun was important because of its cross-admissibility; the gun was a common element of both the homicide and the assault on Siroky at the church, according to the prosecutor's theory. He argued that "the crime in the church proves who did the homicide, and the homicide proves who did the crime in the church." (47 RT 15261.) On the one hand, the prosecutor sought to undercut the defense's lingering doubt theory as to the Cavallo homicide. The defense position was that, although there was evidence that appellant was present for the Cavallo crimes, that someone else – specifically, James Curry – may have been the actual perpetrator. (47 RT 15209-15212.) Accordingly, if the prosecutor convinced the jury that appellant was the perpetrator of the Siroky assault, the fact that a gun consistent with the one attributed to Cavallo was used in that crime would serve to convince the jury that appellant was the actual perpetrator of the Cavallo homicide – that whoever hit the sleeping Cavallo on the head with the dumbbell was the same person who took the gun from the nightstand.

On the other hand, a juror who believed Canniff's testimony and believed appellant was the actual killer of Cavallo would be more likely to believe appellant was the perpetrator of the Siroky assault and reject the defense theory that any fingerprint on the gun cartridge was not convincing evidence that appellant was Siroky's assailant.

There is a reasonable possibility that but for the erroneous admission of the hearsay evidence that the jury would have reached an outcome more favorable to appellant. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-

448.) As to the federal constitutional error, the prosecution cannot establish beyond a reasonable doubt that the error did not affect the sentencing decision. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) This evidence affected two significant aspects of the prosecutor's case for death: the circumstances of the crime (§ 190.3, factor (a)) and the uncharged act of violence against Siroky (§ 190.3, factor (b)). The purported evidence of habit could have been the piece of evidence that persuaded a reasonable juror to decide that appellant was the actual killer of Cavallo and/or the perpetrator of the offenses against Siroky. Whether a defendant is the actual killer or only an aider and abettor can be important to jurors assessing the appropriate penalty. (See *In re Hardy* (2007) 41 Cal.4th 977, 1032-1035.)

Either of these pieces of aggravating evidence could have been decisive in the penalty determination. The case was close. The first penalty retrial resulted in a hung jury. The defense presented a substantial mitigation case, first casting doubt on the prosecution's guilt case and second by demonstrating substantial mitigation through evidence of appellant's deprived childhood and brain abnormalities. The second penalty jury began deliberating on Wednesday afternoon, September 16, 1992, and did not reach its death verdict until Tuesday, September 22. (6 CT 1324, 1331.) During deliberations they requested the readback of multiple witnesses and requested other information from the court. (6 CT 1325-1326.)

For all these reasons, the sentence and judgment of death must be reversed.

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THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ELICIT EVIDENCE THAT APPELLANT FAILED TO APOLOGIZE TO FLORENCE MORTON

Appellant pled guilty in 1972 to assault with intent to commit murder. The incident underlying this conviction was the stabbing of Florence Morton, who was married to appellant's half-brother, Priestley Morton. Appellant was staying with the Mortons at their home in Los Angeles at the time. The prosecutor introduced this conviction as evidence in aggravation under section 190.3, factor (c). At the prosecutor's request, the jury was instructed that none of the crimes admitted as evidence in aggravation under factor (c) could be considered as aggravation under factor (b). (6 CT 1245-1246; 47 RT 15183-15186.)

Despite having the conviction in evidence, the prosecutor also called Florence Morton to testify about this incident, which occurred in December, 1971. According to Morton, she and appellant had a disagreement over the use of the telephone. Appellant got a knife and stabbed Morton. (42 RT 13806-13807.) After Morton was released from the hospital she received a telephone call from appellant in which he tried to persuade her not to testify against him, and threatened to hurt her if she did. (42 RT 13814.) Morton testified at the preliminary hearing despite the threat. (42 RT 13814.) The penalty jury in the present case was allowed to consider the telephone threat as evidence of prior criminal activity involving a threat of violence under section 190.3, factor (b).

After pleading guilty to assault with intent to commit murder, appellant was sent to Patton State Hospital, a state institution for individuals in need of psychiatric care. Morton and her husband visited

appellant while he was incarcerated there. Over appellant's objection, the prosecutor was permitted to elicit testimony that during that visit appellant did not offer an apology to Morton for what he had done to her. (42 RT 13816.) This testimony was irrelevant and should have been excluded.

A. The Testimony

Q. (By Mr. Mullins): Now, after all this had occurred, after you testified, do you recall visiting the defendant at Patton State Hospital?

A. [By Florence Morton] Yeah, that's correct.

Q. With your husband?

A. That's correct.

Q. Did he talk to you at the hospital?

A. He was talking to my husband. We were all sitting at a table, but –

Q. You were right there in his presence?

A. Right, I was right there.

Q. Did he apologize to you?

MR. MASUDA: Objection, you Honor. It's hearsay. It's leading. It's not relevant.

MR. MULLINS: She's present during this.

THE COURT: Overruled.

MR. MULLINS: State –

THE COURT: I will permit it. It relates to this incident. I will permit it.

MR. MULLINS: Excuse me. I am sorry, your Honor.

THE COURT: You may proceed.

MR. MULLINS: Did you finish?

Q. (By Mr. Mullins): Did he apologize to you in any way for what he done [sic] to you?

A. No, no way at all.

Q. Did he ask you anything about the baby?

A. No he didn't say anything about that.

(42 RT 13815-13816.)

B. Morton's Statement Regarding Appellant's Failure to Apologize Was Irrelevant to Prove a Factor in Aggravation Under Section 190.3, Factors (b) or (c)

A prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3. (*People v. Crittenden* (1994) 9 Cal.4th 83, 148; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Aggravating evidence is limited to the circumstances of the capital offense, other violent criminal conduct by the defendant, and prior felony convictions (§ 190.3, factors (a), (b) and (c)); only these, plus the experiential or moral implications of the defendant's age (*id.*, factor (i)), are properly considered in aggravation of penalty. (*People v. Coffman* (2004) 34 Cal.4th 1, 108; see *People v. Wader* (1993) 5 Cal.4th 610, 657.)

A jury is required under section 190.3, factor (b), to consider evidence of the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence, or the express or implied threat of force or violence. Under section 190.3, factor (c), a jury is to consider evidence of the presence or absence of any prior felony conviction.

These two factors serve different purposes. Factor (b) permits evidence of violent criminality to show defendant's propensity for violence. (*People v. Balderas*, *supra*, 41 Cal.3d at p. 203.) To establish a

factor (b) offense, the prosecutor may introduce evidence of the circumstances surrounding the violent conduct in order "to give context to the episode." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013-1014; accord, *People v. Livaditis* (1992) 2 Cal.4th 759, 776-777; *People v. Cooper* (1991) 53 Cal.3d 771, 841.) The circumstances of the crime which are probative are those which show the conduct of the defendant which gave rise to the conviction. (*People v. Gates* (1987) 43 Cal.3d 1168, 1203 [applied to incident admitted under both factors (b) and (c)].)

In contrast, factor (c) allows evidence of prior convictions on the theory that it tends to show that the capital offense was the culmination of habitual criminality that was "undeterred by the community's previous criminal sanctions." (*People v. Balderas*, *supra*, 41 Cal.3d at p. 202.) Neither the facts underlying the conviction nor the circumstances surrounding the crime are relevant to this purpose. This Court has recognized that where the prior criminal activity is only being admitted to prove a prior conviction – generally when the conviction is for a non-violent felony – "subdivision (c) intends convictions to be the sole quick and reliable" means of proof. (*Ibid.*) [27]

The prosecutor offered uncontested documentary evidence of appellant's guilty plea, and Florence Morton's testimony regarding the underlying facts of the offense. Evidence that at some time in the future – after the conviction and after appellant had been sent to prison – appellant failed to apologize to Morton was completely irrelevant to proving that he

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[27] In *People v. Bacigalupo* (1991) 1 Cal.4th 103, 139-141 the Court held that the date of criminal conduct underlying felony conviction could also be relevant under factor (c).

had been convicted of the assault on Morton.

Even if the assault were considered as an aggravating factor under factor (b), the lack of apology would still be irrelevant. Appellant recognizes that some events shortly after a crime may be relevant to show the context of the crime alleged as aggravation. For example, in *People v. Coffman*, *supra*, 34 Cal. 4th at p. 110 there was factor (b) evidence that defendant participated in the kidnaping and killing of a woman, and the theft of her purse. The prosecution properly introduced evidence that shortly thereafter defendant used the victim's credit card to order dinner in a restaurant where she was seen laughing and kissing her co-defendant. (*Ibid.*) Here, however, Morton met with appellant at Patton State Hospital *months* after the assault – after appellant had been convicted and incarcerated. Her testimony about appellant's lack of apology during that meeting cannot reasonably be considered a circumstance of the assault.

The prosecutor did not specify whether he was offering this evidence as being relevant to the assault on Morton or the subsequent telephone threat to her, or both. Even if he was only offering it as to the threat, which was introduced only as factor (b) aggravation, the lack of apology was still irrelevant. The threat occurred before appellant pled guilty and the lack of apology occurred after appellant had been sentenced and sent to Patton State Hospital. The evidence of this visit went far beyond showing the circumstances surrounding the threat and were therefore irrelevant.

Furthermore, the trial court used an incorrect standard in ruling the evidence was admissible. The court overruled appellant's objection with the explanation that the evidence "related to" the incident. (42 RT 13815.) As previously noted, the prosecutor has some freedom to go outside the

specific facts of the violent act and show the surrounding circumstances to give "context" to the episode. (*People v. Kirkpatrick, supra*, 7 Cal.4th at pp. 1013-1014.) But evidence which is merely "related to" an incident is not necessarily part of the surrounding circumstances of that incident, and does not necessarily provide context. Because the evidence relevant to prior acts and convictions under factors (b) and (c) is substantially more circumscribed than evidence "related to" an incident, the court applied an incorrect and overly-broad standard of relevance in admitting this evidence.

The prosecutor apparently introduced the evidence that appellant did not apologize in order to show that appellant was not remorseful for what he did to Morton. But lack of remorse is not an aggravating circumstance, even as a circumstance of the capital crime. (See *People v. Davenport* (1985) 41 Cal.3d 247, 288-290; *People v. Keenan* (1988) 46 Cal.3d 478, 510; *People v. Rodriguez* (1986) 42 Cal.3d 730, 788-790.) Lack of remorse is no more a relevant circumstance of a prior act of violence than it is of a capital crime. The court erred in admitting this statement from Morton.

Besides violating state law, the court's ruling was also federal constitutional error under the Eighth and Fourteenth Amendments. The introduction of non-statutory aggravating evidence violates the federal constitutional requirement that objective criteria guide the imposition of the death penalty (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364; *McCleskey v. Kemp* (1987) 481 U.S. 279, 299-306), and the heightened need for reliability in capital trial and sentencing procedures (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9 (plur. opn.); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.) To the extent the error otherwise only violated state law, it deprived appellant of a state-created liberty interest

and thereby violated his federal due process rights. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

C. The Error Was Prejudicial

The error was prejudicial under either a state law or federal constitutional standard. Appellant presented mitigating evidence showing that he had suffered from a childhood characterized by deprivation and hunger, and both physical and emotional abuse. He had come to the attention of juvenile authorities at an early age but did not receive the kind of treatment he needed. As an adult, appellant suffered from mental illness and abnormal brain activity which severely affected his behavior. The first penalty retrial resulted in a hung jury and the jury in this retrial deliberated over the course of five court days.

Furthermore, at the end of the second day of deliberations September 17, 1992, the jury made a written request for a re-reading of Florence Morton's testimony, asking "especially re, threat & her visit to Johnson, (while he was incarcerated)." (6 CT 1325, 1326.) This request strongly suggests that the inadmissible evidence regarding appellant's failure to apologize played a significant part in the jury's decision, including the substantial risk that the jury improperly considered appellant's purported lack of remorse as aggravating evidence in support of the prosecutor's case for death.

Given these circumstances, there is a reasonable possibility (see *People v. Brown* (1988) 46 Cal.3d 432, 446-448) that the jury would have reached a more favorable verdict to appellant if it had not heard evidence that appellant lacked remorse during his meeting in jail with Morton. Similarly, the prosecution cannot establish beyond a reasonable doubt that the error was not prejudicial. (*Chapman v. California*, *supra*, 386 U.S. at

p. 24.)

The sentence and judgment of death must therefore be reversed.

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THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTOR TO INTRODUCE PREJUDICIAL EVIDENCE IN AGGRAVATION WITHOUT ADEQUATE NOTICE

In the middle of trial, the prosecutor received unexpected help from one of his witnesses. On August 26, 1992, he interviewed Lance Erickson, a California Highway Patrol officer who was scheduled to testify the following day. (42 RT 13582.) Officer Erickson had arrested appellant in 1971 for stealing a car. The arrest occurred nine days after the assault on Florence Morton. Erickson was a minor witness who the prosecutor had expected would testify that appellant, in the course of being arrested for stealing the car, had admitted to stabbing Morton. (5 CT 1138.54 [Prosecution Trial Brief].) But during the interview, Erickson told a far more colorful story, which the prosecutor described the next morning in an offer of proof: Erickson and his Highway Patrol partner had seen appellant commit a traffic violation while driving. They attempted to stop appellant, but he evaded them and a chase ensued. Appellant abandoned the car and the chase continued on foot. (41 RT 13554.) While the officers pursued on foot, appellant told the officers to shoot him. Appellant was subdued after a struggle. Appellant then began talking about how he was an "escapee from Indiana,"[28] and that he just had a shotgun the day before, and that if he still had it, he would shoot the officers. (41 RT 13555.) Appellant then blurted out that he had stabbed his sister-in-law a few days earlier and allegedly stated that the reason he had done so was that she had

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[28] Appellant was not an escapee from Indiana. He had been paroled from Indiana for crimes committed as a juvenile. (32 RT 11022-11023.)

made sexual advances toward him, which he had resisted, but finally he "had enough of it" and stabbed her. (42 RT 13555.)

The prosecutor offered Erickson's testimony for two purposes. First, the struggle with the officer was uncharged violent conduct, relevant as aggravating evidence under section 190.3, factor (b); and second, appellant's statement that Morton had made sexual advances toward him was a false statement relevant to show consciousness of guilt as to the Morton incident. (41 RT 13556.) Appellant objected to the introduction of evidence of both the incident and the statement based on lack of notice. (41 RT 13556, 13558.) After multiple hearings on August 27, the prosecutor decided not to pursue the factor (b) evidence. The court ruled that the statement that appellant allegedly made to Erickson that Morton had "come on" to him was admissible. This ruling was erroneous. The statement should have been excluded because (1) appellant did not have timely notice of this evidence, (2) upon receiving notice appellant requested but was not given a reasonable opportunity to defend against the evidence; and (3) the evidence was otherwise inadmissible.

A. Procedural Background

Much earlier in the case, the prosecutor had filed a pleading entitled Second Amended Notice of Evidence in Aggravation, which was written in the form of an Information. (4 CT 987-999.) This notice, filed February 11, 1991, included allegations regarding three separate incidents involving Florence Morton as the victim: a robbery in November, 1971; the assaults on December 7, 1971; and the telephone threat on December 20, 1971. (4

CT 994-995.)[29] The notice also alleged that appellant had been convicted of grand theft on April 3, 1972, but did not provide any information about the facts underlying that conviction. (4 CT 997.) Nothing in the notice mentioned anything about the events of December 16, 1971, to which Erickson was a witness.

Also on February 11, the prosecutor filed his list of possible witnesses for the retrial. (4 CT 985-986.) Lance Erickson was one of 46 names on the list. (4 CT 985.) Erickson had not testified previously in any of appellant's cases. (42 RT 13580.) Moreover, his police report of the incident could not be found. (42 RT 13591.) Prior to trial appellant received a report by a Los Angeles Police Department (LAPD) officer which was apparently based on the lost Erickson report, but did not include all the information to which Erickson was prepared to testify. It did not include anything about either the struggle with the police, which was the proposed factor (b) evidence, or appellant's statement that Morton had made a sexual advance toward him. (42 RT 13591-13592.)

During the hearings on the admissibility of this new information on August 27, the prosecutor acknowledged that the information Erickson had provided him the night before was new. (42 RT 13582.) He said he had incorrectly assumed that Erickson's testimony would be consistent with what was in the LAPD report. (42 RT 13582.) The defense had been given Erickson's name in 1991, and knew he was in the Highway Patrol, but did not have a phone number or address or any police report indicating to what he would testify. (42 RT 13586; 4 CT 985-986.) Defense counsel did not

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[29] The prosecutor never presented any evidence of the alleged robbery of Morton.

know what Erickson was going to say until speaking to him prior to this hearing. (42 RT 13586, 13588.) The defense asked the court for time to investigate the incident if the court was inclined to admit Erickson's testimony. (42 RT 13588-13589.)

At this point the prosecutor said he would forgo presenting evidence of the chase, struggle and threat, and limit the inquiry to the statements appellant made about Morton. (42 RT 13590.) He offered two theories for admitting appellant's alleged statement that Morton made sexual advances toward him. First, he argued the falsity of the statement made it admissible to show consciousness of guilt. Second, he claimed it was evidence of a pattern of appellant minimizing responsibility for things he did, which was consistent with the prosecution theory that appellant was a sociopath. The prosecutor planned to offer psychiatric evidence of appellant's sociopathy to counter the anticipated defense claim that appellant was paranoid schizophrenic. (42 RT 13593-13595.)

Appellant continued to oppose use of the statement, noting that the LAPD report did not include any statement about Morton making advances toward appellant. (42 RT 13591.) In addition to claiming lack of notice, appellant objected that the prejudicial effect of the evidence outweighed its probative value under Evidence Code section 352. (42 RT 13593.)

Later that day, the court took Erickson's testimony outside the presence of the jury. Erickson's description of the stop, chase, arrest and statement were consistent with the prosecutor's initial offer of proof. Erickson also testified that his partner at the time, Aldon Summers, had heard appellant make the statements at issue here. (42 RT 13628-13629.) Summers was on disability retirement from the Highway Patrol. (42 RT 13628.) The defense again objected to Erickson's testimony and

specifically requested time to locate and speak with Officer Summers. (42 RT 13638.)

B. The Court's Ruling

The court acknowledged that "there is a surprise element in this" but determined that the police report from the LAPD which indicated that appellant made some statement to the CHP officer about the Morton incident gave the defense sufficient notice. (42 RT 13639.) It determined that there was no justification for excluding the testimony or requiring a "protracted delay" while the defense investigated. (42 RT 13639.)

The court elaborated as follows:

> . . . I think the defense is adequately protected by their ability to contact the other officer and call him, if they'll – if his recall contradicts this officer, and – and the passage of time, and things of that sort, and the lack of a full report are all things.
>
> The system doesn't care that everything is going to be perfect. All that can be assured the defense is that the People provide what they have and what's available to them at the earliest point as they are able, and I think that has occurred.
>
> And I think that this is permissible, so I am going to permit the officer to testify in the limited area of the statement. And I think the information he offers is very relevant to the state of mind of the defendant concerning this incident and his attitude toward this incident, how he feels about the violence he visited upon his sister-in-law. It all goes to character and the quality of the criminal conduct involved.

(42 RT 13640-13641.)

Defense counsel interjected that to the extent the evidence was admissible to show appellant's mental state or the presence or absence of any psychiatric disability, that should only be admissible, if at all, as rebuttal. (42 RT 13641.)

The court responded that "it's highly relevant evidence as to the defendant's criminality and state of mind and attitude toward the violent conduct upon his sister-in-law, whether or not any psychiatric issues surface in this case at all." (42 RT 13642.)

Erickson then testified before the jury that appellant was arrested for stealing a car by Highway Patrol officer Lance Erickson after a traffic stop on December 16, 1971, in Altadena, north of Los Angeles. (42 RT 13671-13672.) In the course of the detention, appellant told Erickson he thought he had killed his pregnant sister-in-law by stabbing her. (42 RT 13672-13673.) According to Erickson, appellant said that she "was coming on to him" and that they had an argument. (42 RT 13673-13674.) Morton was stabbed on December 7, 1971, nine days before Erickson stopped and arrested appellant. (Peo. Exh. 65 [plea documents]; 47 RT 15183-15184.) Erickson said he wrote a report on the incident which was later destroyed. (42 RT 13675.)

C. The Notice was Inadequate

Appellant did not receive proper notice of the purported statement that he stabbed Morton in response to her "coming on" to him. Section 190.3 states in relevant part: "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, *prior to trial.* Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation." (Emphasis added.) For the purpose of the notice requirement, prior to trial means "before the cause is called to trial." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1070; *People v.*

Salcido (2008) 44 Cal.4th 93, 157.)

After the trial begins, when the prosecutor learns of evidence that it wants to present, the defendant is entitled to prompt notice of the evidence and, if necessary, to a reasonable continuance to enable him or her to prepare to meet that evidence. (*People v. Jennings* (1988) 46 Cal.3d 963, 987; see *People v. Daniels* (1991) 52 Cal.3d 815, 879–880; *People v. Howard* (1988) 44 Cal.3d 375, 425.)

In either case, the sufficiency of the notice given must be assessed in light of the purpose of the notice requirement, which is to inform a defendant of the evidence against him so that he will have sufficient opportunity to prepare a defense to the aggravating evidence. (*People v. Howard* (2008) 42 Cal.4th 1000, 1016; *People v. Pride* (1992) 3 Cal.4th 195, 258; *People v. Blair* (2005) 36 Cal.4th 686, 751.) As to factor (b) evidence, notice is sufficient if the defendant has a reasonable opportunity to respond. (*People v. Rundle* (2008) 43 Cal.4th 76, 183; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1051.)

The trial court first erred in ruling that the LAPD report, which appellant apparently received before trial, provided appellant notice of appellant's entire statement to Erickson as it related to the Florence Morton incident. The prosecutor conceded that the report did not contain all the information Erickson provided prior to his testimony. Of particular importance, the report did not include the "coming on" statement. (42 RT 13590-13591.) The prosecutor admitted that he did not actually know about that statement until the night before Erickson testified. (42 RT 13582.) Similarly, the defense did not have actual knowledge of the statement until the day Erickson testified. (41 RT 13556.)

It is true that the prosecutor may not need to recite each and every

circumstantial fact of a prior criminal act or transaction to comply with section 190.3. (See, e.g., *People v. Howard* (1988) 44 Cal.3d 375, 424–425.) This is because notice that the prosecution will present evidence of a particular crime should alert the defense that all crimes committed as part of the same course of conduct will be offered, and thus substantially comply with section 190.3. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1163, fn. 33; *People v. Pride*, *supra,* 3 Cal.4th at p. 259.) But appellant's statement cannot be considered part of the course of conduct or transaction of the Morton assault nine days earlier.

The statement came after appellant was chased by the officers and arrested for grand theft, and arguably could be considered part of that course of conduct. But the theft was not admissible as factor (b) evidence and the prosecutor did not offer it in aggravation. (42 13590; 47 RT 15183-15184.) Appellant would have no reason to investigate this incident based on the LAPD report. Accordingly, as to the "coming on" statement, the prosecutor did not comply with the notice requirement in section 190.3 by providing that report to the defense.

The exception to section 190.3 for evidence obtained during trial is also inapplicable here because the trial court failed to grant appellant's request for a reasonable continuance to investigate. (See e.g., *People v. Jennings, supra,* 46 Cal.3d 963, 987.) Appellant received actual notice of the statement when defense counsel spoke with Erickson on August 27, shortly before Erickson testified. (42 RT 13586, 13588.) Counsel requested that the court give the defense time to investigate. (42 RT 13588.) After the prosecutor proposed narrowing the scope of Erickson's testimony, appellant again requested time to investigate. First, he pointed out that the nature of the "coming on" statement as changing the way he

would investigate the Morton incident. (42 RT 13592-13593.) Later, he requested the opportunity to locate and talk to Erickson's former partner, Aldon Summers, who also heard appellant's statements. He specifically requested time to interview Summers prior to Erickson testifying so that he could adequately test Erickson. (42 RT 13638.) Appellant was concerned about Erickson's ability to recall the event in question after 20 years had passed. (42 RT 13637-13638.)

But the court gave the defense no additional time at all to investigate, either before or after Erickson testified. Instead, it stated that the defense was adequately protected by its ability to contact Summers and call him as a witness. (42 RT 13640.) The court summed up its position: "The system doesn't care that everything is going to be perfect. All that can be assured the defense is that the People provide what they have and what's available to them at the earliest point as they are able, and I think that has occurred." (42 RT 13640.)

The failure to grant any time deprived appellant of sufficient notice of the aggravating evidence to prepare a defense to the aggravating evidence. (See *People v. Howard*, *supra*, 44 Cal.3d at p. 425; *People v. Pride*, *supra*, 3 Cal.4th at p. 258.)

The failure to provide adequate notice also denied appellant his federal rights to due process and a reliable penalty determination. (*Gardner v. Florida* (1977) 430 U.S. 349, 362 [denial of a defendant's opportunity to meaningfully deny or explain evidence used to procure a death sentence is a denial of due process]; *Williamson v. Reynolds* (E.D.Okla. 1995) 904 F.Supp. 1529, 1569 [giving only one-day notice of evidence in aggravation violated due process and was fundamental error]; cf. *Lankford v. Idaho* (1991) 500 U.S. 110, 127 [trial court's imposition of the death penalty

without notice that the death penalty was still at issue violates the Eighth and Fourteenth Amendments].)

"[F]undamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." (*Presnell v. Georgia* (1978) 439 U.S. 14, 16.) "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." (*Estelle v. Smith* (1981) 451 U.S. 454, 463.)

D. The Court Erred in Failing to Sustain Appellant's Evidentiary Objection to the Statement

Even if the notice given to appellant was sufficient, appellant's objection under Evidence Code section 352 to appellant's statement should have been sustained.

The prosecutor claimed that one basis for admissibility of the statement was that it was knowingly false and therefore revealed appellant's consciousness of guilt. Appellant does not dispute the long-established law that false statements made by a defendant at the time of arrest may be admissible, not for the truth of the statements, but to show consciousness of guilt. (See e.g., *People v. Kimble* (1988) 44 Cal.3d 480, 496.) Such statements, "though not conclusive of guilt, may strengthen inferences of guilt arising from other facts." (*People v. Amaya* (1941) 44 Cal.App.2d 656 at p. 659; see also *People v. Albertson* (1944) 23 Cal.2d 550, 582 (conc. opn. of Traynor, J.) [false statements to investigators regarded as assertions by the accused tending to show guilt].)

But even assuming the falsity of appellant's statement, the probative value of any consciousness of guilt evidence regarding the Morton incident

was virtually non-existent. First, the prosecutor was supposedly attempting to prove appellant had been convicted of a felony within the meaning of section 190.3, factor (c). He introduced People's Exhibit 65 which was documentary evidence of the conviction. Second, the purportedly-false statement was, according to Erickson, immediately preceded by appellant's clear admission that he stabbed Morton. (42 RT 13672-13674.) Third, appellant did not contest the fact of his conviction in the Morton incident. It is inconceivable that a reasonable juror, unconvinced by the documentary evidence of appellant's conviction and his direct admission of committing the act, would be persuaded that he had indeed been convicted when confronted with the additional, subsequent statement that Morton had "come on" to appellant, thereby raising an inference of appellant's consciousness of guilt. The statement therefore had no substantial probative value as evidence of consciousness of guilt.

The other basis of admissibility argued by the prosecutor – and clearly the one in which he was most interested – was that the statement was an example of appellant seeking to minimize his culpability for his misdeeds. The prosecutor claimed this was a characteristic of sociopaths, and that the evidence therefore supported his theory that appellant was a sociopath. The defense correctly pointed out that to the extent this might be admissible evidence in rebuttal, it was premature as evidence in the prosecution's case in chief. The statement simply was not admissible on its own as aggravating evidence. As discussed in Argument 6, a prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 48; *People v. Boyd* , *supra*, 38 Cal.3d at pp. 772-776.) Aggravating evidence is limited to the circumstances of the capital offense, other violent

criminal conduct by the defendant, and prior felony convictions (§ 190.3, factors (a), (b) and (c)). Evidence to attack a defense medical diagnosis that had not yet even been presented is not within these three factors. Therefore, the statement was not probative evidence on either theory offered by the prosecutor.

The court ruled that the statement was "highly relevant evidence as to the defendant's criminality and state of mind and attitude toward the violent conduct upon his sister-in-law, whether or not any psychiatric issues surface in this case at all." (42 RT 13642.) The court's reasoning was misguided. Evidence of a defendant's "criminality" may be demonstrated at the penalty phase through acts of criminal violence (factor b) and prior convictions (factor c). Factor (b) allows in evidence of violent criminality to show defendant's propensity for violence, while factor (c) allows in felony convictions to show that the capital offense "was the culmination of habitual criminality-that it was undeterred by the community's previous criminal sanctions." (*People v. Balderas, supra,* 41 Cal.3d at p. 202.), Actions or statements that do not rise to the level of crimes are not relevant under these factors. Appellant is dubious that the "coming on" statement is probative in any way of appellant's general "criminality;" under section 190.3 it is clearly irrelevant as evidence in aggravation in a capital penalty trial.

Similarly, appellant's "state of mind" and "attitude toward the violent conduct" about the Morton incident have no independent relevance as aggravating evidence. Furthermore, appellant's state of mind and attitude toward the Morton incident were not relevant as a circumstance of that incident itself. Although the prosecutor has some freedom to go outside the specific facts of the violent act and show the surrounding

circumstances to give "context" to the episode (*People v. Kirkpatrick, supra*, 7 Cal.4th at pp. 1013-1014), the statement at issue here was made a full nine days after the Morton incident. The court's finding that the evidence was highly probative aggravating evidence was therefore erroneous.

To the extent the alleged statement had any legitimate probative value, it was substantially outweighed by its prejudicial effect. As discussed in greater detail in section E, the prosecutor used this statement to bolster his theory that appellant was a dangerous sociopath rather than a troubled man with mental illness and abnormal brain activity. The statement should have been excluded under Evidence Code section 352.

E. The Error was Prejudicial

Appellant presented a powerful mitigation case showing that he had suffered from a childhood characterized by deprivation and hunger, and both physical and emotional abuse. He did not receive the help he needed, despite coming to the attention of juvenile authorities at an early age. As an adult, appellant suffered from mental illness and abnormal brain activity which severely affected his behavior. (See Statement of Facts, pp. 19-31.)

The prosecutor attempted to undercut the mental health component of appellant's case by characterizing appellant as a selfish sociopath. The dubious statement reported by Erickson served to illustrate and support this theory as sketched out by the two prosecution psychiatrists, Drs. Donald Apostle and Ronald Byledbal. Byledbal was appointed in 1979 to evaluate appellant's sanity pursuant to section 1026. (46 RT 14853.) Byledbal did not believe appellant was paranoid schizophrenic. Rather, he believed appellant had an antisocial personality disorder – that he was a sociopath. (See 46 RT 14867-14868.) Byledbal said characteristics of a sociopath

include lying and blaming others for their behavior. (46 RT 14869-14870.) Apostle also examined appellant regarding his sanity in 1979. Apostle concluded appellant had marked sociopathic tendencies. (46 RT 14905.) Such tendencies included not taking responsibilities for his actions and belittling his victims. (46 RT 14906.)

The prosecutor specifically relied on appellant's statement in his closing argument to make his case for death. He returned to the idea that appellant was a sociopath to undermine the defense evidence that appellant suffered from mental illness and brain abnormalities. He asked rhetorically, "How many excuses did he give for these crimes?" (48 RT 15275.) He went on to described the statement to Erickson as one such example. "To Mr. Erickson, who's the Highway Patrol officer who arrested him, after he attacked Florence Morton, she was coming on to me. Man to man she was coming on to me. That was by brother's wife. Pharaoh's wife, I had a right to do that. That's his excuse."

As appellant has noted previously, this was a close case. The first penalty retrial resulted in a hung jury and the jury in this retrial deliberated over the course of five court days. In such a close case, the error was prejudicial under either a state law or federal constitutional standard. There is a reasonable possibility (see *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448) that the jury would have reached a verdict more favorable to appellant if it had not heard that appellant claimed Morton made sexual advances toward him. Similarly, the prosecution cannot establish beyond a reasonable doubt that the error was not prejudicial. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The sentence and judgment of death must therefore be reversed.

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THE COURT ERRONEOUSLY INSTRUCTED THE JURORS THAT THEY COULD CONSIDER APPELLANT'S CONVICTION FOR ASSAULTING VERNA OLSEN AS AN AGGRAVATING FACTOR EVEN THOUGH THE CONVICTION WAS ENTERED AFTER THE CAPITAL CRIME OCCURRED

The trial court erred when it instructed the jury that it could consider as an aggravating factor appellant's conviction for assault with a deadly weapon on Verna Lynette Olsen. The prosecutor introduced evidence that appellant had suffered four felony convictions (Peo. Exhs. 60, 61, 65 & 76) and requested that the jury be instructed with a version of CALJIC No. 8.86 which listed each of those convictions (6 CT 1245-1246). Appellant objected to the inclusion of appellant's conviction for assaulting Verna Olsen with a deadly weapon on the grounds that it was not a prior conviction. The incident which led to the conviction occurred on December 2, 1978, but appellant was not convicted until August, 1979 (Peo. Exh. 76; 45 RT 14520), which was subsequent to the capital crime. The trial court, however, believed that the Olsen assault could count as a prior conviction under section 190.3, factor (c), even though the conviction was entered after the capital crime, because the incident upon which it was based occurred before the capital crime. (45 RT 14520.) The prosecutor concurred with this assessment. (45 RT 14520.) Accordingly, the court noted appellant's objection but instructed the jury as requested by the prosecutor.[30] (45 RT 14521, 47 RT 15183-15184; 6 CT 1245-1246.) Both

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[30] This is the instruction given by the court:

"Evidence has been introduced for the purpose of showing that the (continued...)

the court and the prosecutor were wrong.

In a California capital penalty trial, the prosecution's case for death is limited to evidence based on the statutory factors listed in section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) Not all felony convictions are evidence in aggravation under factor (c) of section 190.3. Specifically, under factor (c) the jury shall consider the "presence or absence of any *prior* felony conviction" suffered by the defendant. (§ 190.3, factor (c) ; emphasis added.) Although appellant suffered a felony conviction in the Olsen case, it was not a "prior" conviction within the meaning of the statute, and the jury should not have been instructed that it could consider it as a prior conviction.

The reference in section 190.3, factor (c) to prior convictions is limited to convictions entered before the capital crime was committed. (*People v. Balderas* (1985) 41 Cal.3d 144, 201-202.) A prior conviction

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[30] (...continued)
Defendant, Joe Edward Johnson, has been convicted of the following four felony crimes:

"One, the assault with intent to commit murder on Florence Morton on December 7, 1971, in Los Angeles County;

"Two, the battery on the person of another, Thomas Scott, on January 23rd, 1973, in Solano County;

"Three, the escape from State prison by force and violence on April 29th, 1974, in San Bernardino County;

"Four, the assault with a deadly weapon on Verna Lynette Olsen on December 2nd, 1978, in Sonoma County.

"Before you may consider any of such alleged crimes as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant was in fact convicted of such prior crimes. You may not consider any evidence of any other felony convictions as an aggravating circumstance pursuant to factor (c). (47 RT 15183-15184.)

under section 190.3 means that the conviction, not merely the act for which the defendant was convicted, occurred prior to the commission of the capital offense. (*People v. Kaurish* (1990) 52 Cal.3d 648, 701-702; see *People v. Morales* (1989) 48 Cal.3d 527, 567; *People v. Hayes* (1990) 52 Cal.3d 577, 637-638.) Because appellant's conviction in the Olsen incident was subsequent to the occurrence of the capital crime, the court erred both in overruling appellant's objection to the proposed instruction and in giving the instruction to the jury in its erroneous form.

Besides violating section 190.3, the instructional error violated appellant's rights to due process and to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. The discretion of a capital case penalty jury 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), and a death sentence must be tailored to the defendant's personal responsibility and moral guilt (*Enmund v. Florida* (1982) 458 U.S. 782, 801). The rationale for allowing a felony conviction as an aggravating factor is that it shows the defendant was not deterred from committing the capital offense by prior successful felony prosecutions. (*People v. Balderas*, *supra*, 41 Cal.3d at p. 203.) Under the logic of the statute, a defendant who has not been deterred by a prior felony conviction from committing a murder is more morally guilty than if he committed the same crime without the prior conviction. But that rationale has no application here because the appellant was not successfully prosecuted until after the Cavallo homicide. Evidence of the conviction in the Olsen incident as an aggravating factor therefore injected an element of arbitrariness and capriciousness into the penalty phase that violated appellant's constitutional rights. Similarly, it allowed the jury to rely

unconstitutionally on an exaggerated sense of appellant's moral guilt in determining whether to impose a life sentence or death. Even if the instructional error was only one of state law, the infringement of appellant's state law liberty interest violated his right to due process under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The error was prejudicial under the facts of this case. Factors (b) and (c) serve distinct purposes as aggravating factors. Factor (b) allows in evidence of violent criminality to show defendant's propensity for violence. (*People v. Balderas*, *supra*, 41 Cal.3d at p. 203.) As noted above, factor (c) allows evidence of prior convictions because it tends to show that the capital offense was the culmination of habitual criminality that was "undeterred by the community's previous criminal sanctions." (*Ibid.*) One crime, however, can be the basis for aggravating evidence under both factors (b) and (c). (*People v. Melton* (1988) 44 Cal.3d 713, 764.) As a result, when jurors have received evidence of a violent crime under factor (b) and have also erroneously been allowed to consider under factor (c) a conviction which occurred after the capital offense, this Court has repeatedly determined that the additional fact that defendant was convicted of that offense adds very little to the total picture considered by the jury. (See e.g., *People v. Hayes* (1990) 52 Cal.3d 577, 637 -638 [finding no prejudice]; *People v. Morales* (1989) 48 Cal.3d 527, 567 [same].)

This case is different. At the prosecutor's request, the jury was instructed not to consider any criminal acts under factor (b) except the five which were specifically listed, and which did not include the Olsen assault.

(47 RT 15184-15186; see 6 CT 1247-1249.)[31] Therefore the jury was only able to consider evidence of the Olsen incident under the erroneous factor (c) instruction. Had the erroneous instruction on the use of the Olsen conviction not been given, that evidence could not have been used at all as aggravation.

It is reasonably possible (*People v. Brown* (1988) 46 Cal.3d 432,

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[31] This is the instruction given on the factor (b) evidence:

"Now we're going to be talking about factor (b).

"'Evidence has been introduced for the purpose of showing that the defendant Joe Edward Johnson has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence which is the description given for factor (b) evidence:

"'First, the forcible rape and rape by threat of Mary Siroky in Santa Rosa, California, on July 28, 1979;

"'The robbery of Mary Siroky in Santa Rosa, California, on July 28th, 1979;

"'The assault with a deadly weapon, a firearm, upon Mary Siroky in Santa Rosa, California, July 28th, 1979;

"'Four, the attempt to prevent Florence Morton from testifying against the defendant in 1972.

"'Before each juror may consider any of such criminal acts as an aggravating circumstance in this case, that juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal acts. It is not necessary for all jurors to agree. If a juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose. *You may not consider any evidence of any other criminal acts as an aggravating circumstance pursuant to factor (b).*

"The factor (b) crimes and evidence of crime that you can consider under factor (b) are the four that I have read to you.

"'Each of the crimes is a distinct offense. Each of you must decide each crime separately. The defendant may be found guilty or not guilty of any or all of the crimes charged.'" (47 RT 15184-15186; emphasis added.)

444-446) that but for the erroneous instruction, the jury would have returned a verdict more favorable to appellant. As to the federal constitutional error, the state cannot establish beyond a reasonable doubt that the error had no effect on the verdict. (*Chapman v. California*, *supra*, 368 U.S. at p. 24.) The attacks on Siroky, Morton and Olsen were key pieces of the case in aggravation, and the prosecutor brought out extensive dramatic evidence of the circumstances of the Olsen incident through eyewitness testimony. Had the jury not considered this evidence, a life verdict was a distinct possibility. The verdict and judgment of death must therefore be set aside.

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THE COURT'S LOSS OF DEFENDANT'S EXHIBIT N DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR PENALTY TRIAL

The trial court lost an important piece of appellant's mitigation evidence after it had been admitted. Defendant's Exhibit N ("Exhibit N") was a detailed letter written in 1965 by a social worker in the juvenile court system that described appellant as a mentally ill child who should have been given top priority in being hospitalized and treated. Although the letter was admitted into evidence, unbeknownst to the court and the parties, it was removed after being used during the testimony of another witness, and not returned until after the trial was over and a verdict rendered. Apparently one of the witnesses, Dr. Richard Komisaruk, had been shown Exhibit N while testifying, and left court without returning it to the clerk. (48 RT 15392.) In an unfortunate turn of events, Komisaruk died shortly after returning home to Michigan. (47 RT 15144; 48 RT 15401.)

The court told the jurors, when they retired to deliberate, that it was sending into the jury room all the exhibits. But in fact Exhibit N was not provided to the jurors, and the error was not discovered until after the death verdict had been rendered. Defense counsel was ultimately able to recover the letter from Komisaruk's family (48 RT 15392), and it was returned to the court on October 28, 1992, at the time the new trial motion was heard (6 CT 1362).

Appellant moved for a new trial based in part on the mistaken failure to provide the jury with Exhibit N during its deliberations. (6 CT 1333-1336.) The trial court, while acknowledging error, found it nonprejudicial and denied appellant's motion. (48 RT 15401.) The court's ruling was

incorrect; a new trial should have been granted.

A. The Letter Was an Important Piece of Mitigating Evidence

Appellant must be permitted to offer as mitigation for the jury's consideration any aspect of the defendant's character as a basis for a sentence less than death. (*Lockett v. Ohio* (1978) 438 US. 586, 604-605; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-117.) A significant part of appellant's penalty phase defense was showing that appellant was the victim of a childhood marred by violence and deprivation. He came to the attention of the juvenile authorities in Michigan at an early age but, despite showing clear signs of mental illness that demanded treatment, was denied appropriate treatment and was put in placements that were not suited to his needs. Exhibit N was an important part of this story.

Appellant was a ward of the Wayne County juvenile court in Detroit, Michigan, when he was a young adolescent. Defense witness Kenneth Peterson was a social worker in the Wayne County juvenile system while appellant was a ward there. According to Peterson, among the problems in the juvenile system at that time was that many children who had been diagnosed with psychiatric or behavioral problems were not able to get the proper treatment. (44 RT 14349.) Children would be ordered committed to one of the two state psychiatric hospitals for treatment, but the hospitals would not accept them immediately. (44 RT 14350.) The delay in getting admitted to the hospitals could be a year or more. (44 RT 14350.) As a result, there were children diagnosed as mentally ill who remained in the Youth Home – the local juvenile hall – without getting the treatment they needed.

Exhibit N is a letter written by Peterson in 1965 which describes how

appellant was one of the unfortunate children diagnosed as mentally ill who were not getting the treatment they needed. In the letter, Peterson urged the Chief Social Worker at Ypsilanti State Hospital to accept appellant. (44 RT 14352.)

Richard Komisaruk was a psychiatrist who worked for the Wayne County juvenile court in the 1960's. (44 RT 14378.) He too testified to the lengthy wait for mentally ill juveniles to be admitted to the state hospitals for treatment, and to the fact that these children were essentially warehoused in local facilities until admission. (44 RT 14385.) Komisaruk also did a statistical study which showed that white children were admitted to the state hospitals at a disproportionately higher rate than were black children. (44 RT 14386.)

This is the letter:

Mr. Dale Rice, Supervisor
Social Service Unit
York Woods School
Ypsilanti State Hospital
Ypsilanti, Michigan

Re: Joseph Johnson
Clinic #23817

Dear Mr. Rice:

We are very concerned about your plans for Joe. As you know, he was seen at your hospital for a pre-admission interview on December 15, 1964, and accepted for admission when a bed became available. Knowing the difficulties that you are facing, we have continued to detain him in the Youth Home and have hoped that a bed would become available for him soon. However, Mrs. DeSantis of our staff has informed me that you indicated to her in a recent telephone conversation that you have some question about admitting him. Joe has been in the Youth Home since March 18, 1964, and has been committed since August 5, 1964. It is

therefore of great concern to us if there is any uncertainty about the plan for him.

Our summary letter on mentally ill children dated February 16, 1965, placed Joe on our list of children who should be given top priority. Among the statements made about him in that letter are there: "He has been in the Youth Home since March 18, 1964, where he continues to have difficulty with the other boys. Despite his constant aggitating [sic] and irritating behavior, he does respond to controls." "During his clinical evaluation he was hyperproductive, expressed a great deal of paranoid thinking, spoke of having auditory hallucinations on occasions when he is involved in delinquent activities, and said he believed his mother has special powers to predict his future. It is our opinion that he needs the control of the Youth Home until hospitalized. Also, his mother has used little discipline with him, overprotects him, blames his behavior on other people and opposes his re-commitment." At the present time, he appears to be making a satisfactory adjustment in the Youth Home; however, we do not know what would happen if he or his mother had reason to question the present plan.

I am calling this case to your attention personally because it is another example of the problem we are both facing, – and about which we are both worried, – that of the mentally ill child who is placed in "cold storage" in quarters not designed for this purpose without adequate psychiatric treatment until a bed becomes available in a mental hospital. I know that we will have your assistance in working out a definite plan for Joe at the earliest opportunity.

Sincerely,

Kenneth A. Peterson, ACSW
Associate Administrative Director
Clinic for Child Study

The letter was documentary evidence that appellant was one of the children personally affected by the state's systemic failure to provide proper care for children who were court wards. It also served, as the trial court acknowledged (48 RT 15397), to corroborate the testimony of Peterson and Komisaruk. Both Peterson and Komisaruk were testifying as to decades-old events. Peterson had never met appellant personally, and Komisaruk had

only a limited recollection of him. (44 RT 14356, 14392.) Furthermore, during his argument to the jury, the prosecutor accused Komisaruk of bias. (48 RT 15278-15279.) Exhibit N was a document drafted contemporaneously with the events it concerned, and provided credible evidence of those events, corroboration of the testifying witnesses, and evidence countering the prosecutor's claim of bias.

B. The Failure of the Court to Provide the Jury with Exhibit N Was Error

Exhibit N was admitted into evidence (44 RT 14376), but the jury never had a chance to consider the powerful mitigation in the letter because it was lost during trial, and before the court sent the exhibits to the jury during deliberations.

The jurors were given the standard proper instruction that they were to determine the facts from the evidence received and not from any other source. (47 RT 15157-15158, 15160.) Shortly before the jurors retired, the court told them that the exhibits would soon be brought to them so they would have access to them. (48 RT 15345.) Following these instructions, the jury would understand that the exhibits that were brought to them were the only ones they could consider in deciding appellant's sentence. As discussed above, Exhibit N was not among the exhibits given to the jurors and it therefore could not have been considered by them.

The trial court acknowledged the error in failing to provide the jury with Exhibit N during deliberations, and that as a result of this failure the jury did not have "the opportunity to study, weigh or deliberate upon the importance of" that document. (48 RT 15397.)

Just as it is clear that appellant has the right to present mitigating evidence about himself as a basis for a life sentence rather than death

(*Lockett v. Ohio, supra*, 438 U.S. at p. 604) it is also clear that the sentencer may not be precluded from considering any such relevant mitigating evidence. (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 114; *Skipper v. South Carolina* (1986) 476 U.S. 1, 3-4.) Furthermore, it is not enough that a defendant be allowed to present mitigation. The Eighth Amendment requires that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for not imposing the death penalty. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 223, 252-254; *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-294.) In *Abdul-Kabir*, the jury's ability to give meaningful consideration and effect to certain mitigation was undermined by the instructions and the prosecutor's argument. Here, it was the court's failure to give the jurors the mitigating exhibit, combined with its instruction informing them that they were being provided all the penalty phase exhibits in evidence, that deprived the jury of the ability to consider meaningfully the mitigating evidence in Exhibit N.

C. The Error Was Prejudicial

In addressing at the new trial motion whether the loss of Exhibit N was prejudicial, the court recognized that the exhibit was important to the defense for three reasons:It was a substantial piece of mitigating evidence; it corroborated the testimony of its author, Kenneth Peterson, who was a defense witness; and it supported the testimony of a second defense witness, Dr. Komisaruk. (48 RT 15397.)

Nevertheless, the court found that the fact that the letter was not sent into the jury room was not prejudicial to appellant. The court believed that much of the sympathetic information that was in the letter was presented through the testimonies of Komisaruk and Peterson. (48 RT 15402.) This

conclusion was apparently based on the prosecutor's contention that during his cross-examination of Peterson, the jury heard a large portion of the letter when he had the witness read aloud from it. (RT 15400.) In fact, the prosecutor had Peterson read only a portion of the second paragraph of the letter. That portion focused first on appellant's difficulty fitting in with the other boys in juvenile hall, his "hyperproductive" behavior, and his paranoid and delusional thinking. It also included the statement that appellant needed the control of the Youth Home until he could be hospitalized. Thus, the prosecutor's cross-examination did not ameliorate the prejudice suffered by appellant from the loss of the exhibit. While the letter overall supported appellant's mitigation case that he had suffered from mental illness from an early age and that the state failed to provide the kind of treatment that could have changed appellant's life for the better, the prosecutor simply brought out the selected details which might support his theory that appellant had an antisocial personality disorder. A juror remembering that portion of the cross-examination without the letter as a whole would not be able to give meaningful consideration and effect to appellant's entire mitigation case.

Furthermore, whatever mitigating effect those portions of the letter might have had on the jury was dissipated by the error in failing to provide the letter to the jurors with the other exhibits. The jurors were instructed that they were only to consider evidence that was admitted. The court told them that all the exhibits that were admitted into evidence were being sent into the jury room with them. Because the letter was not one of the exhibits the jury received, the only conclusion the jury could reach was that they were required to disregard the portions of the letter they heard in testimony.

The court erred in its determination that the loss of the exhibit was

not prejudicial. The failure to give the jury Exhibit N, combined with the court having told the jury that it was sending them all the admitted exhibits, and instructing them not to consider anything other than evidence that had been admitted, had the same effect as if the court had improperly refused to allow the exhibit into evidence in the first place.

The erroneous exclusion of mitigating evidence in a capital case deprives a defendant of his rights to due process, a fair trial and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments as well as under the California Constitution and state statutory law. Appellant's death sentence must be set aside unless the prosecution can establish beyond a reasonable doubt that the error did not affect the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under California law, the sentence must be reversed if there is a reasonable possibility that the error affected the judgment. (*People v. Brown* (1988) 46 Cal.3d 432, 446-449.) Under either standard, the prosecution cannot meet its burden.

The case was close. The first penalty retrial resulted in a mistrial and the second retrial jury deliberated over the course of five days before reaching a decision. (6 CT 1324-1330.) Evidence that a capital defendant suffered from a significant mental illness can be powerful mitigation that can determine the outcome of a capital trial. (*Gray v. Branker* (4th Cir. 2008) 529 F.3d 220, 235; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1559, 1564-65; see also, § 190.3, factor (h); *People v. Whitt II* (1990) 51 Cal.3d 620, 655 [mental illness evidence can only be mitigating].) The mitigating effect is even greater when, as in this case, the state knows of the mental illness in a child which is its ward, and fails to treat the condition effectively. (See *People v. Mickle* (1991) 54 Cal.3d 140, 193-194 [error to

preclude defendant from questioning experts re failure of hospitals and prisons to treat his psychological problems]; *Correll v. Ryan* (9th Cir. 2008) 539 F.3d 938, 954 [improper treatment at state institutions recognized as mitigating evidence].) Had the jury been allowed to review the contents of Exhibit N there is a reasonable possibility the jury would have reached a verdict of life rather than death.

Accordingly, the judgment of death must be reversed.

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THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL OF THE PENALTY JUDGMENT

There were serious constitutional errors in the second retrial of appellant's penalty phase trial, including both evidentiary and instructional error. As set forth in the preceding arguments, each error was sufficiently prejudicial to warrant reversal of appellant's penalty judgment. Even if one or more of the errors were not sufficiently prejudicial individually to warrant reversal of the death judgment, cumulatively they are.

This Court must assess the combined effect of all the errors, because the jury's consideration of all the penalty factors results in a single general verdict of death or life without the possibility of parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

A. Prejudicial Federal Constitutional Errors

Penalty phase errors generally implicate a defendant's federal constitutional rights. For example, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [Eighth Amendment]; *Zant v. Stephens* (1983) 462 U.S. 862, 885 [Fourteenth Amendment due process].)

The Due Process Clause of the Fourteenth Amendment also protects

a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. *(Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of *life* without due process.

Moreover, a violation of the *Hicks* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against arbitrary deprivations of liberty or life, so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. *(Parker v. Dugger* (1991) 498 U.S. 308, 321, citing other cases.)

Separate from any consideration of state law, the Fourteenth Amendment Due Process Clause is also violated by errors which taint the fairness of the trial and present an "unacceptable risk . . . of impermissible factors coming into play." (*Estelle v. Williams* (1976) 425 U.S. 501, 505; accord, *Holbrook v. Flynn* (1986) 475 U.S. 560, 570; *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, 830.)

The test for prejudice from federal constitutional errors is familiar: reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; see generally *Yates v. Evatt* (1991) 500 U.S. 391, 402-405; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 754 [state appellate courts are not required to consider the possibility that penalty phase error may be harmless, and harmless-error analysis will in some cases be "extremely speculative or impossible"].)

> "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been

> rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original.)

When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors, constitutional and otherwise, was harmless. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

B. Prejudicial Errors Under State Law

The errors in this case also compel reversal of the penalty on the basis of the state-law prejudice test for non-constitutional errors at penalty phase.

In *People v. Brown* (1988) 46 Cal.3d 432, 446-448, this Court clarified that the standard for penalty phase error is the "reasonable possibility" harmless error standard. This is an extremely high standard under which it is very difficult for the prosecution to establish that any error, let alone a combination of errors, was harmless with respect to the penalty verdict. It is a "more exacting standard" than the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, used for assessing state law guilt phase error. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.)

Given the nature of the decision entrusted to the jury at the penalty phase, the standard for assessing prejudice could not be otherwise. The decision at the penalty phase is different not in degree but in kind from the decision whether or not the defendant has been proven guilty. This difference significantly reduces the basis for a reasoned appellate judgment about the effect of errors. "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 330.) "Individual jurors

bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" *(McCleskey v. Kemp* (1987) 481 U.S. 279, 311, internal citation omitted.) At the same time the need for reliability is heightened, because of the consequences of a judgment of death.

In assessing prejudice, errors must be viewed through a juror's eyes, not those of the Court. A reasonable possibility that an error may have affected any single juror's view of the case compels reversal. (See *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669; *Mak v. Blodgett, supra*, 970 F.2d at pp. 620-621.) The decision to be made at the penalty phase requires the personal moral judgment of each juror. *(People v. Brown (Albert)* (1985) 40 Cal.3d 512, 541.) The United States Supreme Court's decisions in *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443, and *Mills v. Maryland* (1988) 486 U.S. 367, are predicated on the fact that different jurors will assign different weights to the same evidence. (See also *Stone v. United States* (6th Cir. 1940) 113 F.2d 70, 77 ["If a single juror is improperly influenced, the verdict is as unfair as if all were."], quoted in *United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.)

Intrusion of improper considerations into a discretionary sentencing decision usually requires reversal of the sentence, even in noncapital sentencing by a judge. (E.g., *People v. Morton* (1953) 41 Cal.2d 536, 545; see also *United States v. Tucker* (1972) 404 U.S. 443, 447-449; *People v. Brown* (1980) 110 Cal.App.3d 24, 41.) These cases recognize that determining whether improper considerations affect the sentencing decision is impossible and the resulting uncertainty compels reversal. Therefore, a conclusion of harmlessness is far less appropriate, and less likely, in a capital case in which the jury imposes sentence.

C. The Errors In This Case Were Prejudicial under Either the State of Federal Standard

The prosecution's case in aggravation was made substantially stronger because of the evidentiary and instructional errors described in Arguments 4 through 8. The evidence of the brutal crimes against Mary Siroky and the hearsay statements of the homicide victim Aldo Cavallo provided aggravating evidence under section 190.3, factors (a) and (b) and served to undercut appellant's lingering doubt case. Evidence of appellant's purported lack of remorse as shown by his failure to apologize to Florence Morton, and Lance Erickson's testimony regarding the statement he recalled appellant making about Morton, enhanced the prosecutor's factor (b) evidence. The court's instruction permitting the jury to consider appellant's conviction in the Verna Olsen incident, even though the conviction was entered after the capital crime, strengthened the prosecutor's aggravating evidence under factor (c). Furthermore, the court's error failing to provide the jury with Defense Exhibit N undercut appellant's case in mitigation.

This was a close case at the penalty phase. There was only a single homicide. Appellant presented a lengthy penalty defense focusing on lingering doubt, the affects of appellant's childhood and background on his behavior, the failure of the juvenile court system to help appellant during his youth, appellant's mental illness and abnormal brain activity, and his positive adjustment to prison. (See Statement of Facts, pp. 19-31.) The first penalty retrial ended in a mistrial after the jury could not reach a unanimous decision. (4 CT 984.) The second jury did not reach a verdict until the fifth day of deliberations. (6 CT 1331.)

The numerous penalty phase errors which occurred during appellant's trial cannot be considered harmless. Their cumulative effect was prejudicial to appellant under either the reasonable possibility test (*People v. Brown*, *supra*, 46 Cal.3d at p. 466) or the beyond a reasonable doubt test (*Chapman v. California*, *supra*, 386 U.S. at p. 24) and requires reversal of the penalty judgment.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased 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 in order to urge reconsideration and to preserve these claims for federal review. 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, Factor (a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 47 RT 15177.) 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 method of killing, the motive for the killing, the time of the killing, and the location of the killing. For example, in the present case the prosecutor argued that appellant could have walked away from the burglary without killing Cavallo, and claimed that this showed appellant was arrogant and contemptuous of others. (47 RT 15258.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["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, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits 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].)

Appellant is aware that the 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

California law 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). (*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"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (47 RT 15157-15201.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 536 U.S. 584, 604, now 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: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 47 RT 15200-15201.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi,*

Blakely, and *Cunningham v. California* (2007) 549 U.S. 270 require that each of these findings be made beyond a reasonable doubt. Appellant specifically requested that the jury be instructed that "Further, each fact which is essential to complete a set of circumstances necessary to establish the presence of such aggravating factor must be proved beyond a reasonable doubt." (6 CT 1317.) 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; 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* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The 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 the Court to reconsider its holding in *Prieto* 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 that death is the appropriate sentence. This court has previously rejected appellant's claim that either the Due Process Clause or the Eighth

Amendment 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, or the Jury Should Have Been Instructed That There Was No Burden of Proof

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 appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for 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 State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

The versions of CALJIC Nos. 8.85 and 8.88 given here (47 RT 15157-15201, 15198-15201), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart*

(2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings.

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence 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* (1976) 428 U.S. 280, 305.) Nonetheless, 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, supra*. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and applicaiton

of the *Ring* 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., § 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'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. (CALJIC No. 8.87; 47 RT 15185.) 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* (2001) 25 Cal.4th 543, 584-585.) Here, the assault on Mary Siroky was a key piece of the prosecutor's case for death. Because the evidence of the identity of the perpetrator

The United States Supreme Court's 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 very claim.

(*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances, that it warrants death instead of life without parole." (47 RT 15200-15201.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death

can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. 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; *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, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant 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.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also 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.

8. The Penalty Jury Should Be 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. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

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, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

C. 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* (1976) 428 U.S. 153, 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.

D. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 47 RT 15178) 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 argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury 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. (45 RT 15157-15201.) 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 CALJIC No. 8.85 – 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 jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors 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 a trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

E. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes 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 the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

For all these reasons, the sentence and judgment of death should be reversed.

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THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment right to be protected from the arbitrary and capricious imposition of capital punishment, and also violates his Fourteenth Amendment right to equal protection of the law.

A. The Lack of Intercase Proportionality Review Violates the Eighth Amendment Protection Against the Arbitrary and Capricious Imposition of the Death Penalty

The United States Supreme Court has noted favorably that proportionality review is one method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States

Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.*, at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

Justice Blackmun has observed, however, that the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, 104 S.Ct., at 881, quoting *Harris v. Pulley* (9th Cir. 1988) 692 F.2d 1189, 1194, 1195. As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come to reevaluate the continued validity of the analysis in *Pulley v. Harris* in light of the fact that the California statutory scheme fails to limit capital punishment to the "most atrocious" (see *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.)) murders. Comparative case review is the most rational – if not the only –

effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[32]

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme

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[32] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990)[repealed prospectively by L. 2009, Ch. 11, § 5, eff. July 1, 2009]; N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. (See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in section 190.3, subdivision (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury nearly unrestricted freedom in making the death-sentencing decision. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) .)

California's far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage combine to infuse its capital sentencing scheme with flagrant arbitrariness. Section 190.2 immunizes few kinds of first degree murderers from death eligibility, and section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed elsewhere in the brief. (See, e.g., Argument 11.) Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

B. The Lack of Intercase Proportionality Review Violates Appellant's Right to Equal Protection of the Law

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731-732.) Despite this directive, California provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws. (U.S. Const., 14th Amend.)

California's Determinate Sentencing Law (DSL) has long required intercase proportionality review for noncapital cases. (E.g., § 1170, subd. (d).) The Legislature thus provided a substantial benefit for all prisoners sentenced under the DSL – a comprehensive and detailed disparate sentence review. (See generally *In re Martin* (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in practice].) However, persons sentenced to the most extreme penalty – death – are unique among convicted felons in that they are not accorded this review. This distinction is irrational.

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital defendants, but this Court rejected the argument. The reasoning supporting *Allen*, however, was flawed.

The *Allen* court initially distinguished death judgments by pointing

out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.) Although the observation may be true, it ignores a more significant point, i.e., the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur in noncapital cases, but not to provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (§ 190.2) and sentencing factors (§ 190.3), and a court of statewide jurisdiction is well situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (See *Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.) But juries – like trial courts and counsel – are not immune from error, and they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is

subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (§ 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme.

The second reason offered by the *Allen* Court for rejecting the defendant's equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen, supra*, 42 Cal. 3d at 1287, italics added.) The idea that the disparity between life and death is a "narrow" one, however, is contrary to established constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra*, 477 U.S. at p. 411, internal citation omitted.) "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for – rather than against – requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as supporting the different treatment of persons sentenced to death. (See *People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction, however, is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (Compare § 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 421 and 423.) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, the legislature created the disparate review mechanism discussed above.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (See *Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause prevents violations of rights guaranteed to the people by state governments. (See *Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The arbitrary and unequal treatment of convicted felons who are condemned to death cannot be justified, as this Court ruled in *Allen*, by the fact that a death sentence reflects community standards. Theoretically, all criminal sentences authorized by the Legislature – whether imposed by judges or juries – represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all other convicted felons in this state – the type

of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review violates appellant's Fourteenth Amendment right to equal protection and requires reversal of his death sentence

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APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE THE DEATH PENALTY VIOLATES INTERNATIONAL LAW

The California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the death penalty here is invalid. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant's sentence violates the Eighth Amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, pp. 389-390 [dis. opn. of Brennan, J.].)

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.)

Consequently, this Court is bound by the ICCPR.[33]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. This is especially so in the present case where the jury sentenced appellant to death over 18 years ago. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

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[33] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

Appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California (*People v. Ghent* (1987) 43 Cal.3d 739, pp. 778-779; see also 43 Cal.3d at pp. 780-781, (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511), but submits that the issue should be revisited in light of the growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero*, *supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).)

Accordingly, this Court should find that California's death penalty violates international law and reverse appellant's sentence of death.

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THE TRIAL COURT ERRONEOUSLY RELIED ON FACTS UNAVAILABLE TO THE JURY WHEN IT DENIED APPELLANT'S APPLICATION TO MODIFY THE DEATH VERDICT

The trial court denied appellant's application under section 190.4, subdivision (e) to modify the death verdict. The court erred, however, by basing its decision in substantial part on aggravating facts that were not properly before it. The error requires reversal of the judgment of death and a remand for a new hearing on the application to modify the verdict.

In every case in which the jury has returned a death verdict, the defendant is deemed to have made an application for modification of the verdict. (§190.4, subd. (e).) The court must review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances under section 190.3, and determine whether the verdict was contrary to the law or evidence. (*Ibid.*) The trial court's duty is to make "an independent determination whether imposition of the death penalty is proper in light of the relevant evidence and the applicable law." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 793.) In making this ruling, the court is limited to consideration of the evidence that was before the penalty jury. (*People v. Visciotti* (1992) 2 Cal.4th 1, 78; *People v. Lewis* (1990) 50 Cal.3d 262, 287; see *People v. Avena* (1996) 13 Cal.4th 394, 448; *People* v. *Williams* (1988) 45 Cal.3d 1268, 1329.)

In stating its reasons for affirming the jury's verdict and denying appellant's motion, the court first acknowledged that the environment appellant experienced when he was young deserved consideration as mitigation. (48 RT 15411.) The court next found that the aggravating factors were the acts of "gross violence" that attended some of appellant's

crimes. (48 RT 15411.) The court went on to specify as examples of this violence the rape and assault on Florence Morton, the knife attack on Lynette Olsen, and the attack on Mary Siroky. It believed that but for good fortune, each of these women might have died from the injuries they received. (48 RT 15412, 15413.) Regarding the Morton incident specifically, the court commented on the evidence as follows: ". . . the rape and the assault with intent to commit murder on Florence Morton was an outrageous crime. Here is a woman who befriended him. For her efforts she is brutally attacked and but for the intervention and interruption of her husband, it's almost certain she would not have survived. Then it [sic] broke the knife while attacking her and having stabbed her several times and was returning, proceeded to locate another knife and was returning to finish the job when he was interrupted." (48 RT 15411-15412.)

The court also pointed out that at the time of the Cavallo homicide appellant was out on bail and awaiting trial for the Olsen assault, and that it had reviewed a letter written by appellant to the trial court in the Olsen case seeking release on bail and asserting his innocence. (48 RT 15412.) The court also made passing mention that there was some evidence of appellant committing violence in prison. (48 RT 15412.) The court summed up the aggravation: "So the violence is so extreme. And the continuity of that violence over a period of time is so extreme." (48 RT 15413.) It concluded that the aggravating factors substantially outweighed the mitigation. (48 RT 15414.)

This portrait of extreme violence, however, was heavily influenced by information and evidence that the court should not have considered. First, there was no evidence before the jury that appellant raped Florence

Morton. The prosecutor's notice of evidence in aggravation for the penalty retrial included an allegation that in 1971 appellant assaulted Florence Morton with the intent to murder, and raped her. (4 CT 988-1000.) Appellant moved to exclude evidence of the rape (4 CT 1138.72-1139), and the court, after extensive litigation and appellant's vigorous denial that he raped Morton, ultimately ruled in appellant's favor. (32 RT 11017-11019.) Consistent with that ruling, no evidence of the alleged rape was introduced at the trial. Nevertheless, in ruling on the motion to modify the verdict, the court counted the Morton incident as a significant aggravating factor, stating that "the rape and assault with intent to commit murder on Florence Morton was an outrageous crime." (48 RT 15411.)

Second, the letter written by appellant to the trial judge in the Olsen case was never introduced into evidence and its contents were never put before the jury. The court therefore could not properly rely on appellant's successful plea for release on bail in the Olsen case to deny appellant's motion to modify the sentence of death.

Finally, the court improperly considered the underlying facts of the Olsen assault and the stabbing of Morton in denying the motion. Unlike the alleged Morton rape and the letter discussed above, evidence that appellant attacked Olsen and stabbed Morton was admitted at the penalty retrial. But the prosecutor did not use these incidents as evidence of other acts of violence under section 190.3, factor (b), and the court, at the prosecutor's request, instructed the jury that its consideration of factor (b) evidence was limited to five acts of violence (covering three separate incidents) which did not include the Olsen or Morton assaults. (47 RT 15184-15185; 6 CT 1293-1294.) The jury therefore had no way legally to

consider the circumstances of the Olsen and Morton assaults as evidence supporting the finding of an aggravating factor. (See Argument 8.) Accordingly, the trial court considering the motion to modify could not properly rely on that evidence either. The court was free to consider the fact of appellant's conviction in connection with those two incidents under section 190.3, factor (c), but not the details of the violent acts that led to those convictions. The court's reasoning and decision therefore violated section 190.4, subdivision (e) as well as appellant's state constitutional rights to due process and a fair penalty determination.

These errors also deprived appellant of his federal constitutional rights under the Eighth and Fourteenth Amendments. This Court has indicated that the failure by the trial court to conduct a proper review of a death verdict could render the verdict unconstitutional. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 793; see *People v. Frierson* (1979) 25 Cal.3d 142, 178-179 [characterizing the court's automatic review procedure as an integral part of the state's procedure complying with federal constitutional requirements].) Even if there was no independent federal constitutional error, the state statutory law requiring the trial court's review created "a substantial and legitimate expectation" that a defendant will not be deprived of his life or liberty in violation of that law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

Although appellant did not object to the court's errors, the issue is properly before this Court on appeal. Today, the general rule is that an objection is necessary to preserve for appeal a trial court's errors in its ruling under section 190.4, subdivision (e). (See *People v. Hill* (1992) 3

Cal.4th 959, 193 [establishing the requirement for an objection].) But this Court has also held that prior to *Hill* becoming final, defense counsel did not have adequate notice that they were required to object at the hearing to preserve challenges on appeal. (*People v. Riel* (2000) 22 Cal.4th 1153, 1220.) *Hill* was issued on November 19, 1992 (see *People v. Hill*, *supra*, 3 Cal.4th at p. 959); the trial court in the present case denied appellant's automatic motion to modify the judgment on October 28, 1992. (6 CT 1362.) The issue therefore has not been forfeited.

Where the trial court has relied on information that was not properly before it in making its decision on the motion to modify the verdict, the reviewing court must determine whether the court may have been improperly influenced by that information. (*People v. Coddington* (2000) 23 Cal.4th 529, 645; *People v. Williams* (1997) 16 Cal.4th 153, 282.) The judgment must be set aside if there is a reasonable possibility that the court would have reached a decision more favorable to appellant in the absence of the error. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1201.)

Here, there is such a reasonable possibility. The prosecutor made his case for death based on the circumstances of the crime and appellant's criminal history – both uncharged acts of violence and his felony convictions. (40 RT 13236 [prosecutor's opening statement at the penalty retrial].) The court's statement of reasons for deciding that death was the proper verdict included little or nothing about the circumstances of the capital crime, indicating the court did not consider the facts of the murder to be particularly aggravated. Instead, the court believed that it was appellant's history of violence that justified imposing the death penalty, and its belief was centered on three incidents – those involving Morton,

Olsen and Siroky. That history of violence is far less compelling as a justification for the death penalty without the support of the Olsen and Morton incidents. In *People v. Lewis* (1990) 50 Cal.3d 262, 287 this Court remanded for a new modification hearing where the only error was that the court erroneously read and relied on a probation report which contained information about defendant's juvenile record and prior involvement in a homicide. In *People v. Ramirez*, *supra*, 50 Cal.3d at page 1201 the trial court read the probation report which included information about the defendant's juvenile crimes, but this Court found no prejudice because the improper material did not play a significant role in the court's decision to deny the application to modify the sentence. The improper evidence in the present case was all specifically noted by the court in stating its reasons for denying the application. Given the absence of other substantial aggravation cited by the court and its recognition that the evidence of appellant's difficult childhood was mitigating, there is at least a reasonable possibility that the court would have reached a different result if it had only considered the evidence admitted at the trial.

The judgment of death must therefore be reversed and the matter remanded to the superior court for a new hearing on the motion to modify the sentence.

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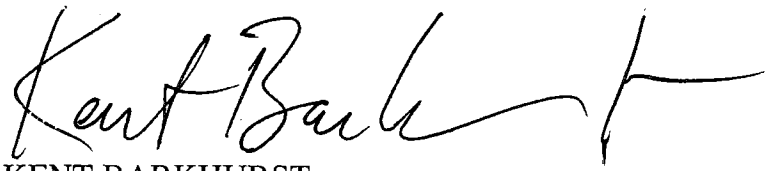
CONCLUSION

For the foregoing reasons, the sentence and judgment of death must be reversed.

DATED: October 17, 2011

Respectfully submitted,

MICHAEL HERSEK
State Public Defender



KENT BARKHURST
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1)(C))

I, Kent Barkhurst , am a Supervising Deputy State Public Defender, and am appellate counsel for JOE EDWARD JOHNSON in this automatic appeal. I directed a member of our staff to conduct 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 58,631 words in length.

DATED: October 17, 2011

KENT BARKHURST

DECLARATION OF SERVICE

Re: *People v. Joe Johnson* No. S029551

I, Neva Wandersee, declare that I 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 the same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: Paul O'Connor, D.A.G.
P. O. Box 944255
Sacramento, CA 94244-2550

Mr. Joe Edward Johnson
(Appellant)

Habeas Corpus Resource Center
303 Second Street, #N400
San Francisco, CA 94107-1328

Clerk of the Superior Court
for the delivery to the
Honorable Peter Mering
720 Ninth Street, Room 101
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Mr. J. Michael Mullins
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Each said envelope was then, on October 17, 2011, 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 October 17, 2011, at San Francisco, California.

DECLARANT