IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHRISTOPHER JAMES SATTIEWHITE,

Defendant and Appellant.

No. S039894

(Ventura County Superior Court No. CR 31367)

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Ventura

The Honorable Lawrence Storch, Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code § 1239.)

STATEMENT OF CASE

On February 26, 1993, following a one-day hearing, a Ventura County Grand Jury handed down an indictment charging appellant Christopher James Sattiewhite with the murder of Genoveva Gonzales in violation of California Penal Code section 187[1]. (1CT 1-3.)[2] The indictment further alleged that the murder had occurred in the course of a

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

[2] "CT" shall refer to the Clerk's Transcript, "RT" to the Reporter's transcript, "SCT" to the Supplemental Clerk's Transcript, "2SCT" to the Second Supplemental Clerk's Transcript, and "ECT" to the Clerk's Transcript containing the Exhibits and Juror Questionnaires.

kidnapping and rape, both in violation of Penal Code sections 207 and 261 and as special circumstances within the meaning of Penal Code section 190.2. The indictment also alleged that appellant had personally used a firearm within the meaning of Penal Code sections 12022.5 and 1203.06. (*Ibid.*) Judge Kenneth W. Riley found the indictment to be a true bill and ordered it filed the same day. (1 CT 5.)

On August 17, 1993, the District Attorney's office gave notice of their intent to seek the death penalty. (1 CT 34-34a.) On August 27, 1993, defense counsel formally declared a doubt as to his client's competency and the court appointed Dr. Kathryn Davis to determine appellant's competency to stand trial. (1 CT 25, 35.) On November 8, 1993, having read and considered Dr. Davis's report, the trial court found appellant competent to stand trial without holding a competency hearing. (1 CT 44; 1 RT 224.)

Jury voir dire began on January 3, 1994 (1 CT 89-95) and a jury was impaneled on January 24, 1994. (3 CT 610; 11 RT 1990, 2011-2012.) On January 12, 1994, appellant brought a *Batson-Wheeler*[3] motion on the ground that the prosecutor was exercising peremptory challenges on the basis of race. (6 RT 1235-1244.) The court denied the motion. (6 RT 1244.)

The guilt phase of trial began on February 1, 1994, and concluded on February 22, 1994. (3 CT 611, 605.) The jury commenced deliberations on February 16, 1994. (19 RT 3426-3427.) On February 22, 1994, six days after deliberations began, the jury found appellant guilty of murder, rape, and kidnapping, and found true the rape and kidnapping special circumstances and the firearm enhancement. (19 RT 3449-3450; 3 CT 605.)

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

The penalty phase of trial began on March 1, 1994, (2 CT 351) and concluded on March 28, 1994. (3 CT 565-566.) On March 22, 1994, the jury received their instructions and began deliberations. (24 RT 4661-4690.) During deliberations, the jury told the court in a note that Juror #3 had a job promotion test of unknown duration on March 29th at 9:00 a.m. in Burbank, Juror #8 had a work-related conference in Las Vegas from March 29th through March 31st, and Juror #4 wanted the court to know she was now on vacation. The court drafted a reply which stated:

> "The court will not take a position on these requests at this time. In the event that the jury has not arrived at a verdict by mid-afternoon on Monday, I will consider these requests at that time." (24 RT 4705-4707.)

The jury subsequently arrived at a verdict by mid-day on Monday. (24 RT 4708.) On March 28, 1994, at 11:48 a.m., the jury returned a verdict of death. The jury was then polled and discharged. (24 RT 4709-4711.)

At the sentencing on April 25, 1994, the court denied appellant's motions for new trial and modification of the verdict. (3 CT 587.) The court then sentenced appellant to death on the murder charge, the upper term of eight years on the rape charge, and the upper term of eight years consecutive on the kidnapping charge, with both the rape and kidnapping sentences to be stayed under Penal Code section 654. (*Ibid.*) The court also imposed five years for the firearm enhancement, to be served consecutively, a restitution fee of $1,000, a fine of $540 under Penal Code section 290.3, and ordered blood and saliva samples be taken under Penal Code sections 290.2 and 1202.1. (*Ibid.*) Finally, the court ordered the sentence to run consecutively to any other sentence, gave appellant no time credits, and sent appellant to San Quentin to await execution. (*Ibid.*) The Notice of Automatic Appeal was initiated on May 10, 1994. (3 CT 596.)

STATEMENT OF FACTS

One month before appellant Christopher James Sattiewhite was born, his mother was in a car accident that slammed her into the dashboard and sent her to the hospital. (22 RT 4328-4329.) Two weeks later she was in another car accident and again went to the hospital. (22 RT 4329.) She bled intermittently and had pain in her stomach until appellant was born. (22 RT 4329-30.)

Appellant was born with brain damage that caused severe physical and mental disabilities. (21 RT 3968-69.) He did not walk or talk until he was two-and-a-half years old. (21 RT 3968-69.) Damage to his upper motor neurons resulted in tightened heel cords, causing a typical "tip-toe" style of walking and requiring surgery and casting of both legs to allow him to walk. (21 RT 3968.) He would talk, but no one could understand what he was saying; he would make up sounds for things and use those sounds instead of the words. (22 RT 4332-3.) He underwent speech therapy until the eighth grade. (21 RT 3969.) He wet his bed and sucked his fingers until he was 13 or 14 years old. (22 RT 4334, 21 RT 3864.) He had lifelong learning disabilities and as a young adult functioned at somewhere between a third and fourth grade level. (21 RT 3969.)

The Reverend J.D. Sattiewhite

Appellant's father, J.D. Sattiewhite, worked as a psychiatric technician at Camarillo State Hospital and was a minister in the Oxnard Church of Christ. (20 RT 3610, 21 RT 3801.) J.D. could not accept that appellant was a slow learner and insisted all of his children would attend (U.C.) Berkeley. (21 RT 3809.) J.D. would not allow appellant to be put in special education classes until high school. (21 RT 3973.) When teachers sent notes home stating appellant was doing poorly in school, J.D. would whip him. (21 RT 3873.) J.D. would make appellant sit in a chair for 4 or

5 hours trying to tie his shoe. If anyone tried to help him, appellant would be beaten and so would the child that helped him. (22 RT 4336.) When he wet the bed, J.D. would rip the sheets off the bed, throw appellant on it and beat him with a long leather belt that he liked to use. (21 RT 3864.) J.D. would then beat him with his fists or whatever was handy and throw him against the wall. (21 RT 3833.) He would hit appellant as if he were hitting a grown man. (21 RT 3832.) He once threw appellant into the corner of a table and appellant acquired a "man-made dimple" on his face that he still carries. (21 RT 3833.) The family did not seek medical attention for appellant because they would have had to explain how it happened. (21 RT 3833-34.) Appellant's mother was forbidden to intervene and would be pushed aside if she tried. (21 RT 3834.)

Appellant did not have friends growing up - friends were not allowed because J.D. didn't want people to know he was beating his family. (21 RT 3870.) If someone came home from school with any of the children, they'd get a whipping when the guest left because J.D. didn't know they were coming. (21 RT 3871.) What J.D. said went no matter what. (21 RT 3836.)

When appellant was in high school, J.D. took to watching violent pornographic movies every night - and had appellant watch them with him. (21 RT 3865.) After watching the movies, J.D. could be provoked by anything. (*Ibid.*)

Reverend Sattiewhite walks out.

J.D. abandoned the family when his wife, Margaret, was in the hospital giving birth to their tenth child, Natasha. She came home from the hospital and he was gone. At the time of trial, no one had seen him since he left. (21 RT 3834.) He simply vanished. (21 RT 3821.) The eldest daughter, Bonita Ballard, testified at trial that her father "had a tight rope around all of us . . . even as adults." "When you have had a noose around

your neck for so long and it is cut . . .you don't know how to act." (21 RT 3835-3836.)

Fred "Freeze" Jackson and Bobby "Little Perm" Rollins

Before J.D. left, appellant never hung out with anybody, no one ever came to visit him at the house, and he did not go to parties or school functions. He didn't seem to have any friends. After J.D. left, appellant began to spend time with two men named Bobby Rollins and Fred Jackson. (21 RT 3836-37.) Bobby "Little Perm" Rollins was a member of the Long Beach Crips who came to Ventura County in 1990 and there met Fred Jackson in the County Jail. (13 RT 2370-2372.) Fred Jackson's father was a minister with J.D. Sattiewhite, so the Sattiewhite family had known Jackson since he was a baby. (21 RT 3867.) Growing up, Jackson was always in and out of juvenile hall, disappearing and coming back. (21 RT 3868.) His family would bring Jackson to church when he wasn't in jail to try and turn his life around. (21 RT 3872.) Appellant and Jackson never ran around together while J.D. was there - J.D. didn't like Jackson because he was always in trouble. (21 RT 3872-73.)

After J.D. left, Rollins and Jackson arrived, appellant started drinking and keeping late hours, and he totally changed. Appellant would explode if anyone tried to say anything when he had been drinking. (21 RT 3868.) The family never saw appellant drinking or doing drugs before J.D. left. Alcohol was not allowed. (21 RT 3868-69.) After J.D. left, appellant would bring a "forty-ouncer" of alcohol into the house and had friends like Rollins and Jackson. (21 RT 3869.) Rollins began dating appellant's 15-year old sister, Lydia. (14 RT 2485.) Rollins' nickname was "Little Perm" because he used to have a long permanent wave in his hair. (14 RT 2486.) Appellant's nickname became "Baby Perm." (13 RT 2373, 14 RT 2486.) When his mother tried to keep appellant away from Rollins, appellant told

her that Rollins was his friend - the only friend that he'd ever had. (13 RT 4349-4350.)

The Oxnard beach rape

On the evening of September 14, 1991, Myra Soto and Jaime Marquez were robbed by three men while at the beach in Oxnard. (14 RT 3624-44.) Two of the men also raped Myra Soto. (20 RT 3655.) Rollins, Jackson, and appellant were subsequently arrested and pled guilty to the crime. (13 RT 2366-67, 15 RT 3710-11.) DNA testing showed that Rollins and Jackson matched the sperm taken from Soto after the rape and that appellant was conclusively excluded as a donor. (20 RT 3718.)

The murder of Genoveva Gonzales

In the early morning hours of January 26, 1992, the body of Genoveva Gonzales was found in a ditch on the side of Arnold Road in Oxnard, California, by two fishermen, who called the police. (11 RT 2089, 2092.) Appellant was arrested for the crime on March 17, 1993, while in the California Reception Center at Wasco for the beach rape. (1 CT 8-10.) Jackson was arrested and tried for the crime after appellant's trial. (Ventura Superior Court No. CR-34092.) In exchange for his testimony against appellant, Rollins cut a deal with the Ventura County District Attorney's Office, received 30 years off on two sets of other charges, and was never charged in the Gonzales murder. (14 RT 2490.)

The Trial:

On March 22, 1993, attorney Willard Wiksell, who had not been appointed to represent appellant, appeared and filed a motion under Penal Code section 170.6 to disqualify the assigned judge, Judge Steele. (1 CT 16; 1 RT 201.) The case was then forwarded to Judge Lawrence J. Storch. (1 CT 17.) Appearing before Judge Storch, Mr. Wiksell then asked to be appointed to represent appellant, stating that "[t]here has been a conflict

with the other co-defendants in other cases, your Honor." (1 RT 202.) There were no co-defendants in appellant's case. (1 CT 1-3.) The public defender's office never declared a conflict in the case. (2 SCT 991.)

The Prosecution's Guilt-Phase Evidence:

Salvador Zavala, the father of three of Genoveva Gonzales' four children, testified that he had been living with Gonzales for a few weeks at the time of her murder, and had previously lived with her 8 or 9 years before that. He was not married to her. (13 RT 2336-2337.) That evening after dinner, Gonzales had asked him for money for food for the children and he had given her $70 or $80, but Gonzales had spoken to her mother and told him she was going to leave the shopping for another day. (13 RT 2345.) Zavala went to bed at 6:30 p.m. and thought Gonzales was going to remain at home. (13 RT 2346.) The next morning, Gonzales was not there, and he went looking for her at the bars she would go to on Oxnard Boulevard. (13 RT 2347.) He found her car at a movie theater with no groceries in it, and later found the money he had given her in a jacket hanging in a closet at the apartment. (13 RT 2341, 2348.)

Tillie Carrillo, owner of the New Mexico Restaurant in Oxnard (formerly the Casa del Oro), testified that Gonzales was a regular customer. (12 RT 2208-2209.) When she met Gonzales, Gonzales was involved with a man named Mario and became involved with narcotics. (12 RT 2219-2220.) Once, Mario and Gonzales came in and Mario showed Carrillo and a patron $60,000 and asked if they would hold it for him while he went to Santa Barbara to deliver some drugs. (12 RT 2222-2226.) Gonzales then put the money in her purse. (12 RT 2222.) Gonzales was always drunk or drugged, mainly on weekends when she was with Mario. (12 RT 2228.) Later, Mario was gone and Gonzales would come into the restaurant without any money, leave with a man, then come back with money to drink

by herself. (12 RT 2231.) Gonzales was very aggressive with men – she would wrestle, fight, joke, or cuss them out depending on her mood. (12 RT 2231-32.) Carrillo identified Fred Jackson from a photo lineup shown to her by an investigator from the district attorney's office as having been with Gonzales at the bar perhaps a month before her death. (12 RT 2236-37.)

The last time she had seen Gonzales was on a Saturday night just after 10:00 p.m. Gonzales came in and choked a man from behind; the man turned very red and was struggling to breathe. (12 RT 2210, 2235.) Carrillo thought they were going to fight. (12 RT 2235.) Gonzales then had a beer with two other men and left with them about 10:30 p.m. (12 RT 2212.) The next morning, Carrillo heard she was dead. (12 RT 2213-2214.)

The investigation

The next morning, Gonzales' body was found by two fishermen, who called the police. (11 RT 2089, 2092.) There were two sets of footprints in the ditch near the body. (11 RT 2117-2121.) The lead investigator on the case, Sergeant Michael Barnes of the Ventura County Sheriff's Department (11 RT 2103-2105), concluded that one set was not involved with the murder because it reappeared further south near where indentations showed that aluminum cans had been pulled from the mud. (11 RT 2122, 2124.) Barnes concluded that prior to the murder someone had been collecting cans in the ditch. (11 RT 2124.) Two .32 caliber shell casings were recovered near the body. (11 RT 2126-2132.)

Barnes testified that, because of the single set of relevant footprints, because there were no signs of a struggle, no mud on the bottom of Gonzales' feet, and because of the contact wounds to the head, copious amounts of blood next to the head and lack of a blood trail leading into the ditch, he concluded that Gonzales had been carried into the ditch by a single

person, dropped to the ground, a gun placed against her head and fired three times, and then the shooter had walked out of the ditch. (11 RT 2136-37.) Criminalist Vince Vitale of the Ventura County Sheriff's crime lab made a cast of the footprints and estimated the shoe that made them as being a size 9 ½ or size 10. (12 RT 2295.)

The autopsy

The autopsy was conducted by Dr. Frederick Lovell, Chief Medical Examiner for Ventura County. (12 RT 2161-2164.) The autopsy showed entrance wounds on the forehead and left cheek and three bullets. (12 RT 2165.) Both wounds were star-shaped contact wounds with the gun pressed against the skin when it was fired. (12 RT 2166-2168.) There were some scratches on the abdomen and back and some bruising to the posterior entrance to the vagina. (12 RT 2165.) There was also a fresh hemorrhage three inches in diameter on the right side of the head near the ear from a blow that was probably inflicted immediately before death and rendered Gonzales unconscious at the time of her death. (12 RT 2169-2170.) Dr. Lovell testified that the bruising to the vagina was consistent with consensual sexual intercourse, particularly if the woman was dry or it occurred in the back seat of a car. (12 RT 2180, 2191.) Gonzales did not have the usual mucous secretions that are normally found in a woman who has recently had sexual intercourse; she was quite dry. (12 RT 2190.) There were no signs of choking, bruising, or other normal signs of sexual assault. 12 (RT 2185-2187.) Dr. Lovell could not say whether the sex had been consensual or forced. (12 RT 2180.) Gonzales had a blood alcohol level of .20, but no drugs in her system other than caffeine. (12 RT 2177, 2193.) Blood samples taken from Rollins, appellant, and Jackson tested against sperm taken from Gonzales excluded Rollins and appellant and matched Jackson. (12 RT 2202-2205.)

Bobby Rollins' story

Bobby Rollins had made a package deal with the Ventura County District Attorney's Office. He pled guilty on the Oxnard beach rape to robbery, rape by a foreign object in concert, 2 counts of forcible rape, and to being armed with a firearm. (13 RT 2366-67.) In a second case involving victims Manuel Lomeli and Lisa Nunez, Rollins pled guilty to robbery, attempted robbery, sexual battery, and being armed with a firearm while he was out on bail awaiting trial in another case on October 10, 1992. The total amount of time he could serve in prison for the two cases was 50 ⅔ years. (14 RT 2490.) Instead, in exchange for his testimony in appellant's case, Rollins was promised he would not be prosecuted at all for the Gonzales murder, and receive a maximum sentence of 20 years on the other two cases. (14 RT 2490.) He would therefore be released from prison after about eight and a half years. (14 RT 2492-2493.)

At appellant's trial, Rollins testified that on January 25, 1992, he, Jackson, and appellant borrowed a brown Cadillac from a woman named Anna Lanier. (13 RT 2374-76.) They kept the car all day and into the night, driving around the neighborhood. Rollins drove all day. (13 RT 2376-77.) As it was getting dark, Rollins left them because Jackson wanted to do a robbery, asking if they wanted to get a victim or not. (13 RT 2378-79.) Rollins drove to an apartment building, whose address he did not know, to find a drug addict named "Glenn," whose last name he did not know, to rent a car in exchange for rock cocaine. (13 RT 2379-2381.) Rollins found Glenn and rented a white Buick Regal. (13 RT 2380-82.) Jackson and appellant left in the Cadillac with appellant driving and without telling Rollins what they were going to do. (13 RT 2383.) Somewhere between 10:00 p.m. and midnight that evening, Rollins found himself driving by a restaurant named "Buddy Burger" and heard appellant yelling

his name. (13 RT 2388-89.) Rollins parked near where appellant was standing on Oxnard Boulevard, got out and started talking to him. (13 RT 2388-89.) Jackson called to appellant from an alley behind the Buddy Burger and appellant told Rollins to follow them. (13 RT 2390-91.) Rollins drove into the alley and saw appellant and Jackson getting into the Cadillac, and a third head in the backseat on the driver's side. (13 RT 2392-93.)

Rollins followed them to the Mira Loma apartment complex in the City of Oxnard and pulled into the carport behind them. (13 RT 2394-96.) Rollins walked up to the Cadillac and could see Jackson pushing a woman down on the back seat. (13 RT 2398.) Appellant told him that Jackson had just "gaffled" the lady. (13 RT 2399.) Rollins understood that to mean "snatched up." (13 RT 2401.) The woman was yelling in Spanish, which Rollins does not speak, and Jackson was telling her to shut up. (13 RT 2402.) Both of them still had their clothes on. (13 RT 2402.) He saw the woman spit at Jackson and Jackson strike her. (13 RT 2403.) Rollins stayed talking to appellant for some time, then left to call appellant's sister, Lydia, from a payphone in the complex. (13 RT 2403, 2405.) After telling Lydia he was on his way, Rollins returned to the cars and they told him to move his car; Rollins had the impression some people had walked by. (13 RT 2407.) He couldn't see what was going on in the back seat and wasn't really paying attention. (13 RT 2407.)

Appellant drove the Cadillac to another area of the complex and parked again. Rollins followed. (13 RT 2408.) Rollins walked over to the Cadillac and could see Jackson having sex with the woman. Jackson had no pants on. (13 RT 2410.) Rollins told appellant that Jackson was going to get him in trouble and that they should get out of there. (13 RT 2413.) Appellant told him that later they were going out to the dead-end on Arnold

Road, a place they had all gone to together before, and that they had Thunderbird and other alcohol in the car. (13 RT 2413-14.)

Both cars then left and Rollins went to the Sattiewhite home to see Lydia and watch television. (13 RT 2415-16.) After some unknown amount of time spent watching television, Rollins drove out to Arnold Road to meet Jackson and appellant. (13 RT 2417-18.) As he drove down Arnold Road towards the beach, Rollins saw the Cadillac parked on the other side of the road with its lights out and the passenger door open. (13 RT 2419, 2421.) Jackson was pushing the woman, who seemed to be unconscious, out the door and appellant was grabbing her. (13 RT 2421-22.) Rollins asked them what they were doing, then told them to wait up, drove down further and made a u-turn. (13 RT 2422-23.) Rollins pulled up behind the Cadillac, left his lights on, and as he walked forward, he heard three shots. (13 RT 2424.) Jackson was in the backseat of the car and appellant was in the ditch by the side of the road. (13 RT 2425.) Rollins walked forward and saw appellant standing over the woman in the ditch. She had no pants on and her legs were jumping. (13 RT 2426.) She was wearing a blue denim jacket and lying face-up. (13 RT 2427.) Rollins had not seen the woman before that day. (13 RT 2437.) Appellant had a gun and was wearing gloves. (13 RT 2427.) Rollins said "Let's go." (13 RT 2427.)

Appellant gave Jackson the gun and both cars drove off. (13 RT 2433.) Rollins passed the Cadillac and drove to an alley near a fire station on Pleasant Valley Road. The Cadillac followed. (13 RT 2434.) Rollins asked appellant why he had done it and appellant had no answer. He seemed to be in shock. (13 RT 2435-36.) Rollins later testified that appellant had not been silent but had told him he had always wanted to do something like that. (13 RT 2445-46.) Jackson was getting clothes out of

the back of the Cadillac and using some of them to clean the gun off before giving the gun back to appellant and throwing the clothes in the trash. (13 RT 2436-37.) The gloves also went into the trash. (13 RT 2438.)

After that, Rollins returned the Buick to Glenn, but didn't remember when. They picked up Lydia from her home and went to Denny's, but couldn't recall if he was in the Buick or the Cadillac. (13 RT 2440.) He could not recall what they did or where they went after Denny's, but believed that both he and Jackson spent the night at the Sattiewhites' house. (13 RT 2441.) Rollins testified that, at Denny's, he had told Jackson and appellant that the victim would haunt them and one of them told him to "stop playing." (13 RT 2441.) At the Sattiewhite house he told Lydia what had happened and at first she didn't believe him. (13 RT 2442.) The next morning, Anna Lanier showed up in a U-Haul truck with Michael "Cuddles" Burnett to reclaim her car. (13 RT 2443.)

Joseph Allen

Witness Joseph Allen, who freely admitted to countless drug arrests and convictions, and who was then serving a one-year term for narcotics possession and sale, testified that he knew both Rollins and "Glenn" and had seen Glenn's white car rented out for drugs before. (14 RT 2622-24, 2627.) He didn't know Glenn's last name or where he lived. (14 RT 2623-24.) He had seen Rollins in Glenn's car on two occasions. (14 RT 2630-31.) Allen was a member of the "805 Crips" out of Bakersfield. (14 RT 2644.) Allen considered Rollins a friend, a "homeboy" of Allen's, and testified that homeboys help each other out. (14 RT 2644.) Allen testified that he had been thinking about buying the car and had been in it. He then testified that he had never been in it. (14 RT 2649-2650.) Allen admitted he had spoken to Rollins about Glenn and the car when they were both in jail, but claimed Rollins did not ask him to come testify for him. (14 RT

2645-46.)

The Gun

Arturo Burciaga, testifying under a grant of immunity from the U.S. Attorney's Office and the Ventura County District Attorney's Office, testified that he had been illegally selling handguns from his gun store and sold a youth named Greg Wells a Davis P-32, .32 caliber semi-automatic handgun without filling out the required paperwork or obeying the required 15-day waiting period. (12 RT 2242-2252.) One of the guns that Burciaga had bought wholesale and subsequently sold without keeping records was a Davis P-32 with the serial number P144343. (12 RT 2248.) Burciaga had sold as many as 30 illegal weapons, but had not been prosecuted for those sales. (12 RT 2254.) He had received probation on a concealed weapon charge, but denied avoiding jail time in exchange for his testimony. (12 RT 2255.)

Greg Wells was a member of the Westside Black Market gang, which "claims" the west side of Oxnard, and the brother of appellant's sometime girlfriend, Adrienne Wells. (15 RT 2661, 2664.) He testified that just before Christmas of 1991, appellant had told him he wanted a "strap," or gun for protection. (15 RT 2666-67.) Wells told him it would cost him $120, then went to Burciaga's and bought a gun and box of shells. (15 RT 2668-69.) Wells purchased the gun without showing any identification or waiting through the 15-day waiting period. Wells knew it was an illegal gun sale. (15 RT 2669.) He admitted that he had previously told the police and the grand jury that appellant had come with him and purchased the gun himself. (15 RT 2681-2682.) He admitted that those were lies. (*Ibid.*)

Wells testified that he had given the gun to appellant but never received any money for it. (15 RT 2668-69.) A few weeks after Wells had

given the gun to appellant, appellant returned the gun to Wells in a sock. The gun had stuff on it and Wells told appellant he didn't want it. (15 RT 2672-73.) Appellant suggested that they sell the gun and Wells drove him to a gas station where appellant sold the gun to a heavyset Mexican guy. (15 RT 2674-2675.) While driving to the gas station, appellant was cleaning the chamber of the gun with the sock. Wells asked him what was on the gun and appellant first told him not to worry about it, then told him it was blood. Wells asked appellant if it had anything to do with the murder in the paper and appellant asked, "Have you heard about any other murder?" (15 RT 2676-2680.)

Witness Alex Polo testified that he had bought a gun from Alfred Ordaz at the Exxon station they both worked at in February of 1992, a couple weeks before separating from his wife. Polo left the gun and most of his possessions at the house when he left and returned to find that his wife had sold everything and the gun was gone. (13 RT 2309-2312.) His wife's nephew was a youth named Hugo Hernandez, who lived three blocks away and had access to the house when he played with their kids. (13 RT 2313.)

Oxnard police officers Stephen Lawrence and Stephen Noguera testified that, while chasing and arresting a robbery suspect named Hugo Hernandez, Lawrence recovered the .32 caliber handgun with the license number P144343 at the bottom of a wall over which Hernandez had fled. (12 RT 2259-2266, 13 RT 2303-2308.) Criminalist Vince Vitale from the Ventura County Sheriff's crime lab testified that the bullets recovered from Gonzales' body had been fired by the gun. (12 RT 2281-2283.)

Dr. Bruce Woodling

Dr. Bruce Woodling, a family practitioner who had neither performed nor attended the victim's autopsy, testified that in his expert

medical opinion the victim had been raped. (15 RT 2750-51, 2761.) Woodling was neither a gynecologist nor pathologist. (15 RT 2753.) Woodling based his "medical" opinion on, among other things, the state of the victim's clothing and Dr. Lovell's notation of scratches on the victim's hip, scratches that were not visible on the photographs he examined. (15 RT 2765, 2771.) He wasn't aware that the victim had been in a bar fight that evening where she had been choking someone. (15 RT 2765.) The prosecutor had told Woodling the victim was a prostitute and the autopsy protocol stated that she was drug-dependent. (15 RT 2764, 2768.)

Dr. Woodling never talked to the physician who actually performed the autopsy, Dr. Lovell, Chief Medical Examiner for Ventura County (12 RT 2161-2164, 15 RT 2762.) Dr. Lovell had testified that the bruising to the vagina was consistent with consensual sexual intercourse, that there were no signs of choking, bruising, or other normal signs of sexual assault, and that he could not say whether the sex had been forced or consensual. (12 RT 2180, 2185-2187, 2191.) Dr. Woodling, however, told the jury there was no other explanation for the injuries. (15 RT 2751.)

Adrienne Wells.

Adrienne Wells, 18 years old at the time of trial, had been appellant's girlfriend off and on for a couple of years, until December of 1991, but they would still talk on the phone a couple times a week after that. (15 RT 2788-2789.) In the beginning of 1992 they had a phone call in which appellant admitted to her that he had killed a lady. (15 RT 2790.) He was crying and sorry he did it. (15 RT 2807.) Wells could not remember if he told her why, because she had also read things in the newspaper. She thought he told her that Jackson had raped her, someone used someone's name, and Jackson said, "See, you said my name. Now you have to kill her." (15 RT 2791.) She then testified that she wasn't sure if he

used the word "rape" or even the word "sex." (15 RT 2804-2806.)

Wells had originally denied any knowledge of the murder to the police and prosecution. (15 RT 2793.) She first told them she had read about it in the newspaper, been told something by appellant's sister, Lydia Sattiewhite, then asked appellant about what happened. (15 RT 2794.) She denied having told the police that Bobby Rollins had told her about it rather than appellant. (15 RT 2796.) She could not recall exactly when the call took place. (15 RT 2800-2801.) Wells testified that she knew a number of people connected with the case and may have confused her conversation with appellant with things she was told by someone else or had read; she really didn't know what appellant had told her. (15 RT 2814, 2817-18.)

The Defense Guilt-Phase Case:

In his opening statement, defense counsel told the jury that appellant had done the shooting, saying, "The evidence will be that Mr. Sattiewhite did in fact shoot Genoveva Gonzales. He did do that. We think that the evidence is such that the crime was manslaughter, no greater than a second degree murder, and that the DA's theory that this was a rape and a kidnapping is just flat wrong." (11 RT 2056.)

The victim's drug conviction

Oxnard police officer Timothy Combs testified that he had arrested the victim, Genoveva Gonzales, for possession of cocaine for sale in 1990. At her residence he had found heroin, cocaine, scales, a cutting agent, and balloons used to package the drugs. (16 RT 2891-2899.)

Jessica Velasquez

Jessica Velasquez, a friend of Lydia Sattiewhite's, testified that Lydia had been at her house the night of the murder, arriving around 7 or 7:30 and staying until after midnight, when Rollins picked her up. (16 RT 2904-2909.) Velasquez had also previously seen the victim, Genoveva

Gonzales, a number of times on her way to Buddy Burgers. Gonzales had been walking up and down Oxnard Boulevard dressed in skimpy clothing despite cold weather, approaching men and cars and leaving with various men. (16 RT 2912-2915.) She thought Gonzales was a cocaine user as well as a prostitute because she ran around half-naked in the cold getting in and out of cars, but would be sweating and had dilated eyes. (16 RT 2918-2919.)

Frank Richardson

Richardson, a friend of appellant, Jackson, and Rollins, recognized Gonzales as a woman he had seen buy drugs from Rollins in the parking lot at the apartment complex where Rollins and appellant shared an apartment. Richardson admitted dealing drugs there himself. Rollins once told him that one day Gonzales would come by without any money and he'd get her to have sex with him. Appellant had never said anything like that - that was not his "M.O." Rollins, on the other hand, was always running his mouth. (16 RT 2921-2934.)

Michael Black

Black, who was in custody for his second robbery conviction, recognized Gonzales as a woman he'd seen beaten up by another woman in Rollins' and appellant's apartment because she was with the woman's boyfriend. He denied seeing drugs sold at the apartment or selling them himself. Sergeant Barnes had shown him a picture of the victim in October of 1992 and Black had told him that Gonzales "rode the rodeo." "The Rodeo" was a stretch of Oxnard Boulevard where Hispanics sell, use, and trade drugs for sex. He also told Barnes that Rollins and appellant "ran the rodeo" but did not define that phrase. Black tried to keep appellant away from Rollins because he did not like Rollins. (16 RT 2935-2946.)

Margaret Sattiewhite.

Mrs. Sattiewhite, appellant's mother, testified that, contrary to Bobby Rollins's story, she did not see Bobby Rollins at her house on January 25th. She had been in Dallas, Texas from January 18th through February 1st, because her mother had undergone knee surgery. (16 RT 2948-2949.)

Lydia Sattiewhite

Lydia Sattiewhite, appellant's sister and Rollins' girlfriend, testified that, contrary to Rollins' testimony, he had never come to her house in a white Buick and watched television. (16 RT 2958.) She had been at the house of her friend Jessica Velasquez that evening until Rollins, Jackson, and appellant came to pick her up in the Cadillac about 2:00 a.m. (16 RT 2953.) She had never seen Rollins in a white car or a Buick Regal; the only car she saw Rollins in that evening was the Cadillac. (16 RT 2956-2957.) They went to Denny's to eat, dropped Jackson off at his house, then went to the Sattiewhite house. (16 RT 2954.) Rollins told her they had picked up a girl, Jackson had sex with her, then they took her to Arnold Road and told appellant to "smoke" [kill] her because he was always standing around watching them and never took part in the "dirt." (16 RT 2955.) Rollins had told appellant that if he didn't smoke her, Rollins was going to smoke her and him, too. (16 RT 2959.) Appellant was afraid of Rollins. (16 RT 2956.) Lydia testified that Rollins used the word "we" when telling her what had happened (16 RT 2956) and told her that he was in the front seat of the Cadillac when it was going on. (16 RT 2958.) She didn't believe him until he offered to take her out and show her the body. (16 RT 2971.) She was scared because of Rollins' gang affiliation - he could send someone after her. (*Ibid.*)

Dr. Werner Spitz, M.D..

Dr. Spitz is a board-certified forensic pathologist, editor of

MedicoLegal Investigation of Death, a recognized textbook used in teaching hospitals in the U.S. and other countries, and had performed or supervised between 50,000 and 60,000 autopsies at the time of trial. (RT 3006-3010.) He served on Congressional committees investigating the deaths of President Kennedy and Martin Luther King. (*Ibid.*)

Dr. Spitz testified that, contrary to Dr. Woodling's opinion, the scratches noted in the autopsy report were too superficial to be seen on any of the photos and were therefore not even remotely suggestive of a struggle. (17 RT 3016-3017.) Because the scratches were not even deep enough to cause a hemorrhage underneath, it could not even be determined whether they were made before or after death. (17 RT 3030.) In a sexual assault there would have been heavy bruising at the wrist, hands, forearms and legs - finger bruises that are round, the size of a coin, and look purple if they are fresh. (17 RT 3017.) The vaginal injury had been caused by rubbing, was not a very violent injury, and the sex could have been either non-consensual or consensual - there was no way of knowing from the physical evidence. (17 RT 3023, 3029.) Dr. Spitz testified that Dr. Woodling's conclusion that the injuries must have occurred during forced sex was insupportable based upon the evidence. (17 RT 3031.)

Upon cross-examination, Dr. Spitz agreed that the appearance of the victim at the crime scene meant that a medical examiner should be concerned about whether a sexual assault had taken place. (17 RT 3036.) He also admitted that he had erred in stating that the victim had been killed elsewhere and transported to where she was found, but stated that that fact made no difference in the appearance or interpretation of the injuries. (17 RT 3040.)

The Prosecution's Penalty-Phase Case:

In its opening statement, the prosecution emphasized three things:

the Oxnard beach rape case and its effects on the victims, a threatening letter from appellant to Rollins in response to an abusive one from Rollins to appellant; and the effects of the murder on the children of the victim. (20 RT 3601-3609.)

The Oxnard beach rape:

The prosecution introduced detailed testimony about the Oxnard beach rape. (20 RT 3624-3719.) Despite a defense objection that victim-impact evidence from other crimes was inadmissible (20 RT 3645, 3648), Myra (Soto) Marquez, Jaime Marquez, and Evangelina Pena also gave detailed and emotional testimony regarding the effect the rape had on Soto and Marquez. (20 RT 3653-58, 3659-89, 3690-3696.) That testimony is summarized in Argument XVII., *post.*

Letters

The prosecution next introduced a letter from Rollins to Sattiewhite and Sattiewhite's reply letter. (20 RT 3735-3741.) Rollins wrote Sattiewhite a letter postmarked 12/2/93:

> "Say nigga! I hear you speaking on a nigga's name. Nigga fuck ya now. Your punk ass should have kept your mouth shut. Then you wouldn't have nothin to swiz'it but since you chose to talk shit, it's on cuz! Nigga all love lost. Too bad you had to go out like this. PS: Continue to talk yo bitch talk nigga! [Signed] the original Perm Doggy-Dog I-II."

There is an added portion which states "Mad ass insane gang XXI, stir enemy killa!!" with an "X" through the word "enemy." Sattiewhite then placed a large "X" through that letter and added the following:

> "You got 2 strikes. Number one, you're a snitch, number two, rapist. Nigga's don't like your kind in the pen. You're no good. Snitch, snitch. Nigga's already ran Fred off the yard."

Sattiewhite also wrote a letter stating the following:

> "I got no love for you. If I don't get the dp, I am taking you

> out. Nigga you don't scare me. Bitch ass nigga. If you would of kept your mouth shut a nigga wouldn't have spoke on your name. But since you chose to turn snitch it's on cuz! It's on you mark. The word is out on you nigga. PS: The OG in the pen gave me the OK to take you out. You're all mines."

Deputy Sheriff Gordon Beckwith testified that "OG" stands for "original gangster" in gang parlance, meaning either a founding member or a veteran who has status in the gang. (20 RT 3741.)

Victim Impact Evidence:

The prosecution presented victim-impact testimony from Gonzales's mother, son, and teachers for two of her children, all of whom gave detailed and emotional testimony describing the grief suffered by Gonzales's children. (20 RT 3742-3790.)

Teachers:

Dr. Joan Calkins testified that she was the first-grade teacher for Gonzales' youngest child, Vanessa, from August until a couple months after the murder. (20 RT 3742-44.) Gonzales had attended two parent-teacher conferences and gone on a field trip to the public library. (20 RT 3745.) Before the murder, Vanessa was shy but participated, always did her homework, always came to school clean and well-dressed - but wasn't afraid to get messy. Afterward, she was shyer and would stay by Calkins on the playground. She seemed sad and showed signs of stress. (20 RT 3745-3747.) Her grades did not go down, and in fact went up in a couple areas. (20 RT 3750-3752.)

Alicia Hernandez taught Gonzales' son Salvador in fourth grade. Salvador was very bright and Hernandez was going to recommend that he join the GATE program for gifted students. (20 RT 3753-54.) He had expressed interest in becoming a doctor. She knew Gonzales as Mrs.

Zavala and had met her on two or three occasions - a parent-teacher conference and when she volunteered to bring things in for parties. (20 RT 3754.) When she offered her sympathies after the murder, Salvador told her he didn't know what she was talking about, that his mother was in Mexico. (20 RT 3758.) After the loss of his mother, she did not feel she could refer Salvador to GATE and he was more interested in police work. (20 RT 3759-3760.) He never spoke of the murder. (20 RT 3761.) Several months after the murder, Salvador had an accident at school, severing the tip of his finger, and ran to the office screaming "Mommy." (20 RT 3761-3763.)

She thought Gonzales was a very good mother. (20 RT 3756.) She was not aware of her felony conviction for possession of cocaine and heroin - or that she was in the country illegally and in violation of her probation. (20 RT 3766-3767.)

The victim's son:

Salvador Zavala, Gonzales's son, was 12 years old and in sixth grade at the time of trial. (20 RT 3772.) He, his brother, two sisters and grandmother were living with his aunt in Fillmore rather than Oxnard. (20 RT 3773.) His mother used to work during the day and was home when they got home from school. (20 RT 3774.) His grandmother lived in a different apartment and watched his brother Edgar while they were at school and his mom was at work. His mom would make them do their homework and help them with it. (20 RT 3775.) He played baseball and his mom would come to games and cheer for him. (20 RT 3776.) After she died they went to Mexico for five months, then came back. He read the newspaper to find out what happened to his mom, but some of the stuff bothered him and he didn't read any more. (20 RT 3777.) He never talked to his sisters about her. (*Ibid.*)

Salvador testified that he missed fun things like going to Chuck E.

Cheese's, Raging Waters, playing cards and checkers, and playing in the park. His mom could swing the highest on the swings and played baseball with him. She made sure they had a place to live, food to eat, clothes to wear to school. (20 RT 3778.)

After church on Sundays they went to the cemetery and brought her flowers. Salvador talked to her and told her what was happening. Sometimes he woke in the night because he was afraid someone was breaking in to get them. (20 RT 3779.) They had moved around a lot and he felt he had to help his grandmother take care of his sisters and brothers with his mom gone. (20 RT 3780) He thought it was hard for his grandmother to take care of them and didn't know what would happen if she couldn't any more. (20 RT 3781.)

The victim's grandmother:

Maria Cabrera, Gonzales's mother, was 68 years old at the time of trial and testified that she had moved in to her daughter's apartment after her death and Salvador Zavala Sr. had moved out. They stayed there for about a year, then went to Mexico for several weeks. (20 RT 3782-3784.) Because she broke some ribs and could not return quickly enough, they lost that apartment and had stayed with her son and another daughter, Concha. (20 RT 3784-85.) At the time of trial they were living with Concha and splitting the rent. (20 RT 3787.) The death of her daughter "rendered" her heart; Gonzales was the one who always cared about her. (20 RT 3787.) Gonzales would work as a seamstress during the day and Cabrera would babysit for her. Gonzales would make Cabrera's meals for her and her children's friends. The friends liked her a lot. (20 RT 3789.) Since his mother's death, Salvador was afraid of everything and didn't want to remain in a room alone. All the children slept with her. The children did not seem to treat each other differently since her death and do not want to

talk about their mother at all. (20 RT 3789-3790.)

Prior Criminal Conviction:

The prosecution then introduced a certified copy of appellant's conviction (12-P) under section 11351 of the Health and Safety Code. (Exhibit 12-P; 20 RT 3791-92.)

The Defense Penalty-Phase Case

The defense introduced testimony from family and church members, teachers and employers, and expert witnesses:

Family and Church Members

Several members of appellant's family, as well as members of the family's church, testified in the penalty phase. (21 RT 3797-3891, 3939-3964, 4049-4086, 22 RT 4087-4124, 4195-4208, 4318-4374, 23 RT 4375-4417.) Mary Noland, a member of the family's church, testified that if appellant could not sit still during a church service, J.D. would come down out of the pulpit and hit appellant, then return to the pulpit and continue preaching. This might happen three to four times during a service. (21 RT 3810-3811.)

Margaret Sattiewhite testified that she had obtained a restraining order against J.D. based upon his physical abuse of both her and the children. (22 RT 4347-48.) J.D. was careful to hit her where the marks would not show in public. (22 RT 4324, 4335.)

Three of appellant's sisters: Bonita Ballard, Sheila Lewis, and Melinda Walker, testified about the circumstances of appellant's damage at birth, J.D.'s continual abuse of appellant, J.D.'s abandonment of the family, and the subsequent appearance of Jackson and Rollins, as outlined above. (21 RT 3828-3843, 3856-3879, 3954-3964.)

Lewis testified that after J.D. left, Margaret cried and cried and lost 40 pounds in a matter of weeks. (21 RT 3879.) Appellant was upset by his

mother's reaction. After appellant was arrested with drugs, he told Lewis he was selling drugs to give their mother money since she had so many kids left at home. (21 RT 3879.)

Family and friends testified that they loved appellant and would support and write him in prison. (21 RT 3824, 3837-3838, 3848, 3875, 3886, 3952, 3960.)

Employers and Teachers

Steve Otani and Joe Carbajal, for whom appellant had worked as a cook's helper, testified that appellant had been a good hard worker, eager to please, but took three times as long as most kids to learn the job. (21 RT 3893-3901.)

Special education teachers Ulla Mills, Brandt Jackson, and Rita Meyer, who had appellant in their classes, testified that appellant had functioned at a second or third grade level in high school. (21 RT 3904, 3909.) Jackson and Meyer testified that appellant was a follower, not a leader. (21 RT 3924, 3932.) Meyer thought appellant would do something wrong to please others. (21 RT 3932.)

Expert witnesses

Four expert witnesses testified for the defense: Francis Crinella, Ph.D., Ines Monguio, Ph.D., Patrick Barker, Ph.D., and David Frank Benson, M.D., Ph.D.. (21 RT 3965-4048, 22 RT 4125-4194, 4209-4282, 4283-4317.) There was one prosecution rebuttal witness: Ronald Markman, M.D.. (RT 4418-4487.) All agreed that appellant suffered from significant brain damage at birth. (21 RT 3968, 3992, 22 RT 4168-69, 4282, 4300, 4316-4317, 23 RT 470, 4472.)

Dr. Barker cited examples of appellant's condition: appellant did not know where the sun set or how many weeks there were in a year. He thought Brazil was in North America and Labor Day was in June. He

thought George Washington was president of the United States during the Civil War. (22 RT 4238.)

Appellant's IQ score of 73 was in the second or third percentile, meaning that 98 out of 100 people his age score higher. (22 RT 4282.)

The experts agreed that the brain damage was consistent with, and almost certainly caused by, the two auto accidents that threw appellant's mother into the dashboard before appellant was born. (21 RT 3968, 3977-79, 22 RT 4169, 23 RT 4472.) The problems appellant had with his feet at birth - the tightened heel cords that gave him a tip-toe gait - and for which he had to be operated on - were not coincidental. That condition resulted from a lack of oxygen at birth that killed the upper motor neurons in the brain. (21 RT 3968-69, 3979.)

Appellant's neuro-developmental age was between 6 and 7 years old. (21 RT 3981.) Academically, he functioned somewhere between the third and fourth grade levels. (21 RT 3969.) However, his ability to deal with moral judgments, consequences, or relationships with people was below that of an average 6 or 7-year-old. (21 RT 3991-3992.)

***

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO APPOINT THE DIRECTOR OF THE REGIONAL CENTER FOR THE DEVELOPMENTALLY DISABLED TO EVALUATE APPELLANT'S COMPETENCY VIOLATED DUE PROCESS AND REQUIRES REVERSAL.

After defense counsel expressed doubts about appellant's competency, the trial court appointed a local psychiatrist to evaluate appellant and found him competent based solely upon a brief review of the psychiatrist's report. However, because appellant is developmentally disabled, Penal Code section 1369 required the court to appoint the director of the local regional center for the developmentally disabled to evaluate appellant. Its failure to do so meant that appellant was not evaluated by a qualified individual, violating appellant's rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Pate v. Robinson* (1966) 383 U.S. 375, 377; *People v. Pennington* (1967) 66 Cal.2d 508; *People v. Leonard* (2007) 40 Cal.4th 1370; *People v. Castro* (2000) 78 Cal.App.4th 1402, 1419.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required. (*Ibid.*)

A. Procedural Background.

On August 10, 1993, defense counsel filed a written request for a hearing at which to declare his doubts as to appellant's competency. (1 CT 25.) On August 27, 1993, the following exchange occurred:

"THE COURT: ... Mr. Wiksell, are you of the view that you have a doubt as to your client's competency at this time?

MR. WIKSELL: Yes.

THE COURT: In light of that representation, I order the

appointment of an examining psychologist or psychiatrist report to the court on the issue of mental competency pursuant to 1368 ad sec [sic] of the Penal Code. Appointment is doctor –

THE CLERK: Lawrence Barr.

THE COURT: Spell his name, please.

THE CLERK: B-A-R-R

THE COURT: Very well. Dr. Barr is appointed to examine and report to the court on the issue of the defendant's competency. Where is the doctor's office[?]

THE CLERK: Your Honor, it is in Tarzana. Do you want somebody closer?

THE COURT: We'll get somebody local. Is that all right with counsel?

MR. GLYNN: That's fine.

MR. WIKSELL: That's fine.

THE COURT: Vacate that appointment.

THE CLERK: Kathryn Davis.

THE COURT: Kathryn Davis is appointed. Where is Kathryn Davis' office?

THE CLERK: On Main Street in Ventura, sir.

THE COURT: All right, that's closer. I'll set the matter for further proceedings on this 1368. I haven't instituted – So the record is clear, I have not instituted 1368 proceedings today.

MR. WIKSELL: Correct.

THE COURT: The criminal proceedings still stand. I'm merely ordering a report in light of the doubt that you have articulated this morning, and I'll order the matter on for further proceedings in that regard. We do need about three weeks for these reports...." (1 RT 214-215.)

On November 8, 1993, the following proceedings took place:

"THE COURT: On the record in the matter of People versus Sattiewhite, defendant is present in CR 31367. On for further proceedings on a 1368. Counsel have a copy of the report of Dr. Davis?

MR. GLYNN: Yes.

MS. MURPHY: Yes, your Honor.

MR. WIKSELL: Yes.

THE COURT: Record will show that the defendant with Mr. Wiksell and the people are appearing with –

MR. GLYNN: Don Glynn and Patty Murphy.

THE COURT: Yes. Have counsel had a chance to look at the psychological evaluation?

MR. GLYNN: Yes.

THE COURT: I'd like to take a moment. Please have a seat. (Pause in the proceedings.)

THE COURT: The record will show I have read and considered the reports of the doctors. I'll hear views of counsel, unless you wish to submit the issue to the court.

MR. WIKSELL: Yes.

MR. GLYNN: Yes, sir.

THE COURT: Mr. Glynn? Miss Murphy?

MS. MURPHY: Yes.

THE COURT: I do at this time find defendant competent within the meaning of 1368, et seq. Do we have a trial date, have we not, counsel, for –...." (1 RT 223-224.)

The court and counsel went on to discuss trial scheduling and procedure. There was no other discussion or hearing on the issue of appellant's competency during the trial.

B. Due Process Requires That Any Doubt Regarding a Defendant's Competency be Properly Evaluated by Experts Prior to Proceeding With Trial.

The Due Process Clause of the Fourteenth Amendment prohibits the states from trying and convicting a mentally incompetent defendant. (*Dusky v. United States* (1960) 362 U.S. 402.) Thus, a defendant "may not be put to trial unless he 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... [and] a rational as well as factual understanding of the proceedings against him.' [Citation.]" (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354 [116 S.Ct. 1373, 1377, 134 L.Ed.2d 498].) Whether a person is competent to stand trial is a jurisdictional question, and cannot be waived by the defendant or counsel. (*People v. Pennington, supra,* 66 Cal.2d at p. 521 [58 Cal.Rptr. 374, 426 P.2d 9422].)

1. Under California law, the competency of a developmentally disabled defendant can only be evaluated by the regional center for the developmentally disabled.

To implement and protect a defendant's due process rights, California has implemented a two-track procedure for assessing

competency, depending on whether the defendant is (1) mentally ill or (2) developmentally disabled. Section 1367, subdivision (a), provides:

> "A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

Thus, the plain language of the statute provides that mental incompetence may be the result of either (1) a mental disorder or (2) a developmental disability. Under section 1370.1, subdivision (a)(1)(H), "developmental disability" is defined to include mental retardation.

The principles in section 1367 are implemented by section 1368, which provides:

> "(a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.
>
> (b) *If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369.* If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.

(c) Except as provided in Section 1368.1, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined.
If a jury has been impaneled and sworn to try the defendant, the jury shall be discharged only if it appears to the court that undue hardship to the jurors would result if the jury is retained on call.
If the defendant is declared mentally incompetent, the jury shall be discharged." (Emphasis added.)

Thus, once defense counsel has declared a doubt as to his client's competency under Section 1368, subdivision (b), a hearing pursuant to section 1368.1 and 1369 was mandatory ("the court *shall* order that the question of the defendant's mental competence is to be determined in a hearing....") Section 1368.1 requires only that a competency hearing not be held until an information or indictment has been filed and is inapplicable here. Section 1369, subdivision (a) provides in relevant part:

"The court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. If it is suspected the defendant is developmentally disabled, the court shall appoint the director of the regional center for the developmentally disabled established under Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code, or the designee of the director, to examine the defendant. The court may order the developmentally disabled defendant to be confined for examination in a residential facility or state hospital."

Thus, for a suspected mental illness, the court is to appoint a psychiatrist or

licensed psychologist, and any other expert the court may deem appropriate, but for a developmentally disabled defendant the only option is to appoint the director of the regional center for the developmentally disabled. This is because

> "The developmentally disabled . . . range from those whose disability is not immediately apparent to those requiring constant care. Thus, we leave it to the Legislature, guided by competent professionals, to determine how such a diverse group shall be treated. (*Cardinal v. Santee Pita, Inc.* (1991) 234 Cal.App.3d 1676, 1682 [286 Cal.Rptr. 275].) The Legislature, in its wisdom, sought to address the rights of just such defendants by providing that developmental disabilities be assessed only by qualified individuals, specifically the regional center director. (§ 1369, subd. (a).) When there is substantial evidence that gives rise to a suspicion that a defendant is developmentally disabled, the defendant may be committed to an approved residential facility for evaluation, but *must* be evaluated by the regional center for the developmentally disabled. [5 Witkin, Cal. Criminal Law (2d ed. 1989) Trial, § 3002, pp. 3681-3682.]" (*People v. Castro, supra,* 78 Cal.App.4th at p. 1417. Emphasis in original.)

If the failure to appoint the director of the regional center for the developmentally disabled deprives a defendant of a qualified evaluator - no matter how many psychiatrists may be appointed in the alternative - the error deprives the defendant of a fair trial to determine his competency and reversal is required. (*People v. Leonard, supra,* 40 Cal.4th at 1388.)

2. Failure to comply with California's statutory requirements for a competency evaluation violates Due Process.

In California, there is a presumption of competence to stand trial, and the burden is on the defendant to rebut the presumption by a preponderance of the evidence (*People v. Masterson* (1994) 8 Cal.4th 965, 973 [35 Cal.Rptr.2d 679, 884 P.2d 136]; § 1369, subd. (f).) The United

States Supreme Court has held that placing the burden on a defendant to show incompetence does not violate Due Process when (1) a state has adopted procedures for determining competence; and (2) the defendant has been provided access to those procedures. (*Medina v. California* (1992) 505 U.S. 437, 449 [112 S.Ct. 2572, 2579, 120 L.Ed.2d 353].) Therefore,

> "When the relevant statutes set forth a specific procedure to be followed in determining whether a defendant is competent to stand trial, and those procedures have not been adhered to, the fundamental integrity of the court's proceedings has been compromised. Due process *requires* that any doubt regarding the defendant's competency be properly evaluated by experts prior to proceeding with trial. [*People v. Castro, supra,* 78 Cal.App.4th at 1419.]" (*People v. Leonard, supra,* 40 Cal.4th at pp. 1388-1389.)

Here, the trial court's failure to follow the statutory procedures deprived appellant of a proper competency evaluation, compromised the fundamental integrity of the proceedings, and requires reversal. (*Ibid.; People v. Marks, supra,* 1 Cal.4th at p. 56.)

C. The Trial Court Failure to Suspend the Criminal Proceedings or to Later Order a Proper Competency Hearing Violated Due Process.

The trial court, while purporting to act under section 1368, failed to follow any of that statute's requirements. It failed to suspend the criminal proceedings, it failed to appoint the regional director to evaluate appellant, it failed to hold a competency hearing, and it later failed to order a proper evaluation and hearing when the full extent of appellant's disability had been revealed. In failing to initiate and conduct a proper competency hearing, the trial court acted in excess of its jurisdiction and reversal is required.

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1. It was the responsibility of the trial court to initiate proper 1368 proceedings.

The duty to properly evaluate appellant's competency belonged to the trial court:

> "Competence cannot be waived, and the court has the initial and primary duty to act when the facts demonstrate the defendant's possible incompetency; it is the failure of the trial court to raise the issue and suspend proceedings, not the failure of defense counsel to raise the issue, which constitutes the jurisdictional error. [See *People v. Howard, supra*, 1 Cal.4th at pp. 1163-1164; *People v. Pennington, supra*, 66 Cal.2d at p. 521; *Pate v. Robinson* (1966) 383 U.S. 375, 384 [86 S.Ct. 836, 841, 15 L.Ed.2d 815.]" (*People v. Castro, supra*, 78 Cal.App.4th at pp. 1416-1417.)

Defense counsel, in fact, did raise the issue by filing a formal written motion raising a doubt as to his client's competency. (1 CT 25; 1 RT 214-215.)[4] The fact that counsel did not formally request the appointment of the director of the regional center is irrelevant:

> "Whether the appointment of the regional center director was specifically requested at the second competency

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[4] In fact, it was not even necessary for appellant or defense counsel to make a motion raising the issue:

> "It is not essential for the defendant, his or her counsel, or the prosecutor to make a motion which raises the issue of the defendant's competence in order to permit consideration of the issue on appeal. (*People v. Tomas, supra*, 74 Cal.App.3d at p. 88; see also *People v. Aparicio* (1952) 38 Cal.2d 565, 568-569 [241 P.2d 221].) Rather, the presence of the requisite substantial objective evidence compels the trial court to sua sponte suspend proceedings and order a hearing, and the court's failure to do so in the face of such evidence is an act in excess of its jurisdiction and may be raised by the defendant on appeal from the judgment. (*Marks, supra*, 1 Cal.4th at p. 69; *People v. Tomas, supra*, 74 Cal.App.3d at p. 90.)" (*People v. Castro, supra*, 78 Cal.App.4th at p. 1416.)

> hearing or not is irrelevant; when a doubt exists, the trial court must 'take the initiative in obtaining evidence on that issue.' (*In re Davis* (1973) 8 Cal.3d 798, 808 [106 Cal.Rptr. 178, 505 P.2d 1018].) At no time did [the defendant] receive the proper competency hearing to which she was legally entitled. (See *In re Dennis* (1959) 51 Cal.2d 666, 672 [335 P.2d 657].)" (*Id.* at 1419.)

During trial, as evidence of appellant's impairment mounted, the trial court had a further duty to act. As the *Castro* court held, "the court has the initial and primary duty to act when the facts demonstrate the defendant's possible incompetency." (*Id.* at 1416-17.)

Here, the evidence that appellant suffered from brain damage and mental disability was *uncontroverted.* His special education teachers testified that in high school he functioned at a second or third grade level in math and reading. (21 RT 3904, 3909.) At the time of trial, one of the evaluating psychologists placed him somewhere between the third and fourth grade level. (21 RT 3969.) The prosecution psychiatrist did not dispute that he suffered from physical brain damage, dysfunction, and impairment. (23 RT 4472, 4484, 4486.) The prosecutor himself admitted that "[w]ith respect to the impaired intellectual ability, certainly he's got – everybody agrees he has the intellectual capacity of a 12-year-old...." (24 RT 4727.)

In light of this overwhelming evidence, the trial court had a duty to suspend the proceedings and order a proper competency evaluation and hearing. As the *Castro* court held:

> "[T]he presence of the requisite substantial objective evidence compels the trial court to sua sponte suspend proceedings and order a hearing, and the court's failure to do so in the face of such evidence is an act in excess of its jurisdiction and may be raised by the defendant on appeal from the judgment. [*Marks, supra*, 1 Cal.4th at p. 69; *People v. Tomas, supra*, 74 Cal.App.3d at p. 90.]" (*People v. Castro, supra,* 78

Cal.App.4th at p. 1416.)

Thus, even if the appointment of Dr. Davis and the review of her report could be construed as something other than a faulty 1368 hearing, the court's subsequent failure to suspend the proceedings and order a full competency evaluation and hearing divested it of jurisdiction and made all subsequent proceedings invalid.

2. The Trial Court unlawfully conducted 1368 proceedings without suspending the criminal proceedings.

At the hearing in which defense counsel voiced his doubts about appellant's competency and the trial court appointed Dr. Davis to evaluate him, the court made the following statements:

"THE COURT: . . . I'll set the matter for further proceedings on this 1368. I haven't instituted – So the record is clear, I have not instituted 1368 proceedings today.

MR. WIKSELL: Correct.

THE COURT: The criminal proceedings still stand. I'm merely ordering a report in light of the doubt that you have articulated this morning, and I'll order the matter on for further proceedings in that regard." (RT 214-215.)

However, despite the trial court's attempt to have it both ways and have appellant evaluated without suspending the proceedings - there simply is no provision for such a maneuver in Section 1368.[5] The court stated that it was

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[5] As shown above, under section 1368(b), once defense counsel had declared his doubts about his client's competency the section mandates that "the court *shall* order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to

not instituting 1368 proceedings seconds after it had stated that it was making ". . . the appointment of an examining psychologist or psychiatrist report to the court on the issue of mental competency pursuant to 1368 ad sec [sic] of the Penal Code."

At the abbreviated "hearing" on the matter, the trial court also purported to make a finding that appellant was competent, stating, "I do at this time find defendant competent within the meaning of 1368, et seq..." (1 RT 224.) The court quite obviously thought it had done a proper 1368 hearing and made the requisite finding.

If - despite making a finding that the defendant was competent within the meaning of 1368 - the trial court had not, as it asserted, instituted 1368 proceedings, reversal is still mandated:

> "When a trial court suspends criminal proceedings based on a doubt that a criminal defendant is competent to stand trial, and the court thereafter fails to hold a competency hearing, the trial court "acts in excess of jurisdiction by depriving the defendant of a fair trial" (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 70 [2 Cal. Rptr. 2d 389, 820 P.2d 613]), and any ensuing criminal conviction must be set aside (*People v. Marks (1988)* 45 Cal.3d 1335, 1340 [248 Cal. Rptr. 874, 756 P.2d 260]; *People v. Hale (1988)* 44 Cal.3d 531, 541 [244 Cal. Rptr. 114, 749 P.2d 769])." (*People v. Leonard, supra,* 40 Cal.4th at p. 1390.)

Thus, even if the November 8th proceeding could somehow be construed as something other than a faulty competency hearing, the end result is the same - by failing to hold a competency hearing the trial court acted in excess of its jurisdiction and the judgment is a nullity.

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Sections 1368.1 and 1369." (Section 1368(b).) The court was required to institute 1368 proceedings - and did so - it simply failed to proceed properly.

D. The Trial Court's Failure to Have Appellant's Competency Properly Evaluated Violated Due Process.

The trial court failed to appoint the director of the regional center for the developmentally disabled to perform appellant's competency evaluation. That failure deprived appellant of a qualified evaluator, and therefore any realistic opportunity to establish his incompetence. That error violated Due Process and requires reversal.

1. Appellant's competence was not assessed by an appropriate evaluator.

As this Court noted in *People v. Leonard,* one of the purposes of section 1369's requirement of an evaluation by the regional director is:

> "to ensure that a developmentally disabled defendant's competence to stand trial is assessed by those having expertise with such disability. In the words of the California Department of Developmental Services (DDS), the state agency that oversees the regional centers: 'A valid assessment of a criminal defendant's ability to stand trial requires a[] comprehensive, individualized examination of the defendant's ability to function in a court proceeding. A reliable assessment is achieved through thorough examinations of each individual by experts experienced in developmental disabilities.' A regional center, the DDS explains, is 'the primary agency to provide expert advice relating to the assessment, needs, and abilities of a criminal defendant with developmental disabilities.' Court-appointed psychiatrists and psychologists may not have this expertise, because their experience may pertain to mental illness rather than developmental disability. This was the case in *Castro*, where the two psychiatrists who evaluated the defendant's competence made no 'attempt to determine [the defendant's] intelligence level or assess the extent of her developmental disability.' [*Castro, supra*, 78 Cal.App.4th at p. 1418.]" (*People v. Leonard, supra,* 40 Cal.4th at pp. 1389-1390.)

In *Castro*, trial counsel requested 1368 proceedings and the appointment of the director of the regional center under section 1369.

Instead, the trial court appointed two psychiatrists who reported that the defendant had an unspecified learning disability, but no psychiatric disorder or disease and that the defendant was "able to understand the nature and purpose of the proceedings" taken against her. The defendant then pled no contest to a charge of second degree murder. (*People v. Castro, supra,* 78 Cal.App.4th at pp. 1411-1412.) Later evidence showed that the defendant functioned at the level of a second or third grader and had been identified as mentally retarded with neurological deficits by the seventh grade. (*Id.* at 1412-1413.) The Court of Appeal reversed unconditionally, finding that the appointment of two separate psychiatrists to evaluate the defendant's competency was not sufficient:

> "That the trial court twice appointed psychiatrists to evaluate [the defendant's] competence to stand trial does not satisfy the requirements of the statute; the trial court was required by law to appoint the regional center director to conduct an evaluation. (§ 1369, subd. (a).) Other courts faced with a potentially developmentally disabled defendant have appointed both a psychiatrist and the regional center director to evaluate the defendant. [See *People v. Kelly* (1992) 1 Cal.4th 495, 541-542 [3 Cal.Rptr.2d 677, 822 P.2d 385].]" (*Id.* at 1418.)

Thus, "[h]aving failed to proceed *properly* with a competency hearing, the trial court acted in excess of its jurisdiction. (*Marks, supra*, 1 Cal.4th at p. 56.)" (*Id.* at p. 1418, emphasis in original.)

In *Leonard*, this Court held that, "although the *result* in *Castro* may well be correct, *Castro* is wrong to the extent it holds that a trial court's erroneous failure to appoint the director of the regional center to examine a developmentally disabled defendant whose competence is in question is a jurisdictional error that *necessarily* requires reversal of any ensuing conviction." (*People v. Leonard, supra,* 40 Cal.4th at p. 1389. Emphasis in original.) This was because the "appointment of the director of the regional

center for the developmentally disabled (§ 1369, subd. (a)) is intended to ensure that a developmentally disabled defendant is evaluated by experts experienced in the field, which will enable the trier of fact to make an informed determination of the defendant's competence to stand trial." (*Id.* at 1391.) Thus, a "defendant's ensuing murder convictions and death sentence need not be reversed unless the error deprived him of a fair trial to determine his competency." (*Id.* at 1390.) This Court then found that in *Leonard* the two psychiatrists who found the defendant competent both had some expertise with the defendant's disability, epilepsy, and both had considered it in their evaluation. Thus, there was no prejudice. (*Id.* At 1391.)

Here, as in *Castro*, appellant was evaluated by a psychologist with no special expertise in developmental disabilities and whose report did not attempt to analyze the impact of appellant's brain damage and retardation on his competency.

It was undisputed that appellant suffered from significant brain damage at birth. (See 21 RT 3968, 3992, 22 RT 4168-69, 4282, 4300, 4316-4317, 23 RT 4470, 4472.) Lack of oxygen at birth had killed the upper neurons in the brain, resulting in significant damage, both physically and mentally. (21 RT 3968-69, 3979.) At trial, appellant's neuro-developmental age was between 6 and 7 years old. (21 RT 3981.) Academically, he functioned somewhere between the third and fourth grade levels. (21 RT 3969.) Yet the psychologist's report, which was the only evidence considered by the court, states only that appellant "appears to function within a Low Average to Borderline level of intelligence. He states that he has learning disabilities but was unable to elaborate." (1A ECT 20.) In another place in her report, the psychologist notes that "[h]e [appellant] was in special education 'something to do with a learning

disability.' He did not elaborate on this." (1A ECT 19.) The psychologist did not perform any IQ testing and there is no discussion of mental retardation or brain damage. She was provided with a cover sheet from an IQ exam. (1A ECT 18.) Appellant's IQ score of 73 was in the second or third percentile, meaning that 98 out of 100 people his age score higher. (22 RT 4282.) Yet here, as in *Castro*, the psychologist did not directly "attempt to determine [the defendant's] intelligence level or assess the extent of [his] developmental disability." [*Castro, supra*, 78 Cal.App.4th at p. 1418.]" (*People v. Leonard, supra,* 40 Cal.4th at pp. 1389-1390.) Instead, the psychologist asked appellant about the issue and stopped her analysis when appellant was unable to "elaborate."

"A valid assessment of a criminal defendant's ability to stand trial requires a comprehensive, individualized examination of the defendant's ability to function in a court proceeding. A reliable assessment is achieved through thorough examinations of each individual by experts experienced in developmental disabilities." (*People v. Leonard, supra,* 40 Cal.4th at pp. 1389-1390.) Here, appellant was not properly evaluated by a qualified individual in violation of appellant's constitutional rights to due process, a fair jury trial and a reliable capital trial. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Reversal is required.

E. Unconditional Reversal is Required.

This Court has taken the position that the United States Supreme Court "accept[s] the possibility of a constitutionally adequate post-trial or even post-appeal evaluation of the defendant's pretrial competence." (*Marks, supra,* 1 Cal.4th at p. 67.) However, the facts of this case make such a retrospective evaluation unacceptable on its face. In *Drope v. Missouri* (1975) 420 U.S. 162, 183 [95 S.Ct. 896, 909], the United States Supreme Court held:

> "The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, see *Pate v. Robinson*, 383 U.S., at 386-387 [95 S.Ct. at pp. 842-843]; *Dusky v. United States* [(1960)], 362 U.S. [402,] 403 [80 S.Ct. 788, 789, 4 L.Ed.2d 824] we cannot conclude that such a procedure would be adequate here. Cf. *Conner v. Wingo* [(6th Cir. 1970)] 429 F.2d [630,] 639-640. The State is free to retry petitioner, assuming, of course, that at the time of such trial he is competent to be tried."

The court in *Castro,* citing *Drope*, found that any *nunc pro tunc* determination would be insufficient because the case also involved the withdrawal of a guilty plea. It then reversed the conviction unconditionally. (*People v. Castro, supra,* 78 Cal.App.4th at p. 1420.) The *Drope* court reversed unconditionally because the evaluation would be made after a delay of six years. Here, appellant's opening brief is being filed in 2008, fourteen years after appellant was tried. "Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances," there simply is no procedure that would be adequate here. The case must be reversed unconditionally, with directions to the Ventura County Superior Court that, should appellant be re-tried, it has a sua sponte duty to declare a doubt as to his competence based upon a possible developmental disability that may impair his ability to understand the nature of the proceedings or assist counsel in the conduct of the defense in a rational manner. (*Drope v. Missouri, supra,* 420 U.S. at 183; *People v. Castro, supra*, 78 Cal.App.4th at p. 1420.)

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II. THE TRIAL COURT COMMITTED PER SE REVERSIBLE ERROR IN DENYING APPELLANT'S *BATSON-WHEELER* MOTION.

During jury selection, the defense challenged the prosecution's peremptory challenge to the panel's only African-American juror, a schoolteacher strongly in favor of the death penalty. Appellant, who is African-American, objected to the prosecution's challenge on *Batson-Wheeler* grounds (*Batson v. Kentucky, supra,* U.S. 79; *People v. Wheeler, supra*, 22 Cal.3d 258), asserting that the prosecutor was improperly challenging the juror on the basis of race. As discussed below, the trial court found that the defense had failed to make out a prima facie case of discrimination and denied the challenge, but did so under the unconstitutional "strong likelihood" standard of *Wheeler* rather than the proper "reasonable inference" standard of *Batson*. (See *Johnson v. California* (2005) 545 U.S. 162 , 125 S.Ct. 2410, 2419; *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1192-1194; *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.) The court also based its ruling upon erroneous factual findings that had no support in the record.

Because the court's ruling was made under the wrong standard, it is entitled to no deference and this Court's review is *de novo*. Because appellant raised an inference of discrimination, the trial court's failure to demand and evaluate the prosecution's reasons violated appellant's federal constitutional rights to a fair trial and equal protection of the law (U.S. Const., 6th & 14th Amends.), and state constitutional right to a trial by a jury drawn from a representative cross-section of the community. (Cal. Const., art. I, § 16.) And, because appellant was arbitrarily deprived of his state-mandated right to a jury trial that does not exclude jurors on the basis of race or gender, he was denied his rights under the federal Due Process

Clause as well. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) These constitutional errors require that the case be remanded to the trial court for completion of the *Batson-Wheeler* inquiry.

A. Procedural Background

Prospective juror Paul Mack, a college graduate and school teacher, was the only African-American on the jury panel. (6 RT 1034.) Mr. Mack had stated on his questionnaire that the death penalty was used too seldom and ranked himself an eight on a scale of ten in favor of the death penalty. (4 SCT 866.) He had no religious opposition to either the death penalty or judging other people. (*Ibid.*) When asked to summarize his general feeling about the death penalty, he wrote: "If someone takes someone's life then they should die." (*Ibid.*)

During *Hovey* voir dire,[6] Mack stated that he would return a guilt phase verdict consistent with the evidence, and could vote for either death or life without parole in the penalty phase. (3 RT 476-77.) Although he had not given the death penalty a great deal of thought before, he reiterated on voir dire that he felt that if a person had died, the guilty person should receive the death penalty. (3 RT 477-78, 486.) He would not impose the death penalty automatically, however, and would listen to evidence of a killing pursuant to a rape or kidnaping "with a wide open mind." (3 RT 479.) He agreed that both the death penalty and life without parole remove a threat from society and that he did not have a higher regard for one over the other. (3 RT 480.) He would remain open to both penalties in all situations. (3 RT 480, 483.) He clarified one of his answers on the questionnaire to state that he was against abortion but favored the death penalty. (3 RT 482.) He also told the prosecutor he would be able to look

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[6] *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 69-81.

appellant in the eye and state that he had voted for death. (3 RT 484.) In later examination, Mr. Mack confirmed that he could be fair and impartial, believed in the presumption of innocence, would wait until he had heard all of the evidence before making up his mind, and would follow the law given to him by the judge regardless of his feelings. (6 RT 999-1000.)

When the prosecutor later excused Mr. Mack, appellant's immediate *Batson-Wheeler* objection was noted as timely,[7] and the trial court stated that the motion would be heard at a later time. (6 RT 1081-1082.) During another break in the proceedings, defense counsel noted that both panels of 130 prospective jurors had included only two blacks. On this panel, one was excused during *Hovey* voir dire or because of hardship, leaving only Mr. Mack. (6 RT 1145.) He noted that Mr. Mack had stated in his questionnaire that the death penalty was used too seldom, ranked himself an "8" out of 10 for being in favor of the death penalty, and said he could be fair and impartial during *Hovey* voir dire. (6 RT 1145; see also 4 SCT 866.) The trial court responded as follows:

> "...The problem is, as I understand the *Wheeler* requirements, not only must you show the fact that the person excluded is a member of a cognizable group, which, of course he is, but you have to make a showing that there's *a strong likelihood* that he was excused or challenged because of his group association; because he was black rather than because of any specific bias...The problem that I have got with it is simply that my recollection of his *Hovey* examination is that his thinking on the subject of the death penalty was at best described as equivocal. And it would seem to me that excusing him through the exercise of a peremptory challenge is a legitimate exercise of a peremptory challenge, regardless of his color." (RT 1146, emphasis added.)

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[7] A *Batson/Wheeler* motion is timely when made before the jury has been selected and sworn. (*People v. Gore* (1993) 18 Cal.App.4th 692, 701, citing *People v. Howard, supra*, 1 Cal.4th at pp. 1154-1155.)

After further argument, where defense counsel again noted that there was no other black on the panel and it was therefore impossible to show systematic exclusion, the court stated:

> "Very well. The record will reflect there is no other black, but I think that where you have an examination of a black juror whose responses are neutral, then I think we have an arguable position, but I don't think you had that in this case." (6 RT 1147.)

The court then suggested that the parties review the *Hovey* transcript and talk about it further. (*Ibid.*) Defense counsel then added an equal protection objection under *Batson v. Kentucky*, arguing "I think it is a more stringent standard than we have here." (6 RT 1148.) Jury selection then continued. At the close of the day, and out of the presence of the jury, the court again commented that after reading the transcript of the *Hovey* examination, he still found Mack's answers equivocal, and that defense counsel could notify him whenever they wished to take it up further. (6 RT 1170-1171.) The following day, defense counsel noted for the record that the morning panel had only one black juror, who was excused for hardship. (6 RT 1229.)[8]

In the final hearing on the motion, defense counsel argued that, while there were passages where Mr. Mack appeared confused by the questions, the same could be said of all the jurors - they did not seem to understand the bifurcated system or the evidence to be presented at penalty phase - and Mr. Mack's answers were consistent with those of the other jurors. (6 RT

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[8] Ventura County has historically had a systemic problem of under-representation of minority groups on venire panels. Because it involves facts outside the record, appellant's challenge to the composition of the venire will be made by writ of habeas corpus. (see *Duren v. Missouri* (1979) 439 U.S. 357, 364 [99 S.Ct. 664, 58 L.Ed.2d 579], *People v. Bell* (1989) 49 Cal.3d 502, 524-526)

1236.) Mr. Mack's questionnaire indicated he was a very strong pro-death juror, and he had indicated in voir dire that he could be a fair juror. He showed no bias - or even a leaning - towards the defense and was certainly not reluctant to find guilt. (*Ibid.*) The court responded:

> "I indicated yesterday that I didn't feel that a prima facie showing was made out. And because I felt that the answers were equivocal at best – and I direct your attention in particular to page 147 of the transcript at lines 15 through 23. [3 RT 479, lines 15-23.]
>
> In response to a question as to whether he would vote for the death penalty for a killing pursuant to a rape or kidnaping, the prospective juror says, "Well, I don't think I can do that," and then later says that well, perhaps he could.
>
> It doesn't in my view warrant a challenge for cause, and any challenge for cause in that context would be overruled. But I think that it's within the purview of Counsel, notwithstanding the fact that a prospective juror is the only black in the panel, to challenge peremptorily on that type of equivocation.
>
> True, the prospective juror indicated that in a circumstance, you know, he could invoke a death penalty, but I think one can glean from the overall evaluation of that prospective juror's examination that as a general proposition he wouldn't or he disfavored it. And I think in that context Counsel would be certainly within his or her prerogative of excusing peremptorily.
>
> For that reason I conclude that you have not made the prima facie showing. Contrasted with the situation where the juror says I am open minded on the subject, I can consider all of the evidence, I don't have any leanings one way or the other. I think there you have a neutral type person, generally speaking, and I think in that context that would present a closer question on whether or not you have made out of [sic] the prima facie case . . . this particular juror was, from my evaluation of his testimony, in most instances favoring life without parole as contrasted with the death penalty....I make the finding that you have not made a prima facie showing, and because of that finding, the People are not compelled to

respond to the challenge." (6 RT 1237-1239.)[9]

After the defense reiterated that their motion was on equal protection grounds, citing *Batson v. Kentucky*, *supra*, 476 U.S. 79, the Court denied the motion under both *Wheeler* and *Batson*. (6 RT 1244.)

B. General Legal Principles under *Batson* and *Wheeler*.

The use of peremptory challenges to excuse prospective jurors on the basis of race violates the Equal Protection Clause of the federal Constitution (U.S. Const., 14th Amend.; *Batson v. Kentucky, supra*, 476 U.S. 79), as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (Cal. Const., art. I, § 16; *People v. Wheeler*, *supra*, 22 Cal.3d 258.) To establish an equal protection violation under the federal Constitution or a denial of the right to a jury drawn from a representative cross-section of the community under the California Constitution, a defendant must first establish a prima facie case

> "...'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California, supra,* 125 S.Ct. at 2416.)

On appeal, the exclusion of a single juror in violation of *Batson* and *Wheeler* requires per se reversal of a criminal judgment. (*Batson v.*

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[9] The prosecutor then briefly addressed the objection, characterizing the prospective juror as a "loose cannon" who did not understand or respond appropriately to the jury questionnaire or voir dire. The Court did not evaluate or even comment on the prosecution's response. (6 RT 1240-1242.)

Kentucky, *supra*, 476 U.S. at p. 100; *People v. Fuentes* (1991) 54 Cal.3d 707, 715-716, fn. 4.)

C. Because the Trial Court Erroneously Denied the *Batson/Wheeler* Motion Under the Wrong Legal Standard, Review is *De Novo*.

In ruling upon appellant's motion, the trial court explicitly stated that it was using the "strong likelihood" standard of *Wheeler*. (6 RT 1146.) In *Johnson v. California,* the U.S. Supreme Court held that California's "strong likelihood" or "more likely than not" standard under *Wheeler* had placed too high a burden on movants to make a prima facie showing of discriminatory use of peremptory challenges. (*Johnson v. California, supra,* 125 S.Ct. at 2419.)

In *Johnson*, the African-American defendant made a *Batson-Wheeler* objection after the prosecution used its peremptory challenges to strike all three prospective African-American jurors from a panel of 43 eligible jurors. (*Id.* at 2414.) The trial court found that the defendant had failed to make a prima facie case under *Wheeler*'s "strong likelihood" standard because the judge's own examination of the record showed that the black venire members had offered "equivocal or confused" answers in their written questionnaires. (*Ibid.*) In reversing the case, the United States Supreme Court held that the "strong likelihood" standard used by California courts was impermissibly strict; a defendant need only raise an inference of discrimination. (*Id.* at 2416.) The court then found that the fact that the prosecution had used peremptory challenges against the only three African-Americans on the jury panel was sufficient to raise an inference of discrimination and reversed the case. (*Id.* at 2418.)

As the Ninth Circuit has noted: "Where the California courts follow the 'strong likelihood' language of *Wheeler* without any indication that they are actually applying a 'reasonable inference' test consonant with *Batson*,

they apply an incorrect legal standard. In such a case, we need not - indeed, should not - give deference to their determination that defendant has failed to establish a prima facie case of bias." In such a case, the court will review a *Batson* claim *de novo*. (*Wade v. Terhune*, *supra*, 202 F.3d at p. 1197; see also *Cooperwood v. Cambram, supra,* 245 F.3d at 1047.) Here, the court explicitly stated that it required appellant to show a "strong likelihood" of a discriminatory motive. (6 RT 1146.) Its ruling was therefore made under the wrong standard and is entitled to no deference. This Court's review must be *de novo*.

D. The Trial Court Erroneously Denied the *Batson/Wheeler* Motion Based Upon a Mistake of Fact; Appellant Had Established a Prima Facie Case.

As shown above, the trial court's ruling was made under the unconstitutional "strong likelihood" standard and is therefore entitled to no deference. In addition, the court's ruling was based upon a factual error. The court cited a particular passage of Mack's voir dire as showing an "equivocal" attitude towards the death penalty (3 RT 479, lines 15-23):

> "Q: Well, excluding children for a moment, let's say that a killing that was the result or pursuant to a rape or kidnaping.
>
> Do you think you could remain open in a situation like that or do you think you might come back or would come back with a verdict of voting for the death penalty?
>
> A: No, I don't think I can just put that person to death penalty for that. I don't think I can do that."

From this passage the court concluded that "this particular juror was, from my evaluation of his testimony, in most instances favoring life without

parole as contrasted with the death penalty." (6 RT 1239.) However, an examination of the full colloquy demonstrates that the court's conclusion was patently incorrect; what the court left out was the colloquy that preceded and followed the cited section. As noted above, Mr. Mack, a college graduate and school teacher, had stated on his questionnaire that the death penalty was used too seldom and ranked himself an eight on a scale of ten in favor of the death penalty. (4 SCT 866.) He had no religious opposition to the death penalty or judging other people. (*Ibid.*) When asked to summarize his general feeling about the death penalty, he wrote: "If someone takes someone's life then they should die." (*Ibid.*) From the questionnaire alone, it appeared Mr. Mack would automatically impose the death penalty for any murder. When questioned by defense counsel about his questionnaire responses, Mr. Mack replied as follows:

"Q: Well, I noticed on your questionnaire that you are of the opinion that the death penalty is exercised too seldom.

Could you elaborate on that somewhat?

A: Let me go back and look at exactly what I wrote up. Remember what pages this is on?

Q: This would have been question 52 on page seven.

A: Oh, okay. I be – this if someone can be proven that they have evidence to prove that the persons are guilty and some other people have died because of this, that I think the person should also receive – should – death penalty also.

Q: Okay. Well, let me ask you this, then sir. If everyone that kills someone – and I am excluding those cases where there is a self-defense or defense of others.

But in every killing where one kills another, you think they should automatically receive the death penalty?

A: Not each one, no.

Q: Okay. Do you have in mind what kind of case would merit, say, life without parole?

Let me – you do understand there are two options? –

A: Yes, I do, uh-huh, yes.

Q: Do you have some set of circumstances in your mind where you think that would merit life without parole?

A: Not really. I really don't have any exactly. I just thought about what – if people lose their lives and young children or someone else, that – I think that really crossed my mind.

Q: Well, excluding children for a moment, let's say that a killing that was the result or pursuant to a rape or kidnaping.

Do you think you could remain open in a situation like that or do you think you might come back or would come back with a verdict of voting for the death penalty?

A: No, I don't think I can just put that person to death penalty for that. I don't think I can do that.

Q: Okay.

A: ***I'd have to listen with a wide open mind before I make a decision about that.***" (3 RT 478-479; emphasis added.)

Thus, seen in its proper context, the passage cited by the trial court actually showed that Mr. Mack was actually a strong supporter of the death penalty

but would listen with a "wide-open mind" before deciding between death and life without parole. Mr. Mack's responses were not "equivocal" except in the sense that he would freely consider both penalties and the trial court was simply wrong in both the factual basis and legal standard used in its ruling.

The trial court itself noted that its ruling was based solely upon Mack's alleged "equivocal" answers, which it

> "....[c]ontrasted with the situation where the juror says I am open minded on the subject, I can consider all of the evidence, I don't have any leanings one way or the other. I think there you have a neutral type person, generally speaking, and I think in that context that would present a closer question on whether or not you have made out of [sic] the prima facie case." (6 RT 1239.)

Here, in fact, that was exactly the situation: Mack explicitly stated that he would listen with a "wide open mind" before making a decision. Thus, the trial court's ruling was based upon clear factual error.

E. Remand to the Trial Court Is the Appropriate Remedy.

The record is clear that the prosecutors had exercised the relevant peremptory challenge against all members of a cognizable group – African-Americans. (*People v. Turner* (1986) 42 Cal.3d 711, 719.) By establishing that the *only* available African-American juror - a juror strongly in favor of the death penalty but still able to be fair and impartial - was excused by the prosecution, defense counsel made a prima facie case of discrimination. (See, e.g.,*U.S. v. Horsley* (1989) 864 F.2d 1543 [prima facie case of purposeful discrimination may be established by peremptory challenge of sole black on jury panel]; *U.S. v. Chinchilla* (1989) 874 F.2d 695, 698, fn. 5 ["...although the striking of one or two members of the same racial group may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury."].) The

trial court's ruling that no prima facie case had been made, based upon both factual and legal errors, violated appellant's rights to a trial by jury, equal protection, and due process. (*People v. Wheeler, supra,* 22 Cal.3d 258; *Batson v. Kentucky, supra,* 476 U.S. 79; Cal.Const., art. I, § 16 [right to jury drawn from representative cross-section of the community]; U.S. Const., 5th, 6th & 14th Amends. [due process and equal protection clause]; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346 [violation of rights under state law also Due Process violation.) This case must be remanded to the trial court for completion of the *Batson/Wheeler* inquiry. (*People v. Johnson* (2006) 38 Cal.4th 1096 [determining whether the prosecution's peremptory challenges were based on impermissible group bias is a matter best left to the trial court after a remand of the case to that court.].)

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III. THE TRIAL COURT IMPROPERLY ADMITTED AUTOPSY AND CRIME SCENE PHOTOGRAPHS THAT SERVED NO PURPOSE OTHER THAN TO INFLAME THE JURY, REQUIRING REVERSAL OF BOTH THE GUILT AND PENALTY PHASES.

A prosecutor may not use photographs of victims where they are "relevant only on what . . . is a nonissue," or they "are . . . largely cumulative of expert and lay testimony regarding the cause of death" or "are . . . unduly gruesome." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137.) Here, the trial court should have excluded crime scene and autopsy photographs as irrelevant to any disputed issue of fact. Their admission was also unduly prejudicial under Evidence Code section 352 and violated appellant's constitutional rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

A. Procedural Background.

Appellant objected to the use of photographs of the victim, including closeups of the wounds and autopsy photographs, and moved the trial court to exclude all such evidence as highly inflammatory and prejudicial. (See 11 RT 2019, 2030-31, 12 RT 2172-2174, 2111-2114, 2155-2156.) The trial court overruled each objection. (*Ibid.*)

Appellant specifically objected to People's 28, a graphic and bloody photograph that the prosecutor contended was necessary to show that the fatal wounds were contact wounds. (11 RT 2030.) Appellant responded that there was no dispute as to whether the wounds were contact wounds, and that that fact would be testified to by Dr. Lovell, the coroner. (11 RT 2031.) The trial court did not address the prejudicial effect of the photos,

but stated there was "sufficient probative value" and overruled the objection. (*Ibid.*) The prosecutor then used the photo in his opening statement. (11 RT 2043.) People's 8, a giant blown-up photo of the victim lying in a pool of blood, was placed right by the jury box on an easel and left up for most of the trial. (See 18 RT 3216, 3336, 3340, 3349; 3384, 20 RT 3630-31, 23 RT 4574; 2 SCT2 299-301.)

Appellant also specifically objected to People's 5, 6, and 7, which also showed the victim lying in a pool of blood in the ditch where she was found. (11 RT 2155-2156.) Appellant additionally objected to all of the photos following the introduction of 5, 6 and 7 as being both cumulative and inflammatory. (11 RT 2111.) The prosecution argued that the photos showed the presence of two sets of footprints in the ditch (one set made with size ten shoes), the shell casings, and the victim's condition - showing that she was carried and placed in the ditch without further movement. (11 RT 2111-2113.)

When appellant's counsel later objected to three autopsy photos, People's 23, 24, and 25, the prosecutor again argued they showed the contact wounds. (12 RT 2173-2174.) Trial counsel, who had conceded that appellant had done the shooting in his opening statement (11 RT 2056), contended that none of the photos were relevant to any issue in dispute. (11 RT 2114, 12 RT 2174.) The prosecutors contended that they still needed to prove every element of their case. (11 RT 2114, 12 RT 2173.)

After the trial court stated that it could not find the photos were without evidentiary value or that their cumulative effect outweighed their probative value, trial counsel asked the court to reconsider its ruling on People's 18 because of the amount of blood in the photo. (11 RT 2114.) The court rebuffed him, saying, "Oh Mr. Wiksell, don't be so sensitive." (*Ibid.*)

The photographs were irrelevant to any disputed issue at trial and were unduly inflammatory in both the guilt and penalty phases of the trial. The trial court erred in not excluding them.

B. The Photos Were Irrelevant to Any Disputed Issue.

No evidence is admissible unless it relates to a disputed fact that is of material consequence. (Evid. Code § 210.) Accordingly, a trial court has no discretion about whether to admit irrelevant evidence. (*People v. Turner* (1984) 37 Cal.3d 302, 321, overruled on another ground in *People v. Anderson, supra,* 43 Cal.3d at p. 1149 [error to admit crime scene photos that were unnecessary to prove any part of the prosecution's case].)

As a general rule, "[t]he trial court's exercise of discretion in determining relevance and the admissibility of photographs will not be disturbed on appeal unless their probative value clearly is outweighed by their prejudicial effect." (*People v. Hughes* (2002) 27 Cal.4th 287, 336.) The determination of the probative value of evidence is inextricably bound to the issue of whether the evidence is relevant. This is so because there is no statutory definition of the word "probative," and thus one must assume that the term is to be understood by its common usage: something is probative if it serves to prove something else. (Webster's 10th New Collegiate Dict. (1993) p. 928.) This Court has inferentially adopted this definition, but keyed its application to the use of the term "relevant" in Evidence Code section 210. (See *People v. Alcala* (1992) 4 Cal.4th 742, 797.)

Even assuming that as a general rule photographs depicting the manner in which a victim was injured are relevant to the determination of malice, aggravation and penalty (see *People v. Farnam* (2002) 28 Cal.4th 107, 185-186), this Court has never held that this automatically qualifies photographs for admission at a capital trial. In fact, this Court has observed

that trial courts should be alert to how gruesome photographs play on a jury's emotions, especially in a capital trial. (*People v. Weaver* (2001) 26 Cal.4th 876, 934 [considering whether admission of gruesome photographs denied appellant a fair penalty phase determination].) Even in those cases which uphold the admission of photographs that seemingly relate only to the circumstances of the offense at issue, the photographs usually derive their probative value from the fact that they are able to uniquely demonstrate some aspect of the crime warranting consideration that cannot be demonstrated in another manner. (See, e.g., *People v. Thompson* (1990) 50 Cal.3d 134, 182 [manner in which 12-year-old victim was hogtied was "indescribable in mere words."].)

Here, the trial court found that the photographs had some evidentiary value and that their prejudicial effect did not outweigh their probative value. (See 11 RT 2114.) However, appellant did not dispute the nature of the wounds that the victim received, the manner of death, or any other fact that the photographs might depict. The prosecution repeatedly argued that they had to show that the victim's wounds were contact wounds as evidence of premeditation and deliberation (see 12 RT 2173), but the *fact* that they were contact wounds was completely undisputed. The *inference* of premeditation was a matter for argument based upon that undisputed fact. Accordingly, the autopsy and crime scene photographs were irrelevant and should have been excluded.

In *People v. Turner*, *supra*, 37 Cal.3d 302, this Court held that photographs offered to show the position of the victims' bodies and the nature of their wounds were erroneously admitted where "[n]either the court nor the prosecution articulated the relevance of the position of the bodies or the manner of infliction of the wounds to the issues presented." (*Id.* at p. 321; see also *People v. Marsh* (1985) 175 Cal.App.3d 987, 998 [autopsy

photographs irrelevant where coroner's testimony was uncontradicted and cause of death undisputed].)

This Court should similarly find that there was undisputed testimony establishing both how the victim was shot and the cause of death. In his opening statement, defense counsel told the jury that appellant had done the shooting: "The evidence will be that Mr. Sattiewhite did in fact shoot Genoveva Gonzales. He did do that." (11 RT 2056.) During guilt phase, the medical examiner, Dr. Lovell, testified that the wounds were contact wounds. (12 RT 2166-68.) In closing argument, defense counsel stated: "Now I told you on the very first day that the person that shot Genoveva Gonzales is sitting right there, and nothing has changed. Just as I told you on the very first day that he shot her, he did in fact shoot her." (18 RT 3274.) He then again told the jury that Dr. Lovell had testified that the wounds were contact wounds - and that that fact was uncontradicted. (18 RT 3276.) Nevertheless, the prosecution still sought to and was permitted to introduce People's 23, 24, 25 and 28 to "prove" those uncontradicted facts.

Similarly, Dr. Lovell also testified that the victim had received a blow to the back of the head before her death. (12 RT 2170.) That fact was not disputed. Nevertheless, the prosecution introduced People's 25, a picture of the victim with her scalp peeled away from her skull during the autopsy - ostensibly introduced into evidence to show the bruise that she had received from a blow. (12 RT 2173-74.) As defense counsel argued at the time, the jury had heard undisputed testimony regarding the blow to the head and didn't need to see such a photo to prove it. (*Ibid.*) Accordingly, the photographs were irrelevant to any disputed issue and should have been excluded.

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C. The Photographs Were More Prejudicial than Probative, Affecting Both the Guilt and the Penalty Phases of Appellant's Trial.

Even assuming that the photographs might have had some marginal relevance, the trial court abused its discretion by finding that the photographs were more probative than prejudicial. Under Evidence Code section 352, a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . ." It applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual and that has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Accordingly, section 352 implicates due process guarantees of fundamental fairness and the Eighth Amendment guarantees of reliability in a capital case. (See *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970-972; *Lesko v. Owens* (3d Cir. 1989) 881 F.2d 44, 52.) This was precisely the kind of inflammatory bias that was created by the autopsy photographs in this case.

1. Graphic Photos Have a Dramatic Effect on Juries.

When deciding the impact of photographs on jurors, a reviewing court is usually left to speculate as to how the jurors may have been affected by viewing the photographs. Studies have recognized that graphic photographs have the power to arouse jurors' emotions: "Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs." (Rubenstein, *A Picture Is Worth a Thousand Words–The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197; see, Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*

(1997) 21 Law & Hum. Behav. 485, 491-492 [documenting jurors' emotional reactions to viewing graphic photographs of murder victim]; Kelley, *Addressing Juror Stress: A Trial Judge's Perspective* (1994) 43 Drake L.Rev. 97, 104 [recounting juror's posttraumatic-stress symptoms experienced after viewing graphic photos of murder victim].)

Studies also show that graphic photographs influence the verdicts that juries return. (Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs]; Douglas et al., *supra*, 21 Law & Hum. Behav. at p. 492-494 [same].) If a jury is more likely to render a guilty verdict when shown autopsy photographs than it would be if not shown the photographs, there is reason to believe that a penalty phase jury would be more likely to return a death verdict when shown the photographs than it would be if not shown the photographs.

Logic supports this conclusion because jurors' decisions at the penalty phase are far more discretionary and less constrained by law than their decisions at the guilt phase. (See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 ["The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts."].) Thus, a jury's death-sentencing discretion at the penalty phase is much more likely to be affected by evidentiary items such as inflammatory photographs. Viewing graphic photographs of victims' corpses creates a strong emotional reaction in a juror and creates a likelihood that the reaction will be so strong that it will override consideration of the other evidence presented on the ultimate question of whether the defendant should live or die.

The belief that the introduction of gruesome photographs causes

jurors to ignore other evidence is supported by empirical study. It has been demonstrated that after viewing graphic photographs, jurors tend to prematurely reach a determination that the defendant should be sentenced to death. (Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)

As reflected by the studies cited above, it is likely that the jurors effectively made their guilt and death-sentencing decisions upon viewing the photographs, at which point they shut their minds to the defense evidence and decided to convict appellant and sentence him to death.

2. Admission of the Photographs Affected Both the Guilt and Penalty Phases.

In the guilt phase, the pictures could only serve to inflame the jury against appellant. Their image was in the jurors' minds even as they considered evidence of guilt and whether any lesser charge should apply. Indeed, the prosecutor repeatedly urged the jury to consider the gruesome poster of the victim that had been a few feet away from them throughout the trial, arguing that "a photo is worth a thousand words and you've got your photo right here." (18 RT 3384, see also 3223, 3336, 3340, 3349.) Accordingly, the photographs undoubtedly influenced their guilt verdicts.

In the final argument of the penalty phase, the prosecutor emphasized the importance of the huge blow-up picture of the victim lying in the ditch in a pool of blood, saying the photo was very important - but not, as the prosecution had previously argued to the court - to show the location or nature of the wounds. Instead, the prosecutor told the jury, "It [the photo] allows you to appreciate the horror, the terror she must have felt

and it allows you to put in balance and perspective what the appropriate punishment is." (RT 4574.) In other words, the photo was important for its emotional impact. It is just this type of graphic evidence and improper argument that is incompatible with a rational or impartial penalty judgement. (See *Saffle v. Parks* (1990) 494 U.S 484, 493 [death penalty must be reasoned moral response rather than emotional one].)

In *People v. Smith* (1973) 33 Cal.App.3d 51, three semi-nude photographs of the victim were at issue. The court emphasized that:

> "Such pictures are always offered as parts of an evidentiary mosaic; thus it is more appropriate to appraise their probative value as cumulative, not isolated, evidence. . . . In this case there were ample descriptions of the positions and appearances of these two bodies. There was autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification." (*Id.* at p. 69.)

Under these circumstances, the Court of Appeal ruled that the trial court had erred in admitting the photographs. (*Ibid.*; see also *People v. Anderson, supra,* 43 Cal.3d at 1149 [photographs cumulative of expert and lay testimony regarding the cause of death, the crime scene, and the position of the bodies].)

Here too, there had been uncontradicted testimony about the crime scene and the precise location and nature of the wounds, including the examiner's opinion about the pressure on the gun when it was fired. (12 RT 2176.) The prosecutor ostensibly sought to use the photographs only to show the physical characteristics of the crime scene and wounds, facts that were not only not disputed by appellant but had been *conceded* in trial counsel's opening statement.

Their true purpose - as shown by the prosecutors' closing arguments during both the guilt and penalty phases - was to inflame the jury, a jury

composed of average citizens who, unlike both the trial court and this Court, had probably never seen such photos. They, like trial counsel, were "sensitive" and that fact, combined with the photos' complete lack of evidentiary relevance, is precisely why those photographs should have been excluded. First, a shocking, poster-size photo of the partially-clad body of a woman lying in a pool of her own blood was put up and left up for almost the entire trial only a few feet away from the jury box. (See 18 RT 3384, see also 3223, 3336, 3340, 3349.) That was followed by a barrage of close-up photographs of the wounds, photos of pools of blood and multiple angles of the victim at the crime scene, culminating in Exhibit 25, a picture of the victim with her scalp peeled away from her skull during the autopsy - ostensibly introduced into evidence to show a bruise that she had received from a blow. (12 RT 2173.) As defense counsel argued at the time, the jury had heard undisputed testimony regarding the blow to the head and did not need to see such a photo to prove it. (*Ibid.*; see *People v. Marsh, supra,* 175 Cal.App.3d at p. 998 ["Here, where the uncontradicted medical testimony identified the precise location and nature of the injuries the autopsy photographs have little, if any, additional probative value."].) In the words of the court in *Marsh*, " [T]he jury was not enlightened one additional whit by viewing these gory autopsy photographs." (*Ibid.*)

Such a relentless parade of horrible images could only have a sharp, emotional effect upon the jury. Accordingly, this Court should find that the trial court erred in concluding that the pictures were more probative than prejudicial.

D. Admission of the Photos Compels Reversal.

Although as a general rule violations of state evidentiary principles do not implicate the federal and state constitutions, in this case the admission of the photographs prevented appellant from receiving a fair trial

and thus violated his constitutional rights. (See *Lisenba v. California* (1941) 314 U.S. 219, 228 [recognizing state court's admission of prosecution evidence that infuses trial with unfairness would violate defendant's right to due process of law]; *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269 [recognizing admission of gruesome photographs may deprive defendant of fair trial and require reversal of judgment].)[10] The admission of these photographs also infringed the Fifth, Sixth, Eighth, and Fourteenth Amendment rights of appellant, as well as rights guaranteed by article I, sections 7, 15, 17, and 24 of the California Constitution, to a fair trial and a reliable capital sentencing proceeding.

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Admitting photographs as graphic as the ones in this case under circumstances where they bore little probative value to the issues rendered them unduly prejudicial resulting in a fundamentally unfair trial. Moreover, appellant had a due process liberty interest in having California's evidentiary standards properly applied to his case. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *People v. Partida* (2005) 37 Cal.4th 428, 431-439.)

The admission of these photographs also violated appellant's right to a reliable capital-sentencing determination. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [requiring heightened reliability for capital-sentencing determination].) "It is of vital importance to the

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[10] Other state courts have also held that the admission of graphic photographs can constitute reversible error. (See *State v. Cloud* (Utah 1986) 722 P.2d 750, 752-755 [reversing murder conviction because of erroneous admission of graphic photographs].)

defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The admission of the photographs evoked the jurors' emotions, rather than their reason, thus improperly affecting their deliberations and verdict. Those emotions would also cause a failure to consider mitigating evidence in violation of Eighth Amendment principles. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114.) Therefore, this Court must reverse the judgment in this case unless the errors are harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Since guilt or death verdicts are never required or preordained by the state of the evidence (see *Woodson v. North Carolina, supra*, 428 U.S. at p. 301 [holding Eighth Amendment precludes automatic imposition of death penalty for first-degree murder]), this is an especially difficult burden for the State to bear. The facts of this case hardly render a death verdict an inevitability. "The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability." (*Hendricks v. Calderon, supra*, 70 F.3d at p. 1044.)

Here, there was no dispute that appellant had been born with significant brain damage at birth. (See 21 RT 3968, 3992, 22 RT 4168-69, 4282, 4300, 4316-4317, 23 RT 4470, 4472.) His neuro-developmental age was between 6 and 7 years old, but his ability to deal with moral judgments, consequences, or relationships with people was below that of an average 6 or 7-year-old. (21 RT 3981, 3991-3992.) Because of this, he had undergone a lifetime of beatings by his father, who would also have

appellant watch violent pornographic movies with him. (See 21 RT 3832-33, 3865.) After appellant was abandoned by his father, he came under the influence of Rollins, the gang member who first directed appellant's actions and then testified against him at trial. (21 RT 3836-37, 14 RT 2490.)

This case was a close one. During penalty deliberations the jury sent a note to the trial court asking "if we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) The trial court's error in admitting inflammatory photographs that likely tipped that balance should cause this Court to doubt the reliability of appellant's death sentence in light of the heightened scrutiny which the Eighth Amendment places upon capital proceedings.

Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that admission of the photographs was harmless error. Both the guilt and penalty phase judgments must be reversed.

* * *

IV. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF KIDNAPPING AND THE TRUE FINDING ON THE KIDNAPPING SPECIAL CIRCUMSTANCE.

At the close of the prosecution's case, appellant moved for a judgment of acquittal as to the kidnapping count and special circumstance under Penal Code section 1118.1. (16 RT 2894; 2900-2901.) The motion was summarily denied. This was clear error, as the prosecution's case for a kidnapping consisted solely of the uncorroborated testimony of an accomplice and sheer speculation. There simply was no corroborating physical evidence or testimony.

That case was even weaker at the close of trial, when the evidence indicated that the victim was a drug-dependent prostitute (15 RT 2764, 2768) who had left home without any money (13 RT 2341, 2345-2348), was working that night (12 RT 2212) , and who already knew Rollins as a source of drugs. (16 RT 2921-2934.)

The denial of the 1118.1 motion, conviction of kidnapping, and the true finding on the kidnapping special circumstance based on legally insufficient proof of guilt violated appellant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17, *Beck v. Alabama* (1980) 447 U.S. 625; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.) They also violated appellant's due process right under the federal constitution to the benefit of the provisions of Penal Code section 1111 requiring corroboration of accomplice testimony, a state statute in which he has a clear liberty interest. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346, *Clemons v. Mississippi* (1990) 494 U.S. 738, 746; *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522.)

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A. Legal Standards

In this matter there are two overlapping legal standards - the requirement that the testimony of an accomplice be corroborated under Penal Code section 1111, and the sufficiency of the evidence in general to prove the charge of kidnapping. As shown below, the evidence *cannot* be sufficient to support the charge because the testimony of accomplice Bobby Rollins was the only evidence of a kidnapping, and that testimony was completely incredible and uncorroborated.

1. Accomplice testimony must be corroborated by evidence connecting the defendant to the commission of the crime.

Under Penal Code section 1111, "[a] conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Section 1111 goes on to define an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Accomplice testimony inculpating the defendant must be corroborated by the testimony of a non-accomplice and that testimony must "connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.) That is, "[t]he corroborating evidence need not by itself establish every element of the crime, but it must, *without aid from the accomplice's testimony*, tend to connect the defendant with the crime. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 986, emphasis added.)

In particular, "... it is not sufficient to merely connect a defendant with the accomplice or other persons participating in the crime. The evidence must connect the defendant with the crime, not simply with its perpetrators. [Citations.] Likewise, it is insufficient to show mere suspicious circumstances. [Citations.]" (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.) Thus, to determine the sufficiency of corroborating evidence, the reviewing court "must eliminate the accomplice's testimony from the case, and examine the evidence of other witnesses to determine if there is any inculpatory evidence tending to connect the defendant with the offense. [Citations.] '[C]orroboration is not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value. . . . ' [Citation.] It must do more than raise a conjecture or suspicion of guilt, however grave. [Citations.]" (*Ibid.*)

2. Sufficiency of the evidence.

An identical standard of review is applied to both the section 1118.1 motion and the sufficiency of the evidence as a whole. The only difference is in the scope of the evidence that is considered.

The "test to be applied by the trial court under "section [1118.1] is . . . the same test applied by an appellate court in reviewing a conviction: whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged [citations]." (*People v. Valerio* (1970) 13 Cal.App.3d 912, 919; see also *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) When the sufficiency of the evidence is challenged at the close of the prosecution's case-in-chief, a later conviction must be reversed if, judging the record at the time the motion was made, the evidence was insufficient. (*See People v. Lines* (1975) 13 Cal.3d 500, 505.)

As formulated by the United States Supreme Court in *Jackson v. Virginia* (1979) 443 U.S. 307, 319, the relevant question in determining whether evidence is sufficient to sustain a criminal verdict is whether a rational trier of fact could have found each element of the charged crime beyond a reasonable doubt. In *People v. Johnson* (1980) 26 Cal.3d 557, 576, this Court concluded that the standard for the sufficiency of evidence set forth in *Jackson* was identical to the standard being applied in California. *Johnson* and earlier California precedent, as well as *Jackson,* thus define evidence sufficient to allow a rational trier of fact to find guilt beyond a reasonable doubt.

Jackson defined the requisite evidence as being sufficient to allow the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . . ." (*Jackson v. Virginia, supra*, 443 U.S. at p. 315.) *Johnson* stated the standard as "whether substantial evidence supports the conclusion of the trier of fact[.]" (*People v. Johnson, supra*, 26 Cal.3d at p. 576, citing *People v. Reilly* (1970) 3 Cal.3d 421, 425.) As the Court explained:

> "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent. As *People v. Bassett* [1968] 69 Cal.2d 122, explained, 'our task . . . is twofold. First, we must resolve the issue in the light of the *whole record* -- i.e., the entire picture of the defendant put before the jury -- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence

> remains substantial in the light of other facts.'"[Citation.] (*People v. Johnson, supra*, 26 Cal.3d at pp. 576-577, emphasis in original.)

Earlier cases provide further meaning for the concept of "substantial evidence." "'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Reyes* (1974) 12 Cal.3d 486, 500, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755; see also *In re Eugene M.* (1976) 55 Cal.App.3d 650, 658 ["Well-grounded suspicion is not proof, and especially is it not proof beyond a reasonable doubt".].) Nor can "substantial evidence" be based on speculation:

> "We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence. " (*People v. Morris* (1988) 46 Cal.3d 1, 21, citations omitted.)

The kidnapping count and special circumstance charged in this case were based solely upon the testimony of accomplice Bobby Rollins, buttressed only with speculation and suspicion, and the lack of substantial evidence to support those charges mandates reversal of the guilt and death verdicts.

B. The Prosecution's Only Evidence For A Kidnapping Was the Uncorroborated Testimony of Accomplice Bobby Rollins.

Appellant was charged with kidnapping under Penal Code section 207, and as a special circumstance within the meaning of Penal Code section 190.2. (1 CT 1-3.) In 1992, when the kidnapping allegedly

occurred, subdivision (a) of Penal Code section 207 provided that, "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping."

The related special circumstance required proof that the murder was committed "in the commission" or attempted commission of the kidnapping. (Pen. Code § 190.2 (a)(17)(B); CALJIC 8.81.17; 2 CT 288.) It could not be "merely incidental" to the murder. (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 816, fn.5; *People v. Green* (1980) 27 Cal.3d 1.)[11] Here, the sum total of the prosecution's case for kidnapping was the uncorroborated and obviously perjured testimony of Bobby Rollins.

1. The non-accomplice testimony presented to prove the charge of kidnapping.

Salvador Zavala, father of three of Gonzales' four children, testified that Gonzales had gone out that night without the grocery money he had given her, and that he had searched for her the next day at the bars she frequented on Oxnard Boulevard. (13 RT 2336-2348.) Tillie Carrillo, owner of the New Mexico Restaurant in Oxnard (formerly the Casa del Oro), testified that she had last seen Gonzales, a regular customer, late on the night of her death. Gonzales came in, choked a man until he turned very red, then drank a beer with two other men and left with them about 10:30 p.m.. (12 RT 2208-2213.) Early the next morning, Gonzales was found

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[11] In 1998, the California Legislature provided specific exceptions to the "independent felonious purpose" rule in enacting subparagraphs (M) of section 190.2(a)(17), relating to kidnapping and arson special circumstance allegations, however, those changes are not applicable to crimes committed before that date.

dead on the side of Arnold Road. (11 RT 2089; 2092.)

Dr. Lovell, Chief Medical Examiner for Ventura County, testified that there were no signs of choking or bruising, no material under her fingernails, no indications of binding on her arms or wrists, no bloody lip or nose (12 RT 2185-2187) - in short, no indication that Gonzales had been kidnapped by force. Nor could he say whether the sex Gonzales had participated in that night had been forced or consensual. (12 RT 2180.)

Thus, the evidence apart from Rollins' testimony showed only that Gonzales had left the Casa Del Oro at 10:30 p.m. with two men, been found dead the next morning, and that there was no physical evidence of any kidnapping by force. The sole evidence of a kidnapping was Rollins' testimony that appellant told him that Jackson had "gaffled" Gonzales. (RT 2399-2401.) Because that testimony was uncorroborated – and part of a package of obvious lies – it was insufficient as a matter of law.

2. Accomplice Bobby Rollins' testimony was uncorroborated and unbelievable.

Penal Code section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial." This means all persons concerned in the commission of a crime whether they directly commit the act, or aid and abet in its commission, or advise, encourage or compel its commission, whether present or not. (Penal Code § 31.) In an interview with Detective Gatling on July 27, 1992, Bobby Rollins had admitted to being in the Cadillac with Jackson, appellant and Gonzales. Rollins then backtracked, telling Gatling "Naw, I ain't saying I drove nowhere. That put me in it." (14 RT 2601-2602.) He then began denying being in the car. In exchange for his testimony at appellant's trial, Rollins struck a deal that he would not be charged for Gonzales's murder and he would serve less than nine years on two other cases where he

faced over fifty years in prison. (14 RT 2490-2493.) Thus, Rollins initially admitted to the police that he had been in the car until the realization sunk in that the admission would "put him in it." Rollins was in it; he was a principal in the crime and subject to the death penalty. (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 744 [A person whose presence assists the commission of the crime may be convicted of that crime].) Rollins then came up with the story he used at trial.

At trial, Rollins testified that he, appellant and Jackson had borrowed a Cadillac and Rollins had driven it all day. (13 RT 2374-2377.) Then, Rollins was apparently so horrified that Jackson wanted to do a robbery that he allegedly rented another car for cocaine from someone the police never found - or even looked for. (13 RT 2379-82.) By sheer coincidence, Rollins then drove by appellant, Jackson, and Gonzales at the Buddy Burger and followed them to the Mira Loma Apartments, where he happened to find out that Gonzales had been "gaffled" and saw Jackson strike her. (13 RT 2388-2414.) Rollins then left them again, but then just happened to drive up at the exact moment when appellant and Jackson removed Gonzales from the car and killed her out on Arnold Road. (13 RT 2417-2427.) Rollins then went with them to dispose of the evidence, pick up Lydia, and eat at Denny's. (13 RT 2433-2440.) The second car that Rollins was supposedly driving was returned at some point, but Rollins could not remember when or how. (13 RT 2440.)

Rollins' testimony was obviously and insultingly false. Rollins testified that, after following appellant and Jackson to the Mira Loma Apartments, he had gone and watched television at the Sattiewhite house with appellant's sister Lydia. (13 RT 2415-2416.) Rollins told the investigating officer that Sattiewhite's mother, Margaret Sattiewhite, had been there. (13 RT 2415-2416; 17 RT 3103-3104.) However, Margaret

Sattiewhite was in Texas during that time (16 RT 2949) and Lydia had been at Jessica Velasquez's house the entire evening. (16 RT 2904-2909; 2951-2953.) Rollins had picked her up that night at Velasquez's house driving the Cadillac with appellant and Jackson as passengers. (*Ibid.*) The only car Lydia saw Rollins in that night was the Cadillac. (16 RT 2956-57.)

Lydia Sattiewhite testified that Rollins told her they had picked up a girl, Jackson had sex with her, then they took her to Arnold Road and told appellant to "smoke" [kill] her because he was always standing around watching them and never took part in the "dirt." (16 RT 2955.) Rollins had told appellant, who was afraid of Rollins, that if he didn't smoke her, Rollins was going to smoke her and him, too. (16 RT 2956, 2959.) Lydia testified that Rollins used the word "we" when telling her what had happened (16 RT 2956) and told her that he was in the front seat of the Cadillac when it was going on. (16 RT 2958.)

Rollins testified that appellant was wearing gloves during the killing (13 RT 2427) and that, after the killing, appellant had told him, " I always wanted to do that." (13 RT 2444-2445.) However, Sergeant Barnes, the investigating officer who had interviewed Rollins countless times about the crime, testified that the trial had been the first time he had heard Rollins say that. (17 RT 3107.)

The investigator from the district attorney's office then testified that Lydia Sattiewhite had previously told her that Rollins had told her, " We picked up a girl around the clubs on Seventh Street. Fred raped her and she ended up dead." (17 RT 3161.) In his closing argument, the prosecutor acknowledged that this meant that Rollins was in the car with appellant and Jackson. (18 RT 3242.) Here, under Rollins' own statements to the police and to his girlfriend, Rollins was driving the car, ordered the killing, and was therefore also subject to the death penalty. (*People v. Lee Yick* (1922)

189 Cal. 599 [One who orders other persons to kill the victim is guilty of murder in the same degree as those who actually did the killing].) Rollins was an accomplice and his testimony was uncorroborated by the other evidence at trial.

3. The victim was drug-dependent prostitute who already knew Bobby Rollins as a source of drugs.

The prosecutor himself had told one of his forensic medical witnesses that Gonzales was a prostitute and the autopsy protocol stated that she was drug-dependent. (15 RT 2764; 2768.) Other witnesses confirmed these facts.

Witness Jessica Velasquez testified that she had seen the victim, Genoveva Gonzales, walking up and down Oxnard Boulevard dressed in skimpy clothing despite cold weather, approaching men and cars and leaving with various men. (16 RT 2912-2915.) She thought Gonzales was a cocaine user as well as a prostitute because she ran around half-naked in the cold getting in and out of cars, but would be sweating and had dilated eyes. (16 RT 2918-2919.)

Witness Tillie Carrillo, owner of the New Mexico Restaurant in Oxnard (formerly the Casa del Oro), testified that Gonzales was a regular customer. (12 RT 2208-2209.) Gonzales would come into the restaurant without any money, leave with a man, then come back with money to drink by herself. (12 RT 2231.)

Appellant, Rollins, and Jackson already knew Gonzales from the "Rodeo." The Rodeo was a stretch of Oxnard Boulevard where Hispanics sold, used, and traded drugs for sex. (16 RT 2935-2946.) Tillie Carrillo identified Fred Jackson from a photo lineup shown to her by an investigator from the district attorney's office as having been with Gonzales at the bar perhaps a month before her death. (12 RT 2236-37.) Witness Frank

Richardson had seen Gonzales buy drugs from Rollins at the apartment shared by appellant and Rollins. (16 RT 2921-2934.) Witness Michael Black had seen Gonzales beaten up by another woman in Rollins' and appellant's apartment because she was with the woman's boyfriend. (16 RT 2935-2946.) Rollins once told Richardson that one day Gonzales would come by without any money and he'd get her to have sex with him. (16 RT 2921-2934.)

Thus, at the close of trial, the evidence supporting the kidnapping charge and special circumstance was even weaker. The weight of the evidence apart from the accomplice testimony showed that Gonzales was a drug-dependent prostitute who had left home without any money, was working that night, and who already knew Rollins as a source of drugs. In addition, Rollins, appellant and Jackson were drinking "everything" that night and were "buzzed" (See 13 RT 2413-14, 2419; 16 RT 2849), and Gonzalez had a .20 blood alcohol level. (12 RT 2177.) Thus, it was much more likely that she went with the three men willingly for alcohol, the promise of drugs, or payment.

The jury did not believe Rollins' story. On February 18th, the jury submitted a note requesting:

> "[c]larification of the wording slight or trivial. [with an arrow to the phrase 'page 57 of the judges instructions' [movement required for kidnaping] Also, do you need to be the driver to be aiding or abetting or can a passenger also be considered aiding or abetting of the crime[?]"

The court responded: "As to "slight" or "trivial" please refer back to the instructions you have already been given. A passenger can be an aider and abettor." (3 CT 603A.)

The jury was focused on this point. On February 22nd, six days after deliberations began, the jury submitted the following note:

> "[T]he jury in the Sattiewhite action request the following. Could a person be considered to be aiding and abetting a rape if any of these following scenarios are a fact or strong possibility: 1, the defendant was willingly with the rapist when the victim was picked up and knew what the intentions were. 2, the defendant was a passenger in the vehicle during transportation. 3, the defendant witnessed the rape. 4, the defendant disposed of the victim after the alleged rape." (19 RT 3446-3448.)

Thus, the jury clearly thought that Rollins had been driving the car, appellant had been a passenger in the vehicle, and that Gonzales had been "picked up," not kidnapped. And for good reason. Rollins' story was simply unbelievable by any reasonable standard, and the evidence showed that Gonzales was a drug-dependent prostitute who knew all three men and had previously bought drugs from Rollins.

4. The evidence was uncorroborated and legally insufficient to prove that appellant kidnapped Gonzales.

It has long been recognized that only movement accomplished by force can sustain a charge of kidnapping. (See *People v. Stanworth* (1974) 11 Cal.3d 588, 602; *People v. Harris* (1979) 93 Cal.App.3d 103, 114.) Thus, when the victim consents to the asportation there is no violation of Penal Code section 207. (*People v. Harris, supra*, 93 Cal.App.3d at p. 114.) Kidnapping cannot be accomplished by means of fraud or inducement by fraud or deceit (*People v. Green, supra*, 27 Cal.3d at p. 64; *People v. LaSalle* (1980) 103 Cal.App.3d 139, 162.)

Here, the only evidence of force was Rollins' uncorroborated testimony that, after he had seen a woman in the back of the car with Jackson, appellant told him that Jackson had just "gaffled" the lady. (13 RT 2399.) Rollins testified that he understood that to mean "snatched up." (13 RT 2401.) There simply is no other evidence in the present case to suggest

that the asportation was involuntary.

The prosecutor, acknowledging that Gonzales knew Jackson, argued that even if the initial contact or asportation by Jackson and appellant of Gonzales was consensual, compelling her to remain in the vehicle at the Mira Loma Apartments against her will constituted the movement for the kidnapping. (17 RT 3202; 3258.) However, the *only evidence* that Gonzales was compelled to remain in the vehicle - or even that the vehicle was ever at the Mira Loma Apartments was, again, Rollins' uncorroborated testimony. (13 RT 2394-2403.)

The sole "corroboration" for Rollins' story that the prosecutor could point to was that Lydia Sattiewhite had testified that Rollins had called her that night and said that he was calling from behind a "Sav•On" drugstore. (18 RT 3259.) This testimony corroborates nothing. As noted above, corroborating evidence need not by itself establish every element of the crime, but it must, *without aid from the accomplice's testimony*, tend to connect the defendant with the crime. [Citation.]" (*People v. McDermott, supra,* 28 Cal.4th at p. 986, emphasis added.) Here, the only evidence that a kidnapping *even occurred* was Rollins' testimony and the "corroborating evidence" used by the prosecutor does not establish a crime, much less appellant's connection to it. (*Ibid.*)

In *United States v. Chancey* (11th Cir. 1983) 715 F.2d 543, the Eleventh Circuit Court of Appeals, in finding the evidence insufficient where it depended on the credibility of a key prosecution witness, observed that the general rule that the credibility of a witness is for the jury to resolve, "[a]s far as it goes . . . is undoubtedly correct. It does not address the problem, however, which arises when the testimony credited by the jury is so inherently incredible, so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no

reasonable person would believe it beyond a reasonable doubt. The mere fact that the testimony is in the record is not enough." (*Id.*, at pp. 546-547.) Here, Rollins' story about getting a second car *but still witnessing everything that happened that night* was "so completely at odds with ordinary common sense that no reasonable person would believe it beyond a reasonable doubt." (*Ibid.*) The remainder of his testimony is therefore both uncorroborated and unworthy of belief.

Even viewing the remaining evidence in the light most favorable to the prosecution, the circumstances of this case do not establish that Gonzales went with Jackson, Rollins and appellant involuntarily or by the use of force. The evidence was insufficient as a matter of law to allow the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . .." (*Jackson v. Virginia, supra*, 443 U.S. at p. 315.) Appellant's conviction for kidnapping, felony murder and the kidnapping special circumstance must be reversed.

C. Reversal is Required.

The trial court instructed on first degree murder based on felony-murder as well as premeditation and deliberation. Thus, this Court cannot know whether the jury actually based its conviction of appellant on premeditation or on an invalid felony murder theory.[12] This Court has held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect; and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122; see also *Zant v. Stephens*

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[12] The trial court itself noted that the case had been submitted to the jury under both premeditation and felony-murder theories, and that it could not be told from the verdict which theory they had adopted. (24 RT 4735.)

(1983) 462 U.S. 862, 879 ["a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground"].) In this case at least one of the three theories of culpability were flawed and the jury was not required to agree on which type of first degree murder was committed. Appellant's conviction of first degree murder was fundamentally tainted and must be reversed. (*Zant v. Stephens, supra*, 462 U.S. at p. 879.)

Appellant was convicted of capital murder on the uncorroborated testimony of a man who could have been charged with the same crime, and who escaped prosecution and punishment by testifying against appellant. This was a violation of appellant's rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, 643; *Lockett v. Ohio* (1978) 438 U.S. 586; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)[13]

Reversal of the entire judgment is also required because appellant's kidnapping and murder convictions and the true finding on the kidnapping-special circumstance were obtained in violation of section 1111, a state law provision in which appellant had a vital liberty interest, and therefore denied appellant his due process right under the federal constitution to the correct application of state law. (*Hicks v. Oklahoma, supra,* 447 U.S. 343;

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[13] The imposition of the death penalty on appellant in these circumstances would also be arbitrary and capricious and in violation of the fundamental constitutional principles enunciated in *Furman v. Georgia* (1972) 408 U.S. 238, 309-310 (Stewart, conc.), 313 (White, conc.); *Gregg v. Georgia* (1976) 428 U.S. 153, 189; *Woodson v. North Carolina, supra,* 428 U.S. 280; and *Roberts v. Louisiana* (1976) 428 U.S. 325.

Clemons v. Mississippi, supra, 494 U.S. at p. 746.)

Even assuming arguendo that the evidence was sufficient to sustain the murder conviction and special circumstance findings, this Court should reverse the death judgment. In *Beck v. Alabama, supra,* 447 U.S. 625, the High Court held that because death is a "different kind of punishment from any other," it is vitally important that any death verdict be based on a reliable sentencing determination, which includes a reliable guilt determination. (*Id.* at p. 637; see also *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Thus, "the risk of an unwarranted conviction ... cannot be tolerated in a case where the defendant's life is at stake." (*Beck v. Alabama, supra*, 447 U.S. at p. 637.) Because of the heightened need for reliability in fact-finding when a death sentence is involved, evidence which may meet the minimum requirements to uphold a guilt verdict on appeal, but which is equivocal, must be held insufficient to uphold a sentence of death.

This standard of heightened reliability is consistent with the protections that are applied under international law.[14] In 1984, the United Nations Economic and Social Council adopted a series of safeguards to protect the rights of those facing the death penalty. (See "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (1984) ECOSOC Res. 1984/50, endorsed by the General Assembly in res.

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[14] International law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana* (1900) 175 U.S. 677, 700.) It is determined by both treaty obligations and customary practices that define the law of nations. (*Siderman de Blake v. Republic of Argentina* (9th Cir. 1992) 965 F.2d 699,715 [content of international law determined by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators"].)

39/118 of Dec 14, 1984.) These safeguards emphasize the importance of due process in death penalty cases and allow the death penalty only when the guilt of the person charged is based upon clear and convincing evidence "leaving no room for alternative explanation of the facts." (Id. at ¶ 4; see Albert Wilson v. Philippines, United Nations Human Rights Committee, Communication No. 868/1999, adopted Oct. 30, 2003, p. 5 [quoting above standard]; see also European Union, "Policy Towards Third Countries on the Death Penalty," General Affairs Council, June 29, 1998 [adopting standard].) These policies make clear that if the death penalty is imposed, it must be based upon the highest standards of evidence, without room for equivocal interpretation. This Court should adopt this standard in determining whether appellant's death sentence is supported by reliable evidence. (See *Trop v. Dulles* (1958) 356 U.S. 86, 100 [8th Amendment draws its meaning from standards of decency that mark the progress of a maturing society]; *Lawrence v. Texas* (2003) 539 U.S. 558, 572-573 [recognizing importance of international law in determining constitutional issues]; *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 2249, fn. 21] [citing view of "world community"].)

Here, the prosecutor's shifting theories on the kidnapping strengthen the case for alternative explanations. Under the evidence, it is much more likely that Gonzales went with Rollins, Jackson, and appellant willingly that night. Accordingly, the death judgment violates the restrictive nature of international standards and cannot meet the Eighth Amendment standards of heightened reliability. The judgment against appellant must be reversed.

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V. THE TRIAL COURT'S ERRONEOUS INSTRUCTION ON THE CONSENT DEFENSE TO KIDNAPPING WAS REVERSIBLE ERROR.

As shown above, there was strong evidence that Gonzales knew Jackson, Rollins, and appellant and was working as a prostitute on the night in question - and there was no substantial evidence to show that Gonzales had been anything other than a willing passenger in the car with the three men. (Argument IV, *supra.*) However, appellant was charged with kidnapping and a kidnapping special circumstance (1 CT 1-3) and the instructions given in this case allowed the jury to find that the entire asportation was non-consensual because those instructions embodied an erroneous definition of consent. The erroneous definition of an element of the crime violated appellant's right to trial by jury, his due process right to have every element of the crime proved beyond a reasonable doubt, and his due process right to a fair trial. (U.S. Const., Amends. 5th, 6th, & 14th; Cal. Const., art. I, §§ 7, 15, 16.) Because this is a capital case, the error also violated appellant's right to a fair and reliable capital penalty trial. (U.S. Const., Amends. 8th & 14th; Cal. Const., art. I, § 17; *Beck v. Alabama*, supra, 447 U.S. at p. 638).

A. Consent is a Defense to Kidnapping

Kidnapping is defined by Penal Code section 207, which provides that "Every person who forcibly, or by any other means of instilling fear," takes another person in this state and carries them "into another country, state, or county, or into another part of the same county, is guilty of kidnapping." Force or fear is an essential element of kidnapping, and consent operates as a defense to kidnapping by negating the element of force. (*In re Michelle D.* (2002) 29 Cal.4th 600, 609; *People v. Harris*, *supra*, 93 Cal.App.3d at p. 114.)

The trial court instructed appellant's jury on the defense of consent by delivering CALJIC No. 9.56, which read as follows:

> "When one consents to accompany another, there is no kidnapping so long as such condition of consent exists.
>
> To consent to an act or transaction, a person must
>
> 1. act freely and voluntarily and not under the influence of threats, force or duress;
>
> 2. have knowledge of the true nature of the act or transaction involved; and
>
> 3. possess sufficient mental capacity to make an intelligent choice whether or not to do something proposed by another person.
>
> [Mere passivity does not amount to consent.] Consent requires a free will and positive cooperation in act or attitude."(2 CT 295; 19 RT 3416.)

As explained below, this instruction suffered from three independent but related defects which rendered its definition of consent prejudicially erroneous.

B. The Version of CALJIC 9.56 Given to Appellant's Jury Erroneously Defined the Type of Knowledge Required for Effective Consent, Required a Positive Display of Cooperation, and Failed to Define the Quantum of Force That Would Vitiate Consent.

Under the version of CALJIC No. 9.56 given to appellant's jury, the victim of an alleged kidnapping could not be found to have consented to being moved by the defendant unless he or she had "knowledge of the true nature of the act or transaction involved," and showed "positive cooperation." The instruction also failed to define the amount of force that might vitiate any consent given. Those errors prevented the jury from correctly deciding one of the crucial issues in this case.

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1. The instruction erroneously required that the victim understand the "true nature" of the act to consent to it.

In kidnapping cases, there is no requirement that the alleged victim understand "the true nature" of the act before he or she can give effective consent to it. The consent of the alleged victim is a defense to kidnapping even if that consent was obtained by fraud or deceit. There is no crime of "kidnapping by false pretenses." (*People v. Davis* (1995) 10 Cal.4th 463, 518; *People v. Green*, *supra*, 27 Cal.3d at p. 64; *People v. Stephenson* (1974) 10 Cal.3d 652, 659-660.)

Effective consent in kidnapping cases requires only that the alleged victim have knowledge of the asportation itself, i.e., only knowledge of the fact that he or she is being moved. (*People v. Davis, supra,* 10 Cal.4th at pp. 517-518.) The current CALJIC instruction omits the reference to "the true nature of the act or transaction" and correctly states instead that the alleged victim need only have knowledge that he or she "was being physically moved,"[15] but appellant's jury was given the earlier version of the instruction which included the erroneous reference to the true nature of the act.

That instruction allowed the jury to find appellant guilty of kidnapping through deception on the theory that Ms. Gonzales's ignorance of the "true nature of" her asportation prevented her from giving effective legal consent to being moved. A similar, but not identical, version of CALJIC No. 9.56 was challenged in *People v. Davis*, *supra*, 10 Cal.4th 463,

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CALJIC No. 9.56 was modified after appellant's trial as follows: the second numbered paragraph now provides that, in order to consent, the person transported must "[h]ave knowledge that [he] [she] was being physically moved." (CALJIC No. 9.56 (7th ed. 2003); CALJIC No. 9.56 (6th ed. 1997).)

a case which also involved an asportation which began consensually (when the defendant entered the victim's car at a supermarket) but apparently became non-consensual at some point thereafter,[16] and the holding of *Davis* is thus relevant, albeit not controlling, here.

The defendant in *Davis* also argued that the consent instruction given in his case might have misled the jury into believing that consent in a kidnapping case could be vitiated by fraud or deceit. This Court agreed that the instruction "was not well-worded." However, it concluded that the instruction "correctly states the law" because the phrase "act or transaction involved" referred to the earlier phrase, "to accompany another," and thus "'knowledge of the true nature of the act or transaction involved,' refers to the act or transaction of accompanying another, i.e., physical asportation." (*Id.*, at p. 517.)

Appellant respectfully submits that *Davis* erred in concluding that the instruction reviewed therein correctly stated the law. It is true that the phrase "act or transaction involved" refers to the phrase "to accompany another," but that does not eliminate the problem created by use of the phrase, "the true nature of." Under the instructions given, the jury could find that any consent given was not an effective legal consent because Ms. Gonzales was fully aware of "the act or transaction involved" (i.e., the act

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[16] The jury instruction reviewed in *Davis* read as follows: "When one consents to accompany another there is no kidnapping so long as such condition of consent exists. To consent to an act or transaction a person must, one, act freely and voluntarily and not under the influence of threats, force or duress; two, have knowledge of the true nature of the act or transaction involved; and, three, possess sufficient mental capacity to make an intelligent choice whether or not to do something proposed by another person." (*People v. Davis*, *supra*, 10 Cal.4th at pp. 516-517.) Missing from this instruction is the erroneous final paragraph of the instruction given to appellant's jury, which is discussed in section B.2. of this argument, *infra*.

of accompanying appellant, Jackson, and Rollins) but not aware of the true nature of that act.

Jury instructions must be evaluated with regard to the way they would be understood by a reasonable juror (*Francis v. Franklin* (1985) 471 U.S. 307, 315-316; *People v. Hardy* (1992) 2 Cal.4th 86, 151), and the courts will presume "'that jurors, conscious of the gravity of their task, attend closely *the particular language of the trial court's instructions* in a criminal case and strive to understand, make sense of, and follow the instructions given them.'" (*United States v. Olano* (1993) 507 U.S. 725, 740, citations omitted, italics added).

Under the instructions given, it is entirely possible that a reasonable juror believed that effective consent could only be given if the alleged victim understood not only the bare fact of asportation but also the "true nature" of that movement, i.e., Jackson's motive in inviting her into the car, their intended destination, and the consequences of accompanying him. Otherwise, a juror could well conclude, the court would not have used all the words it did. The instruction would not have included the qualifying phrase, "the true nature of." It would have said simply that the alleged victim must "have knowledge of the act or transaction involved."

Furthermore, other circumstances in *Davis* reduced the likelihood of juror confusion, circumstances that are not present in this case. The jury in *Davis* was given an additional instruction which read as follows:

> "It is not necessary, in order to constitute kidnapping, that the victim be forcefully abducted. If all of the other elements, as I have defined them, are proven beyond a reasonable doubt, a kidnapping may occur where the victim initially voluntarily went somewhere with the defendant or voluntarily permitted him to go somewhere with her, but thereafter she was transported after being forcibly restrained from leaving." (*People v. Davis*, *supra*, 10 Cal.4th at pp. 517-518.)

Because this instruction required that the victim be "forcibly restrained from leaving," which could only happen if the victim desired to leave rather than to continue in the defendant's company, it informed the jury that knowledge of the true nature of the act or transaction referred to the victim's knowledge that she was being *forcibly* moved. No similar instruction was given in this case.

Also, the prosecutor's argument in *Davis* did not suggest that the asportation began at the supermarket through fraud, deceit, or deception. The prosecution's theory of kidnapping was that the defendant applied force to the victim after the car was moving and thereby transformed what had begun as a consensual asportation into a kidnapping from that point on, and defendant emphasized in closing argument that the prosecutor had "urged that the kidnapping commenced, not at the supermarket, but when [the victim] tried to leave the moving car." (*People v. Davis*, *supra*, 10 Cal.4th at p. 518.)

In this case, although the prosecutor did not explicitly claim that the kidnapping was accomplished through deception, he did acknowledge that Gonzales knew Jackson. (18 RT 3258.) The prosecutor then told the jury they did not have to worry about whether the asportation was consensual at the Buddy Burger, because it became a kidnapping at the Mira Loma Apartments and from there out to Arnold Road was a non-consensual movement by force. (18 RT 3259, 3381.) As discussed in Argument IV, *supra*, the only evidence for anything occurring at the Mira Loma Apartments was the uncorroborated testimony of accomplice Bobby Rollins, which was no evidence at all. It was much more likely, given that Gonzales was a prostitute who had previously been seen with Jackson and had a blood alcohol level of .20 that evening (12 RT 2231, 2236-7, 2177), that the group went immediately to Arnold Road, a location commonly used

by people for necking and partying. (See 11 RT 2075.)

In fact, it is likely that the jury had a different view of the case. On February 22d, six days after deliberations began, the jury submitted the following note:

> "the jury in the Sattiewhite action request the following. Could a person be considered to be aiding and abetting a rape if any of these following scenarios are a fact or strong possibility: 1, the defendant was willingly with the rapist when the victim was picked up and knew what the intentions were. 2, the defendant was a passenger in the vehicle during transportation. 3, the defendant witnessed the rape. 4, the defendant disposed of the victim after the alleged rape." (19 RT 3446-3448.)[17]

The note indicates that the jury thought Gonzales had been picked up and taken to Arnold Road by deception rather than force. Of course, appellant's jury was not limited to the theory of kidnapping selected by the prosecution (*People v. Cox* (2003) 30 Cal.4th 916, 956; *People v. Perez* (1992) 2 Cal.4th 1117, 1126) but was instead free to make its own evaluation of the evidence in accord with the court's instructions (CALJIC No. 1.00; 2 CT 238; 19 RT 3389-90.) (See, e.g., *People v. Lee* (1999) 20 Cal.4th 47; *People v. Barton* (1995) 12 Cal.4th 186.) However, the jury may have found that Gonzales went to the Mira Loma Apartments consensually (if she went there at all), and went to Arnold Road consensually, but still found appellant guilty of kidnapping because of the erroneous instructions. This was clear error.

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[17] The trial court drafted a written response: "The court cannot answer your question. The court would direct your attention to all of the instructions and in particular those appearing on pages 30 and 31. [CALJIC 3.00, 3.01.]" (19 RT 3448.)

2. The instruction erroneously required positive cooperation by the victim in order for there to be consent.

The last paragraph of the version of CALJIC No. 9.56 given to appellant's jury stated that "Mere passivity does not amount to consent. Consent requires a free will and positive cooperation in act or attitude." (2 CT 295; 19 RT 3416.) This additional requirement was erroneous and unsupported by either statutory or decisional authority, and it precluded appellant's jury from properly determining whether the asportation of Ms. Gonzales from Oxnard Boulevard to Arnold Road was consensual.

Language similar to the language in the last paragraph of CALJIC No. 9.56 appears in Penal Code section 261.6, which states the definition of consent that applies in cases of forcible sex crimes.[18] In *People v. Bermudez* (1984) 157 Cal.App.3d 616, 624, a case involving a rape allegedly committed before that statute was enacted, the Court of Appeal commented that, although it was "...not applying section 261.6 to this case, we find nothing novel in its emphasis on positively displayed willingness to join in the sexual act rather than mere submissiveness."

Although *Bermudez* correctly states the requirements for consent in cases involving forcible sex crimes, the alleged victim's "positively displayed willingness to join in" his asportation has never been a requirement for consent in cases of kidnapping. "[T]he forcible moving of a person *against his will*, where such person is capable of giving consent, is kidnaping under Penal Code, section 207, without more" (*People v. Oliver*

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[18] Penal Code section 261.6 provides in pertinent part: "*In prosecutions under Section 261, 262, 286, 288a, or 289,* in which consent is at issue, 'consent' shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (Emphasis added.)

(1961) 55 Cal.2d 761, 765, emphasis added), but the fact that the alleged victim appears outwardly passive or fails to make some show of positive cooperation in the asportation does not mean that the movement is against his will.

By instructing the jury in this case that consent was not a defense to the kidnapping charge if Ms. Gonzales was merely passive and did not display positive cooperation in her movement, the trial court relieved the jurors of making a difficult determination regarding Ms. Gonzales's state of mind. They did not need to determine what she actually thought or felt prior to the time that she arrived at Arnold Road. All they had to do was look for evidence of positive cooperation. If they found none, they knew from the consent instruction that rejection of the consent defense was required.

Indeed, the jurors were required to reject the consent defense and find the entire asportation nonconsensual even if they did consider Ms. Gonzales's actual state of mind and, having done so, concluded that the asportation was pursuant to her subjective, but undisclosed, agreement. An undisclosed agreement does not constitute the "positive cooperation" in act or attitude that CALJIC No. 9.56 required. The consent instruction thus prevented the jury from accepting appellant's sex-for-drugs consent defense. (See, e.g. 18 RT 3287-89)

3. The instruction erroneously failed to define the quantum of force that would vitiate consent.

As this Court recognized in *In re Michelle D.*, *supra*, 29 Cal.4th at p. 609, "the consent and force elements of kidnapping are clearly intertwined. [Citation.]" The version of CALJIC No. 9.56 given to appellant's jury provided that, in order for there to be effective consent, the person moved must "act freely and voluntarily and not under the influence of threats, *force*

or duress." (Emphasis added.) However, the meaning of "force" in this context was not defined.

This Court has held that "ordinarily the force element in section 207 requires something more than the quantum of physical force necessary to effect movement of the victim from one location to another." (*In re Michelle D.*, *supra*, 29 Cal.4th at p. 606.) However, appellant's jury was never advised of this rule. This omission was erroneous (*People v. Bland* (2002) 28 Cal.4th 313, 334 [trial court's failure to define "proximate cause" was error]), and allowed appellant's jury to find "force" in the minimal touches and tugs that would normally accompany even a consensual movement, such as helping someone into a car.

Having once found force, the jurors would be precluded from finding consent, because the definition of consent in CALJIC No. 9.56 required that the person consenting not be acting under the influence of force. Therefore, the court's failure to define the "force" element of kidnapping was not only error as to the force element itself but also error as to the element of lack of consent. In particular, because there was evidence of a type of force - but not evidence of force as that term is used in the definition of kidnapping - applied to render Gonzales unconscious immediately before the shooting, the erroneous instruction allowed the jurors to find appellant guilty of kidnapping on the basis of evidence that was insufficient as a matter of law to show a nonconsensual asportation.

C. Delivery of the Erroneous Consent Instruction Violated Appellant's Constitutional Rights.

Lack of consent is an essential element of the crime of kidnapping. (*People v. Jones* (2003) 108 Cal.App.4th 455, 462; *People v. Harris*, *supra*, 93 Cal.App.3d at p. 114.) Therefore, delivery of an instruction which incorrectly describes the term "consent" in a kidnapping case amounts to

the misdefinition of an element of the crime and constitutes a violation of the defendant's state and federal constitutional rights. (*California v. Roy* (1996) 519 U.S. 2, 5-6; *People v. Hagen* (1998) 19 Cal.4th 652, 670; *Martinez v. Borg* (9th Cir. 1991) 937 F.2d 422, 423.)

"[M]isdescription of an element of the offense . . . deprive[d] the jury of its fact-finding role" (*Carella v. California* (1989) 491 U.S. 263, 268 (conc. opn. of Scalia, J.)) and thereby violated appellant's right to trial by jury (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, § 16), his due process right to have every element of the crime proved beyond a reasonable doubt (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15), and his due process right to a fair trial (*ibid.*). Because this is a capital case, the misdescription also violated appellant's right to a fair and reliable capital guilt trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. at p. 638).

D. Delivery of the Erroneous Consent Instruction Was Reversible Error.

In this case, delivery of the instruction which erroneously defined consent was prejudicial because it permitted the jury to conclude that appellant had forcibly moved Ms. Gonzales for a substantial distance without her consent, and hence that he had committed the crime of kidnapping, even if the underlying facts found by the jury were consistent only with a finding of consent.

Under the instructions given, the jury could find that the kidnapping began either on Oxnard Boulevard because (a) although Ms. Gonzales did subjectively agree to accompany appellant, Jackson, and Rollins at that point, her consent was ineffective because she did not understand "the true nature of" the asportation and realize that the three men may have been moving her away from the Rodeo in order to perpetrate a sexual assault, or

(b) although Ms. Gonzales did subjectively agree to accompany the three men, she never made a positive display of her cooperation and her undisclosed subjective agreement did not constitute legal consent, or (c) although Ms. Gonzales did subjectively agree to accompany appellant, her consent was ineffective because she acted under the influence of the minimal "force" the men may have used during the asportation. Even if the jury believed Gonzales had gone to the Mira Loma Apartments and been involved in a scuffle there, they may also have found that she still decided to accompany the men to Arnold Road for alcohol, drugs, or payment, given her profession, her aggressive nature, and her blood alcohol level. However, the jury again could have erroneously found that she did not consent for the same reasons.

In all of these situations, the jury would have rejected appellant's consent defense, and found that the element of lack of consent had been proven, even though its view of the facts was, under a proper interpretation of the law, consistent only with finding of consent. Under these circumstances, the instructional error cannot be deemed harmless beyond a reasonable doubt, and it is reasonably probable that a different result would have occurred in the absence of the error. Therefore, reversal is required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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VI. IF ANY COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE DEATH VERDICT MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE.

The jury made its decision to impose a death judgment at a time when appellant had been convicted of one count of first degree murder and the special circumstances of rape and kidnapping had been found to be true. If this Court reduces or vacates any of the counts or special circumstances, the penalty verdict should be reversed. This is so because the jury's consideration of the unauthorized factors in aggravation added improper weight to death's side of the scale and violated appellant's right to a fair trial and reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Article I, section 17; *Stringer v. Black* (1992) 503 U.S. 222, 232; ["[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale"]; but see *Brown v. Sanders* (2006) 546 U.S. 212, 126 S.Ct. 884, 895 ["An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances"].)

Section 190.3 codifies the factors that a trier of fact may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's jury was guided by CALJIC No. 8.85 which instructs that the trier "shall" consider and be guided by the presence of enumerated factors, including, *inter alia*, "the circumstances of the crime of which the defendant was convicted." (Pen. Code, § 190.3, factor (a); 3 CT 446-47; 24 RT 4670-72;

CALJIC No. 8.85.)

The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, appellant must be granted a new penalty trial, to enable the fact-finder to consider the appropriateness of imposing death.

Moreover, in *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 to capital sentencing procedures and concluded that specific findings the legislature makes as a prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. (See also *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856].) In California, the trier of fact has two critical facts to determine at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists, and (2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances. If this Court reverses or reduces any of the convictions or special findings, the delicate calculus the trier of fact must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt.

This Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" (See *Ring, supra*, 536 U.S. at p. 589 [quoting *Apprendi, supra*, 530 U.S. at p. 483]), and under *Ring*, the power to make those findings is the jury's alone. Accordingly, because jury findings

regarding the facts supporting an increased sentence is constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors - and that death is the appropriate sentence - must be made when any count or special circumstance is reversed or reduced.

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VII. THE TRIAL COURT PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS IN INSTRUCTING THE JURY ON FIRST-DEGREE PREMEDITATED MURDER AND FIRST-DEGREE FELONY MURDER BECAUSE THE INDICTMENT CHARGED APPELLANT ONLY WITH SECOND-DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187.

At the conclusion of the guilt phase of the trial, the court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 19 RT 3408-3409) or committed first degree felony-murder as an aider and abettor. (CALJIC No. 8.27; 19 RT 3410.) The jury found appellant "guilty of first-degree murder in violation of Penal Code section 187(a) as alleged in count I of the Indictment." (19 RT 3449.)

Instructing the jury on first degree murder was erroneous - first degree murder was not properly before the jury - and the resulting conviction of first degree murder must be reversed, because the indictment did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[19] Instructing the jury that it could convict appellant of uncharged crimes violated appellant's rights to notice of the charges against him, due process of law, fair trial, and a reliable capital verdict. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Calif. Const., art. I, §§ 7, 15, 16, & 17.)

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[19] The Indictment was not defective. Count 1 of the Indictment was a proper charge of second degree malice-murder in violation of section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony-murder pursuant to section 189.

A. Appellant Was Charged Only With Second-Degree Malice Murder.

Count 1 of the Indictment alleged that the "1992-1993 Ventura County Grand Jury . . . hereby accuses CHRISTOPHER JAMES SATTIEWHITE . . . of committing the crime or MURDER, in violation of section 187(a), of the Penal Code, a felony, in that on or about January 25, 1992, in Ventura County, State of California, he did willfully, unlawfully, and with malice aforethought murder Genoveva Gonzales, a human being. It is further alleged that the above offense is a serious felony within the meaning of Penal Code section 1192.7(c)(1)." (1 CT 1.)

Both the statutory reference ("section 187(a) of the Penal Code") and the description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that appellant was charged exclusively with second degree malice-murder in violation of section 187, not with first degree murder in violation of Penal Code section 189.[20]

Section 187, the statute cited in the Indictment, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and

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[20] The Indictment also alleged two special circumstances: kidnaping-murder and rape-murder in connection with Count 1. (1 CT 1-3.) These allegations, however, did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

Moreover, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony-murder. A conviction under the felony-murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not. (*People v. Davis, supra,* 10 Cal.4th at p. 519; *People v. Green, supra,* 27 Cal.3d at p. 61)

deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[21] "Section 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[22]

B. The Trial Court Lacked Jurisdiction to Try Appellant for First Degree Murder.

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

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

[22] At the time the murder in this case occurred, section 189 provided in pertinent part:

> "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Sections 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the Indictment or Information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes, supra*, 27 Cal.4th at pp. 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary. Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court stated:

> "Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, [1883] 63 Cal. 165, 'The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[23] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of

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[23] This statement alone should preclude placing any reliance on *People v. Soto, supra* 63 Cal. 165, overruled on another point in *People v. Gorshen* (1959) 51 Cal.2d 716. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

> murder, the defendant could be legally convicted of either degree warranted by the evidence."

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

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

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be section 189.

No other California statute purports to define premeditated murder or murder during the commission of a felony, and *Dillon* expressly held that

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

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and *second degree* malice-murder clearly *are* distinct crimes. (See *People v. Hart, supra*, 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford, supra*, 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[24]

The greatest difference is between second degree malice-murder and first degree felony-murder. By the express terms of section 187, second degree malice-murder includes the element of malice (*People v. Watson, supra*, 30 Cal.3d at p. 295; *People v. Dillon, supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (*People v. Box, supra*, 23

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[24] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that:

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

Cal.4th at p. 1212; *People v. Dillon, supra*, 34 Cal.3d at pp. 475, 476, fn. 23).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey, supra,* 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.*" (*Id.* at p. 476, emphasis added, citation omitted.) In *Cunningham v. California, supra,* 549 U.S. 270, the Court applied this standard to California's Determinate Sentencing Law and found that, because the DSL's circumstances in aggravation were factual in nature, they must be pled and found true by a jury beyond a reasonable doubt. (*Ibid.*) *Apprendi* and *Cunningham* compel the conclusion that the premeditation and felony-murder allegations of section 189 constitute elements of the offense that "*must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.*" (See also *People v. Seel* (2004) 34 Cal.4th 535.)[25]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree

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

murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts were required to be charged in the Indictment. (See *United States v. Allen* (8th Cir. 2004) 357 F.3d 745, 758 [vacating death sentence because failure to allege aggravating factor in indictment was not harmless error]; *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

C. The Error Requires Reversal.

Permitting the jury to convict appellant of an uncharged crime violated his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) "Conviction upon a charge not made would be sheer denial of due process." (*DeJonge v. Oregon* (1937) 299 U.S. 353, 362.)

> "A person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense.[Citations.]"

(*In re Hess* (1955) 45 Cal.2d 171, 174-175; see also *People* v. *Granice, supra,* 50 Cal. At pp. 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People* v. *Murat* (1873) 45 Cal. 281,284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

One particular aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without

finding the malice which was an essential element of the crime alleged in the Indictment. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96, overruled on other grounds by *People v. Flood* (1998) 18 Cal.4th 470.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. at p. 638.)

Instructing the jury on an uncharged crime went to the core of the trial court's jurisdiction. It is structural error that affected the framework of appellant's trial and is not susceptible to ordinary harmless error analysis. Accordingly, the judgment must be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Even under traditional harmless error analysis, the violations of appellant's constitutional rights cannot be found harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p.24.) The errors were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin, supra*, 843 A.2d at pp. 1034-1035.) Appellant's convictions for first degree murder, the special circumstances findings, and the death sentence must be reversed.

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VIII. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, IN THAT DURESS COULD HAVE NEGATED MALICE AS WELL AS PREMEDITATION AND DELIBERATION.

Compounding its error in instructing the jury on first-degree murder (see Argument VII, *supra*), the trial court refused to instruct the jury on the lesser-included offense of voluntary manslaughter, finding that duress could only be a complete defense and could not result in "heat of passion" sufficient for a manslaughter conviction. (17 RT 3059-3069.) The prosecutor then underlined the lack of a manslaughter instruction for the jury. (18 RT 3219.) This ruling was based upon a misunderstanding of the law as it stood in 1994 and constituted prejudicial error.

The failure to instruct on the lesser-included offense of voluntary manslaughter deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

A. Duress Can Negate Malice, As Well As Premeditation and Deliberation.

The prosecution charged and argued to the jury that Sattiewhite was guilty of, among other things, malice murder. (1 CT 1, 2 CT 281; 19 RT 3410.) The trial court instructed the jury with CALJIC 4.40 and 4.41 (2 CT 300-301), which instructed the jury on the defense of duress, and then instructed them that the defense was inapplicable to a crime punishable with death. The prosecutor then told the jury that the duress defense was not

applicable. (18 RT 3270.) However, as a factual matter, duress can negate malice, as well as premeditation and deliberation. (*People v. Beardslee* (1991) 53 Cal.3d 68, 85; *People v. Caldwell* (1984) 36 Cal.3d 210, 218; *People v. Flannel* (1979) 25 Cal.3d 668, 680; *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197; *People v. Heath* (1989) 207 Cal.App.3d 892, 900; *People v. Beach* (1987) 194 Cal.App.3d 955, 973; *People v. Coad* (1986) 181 Cal.App.3d 1094, 1106.) Hence, had the jury been properly instructed on duress and its applicability to the facts of the case, it might have returned a verdict for a lesser offense – voluntary manslaughter or second degree murder.[26] The trial court therefore erred prejudicially in denying Sattiewhite's right to argue that duress negated malice, thereby reducing the charge to voluntary manslaughter. (*People v. Breverman* (1998) 19 Cal.4th 142, 170, fn. 19.)

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman, supra*, 19 Cal.4th at p. 162.) A court must instruct on its own motion even if the lesser included instruction is inconsistent with the defense elected by the defendant (*id.*, at p. 157), even if the defense itself has inconsistencies (*id.*, at p. 163), or even when, as a matter of trial tactics, the defendant expressly objects to the instruction. (*Id.*, at p. 154.)

Substantial evidence existed in this case to support a voluntary manslaughter verdict. (*People v. Breverman, supra*, 19 Cal.4th at p. 162 ["instructions on a lesser included offense ... are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury"].) In this context, substantial evidence is present when a jury composed of reasonable persons could

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[26] The trial court instructed the jury on second degree murder. (2 CT 281; 19 RT 3410.)

conclude that the lesser, but not the greater offense was committed. (*Ibid.*) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*Ibid.*)

B. Voluntary Manslaughter Was A Lesser-Included Offense.

Voluntary "manslaughter is the unlawful killing of a human being without malice ... [¶] ... upon a sudden quarrel or heat of passion" (§ 192, subd.(a)), and is a "lesser necessarily included offense of intentional murder." (*People v. Breverman, supra*, 19 Cal.4th at p. 154.) "What distinguishes voluntary manslaughter from murder is the absence of malice. By statute, malice is negated if the intentional killing is the result of 'a sudden quarrel or heat of passion' (§ 192, subd. (a)) – otherwise known as adequate provocation ...." (*People v. Coad, supra,* 181 Cal.App.3d at p. 1106.) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'" (*People v. Barton, supra,* 12 Cal.4th at p. 201 [citations omitted]; see also *People v. Beardslee, supra*, 53 Cal.3d at p. 85 [noting but not deciding whether threats causing the defendant to honestly but unreasonably believe his life was in imminent peril could negate malice aforethought, thus reducing the crime from murder to voluntary manslaughter under *People v. Flannel, supra*, 25 Cal.3d 668].)

In *Breverman*, two men walking by defendant's house got into a fight with a larger group congregated in the driveway. The two sustained injuries before leaving. The next night, at least one of the pair returned with a group of friends. Some members of the group taunted defendant, then used a baseball bat and other implements to batter his automobile, which was parked in the driveway near his front door. Defendant fired

several shots through a window pane in the front door, then came outside and fired more shots toward the fleeing vandals. One bullet from this second volley fatally wounded Andreas Suryaatmadja. (*People v. Breverman, supra*, 19 Cal.4th at pp. 148-150.)

Mr. Suryaatmadja, however, was not in the group that hit the car. He may have been hanging back at an intersection. When the defendant's gunfire stopped, Mr. Suryaatmadja was lying in the street, unconscious and bleeding from the head. He had been shot in the back of the head, and died at a hospital several hours later. (*Id.* at p. 150.) A jury convicted the defendant of Mr. Suryaatmadja's murder. (*Id.* at p. 152.)

An issue in *Breverman* was whether the trial court had a sua sponte duty to instruct the jury on the lesser included offense of voluntary manslaughter based on a "heat of passion" theory, *even though the trial court instructed the jury on voluntary manslaughter based on a theory of unreasonable self-defense*. (*Id.* at p. 148.) The evidence at trial showed that the behavior of the vandals outside defendant's home "caused immediate fear and panic" inside defendant's home. (*Id.* at p. 163.)

This Court found that "a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*Id.* at pp. 163-164.) This Court also stated that "the jury could infer that defendant observed an attack on his vehicle, within feet of the entrance to his home, by a large, armed, and clearly hostile group of men who, defendant had reason to suspect, were seeking revenge for the incident of the previous evening, and *that defendant feared the intruders intended to force their way into the residence.*" (*Id.*, at p. 164, fn. 11 [emphasis added].) Accordingly, this Court concluded that the lower court erred when it failed to instruct, even absent a defense request, on heat of passion as a

theory of voluntary manslaughter. (*Id.*, at p. 164.)

Here, in giving the intoxication and duress instructions, the trial court found substantial evidence that appellant was intoxicated and that Rollins threatened to "smoke" [kill] appellant. Even the prosecutor conceded there was an evidentiary basis for the duress instruction. (See 17 RT 3090.) When a trial judge has given an instruction that implies the judge credited the defense evidence, the judge's opinion "'is entitled to some weight on appeal.'" (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1181.)[27] A reasonable jury could infer that appellant killed the victim only out of fear that appellant would be killed as well. Lydia Sattiewhite, appellant's sister and Rollins' girlfriend, testified that Rollins told her that he had told appellant to "smoke" [kill] her because he was always standing around watching them and never took part in the "dirt." (16 RT 2955.) Rollins had told appellant that if he didn't smoke her, Rollins was going to smoke Gonzales and then appellant, too. (16 RT 2959.)

The *Breverman* court made clear that " 'no specific type of provocation [is] required ....'" [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any "'*[v]iolent, intense, high-wrought or enthusiastic emotion*'" [Citations] other than revenge [Citation.]" (*Id.* At 163, emphasis added.) Here, appellant was told that if he did not kill Gonzales, Rollins would kill her and then kill appellant. Being told to kill someone else or die yourself would certainly cause a "violent, intense, high-

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[27] In evaluating whether appellant was entitled to the voluntary manslaughter instruction, this Court must take the proffered evidence as true, "regardless of whether it was of a character to inspire belief.[Citations.]" (*People v. Wilson* (1967) 66 Cal.2d 749, 762.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.'[Citations.]"(*People v. Flannel, supra,* 25 Cal.3d at p. 685.)

wrought or enthusiastic emotion."

Thus, as defense counsel argued to the court (17 RT 3068), "a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*Breverman* at pp. 163-164.) Accordingly, under *Breverman*, the trial court erred by not giving the jury a voluntary manslaughter instruction based on the heat of passion theory.[28]

Providing the jury in this case with a voluntary manslaughter instruction would also have been consistent with the common law. In discussing the common law, the Supreme Court in *People v. Flannel, supra*, 25 Cal.3d 668, quoted one scholar as follows:

> "Since manslaughter is a "catch-all" concept, covering all homicides which are neither murder nor innocent, it logically includes some killings involving other types of mitigation, and such is the rule of the common law. For example, if one man kills another intentionally, under circumstances beyond the scope of innocent homicide, the facts may come so close to justification or excuse that the killing will be classed as voluntary manslaughter rather than murder. [Perkins on Criminal Law (2d ed. 1969) pp. 69-70.]"

(*People v. Flannel, supra*, 25 Cal.3d at pp. 679-680; see also *People v. Uriarte, supra,* 223 Cal.App.3d at p. 197 ["[t]he focus of *Flannel* is that a person who honestly believes there is an imminent threat to his own life or the lives of others cannot harbor malice"].)[29] Thus, Perkins and Boyce

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[28] In *People v. Caldwell, supra*, 36 Cal.3d 210, the Court stated that "the jury's implicit rejection of [the defendant's] duress defense [to a murder charge] in itself could constitute substantial evidence of malice." (*Id.*, at p. 218.) Contrarily, a jury's acceptance of a defendant's duress defense could negate malice.

[29] As *Flannel* also noted: "Perkins goes on to add that 'some legislative enactments have spoken of voluntary manslaughter in terms only of a killing in "a sudden heat of passion caused by a provocation" and so

contend that the presence of duress should reduce murder to voluntary manslaughter. (Perkins & Boyce on Criminal Law (3d ed. 1982) at p. 1058.) This is also the view of at least two states. (Minn. Stat. § 609.08, 609.20(3); N.J. Stat. § 2C:2-9.) Hence, the trial court should have instructed the jury on voluntary manslaughter.

Respondent, however, may argue - as did the trial court - that because the victim did not induce appellant's fear, the heat of passion defense theory is inapplicable. (Witkin & Epstein, California Criminal Law (2d ed. 1998) § 512 ["the provocation ordinarily must come from the victim"].) Nevertheless, as Witkin and Epstein have also observed, "[t]he provocation may be *anything which arouses great fear*, anger, or jealousy ...." (*Ibid.* [emphasis added]; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 [same]) Thus, in *Breverman* the Supreme Court had no trouble finding substantial evidence of fear to warrant a voluntary manslaughter instruction, even though the defendant was armed with a semiautomatic weapon inside his own home (*Breverman* at p. 151), and *the provocation did not come from the victim*, Mr. Suryaatmadja, who was not in the group that hit the defendant's car. (*Id.*, at p. 150.) Mr. Suryaatmadja might just as well have been a passerby. Under *Breverman*, the provocation therefore need not come from the victim.

Thus, the issue is "whether the circumstances were sufficient to arouse the passions of the ordinarily reasonable person." (*People v. Fenenbock, supra*, 46 Cal.App.4th at p. 1704.) And while an unreasonable self-defense must be aimed at the threat (see *In re Christian S.* (1994) 7

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forth. Such restriction is probably unintentional, being attributable to the fact that this is by far the most common type of mitigation; but it is very unfortunate.'" (25 Cal.3d 668, 680 [quoting Perkins on Criminal Law, *supra*, (2d ed. 1969) at p. 70].)

Cal.4th 768), in a heat-of passion defense the focus is on the "violent, intense, high-wrought or enthusiastic emotion" experienced by appellant. (*People v. Breverman, supra,* 19 Cal.4th at pp. 163-164.) The jury in this case should have been given the opportunity to decide this question.

C. The Error Was Prejudicial.

The court's error was prejudicial because it was not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) *Chapman* review is appropriate here because "the failure to instruct sua sponte, where evidence of heat of passion existed, that an intentional, unlawful killing is nonetheless without malice if done in a heat of passion, and thus constitutes not murder but voluntary manslaughter, caused the definition of the malice element of murder, the charged offense, to be incomplete." (*People v. Breverman, supra*, 19 Cal.4th at p. 170, fn. 19.) Reversal is required.

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IX. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY WITH AN UNMODIFIED VERSION OF CALJIC 2.11.5, THE INSTRUCTION PERTAINING TO UNJOINED PERPETRATORS.

The prosecution's star witness, Bobby Rollins, was an accomplice who potentially faced a death sentence for the same crime. (See 17 RT 3076-3078; Argument IV, *supra*.) Instead, Rollins was given immunity in exchange for his testimony. (14 RT 2490.) In addition, Rollins was facing over fifty years in state prison for two other crimes - but under his deal with the prosecution Rollins would serve approximately eight and a half more years. (14 RT 2490, 2492-93.)

The trial court properly instructed the jury that accomplice testimony was to be distrusted and must be corroborated (See CALJIC 3.18, 3.11; 2 CT 275, 272), but then inexplicably instructed the jury not to consider why Rollins had not been charged in the case. (CALJIC 2.11.5; 2 CT 249; 19 RT 3396.)[30] The instruction violated appellant's constitutional rights to due process, a fair trial and a reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

A. CALJIC No. 2.11.5

When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices. *(People* v. *Tobias* (2006) 25 Cal.4th 327,

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[30] Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood, supra*, 18 Cal.4th at p. 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

331.) The trial court did so here - up to a point. (See 17 RT 3076-3078; CALJIC 3.18, 3.11; 2 CT 275, 272.) However, the trial court then instructed the jury with an unmodified version of CALJIC No. 2.11.5 during the guilt phase of appellant's trial. That instruction states:

> "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crimes for which the defendant is on trial.
> There may be many reasons why that person is not here on trial. *Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted.* Your sole duty is to decide whether the People have proved the guilt of the defendant on trial." (2 CT 249; 19 RT 3396; emphasis added)

In giving this instruction, the trial court erred.

B. Use of the Instruction Was Erroneous.

Use of this instruction was clear error. The law is clear that a court should not use CALJIC 2.11.5 when there are persons testifying under a grant of immunity from prosecution. (*People* v. *Cornwell* (2005) 37 Cal.4th 50, 88; *People v. Hinton* (2006) 37 Cal.4th 839, 880-881; *People v. Crew* (2003) 31 Cal.4th 822, 845; *People v. Marks* (1988) 45 Cal.3d 1335, 1347 ["The Use Note to CALJIC 2.11.5 states: 'This instruction is *not* to be used if the other person is a witness for either the prosecution or defense.' (Italics added.)"].) The use of CALJIC No. 2.11.5 would have been proper if it had been expressly limited to exclude that accomplice who testified under a grant of immunity. (*People* v. *Carrera* (1989) 49 Cal.3d 291, 312, n. 10.) That was not done.

Here, as shown above in Argument IV, *supra*, Rollins was the heart of the prosecution case. Because the instruction was phrased in the singular and Rollins was present at trial, the jury necessarily would have thought it applied to him. Thus, the trial court erred when it instructed the jury not to

"discuss or give any consideration why the other person [i.e. Rollins] was not being prosecuted . . . or whether [he] has been or will be prosecuted." (2 CT 249; 19 RT 3396; CALJIC 2.11.5.)

In *People* v. *Hinton, supra,* 37 Cal.4th at p. 839, and *People* v. *Cornwell, supra,* 37 Cal.4th 50, this Court found this type of error to be non-prejudicial. However, in *Hinton,* the version of CALJIC No. 2.20 that was given to the jury advised that, in assessing a witness' credibility, the jury could consider the fact that the witness testified under a grant of immunity. (*People v. Hinton, supra,* 37 Cal.4th at pp. 880-881.) Similarly, in the *Cornwell* case, the jury was instructed to keep in mind any sentencing benefits received by witnesses in assessing credibility. (*People v. Cornwell, supra,* 37 Cal.4th at p. 88.) In appellant's case, in contrast, no such instructions were given to countermand the effect of the erroneous instruction.[31]

In fact, the jury was entitled to consider the fact that Rollins was not being prosecuted for a capital crime in assessing his credibility. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 437 ["this instruction should not be given when the non-prosecuted person testifies "because the jury is entitled to consider the lack of prosecution in assessing the witness' credibility."]; *People v. Hernandez* (2003) 30 Cal.4th 835, 875.) The trial court's erroneous instruction prevented them from doing so - and was therefore reversible error.

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[31] The jury was instructed with CALJIC No. 2.20 which permits the jury to consider "[t]he existence or nonexistence of a bias, interest or other motive." (2 CT 251-252.) However, although this instruction permitted the jury to consider other evidence of bias, interest or motive Rollins may have had, it did not change the fact that the jury was specifically precluded by CALJIC No. 2.11.5 from considering the lack of prosecution in assessing his credibility.

C. The Error Was Prejudicial.

The trial court's error was not harmless. An appellate court must "presume that jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v. Hardy, supra,* 2 Cal.4th at p. 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin, supra,* 471 U.S. at pp. 324-325, fn. 9.)

Here, as discussed at length above, Rollins was the heart of the prosecution's case. He was the only evidence for the rape and kidnapping charges and special circumstances, and no percipient witness other than Rollins testified about the events of that night. Appellant's defense hinged on showing Rollins to be a liar who testified to save his own life and walk away from two sets of other charges with a slap on the wrist. The trial court's error prevented the jury from properly evaluating appellant's defense and Rollins' credibility.

This Court should, therefore, vacate appellant's death sentence. Jury instructions which invade the province of the jury to determine the facts and assess the credibility of witnesses deprive the accused of a fair trial. (*United States* v. *Rockwell* (1986) 781 F.2d 985, 991.) Moreover, this error denied appellant a meaningful opportunity to present a defense, further compromising his right to due process under the Fourteenth Amendment (*California v. Trombetta* (1984) 467 U.S. 479, 485; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740) and his right to a reliable death verdict in violation of the Eighth Amendment. (*Woodson v. North Carolina, supra,* 428 U.S. 280. This Court should, therefore, reverse appellant's first-degree murder conviction and vacate his death sentence because the prosecution

cannot show beyond a reasonable doubt that the instructional error did not contribute to the verdict obtained. (*Chapman v. California, supra,* 386 U.S. at p. 21.)

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X. THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE.

The trial court instructed the jury under then-CALJIC 2.51:

> "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled." (2 CT 258; 19 RT 3399-3400.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to reduce the prosecutor's burden of proof and require appellant to show an absence of a motive to establish innocence. The instruction therefore violated constitutional guarantees of due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, & 17.)[32]

A. The Instruction Allowed the Jury to Determine Guilt Based on Motive Alone.

CALJIC 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient as to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. 307.) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See e.g., *United*

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[32] As noted above, instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (See fn. 30, *supra*, Pen. Code, §§ 1259 & 1469.)

States v. Mitchell (9th Cir. 1999) 172F.3d 1104 [motive based on poverty is insufficient to prove theft or robbery].)

However, where other instructions given in this case specifically stated that they were insufficient to establish guilt[33], CALJIC No. 2.51 appeared to include an intentional omission allowing the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

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

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

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the

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[33] See, e.g. CALJIC 2.03 - false or misleading statement regarding the crime showing consciousness of guilt "is not sufficient by itself to prove guilt ... ."(2 CT 246; 19 RT 3395.)

instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 5th, 6th, 8th and 14th Amends; Cal. Const., art. 1, §§ 7, 15-17.)

B. The Instruction Impermissibly Reduced the Prosecutor's Burden of Proof and Violated Due Process.

The jury was instructed that in order to establish first-degree felony murder, the prosecutor had the burden of proving beyond a reasonable doubt that appellant had the specific intent to commit, encourage, or facilitate the alleged kidnaping and/or rape. (2 CT 280; CALJIC 8.27.) However, by also informing the jurors that "motive was not an element of the crime," the trial court reduced the burden of proof on the one thing that the prosecutor's case demanded – that the jury find that appellant had the purpose of committing, encouraging or facilitating the alleged kidnaping and raping of the victim.

The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].) There is no logical way to distinguish motive from intent in this case.

The only theory supporting the first degree felony-murder allegation was that appellant had intended to aid and abet Jackson's kidnaping and rape of the victim. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC 2.51 impermissibly lessened the prosecutor's burden

of proof.

It is important to note that even the law cannot always maintain a technical purity between "motive" and "intent." Various opinions have used the two terms as synonyms:

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

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

> "A person could not kidnap and carry away his victim to commit robbery if the intent to rob was not formed until after the kidnaping had occurred." [citation] . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping."

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

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

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, emphasis added.)

> "In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: 'But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful.'"

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, emphasis added.) Accordingly, it is clear that "motive" and "intent" are commonly interchangeable under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at pp. 1126-1127.) The court of appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was error. (*Id.* at pp. 1127-1128.)

Here, there was a similar likelihood of conflict and confusion. The jury was instructed to determine whether appellant had the intent to aid the kidnaping and/or rape, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was constitutional error.

C. The Instruction Shifted the Burden of Proof to Imply that Appellant Had to Prove His Innocence.

CALJIC 2.51 informed the jurors that the presence of a motive could be used to establish guilt and that the absence of motive be used to establish

innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor.

As used in this case, CALJIC 2.51 deprived appellant of his constitutional rights to due process and fundamental fairness. (*In re Winship* (1970) 397 U.S. 358, 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution submitting the full measure of proof. (See *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is Required.

The prosecutor underlined the motive instruction for the jury in closing argument, telling them that "the key to solving every case is motive" and emphasizing that "the law does say that if there is motive it tends to establish guilt." (18 RT 3337.) As discussed above, the motive instruction reduced the prosecutor's burden in several respects that implicated appellant's federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Accordingly, this Court must reverse the judgment unless the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Although appellant conceded his guilt in the homicide, the degree of his guilt was very much at issue. Appellant contended that there had been neither a kidnaping nor rape, that Jackson had picked up the victim, a prostitute with whom he had been seen before, in a sex-for-drugs deal, after which appellant had been forced to kill her by the prosecution's star witness, Bobby Rollins, who had threatened to "smoke" both the victim and appellant if appellant refused to kill her. (16 RT 2955, 2959.) In short, appellant's defense was that he had no intent to aid or abet a rape or

kidnaping and was forced into doing the killing. It is this kind of defense that the motive instruction was most likely to affect since it confused motive with intent and reduced the prosecutor's burden of proving that the crime was committed to aid and abet a kidnaping and rape. Accordingly, this Court should find that the error is not harmless beyond a reasonable doubt and reverse the judgment in this case.

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XI. THE TRIAL COURT'S FAULTY EXPLANATION OF THE TRIAL PROCESS AND ERRONEOUS GUILT-PHASE INSTRUCTIONS DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT AND VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

One of the fundamental principles of criminal law is that the defendant is presumed innocent and it is the prosecution's burden to prove him guilty beyond a reasonable doubt. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684, 699 [44 L.Ed.2d 508].) Indeed, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215.)

In the trial in this matter, however, the trial court erroneously described the first phase of the trial to the jury as determining guilt or innocence - and commented that one could call it an "innocence trial." (See, e.g. 7 RT 1311.) A number of the jury instructions given during the guilt phase then exacerbated the error by misleading the jury regarding the reasonable doubt standard and impermissibly lightening the prosecution's burden of proof.

The combination of the court's explanation and instructions thus deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment are required.

A. The Error During Voir Dire.

Throughout voir dire the trial court referred to the first phase of the trial as determining the issue of "guilt or innocence" and stated that it was "commonly called a guilt trial, although I suspect one equally could call it

an innocence trial." (7 RT 1311, 1323, 1339, 1368 [the guilt phase "may just as well be called an innocence phase"], 1371, 8 RT 1402, 1410, 1428, et seq..) The court told them that "[j]urors are to consider only evidence properly received in the courtroom in determining the guilt or innocence of the defendant." (RT 1935.) The prosecutor also characterized the issue as one of guilt or innocence. (See, e.g., 6 RT 1163, 11 RT 1930, 2008.)

It is indisputable that this characterization misstated the function of a jury as deciding between guilt and innocence. The implications of the use of the words "innocent" and "innocence" are enormous: they imply that the defendant must prove his innocence even as the prosecution tries to prove his guilt - and whoever puts on the best case wins. The error was particularly harmful in this case because defense counsel admitted that appellant had shot the victim in his opening statement:

> "The evidence will be that Mr. Sattiewhite did in fact shoot Genoveva Gonzales. He did do that. We think that the evidence is such that the crime was manslaughter, no greater than a second degree murder, and that the DA's theory that this was a rape and a kidnapping is just flat wrong."
> (11 RT 2056.)

Clearly, appellant was not "innocent" of all the charges by counsel's own admission, and the erroneous terminology used by the court and prosecutor lightened the prosecution's burden of proof. This error was then exacerbated by a series of CALJIC instructions given by the court.

B. The Trial Court's Use of Erroneous CALJIC Instructions Misled The Jury Regarding the Prosecution's Burden of Proof and the Presumption of Innocence.

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364;

accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law,'" (*In re Winship*, *supra,* 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard [of proof beyond a reasonable doubt.]" (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

1. CALJIC Nos. 1.0, 2.01, and 2.51 Diminished the Prosecution's Burden of Proof.

Several instructions violated appellant's constitutional rights by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty beyond a reasonable doubt or not.

CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to

trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (2 CT 238.)

CALJIC No. 2.01 also referred to the jury's choice between "guilt" and "innocence." (2 CT 244.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence." (2 CT 258.)

These instructions diminished the prosecution's burden by erroneously telling the jurors - just as the trial court had in its description of the trial process - they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find appellant guilty because it had not been proven that he was "innocent."[34]

2. CALJIC Nos. 2.2, 2.7, and 8.20 All Placed An Unconstitutional Burden on Appellant.

The jury was instructed with CALJIC No. 2.22 as follows:

"You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not

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[34] As one court has stated:

"We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone."* (*People v. Han* (2000) 78 Cal.App.4th 797, 809 [original italics].) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.* [citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739].) As shown below, the same is not true in this case because CALJIC No. 2.90 is also misleading under the circumstances of this case.

> convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence." (2 CT 255; 19 RT 3398-99.)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." The *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (2 CT 257), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant cannot be required to establish or prove any "fact." Indeed, this Court has "[agreed] that the instruction's wording could be altered to have a more neutral effect as between

prosecution and defense" and "[encouraged] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation . . . ." (2 CT 278-279 [italics added].) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction on a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was

proven by the prosecution beyond a reasonable doubt.

C. CALJIC 2.90 Was Deficient and Misleading Because the Instruction Failed to Affirmatively Instruct That the Defense Had No Obligation to Present or Refute Evidence.

The instructional language that defined and explained the presumption of innocence was the first paragraph of CALJIC No. 2.90, which provided as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (2 CT 266; 19 RT 3403.) The instruction omitted one of the most fundamental underpinnings of the presumption of innocence, that is, that the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of other instructions, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt.

The essence of the presumption of innocence is that the defense has no obligation to present evidence, refute the prosecution evidence or to prove or disprove any fact. (*In re Winship*, *supra*, 397 U.S. at p. 364; *see People v. Hill* (1998) 17 Cal.4th 800, 831 ["to the extent [the prosecutor] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence"]; *see also State v. Miller* (W. Va. 1996) 197 W. Va. 588, 610 [476 S.E.2d 535, 557] [if requested, court must instruct that defendant has no obligation to offer evidence]; *United States v. Maccini* (1st Cir. 1983) 721 F.2d 840, 843.)

As the judge told the jury in *Maccini*:

> "I take this occasion to state to the jury one of the fundamental principles of American jurisprudence, which is

> that the burden is upon the [prosecution] in a criminal case to prove every essential element of every alleged offense beyond a reasonable doubt. That is, the burden is upon the [prosecution] to prove guilt beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. There's no burden on [defendant] to produce any evidence. In every case, and I have no doubt in this case as well, the defendant will be presenting evidence by way of cross-examination of [prosecution] witnesses. The defendant relies upon evidence elicited by cross-examination. So that the opportunity that [defendant] will have, as the defendant in every case has, to bring out certain facts by way of cross-examination and by way of argument and analysis to the jury, does not in any way imply a necessity on the part of the defendant to produce any evidence. That's fundamental. There is no need of the defendant to produce any evidence. There is no need in law for him to take advantage of the opportunity. He doesn't have to put a single question on cross-examination if counsel decides not to do so. The bottom line is that the burden is on the [prosecution] to prove guilt beyond a reasonable doubt. There is no burden on the defendant to prove his innocence, and there's no burden on the defendant to come forward with a single item of evidence or testimony." (*U.S. v. Maccini*, *supra*, 721 F.2d at p. 843.)

An instruction explaining that the defendant has no obligation to produce evidence is especially important in cases where, as here, the defense presents affirmative evidence because the jurors will be naturally inclined to view their duty as deciding whether the defense evidence has proven or disproven the facts in issue.

As shown above, and when considering the instructions as a whole (as required by the instructions (2 CT 240; CALJIC 1.01) and presumed by the law[35]), the jurors were reasonably likely to assume that the defense had

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[35] "Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; see also *People v.*

the burden of producing sufficient evidence to raise a reasonable doubt. The instructions from which such an erroneous assumption would have been made included the following:

CALJIC No. 1.00 – Respective Duties of Judge and Jury. (2 CT 238-239.) In addition to framing the issue as one of guilt or innocence, this instruction described the jurors' duties in terms of "determin[ing] the facts" and "reach[ing] a just verdict . . . ." These descriptions implied a weighing of the evidence presented by both parties to determine what actually happened that would be consistent with the jurors' natural intuition. Nevertheless, the jurors' duty under the presumption of innocence is not to determine the ultimate truth but rather to determine whether the prosecution had proved guilt beyond a reasonable doubt. Hence, this instruction was misleading.

CALJIC No. 2.11 – Production of All Available Evidence Not Required. (2 CT 248; RT 3396.) Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence. This "missing witness" instruction exacerbated the deficient presumption of innocence instruction by implying that the defense had the obligation to present evidence. By expressly telling the jury that neither side is required to "call . . . all" potential witnesses to an event or "produce all objects or documents," the instruction suggested that the production of some evidence by both sides was required. (See e.g.,

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Hardy, supra, 2 Cal.4th at p. 208.) "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin, supra,* 471 U.S. at pp. 324-325, fn. 9.)

Commonwealth v. Bird (Pa. 1976) 240 Pa. Super. 587, 590 [361 A.2d 737, 739] [reversible error to instruct jury that it could draw inference against defendant for failure to call bystander as witness even though the instruction also permitted the jury to draw an inference against the prosecution for its failure to call the same witness); *State v. Mains* (1983) 295 Or. 640, 647 [669 P.2d 1112, 1117].)

CALJIC No. 2.01 – Sufficiency of Circumstantial Evidence Generally. (2 CT 244; RT 3393-94.) The circumstantial evidence instructions also exacerbated the deficiencies of the presumption of innocence instruction. True, paragraph 2 of CALJIC No. 2.01 stated that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (*Ibid.*) But, this paragraph reasonably addressed only the prosecution's evidence and did nothing to explain how the defense evidence should be considered in light of the prosecution's burden.

CALJIC No. 2.60 – Defendant Not Testifying - No Inference of Guilt May Be Drawn. (2 CT 259; 19 RT 3400.) This instruction was limited to the defendant's failure to testify. It did not apply to the failure to present evidence. Hence, this instruction further reinforced the misconception that the defense had the burden of producing evidence to raise a reasonable doubt.

CALJIC No. 2.61 – Defendant May Rely on State of Evidence. (2 CT 260; 19 RT 3400.) This instruction did discuss the defendant's reliance on a failure of proof by the prosecution: "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will supply a failure of proof by the People so as to support

a finding against him on any such essential element." (*Id.*) Nevertheless, by making the instruction specifically applicable to "deciding whether or not to testify," and by admonishing that "no lack of testimony on defendant's part will supply a failure of proof," the instruction, by implication, did not apply to the defendant's failure to present evidence.

In sum, the instructions as a whole perpetrated the misconception that the defense had the burden of raising a reasonable doubt and lowered the prosecution's burden of proof. This was reversible error.

D. The Combined Errors Violated the Federal and State Constitutions.

For all of the above reasons, the trial court's erroneous explanation of the trial process, together with the poor language contained in the older CALJIC instructions, failed to properly instruct the jury on the prosecution's burden of proof. The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated appellant's state and federal constitutional rights to due process and fair trial by jury. (U.S. Const., 5th , 6th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15-17; *In re Winship, supra,* 397 U.S. 358; see also *Sullivan v. Louisiana, supra,* 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia,* supra, 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment clauses of the federal constitution, which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (U.S. Const., 8th & 14th Amends.; *Beck v. Alabama, supra,* 447 U.S. at pp. 627-646; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785.) Furthermore, verdict reliability is also required by the Due Process

Clause of the federal Constitution. (U.S. Const., 14th Amend.; *White v. Illinois* (1992) 502 U.S. 346, 363-364; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.) Further, because appellant was arbitrarily denied his state-created right to proper instruction on the burden of proof under the state Constitution and Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (U.S. Const., 14th Amend.; Evid. Code, §§ 500-502; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Puckett* (9th Cir. 1991) 997 F.2d 1295, 1300; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

E. The Guilt and Death Verdicts Must Be Reversed.

Errors that dilute the standard of proof for conviction are reversible per se. Any error in defining reasonable doubt for a jury cannot be deemed harmless because the error goes to the very heart of the system of criminal trials and deprives the criminal defendant of the right to be convicted only on a finding by the jury of guilt beyond a reasonable doubt as correctly defined. (*Sullivan v. Louisiana, supra,* 508 U.S. 275.) This court has reached a similar conclusion. (*People v. Vann* (1974) 12 Cal.3d 220, 225-26.) Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution can demonstrate beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman, supra,* 386 U.S. at p. 24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-470 (*Chapman* standard applied to combined impact of state and federal constitutional errors); *People* v. *Williams* (1971) 22 Cal.App.3d 34, 58-59.) Given the weakness of the prosecution's evidence regarding the rape and kidnapping, and the substantial impact of the error, the prosecution cannot

meet this burden. Therefore, the judgment should be reversed under *Chapman*. Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty - under both the state and federal standards of prejudice - because it undermined the mitigating theory of lingering doubt.

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XII. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT AND PENALTY PHASES, AND THOSE CLAIMS WILL BE RAISED BY PETITION FOR WRIT OF HABEAS CORPUS.

The right to counsel guaranteed to criminal defendants by the Sixth and Fourteenth Amendments "is the right to the effective assistance of counsel." (*McMann* v. *Richardson* (1970) 397 U.S. 759, 771, fn. 14.) Throughout the proceedings in the trial court, defendant was deprived of his fundamental right to effective assistance of counsel. (*Strickland* v. *Washington* (1984) 466 U.S. 668.)

This Court has recognized that claims of ineffective assistance of counsel must generally be raised by petition for writ of habeas corpus. (See *People* v. *Pope* (1979) 23 Cal.3d 412, 426.) This Court has also explicitly held that the procedural bars of *In re Dixon* (1953) 41 Cal.2d 756, and *In re Waltreus* (1965) 62 Cal.2d 218, do not apply "to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely on the appellate record." (*In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; accord, *People* v. *Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

Accordingly, in reliance on this precedent, appellant will raise his ineffective assistance of counsel claims only in his petition for writ of habeas corpus.

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XIII. THE TRIAL COURT'S FAILURE TO ADDRESS THE TIME CONFLICTS OF THREE SEPARATE JURORS TAINTED THE PENALTY VERDICT AND REQUIRES REVERSAL.

Jurors in a capital penalty trial are faced with an "awesome responsibility" of determining the appropriate punishment. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 333.) In making this decision, it is vital "that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." (*People v. Hogan* (1982) 31 Cal.3d 815, 848, citing *Mattox v. United States* (1982) 146 U.S. 140, 149.) In this case, the pressure caused by jurors' travel, work, and vacation plans and the trial court's failure to recess deliberations, replace the jurors or even caution the jury not to hasten their deliberations - tainted the verdict in violation of due process guarantees and left the death sentence unreliable under Eighth Amendment standards.

A. Procedural Background.

On the second day of deliberations, Wednesday, March 23, 1994, the jury sent the court a note stating that juror #3 had a job promotion test of unknown duration on March 29th at 9:00 a.m. in Burbank, that juror #8 had a work-related conference in Las Vegas from March 29th through March 31st, and that juror #4 wanted the court to know she was now on vacation. (3 CT 617A.) The court drafted a reply which stated:

> "The court will not take a position on these requests at this time. In the event that the jury has not arrived at a verdict by mid-afternoon on Monday [March 28th], I will consider these requests at that time." (3 CT 617A; 24 RT 4705-4707.)

The next day, the third day of deliberations, Thursday, March 24, 1994, a jury note was sent to the court repeating that juror #8 had a conference in Las Vegas from the 29th through the 31st and asking for an answer by 3:30 p.m.. The court replied that it would not permit a recess in

deliberations to allow her to attend. (3 CT 554.) Another note then asked if the court would assist in trying to get a refund on the airline tickets. The court replied that it would. (3 CT 555.) In the last note of the day, the jury submitted a note asking, " [I]f we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) The court replied, "The jury is not to be concerned with what will happen should the jury be unable to arrive at a verdict." (*Ibid.*)

On the next day of deliberations, Monday, March 28th, the jury's final note asked to have the testimony of the beach rape victims read to them. (3 CT 559.) The jury then delivered a verdict of death before noon. (RT 4708.) The jury was then polled and discharged. (24 RT 4709-4711.)

B. The Trial Court's Failure to Address The Time Pressures of Three Separate Jurors Allowed External Pressures to Hasten the Jury's Deliberations.

Penal Code section 1089 provides that if a juror is unable to perform his duty, a trial court "may order him to be discharged." Here, it is clear that jurors #3, #4, and #8 all felt pressured to end the penalty deliberations swiftly. Juror #3 had a job promotion test on March 29th, juror #8 had the conference in Las Vegas from March 29th through March 31st, and juror #4 was using up her own vacation time for the trial. Each of those jurors' plans and commitments would require they be discharged if they were no longer able to deliberate. By refusing to either recess deliberations, replace the jurors, or even address the jurors' time issues, the trial allowed external pressures to end the deliberations quickly.

Due process requires a trial court to avoid any coercion of the jury that would displace the jury's independent judgment "in favor of considerations of compromise and expediency." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775; *People v. Carter* (1968) 68 Cal.2d 810, 817.) A jury must be "capable and willing to decide the case solely on the evidence

before it." (*Smith v. Phillips* (1982) 455 U.S. 209, 217 [71 L.Ed.2d 78, 86, 102 S.Ct. 940].) This is especially important in a penalty trial, because a "capital jury must retain and exercise vast discretion different from that possessed by any guilt phase jury." (*People v. Brown* (1988) 46 Cal.3d 432, 447.) A verdict of death must be based upon the evidence developed at trial and not be influenced by any other external consideration. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [119 L.Ed.2d 492, 501-502, 112 S.Ct. 2222, 2228-2229].) Indeed, this requirement is necessary to satisfy the Eighth Amendment standards that require heightened reliability in the determination that death is the appropriate punishment. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 340.)

Courts have recognized that a juror's travel plans may require them to be discharged from the jury and replaced with an alternate. (See, e.g., *People v. Jones* (2001) 287 A.D.2d 339, 339 [731 N.Y.S.2d 180, 181.) Accordingly, in *People v. Lucas* (1995) 12 Cal.4th 415, a juror was excused when her vacation plans conflicted with the penalty phase deliberations. Although the juror stated the cancellation of her vacation would not affect the discharge of her duties as a juror, this Court noted that

> "the juror would have felt some pressure to bring the penalty deliberations to a speedy close in order to preserve her planned vacation. It was not an abuse of discretion to discharge her." (*Id.* at p. 489.)

This kind of time pressure was particularly important in the present case. Juror #3 had a job promotion at stake, juror #8 would miss her trip to Vegas and be unlikely to receive a refund on her tickets only a few days before the flight was to leave, and juror #4 obviously felt it was important to tell the court she was now losing her vacation time to the trial. Thus, those external pressures created a "great risk" that those three jurors "unconsciously or otherwise, would hasten their deliberations and suppress

any uncertainties or disagreements to reach a verdict." (*People v. Beeler* (1995) 9 Cal.4th 953, 1013 [conc. and dis. opn. of Kennard, J.].) Yet the trial court failed to recess deliberations, replace the jurors, question any of the jurors about whether they would let those commitments play a conscious part in the penalty decision, or even caution them against hastening their deliberations.

Despite the obvious coercion inherent in its refusal to either recess deliberations or replace the jurors, there was simply no attempt by the court to ensure that due process and Eighth Amendment requirements of reliability were met.

C. The Timing of the Verdict in this Case Shows the Prejudicial Effect of the Trial Court's Failure to Recess Deliberations or Replace the Jurors.

The jury had been deliberating for three days when the trial court gave its reply regarding the jurors' other commitments, and the jury next asked the court what would happen if they were unable to reach a unanimous decision. (3 CT 556.) It is clear that the jury was divided and far from reaching a verdict. After the court's reply, they recessed for the day and then returned a verdict after only three hours of deliberations on the 28th, just before jurors #3 and #8 needed to leave town. (3 CT 558.) The timing of the verdict speaks for itself, and its speed underscores the coerciveness of the situation. (See *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 462 [57 L.Ed.2d 854, 98 S.Ct. 1121] [swift verdict following improper court communication raised a "serious question" about the communication's coercive effect].)

The speed of a verdict is an important indicator of the prejudice stemming from a trial court's improper attempt to resolve a jury deadlock. (See *People v. Cook* (1983) 33 Cal.3d 400, 412; *United States v. Petersen* (9th Cir. 1975.) 513 F.2d 1133, 1136 [quick return of verdict following

deadlock as factor showing prejudice].) It is an equally important indicator in this case, where the jury had engaged in long deliberations and sent out a note asking about the consequences of a deadlock before suddenly reaching a verdict. The speedy verdict just before jurors #3 and #8 needed to leave town shows the coercive effect of the court's failure to recess deliberations or replace the pressured jurors.

There was substantial mitigating evidence before the jury. Appellant had been born with significant brain damage at birth. (See 21 RT 3968, 3992, 22 RT 4168-69, 4282, 4300, 4316-4317, 23 RT 4470, 4472.) His neuro-developmental age was between 6 and 7 years old, but his ability to deal with moral judgments, consequences, or relationships with people was below that of an average 6 or 7-year-old. (21 RT 3981, 3991-3992.) He had undergone a lifetime of beatings by his father, who would also have appellant watch violent pornographic movies with him. (See 21 RT 3832-33, 3865.) After deliberating upon these facts for three days, the jury's note to the court specifically asked "if we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) Then, when the jurors' external commitments were almost upon them, a verdict was suddenly reached.

A formerly deadlocked jury hurried into a death verdict to meet external obligations, and the trial court's error in rushing them along cannot be said to be harmless beyond a reasonable doubt. Accordingly, the penalty verdict must be reversed. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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XIV. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR MODIFICATION OF VERDICT BASED UPON APPELLANT'S PROBATION REPORT AND UPON ITS MISUNDERSTANDING OF THE FACTORS IN AGGRAVATION AND MITIGATION.

Under Penal Code section 190.4, subdivision (e), a motion for modification of penalty is heard automatically after a death verdict.[36] In ruling on that motion, the trial court must 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*, *supra*, 42 Cal.3d 730, 793.)

Here, the trial court erred in denying appellant's automatic motion for modification of the penalty verdict when it failed to consider only the evidence presented to the jury as required by Penal Code section 190.4, subdivision (e). (*Ibid.*) The trial court erroneously considered prejudicial information from appellant's probation report, which included appellant's entire criminal record, misleadingly stated that there were no mitigating factors, and included extremely negative and conclusory statements about appellant as well as the probation officer's recommendation that appellant be given the death penalty.

The trial court also erroneously considered appellant's alleged lack

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[36] Penal Code section 190.4, subdivision (e), provides, "In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for the modification of such verdict or finding. . . . In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings."

of remorse at trial and cited victim impact evidence from an unrelated crime as being the most important aggravating factor.

The trial court's errors, both individually and cumulatively, violated appellant's rights to due process, a fair trial, equal protection, and a reliable penalty determination. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) This Court must remand the case to the trial court for a new determination on the motion for modification of the penalty verdict.

A. Procedural Background.

During the hearing on the automatic motion to modify the verdict, the trial court noted three major factors in upholding the death sentence: the callous nature of the crime, appellant's alleged lack of remorse, and the emotional impact of the beach rape upon its victims. (24 RT 4732-33.)

The court first noted that the perpetrators had gone to a coffee shop for food after the execution-style killing and, while the court and jury had heard a lot of concern from appellant's family, they had never heard any remorse on the part of appellant. (24 RT 4732.)

The court emphasized the overriding importance of the Oxnard beach rape, stating that Jamie Marquez would remember for the rest of his life that he held his lover's hand as she was repeatedly raped, and stated that the humiliation of Myra Marquez was overwhelming. (24 RT 4732-4733.) The court further noted that the jury also placed great weight upon the testimony of the victims of the Oxnard beach rape, and had asked that their testimony be re-read during deliberations:

> "I think that the jury, and I think this court might feel somewhat differently if, not withstanding the egregious nature of this murder, you did not have the Oxnard situation. And I recall when the jury was deliberating the – I think the last day of deliberations they wanted the testimony of one of those victims read back; that is, one of the Oxnard beach victim's

read back." (24 RT 4733.)

The court went on to state that it did not give a great deal of weight to appellant's prior conviction for possession of cocaine or the threat to Rollins. (*Ibid.*) The court then briefly considered the factors in mitigation:

> "And then I contrast the aggravating factors to those in mitigation. And I look at the fact that we are not dealing with a person of significant intelligence who has borderline mental retardation with an IQ that, depending on who you talk to, is either 70 or 74 or 73, who suffered life-long abuse by his father. I look at the impact that the case has had on the Defendant's family. I look at the impact that the case has had on the victim's family. And after having evaluated all of it, I cannot come to the conclusion that as a matter of law or as a matter of fact that the jury's verdict is not supported by the evidence." (24 RT 4733.)

The court then denied the motion, stated that it had read the probation officer's report and ordered it filed, then sentenced appellant to death. (24 RT 4734.)

B. The Trial Court Improperly Considered the Facts and Recommendations from the Probation Report.

In deciding the motion for modification, a trial court must limit its review to the evidence presented to the jury. (Pen. Code, § 190.4, subd. (e); *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 793.) It is error to consider facts or recommendations that were not before the jury, including material presented in a probation report. (*People v. Lewis* (1990) 50 Cal.3d 262, 287.)

Here, as in *Lewis*, the trial court based its decision on the recommendations of the probation report that were not considered by the jury. The court announced that it had already read the report immediately after ruling on the motion for modification, and thus was obviously aware of its contents when it decided the motion. (24 RT 4734.) This was clear

error.

The probation report relied upon by the court contained new and prejudicial information, erroneous conclusions of both fact and law, and a recommendation of death that were not before the jury. It detailed appellant's entire criminal record, erroneously stated that there were no mitigating factors, argued that, despite his limited intelligence, appellant knew right from wrong, and concluded that appellant was "a dangerous predator." It recommended that appellant be sentenced to death.

The report's information, misinformation, and recommendation had no proper place in deciding the motion for modification. Appellant was entitled to a hearing that was untainted by matters that were outside the statutory scheme. (*People v. Lewis*, *supra*, 50 Cal.3d at p. 287.)

In *People v. Lewis*, *supra*, 50 Cal.3d at pp. 286-287, the trial court similarly considered the probation report before ruling on the defendant's motion for modification. The report detailed the defendant's juvenile record, including involvement in a homicide, that was not in evidence before the jury. This information would not have otherwise been considered by the trial court. Therefore, the matter was remanded for a new hearing on the application for modification of the verdict. (*Id.* at p. 287.) As in *Lewis*, this Court, at the very least, should remand this case for a new hearing.

The recommendations in a probation report normally carry great weight. (See *People v. Scott* (1994) 9 Cal.4th 331, 350 [probation report indicates reasons for the sentence likely to be imposed].) Even if the trial court had sought to distance itself from the report, it would have been difficult to put the recommendations and the information contained in the probation report outside of its mind. (See *People v. Ramirez*, *supra*, 50 Cal.3d at p. 1202 (conc. and dis. opn. of Mosk, J.).) The trial court in this

case made no such effort.

The trial court's failure to perform its statutory duty and limit its consideration to the evidence before the jury violated the statutory mandate of section 190.4 and appellant's due process rights. (U. S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 1, 7, 15; *Hicks v. Oklahoma, supra,* 447 U.S. 343.) It prevented appellant from confronting the evidence contained in the report in violation of his Sixth Amendment rights. (See *Gardner v. Florida, supra*, 430 U.S. at p. 362; *Proffit v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1255.) It violated the Eighth Amendment's requirement for reliability in capital sentencing by introducing the report's subjective recommendations into the sentencing decision. (See *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Accordingly, this Court must remand this case to the trial court for a new hearing on the motion for modification.

C. The Trial Court Improperly Used Appellant's Failure to Testify as Evidence of Lack of Remorse, then Improperly Used The Alleged Lack of Remorse as an Aggravating Factor.

In ruling on the motion for modification, and during its discussion of the aggravating factors, the trial court noted the callous nature of the crime and that

> "[t]he Court has not heard, nor has the jury heard, any remorse on the part of the Defendant. Heard a lot of concern from the Defendant's family." (24 RT 4732.)

Thus, the trial court explicitly used appellant's failure to testify to infer - incorrectly[37] - that appellant had no remorse at the time of trial, and then, to

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[37] Prosecution witness Adrienne Wells testified that, during the course of the conversation in which he told her he had "killed a lady," appellant was crying and sorry that he had done it. (15 RT 2790, 2807.) The prosecution's star witness, Bobby Rollins, had told the police that appellant was upset and "never the same" afterward because he felt so bad.

compound that error, used that alleged lack of remorse as an aggravating factor.

It is fundamental that, under the Fifth Amendment, no negative inference may be drawn from a defendant's failure to testify. (U. S. Const., 5th and 14th Amends; *Griffin v. California* (1965) 380 U.S. 609, 614, [85 S.Ct. 1229, 14 L.Ed.2d 106.].) Even where a defendant has plead guilty, the sentencing court may not draw any adverse inference from the defendant's silence in determining the circumstances of the crime. (*Mitchell v. U.S.* (1999) 119 S.Ct. 1307; 143 L.Ed.2d 424.) Yet here, that is precisely what the trial court did. As this Court noted in *People v. Coleman* (1969) 71 Cal.2d 1159, 1168 [overruled on other grounds in *Garcia v. Superior Court* (1997) 14 Cal.4th 953]:

> "It is fundamentally unfair to urge, as was done here, that a defendant's failure to confess his guilt after he has been found guilty demonstrates his lack of remorse and that therefore such failure should be considered as a ground for imposing the death penalty. Even after he has been found guilty, a defendant is under no obligation to confess, and he has a right to urge his possible innocence to the jury as a factor in mitigation of penalty. [Citation.]" (*Id.* at 1168.)

Here, the trial court actually used appellant's failure to testify as evidence of a lack of remorse at trial and cited it in his list of aggravating factors.[38] It is very clear that, even where there actually is evidence of post-crime lack of remorse, it cannot be used as an aggravating factor.

A defendant's overt remorselessness "at the immediate scene of the

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(17 RT 3105.)

[38] It is very clear that the court used lack of remorse at trial as an aggravating factor - it discussed it in its list of aggravators, just before it noted the Oxnard beach rape, appellant's cocaine conviction, and the threat to Rollins. (24 RT 4733.) Only then did the court discuss the mitigating factors: "And then I contrast the aggravating factors to those in mitigation. And I look at the fact that we are not dealing with a person of significant intelligence who has borderline mental retardation . . . " (*Ibid.*)

crime" may be argued by the prosecutor and considered by the jury as aggravation because factor (a) of section 190.3 allows the sentencer to evaluate aggravating aspects of the "*capital crime itself.*" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232, original emphasis; see also *People v. Cain* (1995) 10 Cal.4th 1, 77, emphasis added ["A murderer's attitude toward his actions and the victims at the time of the offense is a '*circumstance of the crime.*'"] "On the other hand, post-crime evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1232, citing *People v. Boyd* (1985) 38 Cal.3d 762, 771-776; see also *People v. Crittenden* (1995) 9 Cal.4th 83, 150, fn. 17.) Thus, if it is "reasonably likely" a juror would have construed a prosecutor's argument as suggesting the defendant's lack of remorse factored in favor of a death sentence, the argument is improper. (*People v. Payton* (1992) 3 Cal.4th 1050, 1071, citing *Boyde v. California* (1990) 494 U.S. 370, 378-381.)

Here, of course, there is no dispute over whether the improper factor was considered - it is unarguable that the trial court actually and erroneously used appellant's alleged lack of remorse as an aggravating factor. This violated an important state procedural protection and liberty interest (the right to not to be sentenced to death except on the basis of statutory aggravating factors) that is protected as a matter of federal due process under the Fifth and Fourteenth Amendments. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Puckett, supra,* 997 F.2d at pp. 1300-1301.) It also violated the Eighth and Fourteenth Amendment requirements that capital sentencing be subjected to heightened standards of fairness and reliability. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, citing *Woodson v. North Carolina, supra,* 428 U.S. at p. 305; see also *Zant v. Stephens, supra,* 462 U.S. at p. 885 [due process of law requires that a

jury's decision to impose death be set aside where an impermissible factor is injected into the penalty determination].) The case must be remanded to the trial court for a new hearing on the motion for modification.

D. The Trial Court Improperly Used Victim Impact Evidence From A Separate Crime as the Most Important Aggravating Factor.

When listing the aggravating factors it considered, the trial court found that the most important aggravator was the victim impact evidence from a completely separate crime: the rape of Myra (Soto) Marquez at an Oxnard beach by Bobby Rollins and Fred Jackson with the help of appellant. The court stated:

> "I think that the jury, and I think this court might feel somewhat differently if, not withstanding the egregious nature of this murder, you did not have the Oxnard situation. And I recall when the jury was deliberating the – I think the last day of deliberations they wanted the testimony of one of those victims read back; that is, one of the Oxnard beach victim's read back." (24 RT 4733.)

This was clear error. As shown at length in argument XVII, *infra*, victim impact evidence is admissible only as a "circumstance of the crime" under section 190.3, subdivision (a), and is therefore limited to the capital crime itself, or a crime directly related to the capital crime. (*People v. Taylor* (2001) 26 Cal.4th 1155.)

Thus, like its use of appellant's alleged lack of remorse and consideration of the probation report, the court's use of victim impact evidence from a completely unrelated crime as the single most important aggravator violated appellant's right to not to be sentenced to death except on the basis of statutory aggravating factors, a right protected as a matter of federal due process under the Fifth and Fourteenth Amendments. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Puckett, supra,* 997 F.2d at

pp. 1300-1301.) It also violated the Eighth and Fourteenth Amendment requirements that capital sentencing be subjected to heightened standards of fairness and reliability. (*Johnson v. Mississippi, supra,* 486 U.S. at p. 584, *Zant v. Stephens, supra,* 462 U.S. at p. 885.) The case must be remanded to the trial court for a new hearing on the motion for modification.

E. Remand to the Trial Court Is Required Because the Cumulative Impact of the Errors Creates a Reasonable Possibility That They Affected the Modification Decision.

The trial court's multiple errors in deciding the motion for modification compounded each other, render the result unreliable, and require remand of the case. The trial court explicitly used appellant's failure to testify to infer (incorrectly) that appellant had no remorse, and then, to compound that error, used that lack of remorse as an aggravating factor. It then improperly used victim impact evidence from a completely separate crime as the most important aggravating factor. Finally, the trial court's consideration of the probation report and acceptance of its recommendations added further improper aggravation to an already improperly skewed determination of aggravating factors. These errors combined to affect the modification decision and compel this Court to remand the case for a new modification hearing. (See *People v. Holt* (1984) 37 Cal.3d 436, 459 [multiple errors in penalty decision compounded each other].)

The trial court's errors implicated constitutional protections and require reversal unless they were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) However, even if the errors are viewed as only rising under state law, error that affects the penalty determination similarly requires reversal if there was a "reasonable possibility" that it affected the penalty decision. (*People v. Brown, supra,*

46 Cal.3d at p. 447.) These standards are the same in substance and effect. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.)

That the errors occurred in the trial court's consideration of the motion for modification, rather than the jury's deliberation, does not make any difference in this Court's standard of review. (See *People v. Kaurish*, (1990) 52 Cal.3d at p. 718 [adopting reasonable possibility test in reviewing motion for modification].) As with the original penalty decision, the motion for modification requires the trial court to make a normative decision, based upon its review of the aggravating and mitigating circumstances. (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 794.) Thus, any substantial error renders the entire decision in doubt. Such error "must be deemed to have been prejudicial." (*People v. Robertson* (1982) 33 Cal.3d 21, 54; see also *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281 [124, L.Ed.2d 182, 113 S.Ct. 2078] [if error vitiates findings, reviewing court cannot speculate on what hypothetical sentencer might have done]; *People v. Karis* (1988) 46 Cal. 3d 612, 652 [reversal unless error had "no impact" on trial court's decision to deny].)

In *People v. Sheldon* (1989) 48 Cal.3d 935, the trial court failed to provide an adequate statement of reasons to support its finding on the motion for modification. This Court remanded the matter for a new hearing "out of an abundance of caution." (Id. at p. 962.) It reasoned that "the trial judge's familiarity with the record would enable him to review the application . . . with relatively little delay and expenditure of judicial resources." (Ibid.) If the mere failure to state reasons warrants a remand out of caution, then this Court has all the more reason to be concerned about the reliability of the trial court's finding when there is clear error before it. As in *Sheldon*, it should remand the case and allow the trial court to conduct a proper hearing on the modification motion.

The trial court's review of the verdict under Penal Code section 190.4, subdivision (e), is one of the key "checks on arbitrariness" in the California death penalty scheme. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-52; see also *People v. Frierson* (1979) 25 Cal.3d 142, 179 [section 190.4 provides safeguard for assuring careful appellate review].) The Eighth Amendment standards for reliability and this Court's recognition of the need for special care in reviewing a death verdict should compel it to remand the case to the trial court for a new hearing on the motion for modification.

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XV. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S NEW TRIAL MOTION BASED UPON THE NEWLY DISCOVERED EVIDENCE THAT THE VICTIM'S FAMILY DID NOT WANT APPELLANT TO RECEIVE THE DEATH PENALTY.

After trial, the probation report in this case revealed that the victim's family - her mother and eldest son - did not want appellant to receive a death sentence, a fact that the prosecution had known but not revealed to the defense. (24 RT 4714-4717.) The trial court then denied appellant's motion for new trial based upon this new information on the grounds that such evidence was inadmissible. (24 RT 4722.) This was incorrect, as such evidence was admissible as mitigation evidence and - most importantly - rebuttal evidence to the prosecution's argument that redress for the family demanded a sentence of death.

The erroneous denial of the motion prevented a jury from considering all available mitigating evidence when it decided appellant deserved to die, and precluded appellant from introducing rebuttal evidence to counter the State's evidence and argument for the death penalty in violation of his rights to due process, a fair jury trial, equal protection, and a reliable jury determination on penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Eddings v. Oklahoma*, *supra*, 455 U.S. 104; *Lockett v. Ohio*, *supra*, 438 U.S. 586; *Gardner v. Florida*, *supra,* 430 U.S. at p. 362; *Skipper v. South Carolina, supra,* 476 U.S. at p.5, fn. 1, *id.* at pp. 9-11 (conc. opn. of Powell, J.).) Appellant's death sentence must be reversed and the case remanded for a new penalty phase.

A. Factual Background.

In the interview portion of the probation report, the views of Maria Cabrera, the victim's mother, regarding appellant were summarized as

follows:

> "The defendant did a very bad thing, but she asks God to forgive him. She does not want to see another death and have another mother crying because of what happened to her daughter. She feels that God will punish the defendant."

The victim's son, Salvador Zavala, was described in similar terms: "He also feels that God will punish the defendant and does not want to see another death." (Probation Report, p. 13.) Both Cabrera and Zavala had given extensive victim impact evidence at trial.

Appellant brought a motion for new trial based upon the newly discovered evidence. (24 RT 4714.) The prosecution stipulated that they had known of the mother's opposition to appellant receiving a death sentence, but argued that it was not relevant or admissible evidence. (24 RT 4717-4720.) Defense counsel argued that, under factor (k), such evidence would extenuate the gravity of the crime. (24 RT 4718.) He noted that the prosecution had made emotional arguments about the hardships the victim's death had caused the family, and argued that the impact of that evidence would have changed dramatically if they could have shown that, notwithstanding those hardships, the family wanted appellant to receive a sentence of life without parole. (24 RT 4718-4719.) As counsel noted, it would have taken one question on cross-examination: "'[a]re you satisfied with life without the possibility of parole?' And she would have said, 'Yes.' I think that is tremendous evidence." (RT 4719.) The prosecutor responded that, as the prosecution was barred from putting on victim witnesses to ask for the death penalty, the defendant must be similarly barred. (RT 4719.)

Defense counsel also argued that the prosecution's closing arguments were deceptive and implied to the jury that the family had to have a death sentence to feel that justice was done. (RT 4715, 4718-4720.)

The trial court then stated that it was obliged to listen to the views of the victims at sentencing, but the jury was not, and that the victims' view of capital punishment was not admissible in the penalty phase. The court then denied the motion. (RT 4721-4722.)

B. The Fact That The Victim's Family Wished To Show Appellant Mercy Was Admissible Mitigating Evidence.

Under the Eighth and Fourteenth Amendments of the federal Constitution, and under California law (§ 190.3), a capital defendant must be allowed to present all relevant mitigating evidence to demonstrate he deserves a sentence of life rather than death. (*Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5; *Eddings v. Oklahoma, supra,* 455 U.S. at pp. 110-114; *Lockett v. Ohio, supra,* 438 U.S. p. 604; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117, *People v. Mickey* (1991) 54 Cal.3d 612, 692; *People v. Harris* (1985) 36 Cal.3d 36, 68.) "The jury 'must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1015, quoting *Jurek v. Texas* (1976) 428 U.S. 262, 271.) "[T]he mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 441.)

As discussed below, the fact that the victim's family did not wish appellant sentenced to death was highly relevant to the jury's penalty determination because a rational juror could have found that their merciful evaluation of appellant and his character justified a sentence of less than death.

1. The scope of admissible mitigation evidence is far broader than that of admissible aggravation evidence.

During the new trial motion, the prosecutor made the following argument:

> "Your honor, when we put the little boy on, Chava [Salvador Zavala], we believed that he was in favor of Mr. Sattiewhite receiving the death penalty, yet we did not even pursue the idea of asking him to ask the jury for the death penalty. I think that would have been improper.
>
> I realize it is proper for the Defendant's family to come in and beg for mercy, but I don't think it is proper for us to put on any number of victims to beg that the jury give the death penalty.
>
> So the other side of that coin is I don't think that it is relevant as to what the victim's family's attitude is toward capital punishment or toward a particular defendant receiving capital punishment." (RT 4719.)

Similarly, in *People v. Smith* (2003) 30 Cal.4th 581, 622, this Court reasoned that

> "It is clear that the *prosecution* may not elicit the views of a victim or victim's family as to the proper punishment. (*Booth v. Maryland* (1987) 482 U.S. 496, 508-509.) The high court overruled *Booth* in part, but it left intact its holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2.) That court has never suggested that the defendant must be permitted to do what the prosecution may not do." (*Ibid.*)

Appellant respectfully suggests that this type of reasoning is incorrect, and that this Court should reconsider the holding of *Smith*. Defendants in capital cases are allowed to introduce an extremely broad array of mitigation evidence. Under California law, a capital defendant may present as mitigation eight separate categories of mitigation evidence, including "[a]ny . . . circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (§ 190.3, subd.

(k).) There is no equivalent provision for aggravating circumstances. In fact, there are precisely three narrowly-drawn categories of aggravating evidence. Thus, the fact that the prosecution is barred from introducing such evidence under *Booth* and *Payne* is irrelevant in determining whether the defendant may do so. As shown below, this evidence was highly relevant under both federal and state law to the jury's determination of whether appellant deserved to live or die.

Both this Court and the United States Supreme Court have espoused an expansive view toward the type of mitigating evidence a jury may consider in the sentencing phase of a capital trial.

> "In a capital case, the penalty jury looks at the individual as a whole and determines if he is fit to live. The scope of admissible evidence as to the defendant's character and background must therefore be very broad."

(*People v. Harris*, *supra*, 36 Cal.3d at p. 68, citations and internal quotation marks omitted.)

> "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

(*Lockett v. Ohio, supra,* 438 U.S. at p. 604; see also *Buchanan v. Angelone* (1998) 522 U.S. 269, 276 ["we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination" of whether death is the appropriate punishment]; *People v. Frye, supra,* 18 Cal.4th at p. 1015 [the "constitutional mandate" that the jury not be precluded from considering any aspect of a defendant's character or record proffered for a sentence less than death "contemplates the introduction of a broad range of evidence mitigating imposition of the

death penalty."].)

As noted above, under California law, a capital defendant may present as mitigation, "[a]ny . . . circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (§ 190.3, subd. (k).) To ensure that jurors understand the scope of mitigating evidence, trial court's instructing on section 190.3, subdivision (k), should inform the jurors they may consider as a mitigating factor not just circumstances extenuating the gravity of the crime, but also "any other aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10, citing *Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

Relevant mitigating evidence therefore includes both evidence relating to the crime and victim, and evidence related to the defendant whose fate the jury will decide. (See, e.g., *Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5 [holding that even though inferences drawn from evidence relating to the defendant's future adaptability to prison life would not relate specifically to the defendant's culpability for the crime he committed, "such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'"].)

Here, the members of the victim's family, those most hurt by the crime, had found appellant worthy of mercy and forgiveness. Maria Cabrera had asked God to forgive appellant and did not wish to see him die. Nor did the victim's son Salvador. Their sympathy and mercy were certainly "a basis for a sentence less than death" and appellant was entitled to have the jury consider that factor in making their decision.

"[T]he Supreme Court's decisions in *Lockett* [and] *Eddings* . . . 'make it clear that in a capital case the defendant is constitutionally entitled

to have the sentencing body consider any "sympathy factor" raised by the evidence before it.'" (*People v. Easley, supra,* 34 Cal.3d at p. 876, quoting *People v. Robertson, supra,* 33 Cal.3d at p. 58.) Sympathy in this context is synonymous with mercy and pity. (*People v. Ochoa* (1998) 19 Cal.4th 353, 459; *People v. Caro* (1988) 46 Cal.3d 1035, 1067.) Thus, appellant was entitled to seek mercy and ask the jury to assign a value to his life that precluded execution. A rational juror in appellant's case could have found the family's merciful response to appellant both relevant and worthy of significant weight in making that decision.

The prosecution's suppression of this evidence and the erroneous denial of the new trial motion thus prevented a jury from considering all available mitigating evidence when it decided appellant deserved to die. That omission violated appellant's rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Eddings v. Oklahoma, supra,* 455 U.S. 104; *Lockett v. Ohio, supra,* 438 U.S. 586.)

C. Once the Prosecutors Asked For A Death Sentence on Behalf of the Victim's Family, Due Process Required That The Contrary Views of the Victim's Family Be Admissible as Rebuttal Evidence.

A central theme in the State's penalty phase case was, as trial counsel noted (24 RT 4718-4719), that justice for the victim's family demanded a death sentence. The prosecutors emphasized and re-emphasized in their closing arguments that justice for the family meant a death sentence:

> "The defendant and his family begged you for mercy. For the People of the State of California and for the family of Genoveva Gonzales, I ask you for justice." (23 RT 4548.)

Of course, the only two choices given the jury at penalty phase were death and life without parole. Thus, the prosecutor explicitly told the jury that

"mercy" meant life without parole, "justice" meant a death sentence, and that he was asking them, *on behalf of the Gonzales family*, for a death sentence. As the probation report and the prosecutor's later stipulation show, his implicit assertion that the family wanted appellant to receive a death sentence was false. In fact, appellant's execution would further wound Mrs. Cabrera, who did not want "to see another death and have another mother crying because of what happened to her daughter." (Probation report, p. 13.)[39]

The prosecutors repeatedly gave the jury that same message. When one of the prosecutors told the jury that "[t]o fix the penalty in this case at life in prison would be to minimize the suffering and death of Genoveva Gonzales and continued suffering of her family," (RT 4596), she knew - *she knew* - that the family did not want to see another death, another mother crying for her child. But she went on. "Everything Sattiewhite had with his mother, he ripped from the grasp of the Gonzales children. There is only one way that can be redressed, and you know in your heart what that is." (23 RT 4604.) "Redress" means making compensation for a wrong. She, like her co-prosecutor, was telling the jury that the Gonzales children must be compensated with appellant's death - quite the opposite of their true wishes. Appellant's inability to rebut these misrepresentations was a result of the court's ruling on the new trial motion, and thus constituted reversible error.

In *Skipper v. South Carolina, supra,* 476 U.S. 1, the defendant was

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[39] During his closing, one of appellant's attorneys even asked "And I have often wondered whether or not Salvador, Mrs. Gonzales mother, would really have wanted you to kill Mr. Sattiewhite in their name." (23 RT 4571.) The prosecutors knew the answer to that very important question was "no" and suppressed that fact so they could imply that the family wanted a death sentence.

prevented during the sentencing phase of his capital trial from presenting witnesses who would have testified he had made a good adjustment to jail during his pretrial incarceration. After the trial judge ruled this evidence was irrelevant, the state prosecutor argued in closing argument that the defendant would be a discipline problem in prison and would likely rape other prisoners. (*Id.* at pp. 3.) The Supreme Court reversed the defendant's death sentence on the ground that evidence of defendant's good behavior in jail was a mitigating aspect of his character that was relevant to the jury's penalty determination. (*Id.* at p. 8.) In so doing, the High Court stated:

> "The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'"

(*Id.* at p. 5, fn. 1, citing *Gardner v. Florida*, *supra*, 430 U.S. at p. 362.) The concurrence in *Skipper* agreed with the result reached by the majority, but would have reversed on the ground that the death sentence was imposed, at least in part, on the basis of information which the defendant had no opportunity to deny or explain. (*Skipper, supra*, 476 U.S. at pp. 9-11(conc. opn. of Powell, J.) As did the majority, the concurrence pointed out that the constitutional error was aggravated by the prosecutor's closing argument, which emphasized the defendant's misconduct in prison after his arrest. (*Id.* at p. 11.) Citing both the lead and concurring opinions in *Skipper*, this Court has stated that, "[w]hen a defendant is precluded from introducing

evidence rebutting the prosecutor's argument in support of the death penalty, fundamental notions of due process are implicated." (*People v. Frye, supra,* 18 Cal.4th at p. 1017.)

As in *Skipper*, the victim's family's merciful evaluation of appellant was crucial mitigating evidence that the jury needed to consider in deciding whether he should live or die. (*Skipper, supra*, 476 U.S. at p. 8.) And, as in *Skipper*, the relevance of this evidence was magnified by the prosecutor's penalty phase evidence and argument which emphasized that justice for the family demanded a death sentence. Accordingly, "it is not only the rule of *Lockett* and *Eddings* that require[d] that [appellant] be afforded an opportunity to introduce [the views of the family]; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" (*Skipper, supra,* 476 U.S. at p. 5, fn. 1, citing *Gardner v. Florida, supra,* 430 U.S. at p. 362.)

This Court allows the State to argue non-statutory aggravation when it rebuts mitigating evidence offered by the defendant. (*People v. Davis, supra*, 10 Cal.4th at p. 537, citing *People v. Cox* (1991) 53 Cal.3d 618, 685 [dealing with lack of remorse].) Appellant certainly must be afforded similar consideration, as the family's views were highly relevant to rebut the State's arguments regarding what justice for the Gonzales family might require.

The trial court's denial of the motion precluded appellant from introducing rebuttal evidence to counter the State's evidence and argument for the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Gardner v. Florida, supra,* 430 U.S. at p. 362; *Skipper v. South Carolina, supra,* 476 U.S. at p. 5, fn. 1, *id.* at pp. 9-11 (conc. opn. of Powell, J.).) Because that error was clearly prejudicial, appellant's death

sentence must be reversed and the case remanded for a new penalty phase.

D. Denial of the New Trial Motion Requires Reversal.

Because a death judgment's reliability depends on the sentencer's ability to fully consider all relevant evidence that mitigates against a death sentence, the U.S. Supreme Court has seldom conducted detailed prejudice analyses in its cases reversing death judgments due to the erroneous exclusion of mitigating evidence. In its leading case on the subject, the High Court applied no prejudice analysis whatsoever. (*Lockett v. Ohio, supra,* 483 U.S. at p. 608.) When faced with the issue now before this Court - the erroneous exclusion of evidence that could have served as a basis for a sentence less than death, and would have rebutted the prosecutor's arguments for a death sentence - the Supreme Court held that, "under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." (*Skipper v. South Carolina, supra,* 476 U.S. at p. 8.)

This Court has held that exclusion of mitigating evidence is subject to the standard of review articulated in *Chapman v. California, supra,* 386 U.S. 18. (*People v. Frye, supra,* 18 Cal.4th at p. 1017; *People v. Fudge, supra,* 7 Cal.4th at p. 1117; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032.) Under the plain language of *Chapman*, the question is not whether the State's evidence and arguments supported a death sentence, but instead, whether the State can "prove beyond a reasonable doubt that the [exclusion of mitigating evidence] did not contribute to the [death] verdict obtained." (*Chapman, supra,* 386 U.S. at p. 24.) In other words, reversal is required if there is a reasonable possibility that the error complained of could have affected the jury's decision to impose the death penalty. (*Ibid.*; *People v. Frye, supra,* 18 Cal.4th at p. 1017.) The essential inquiry is whether the death verdict rendered at appellant's trial "was surely unattributable to the

error." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

This was a close case. The jury took four days to decide punishment, asking for read backs of testimony and making a number of other inquiries. There was substantial mitigating evidence before the jury. Appellant had been born with significant brain damage at birth. (See 21 RT 3968, 3992, 22 RT 4168-69, 4282, 4300, 4316-4317, 23 RT 4470, 4472.) His neuro-developmental age was between 6 and 7 years old, but his ability to deal with moral judgments, consequences, or relationships with people was below that of an average 6 or 7-year-old. (21 RT 3981, 3991-3992.) He had undergone a lifetime of beatings by his father, who would also have appellant watch violent pornographic movies with him. (See 21 RT 3832-33, 3865.) The jury was, in fact, at an impasse on the third day of deliberations, when they sent out a note asking "if we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) This error precluded the jury from hearing evidence that might have served as the basis for a sentence less than death, and certainly would have rebutted one of the State's most powerful and emotional arguments for a death sentence, thereby creating a risk that the death penalty was imposed on appellant in spite of factors which may have called for a less severe penalty. (*Lockett v. Ohio, supra,* 438 U.S. at pp. 604-605.) Under U.S. Supreme Court precedent, that risk "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*)

> "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling. . . . Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.'"

(*McKoy v. North Carolina, supra*, 494 U.S. at p. 442, citing *Mills v. Maryland* (1988) 486 U.S. 367, 375 [internal citations omitted].) The same is true here. The death judgment must be reversed and the case remanded for a new penalty phase.

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XVI. THE PROSECUTION'S FAILURE TO DISCLOSE THE VICTIM'S FAMILY'S VIEWS TO THE DEFENSE VIOLATED *BRADY V. MARYLAND.*

In *Brady v. Maryland* (1963) 373 U.S. 83, the Supreme Court held that under the Due Process clause of the Fourteenth Amendment, the prosecution has a constitutional duty to disclose to the defense all favorable evidence material to guilt or punishment. (*Id.* at 87.) The prosecution is obligated to learn of favorable evidence known to others acting on the prosecution's behalf, including police. (*Kyles v. Whitley, supra,* 514 U.S. at p. 437.) The timing of the disclosure is crucial. To escape the *Brady* sanction, disclosure must be made at a time when it would be of value to the accused. (*United States v. Davenport* (9th Cir. 1985) 753 F.2d 1460, 1462.)

The prosecutor's duty to produce *Brady* material is self-executing: the State must turn over *Brady* material, regardless of whether the defense has made a specific request. *United States v. Bagley* (1985) 473 U.S. 667, 682 [abandoning earlier distinction drawn in *United States v. Agurs* (1976) 427 U.S. 97, 103-07 based upon whether defense makes specific discovery request]. Nor is the good faith or bad faith of the prosecutor relevant to the *Brady* inquiry. See *Giglio v. United States* (1972) 405 U.S. 150, 154 ["Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government."]. Nor is *Brady* material limited to admissible evidence if the material will assist the defense in developing admissible evidence. (*People v. Santos* (1994) 30 Cal.App.4th 169, 179 [*Brady* required disclosure of inadmissible misdemeanor conviction, to assist defense in developing evidence of underlying misdemeanor conduct].)

Non-disclosure of favorable evidence violates *Brady* if that evidence is sufficiently material to guilt or punishment to deprive petitioner to his

right to a fair trial. Favorable evidence is material if there is "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley, supra,* 473 U.S. at p. 682.) A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." (*Id.*) If "the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict," (*Strickler v. Greene* (1999) 527 U.S. 263, 282), a defendant will be entitled to either reversal of his conviction or a new sentencing hearing.

Here, as shown above at length in Argument XV, *supra,* the prosecution stipulated that they had known of the mother and son's opposition to appellant receiving a death sentence, and had failed to disclose it to the defense. (24 RT 4717-4720.) As further shown above, the evidence was admissible as mitigation evidence because it might serve "as a basis for a sentence less than death." (*Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5), and as rebuttal evidence whose admission was required by Due Process to rebut the prosecution's repeated calls for a death sentence on behalf of a family that did not want it. (*Ibid., People v. Frye, supra,* 18 Cal.4th at p. 1017; 23 RT 4596; 4604.)

There can be no doubt that the evidence was material, in that there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley, supra,* 473 U.S. at p. 682.) As defense counsel noted during the new trial motion, it would have taken one question on cross-examination: "'Are you satisfied with life without the possibility of parole?' And she would have said, 'Yes.' I think that is tremendous evidence." (24 RT 4719.) Clearly the prosecution thought it tremendous evidence as well, as it would have undercut the emotional pleas for a death sentence that the

prosecutors made in the family's name. There is more than a reasonable probability that the proper disclosure and admission of this evidence would have produced a different result. Reversal for a new penalty phase is required. (*Strickler v. Greene, supra,* 527 U.S. at p. 282.)

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XVII. THE INTRODUCTION OF INFLAMMATORY VICTIM IMPACT EVIDENCE FROM AN UNRELATED CRIME VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Over repeated objections, the prosecution introduced detailed and emotional testimony regarding the unrelated Oxnard beach rape and its impact on the two victims. (See RT 3624-3683.) The admission of prejudicial victim impact evidence not directly related to the capital offense violated appellant's constitutional rights, including the right to confrontation, to due process, to a fundamentally fair penalty proceeding, and to a reliable sentencing determination, under the Fifth, Sixth, Eighth, Fourteenth Amendments of the United States Constitution, and the parallel provisions of the California Constitution. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) In addition, because in California victim impact evidence is admissible only as a "circumstance of the crime" under section 190.3, subdivision (a), admission of such evidence from completely unrelated crimes would render the California sentencing statute unconstitutionally vague and overbroad. Reversal for a new penalty phase is required.

A. Procedural and Factual Background.

Despite a defense objection that victim-impact evidence from other crimes was inadmissible (20 RT 3645, 3648), Myra (Soto) Marquez, Jaime Marquez, and Evangelina Pena all testified in detail regarding the effect the Oxnard beach rape had on Soto and Marquez. (20 RT 3653-58.) Pena testified that Marquez and Soto were crying, hysterical, and out of control when they appeared at her home that night. (20 RT 3692, 3696.) Myra Marquez testified that at the time of trial she was still scared and lacked confidence. (20 RT 3653.) Whenever she went outside she felt someone was watching her or would attack her from behind - especially at night. (20

RT 3653.) She testified that she could not take her little girl to the park for more than 15 minutes when it was just the two of them; she was too scared. (20 RT 3653.) She and her husband Jaime had trouble communicating and did not go to the beach anymore. (*Ibid.*)

Final Argument:

The prosecutors emphasized the testimony about the beach rape in their closing arguments, arguing:

> "You can consider -- you can consider the devastating effect that that crime would have on Jaime and Myra Marquez. That's something they will remember for the rest of their lives. They will remember the horror of that event. They will remember how Jaime laid with his head in the sand feeling Myra's body moving next to him as she prayed to God for the strength to survive the ordeal." (23 RT 4544.)

Jury and Court Use of the Evidence:

At the end of the third day of deliberations, the jury submitted a note asking, " [If] we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) The next day of deliberations was Monday, March 28th.[40] On Monday, the jury's final note asked to have the testimony of Jamie and Myra Marquez read to them. (3 CT 559.) The jury then delivered a verdict of death before noon. (24 RT 4708.)

In denying the motion for new trial and motion for modification of the verdict, the trial court emphasized the importance of the Oxnard beach rape testimony in its decision, stating that Jamie Marquez would remember for the rest of his life that he held his lover's hand as she was repeatedly raped, and further stated that the humiliation of Myra Marquez was

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[40] As noted in argument XIII, *supra*, two of the jurors were also under great time pressure to reach an immediate verdict so they could leave town the following day. The combination of that time pressure and the inadmissible and highly prejudicial testimony of Jamie and Myra Marquez combined to move the jury from deadlock to death verdict.

overwhelming. (24 RT 4732-4733.) The court noted that the jury also placed great weight upon the testimony of the victims of the Oxnard beach rape, and had asked that their testimony be re-read during deliberations:

> "I think that the jury, and I think this court might feel somewhat differently if, not withstanding the egregious nature of this murder, you did not have the Oxnard situation. And I recall when the jury was deliberating the – I think the last day of deliberations they wanted the testimony of one of those victims read back; that is, one of the Oxnard beach victim's read back." (24 RT 4733.)

The court then denied the motions and sentenced appellant to death. (24 RT 4734.)

B. Victim Impact Testimony Concerning any Crime Other Than the Capital Offense is Inadmissible.

In *Payne v. Tennessee*, *supra*, 501 U.S. 808, the United States Supreme Court upheld admission of evidence describing the impact of a state defendant's capital crimes on a three-year-old boy who was present and seriously wounded when his mother and sister were killed. The court held the Eighth Amendment did not preclude admission of, and argument on, such evidence (*id.* at p. 827), thereby overruling the blanket ban on victim impact evidence and argument imposed by its earlier decisions in *Booth v. Maryland*, *supra*, 482 U.S. 49, and *South Carolina v. Gathers* (1989) 490 U.S. 805. The Court concluded "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." (501 U.S. at 827.)

In finding no per se Eighth Amendment bar to victim impact evidence, however, the *Payne* opinion did not mandate the introduction of such evidence, nor did it suggest that such evidence could be introduced without limitation. Justice O'Connor stated in her concurrence: "we do not

hold today that victim impact evidence must be admitted, or even that it should be admitted." (502 U.S. at 831.)

Thus, the general constitutional guidelines regarding capital sentencing remain unaffected: the need for "extraordinary measures" to ensure the reliability of decisions regarding the punishment imposed in a death penalty trial. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 118 (conc. opn. of O'Connor, J.); see *Gardner v. Florida*, supra, 430 U.S. at p. 305.) Those measures must ensure that "the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 423.)

1. No other state has allowed victim impact evidence from another crime under *Payne*.

Notwithstanding the unanimous conclusion, shared by every other court that has squarely addressed the question, that no victim impact evidence may be presented regarding the impact of any crime committed by defendant other than the capital murder at issue, this Court, in *People v. Holloway* (2004) 33 Cal.4th 96, upheld the admission of evidence under factor (b) that the victim of defendant's prior assault, who had been beaten in her home, had received psychological treatment and bought a handgun as a result of the attack. (*Id.* at pp. 249-250.) This was victim impact evidence from a completely separate crime, yet the *Holloway* decision devoted less than three paragraphs of analysis to admission of the evidence, finding that the victim's emotional trauma years after the assault was admissible as "context" because it was "direct and foreseeable." (*Ibid.*) This Court should reconsider its decision, as every other court that has considered the issue has held that victim impact evidence must be limited to evidence concerning the impact of the capital murder for which defendant is currently being prosecuted, and is not permissible concerning any other

violent criminal activity - including other murder convictions. In fact, it appears that no reported decision from the high court of any other state squarely deciding the issue has ever reached a contrary conclusion:

Illinois:

The leading case on the issue, cited by other states in their decisions, is *People v. Hope* (Ill. 1998) 702 N.E.2d 1282, in which the Illinois Supreme Court held "that *Payne* [*v. Tennessee*, *supra*, 501 U.S. 808], clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried." Thus, "evidence about victims of other, unrelated offenses is irrelevant and therefore inadmissible." The *Hope* court reversed defendant's death sentence because of the erroneous admission of victim impact evidence concerning defendant's previous murder conviction.

Nevada:

The Nevada Supreme Court reached the same conclusion in *Sherman v. State* (Nev. 1998) 965 P.2d 903, 914, holding "that the impact of a prior murder is not relevant ... and is therefore inadmissible during the penalty phase." The Court explained that "evidence of the impact which a previous murder had upon the previous victim is not relevant to show" the damage done by the current capital offense. (*Ibid.*)

Tennessee:

Similarly, in *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, the Tennessee Supreme Court "reiterate[d] that victim impact evidence of another homicide, even one committed by the defendant on trial, is not admissible." (*Nesbit*, *supra*, at fn. 11, citing *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 813.)

Ohio:

Likewise, in *State v. White* (Ohio 1999) 709 N.E.2d 140, 154, the Ohio Supreme Court held that evidence of the impact of a non-capital murder (i.e., second degree murder as a lesser offense of capital murder) and attempted aggravated murder were not admissible at the penalty phase of defendant's trial because the judge, not the jury, is responsible for determining the appropriate sentence for those convictions, although defendant was convicted of those crimes in the same trial which resulted in his conviction on the capital murder.

Colorado:

In *People v. Dunlap* (Colo. 1999) 975 P.2d 723, 744-745, the Colorado Supreme Court relied on the decision of the Illinois Supreme Court in *People v. Hope*, *supra*, 702 N.E.2d at p. 1289, in holding that evidence of "the perceptions of the victims" of defendant's prior crimes was not admissible at penalty phase, requiring the exclusion of evidence describing the previous victims' fear and nervousness during those crimes, and a victim's emotional state following a previous aggravated robbery.

Texas:

The Texas Court of Criminal Appeals reached a similar conclusion in *Cantu v. State* (Tex. Cr. App. 1997) 939 S.W.2d 627, 637, holding that it was error to present victim impact evidence concerning the non-capital murder, sexual assault and robbery of a teenage girl in the same incident as the capital murder of another girl, because the former girl was "not the 'victim' for whose death [defendant] has been indicted and tried, and *Payne* does not contemplate admission of such evidence as permissible under the Eighth Amendment." (See, also, *Wilson v. State* (Tex. 1999) 15 S.W.3d 544, a non-capital case, observing that "[t]he testimony of the victim of an extraneous [aggravated sexual assault] offense concerning the effect of the offense on her life is not admissible.")

2. The admission of factor (b) victim impact evidence as a "circumstance of the crime" under Section 190.3, subdivision (a) would render the California sentencing statute unconstitutionally vague and overbroad.

A state seeking to put an individual to death must "tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia, supra*, 446 U.S. at p. 428.) "It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" (*Ibid.*, fns, omitted.)

Payne approved evidence showing the effect of the capital crime on family members who were personally present at the scene (*Payne v. Tennessee, supra,* 501 U.S. at pp. 812, 814-815) where a state permits the sentencer's consideration of such evidence. (*Id.* at pp. 827; see also *id.* at p. 831 (conc. opn. of O'Connor, J.).) California's statutory law does not specifically authorize the type of evidence commonly referred to as "victim impact evidence." Nevertheless, this Court has held that evidence and argument on the "harm caused by the defendant, including the impact on the family of the victim" is a legitimate sentencing factor under section 190.3, subdivision (a). (*People v. Edwards* (1991) 54 Cal.3d 787, 835.) That section permits jurors deciding whether a capital defendant will die to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true[.]" (§ 190, subd. (a); see also CALJIC No. 8.85.)

"Circumstances of the crime" is "a traditional subject for consideration by the sentencer[,]" and has a common sense meaning that

jurors can easily understand and apply (*Tuilaepa v. California* (1994) 512 U.S. 967, 976), and can be distinguished from "victim impact evidence," which "is of recent origin." (*Payne v. Tennessee, supra*, 501 U.S. at p. 821, *id.* at p. 858 (dis. opn. of Stevens, J.).) Expansion of the "circumstances of the crime" to include victim impact evidence from a completely separate crime under the nebulous and undefined category of "harm caused by the defendant" (*Edwards, supra,* 54 Cal.3d at p. 835), without proper delineation or express limitation, would render California's sentencing statute unconstitutionally vague and overbroad, in violation of Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. This Court should find that victim impact evidence from unrelated crimes is inadmissible.

3. Under California law, victim impact evidence concerning another crime should be admissible only if "directly related" to the capital crime.

Under the California statutory scheme, there is no "victim impact" sentencing factor. The aggravating evidence at penalty phase is limited to evidence relevant to the specific aggravating factors under Penal Code section 190.3. (*People v. Boyd, supra*, 38 Cal.3d at pp. 771-776.) In *People v. Edwards, supra*, 54 Cal.3d at pp. 835-836, this Court, relying on *Payne*, held that some evidence of certain characteristics of the victim can be used as a proper consideration at penalty phase under section 190.3 factor (a) because they might relate to "circumstances of the crime." Further stretching that rationale to include victim impact evidence from other crimes to show the "context" of those crimes (*People v. Holloway, supra,* 33 Cal.4th at 249) would stretch interpretation of section 190.3 until it is unconstitutionally vague and overbroad, in violation of Fifth, Eighth, and Fourteenth Amendments.

In *Edwards,* this Court upheld the admission of photographs of the

victim while she was alive, and the prosecutor's argument referring to the impact of the crime on her family:

> "We thus hold that factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. This holding only encompasses evidence that logically shows the harm caused by the defendant. We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne, supra*, 501 U.S. [808]." (*People v. Edwards, supra,* 54 Cal.3d 787.)

Thus, while this Court has decided that some "victim impact" evidence could be admitted under Pen. Code § 190.3, subdivision (a), as part of the circumstances of the crime, such evidence is limited to the "immediate injurious impact of the capital murder." (*People v. Montiel* (1993) 5 Cal.4th 877, 934-35, citing *People v. Edwards*, *supra*, 54 Cal.3d at pp. 833-36.)

This rationale of allowing evidence of victim impact as part of the circumstances of the capital crime is entirely inapplicable in the context of defendant's other violent criminal activity, unless that activity was part of the circumstances of the capital crime - which is precisely what this Court held in the earlier case of *People v. Taylor*, *supra*, 26 Cal.4th 1155.

People v. Taylor:

This Court issued its first decision directly addressing the propriety of victim impact evidence from other crimes in *People v. Taylor, supra,* 26 Cal.4th 1155. The defendant was convicted at guilt phase for the burglary–robbery murder of Ryoko Hanano and the attempted murder of her husband, Kazumi Hanano, during the same incident, in which Mr. Hanano was shot, leaving him a quadriplegic. A "few hours later," their son found his parents, after they had been shot, "still handcuffed and kneeling next to

the bed." (*Id.* at 1164.)

Evidence was presented at the guilt phase concerning the extent of Mr. Hanano's paralysis and his loss of bodily functions, which was upheld as "relevant to show the extent of [his] injuries and to confirm that, despite his injuries, he could accurately recall the incident." (*Id.* at 1171.)

At the penalty phase, this Court upheld the introduction of evidence concerning the extent of the attempted murder victim's injuries because "'[e]vidence of the impact of the defendant's conduct on victims other than the murder victim is relevant *if related directly* to the circumstances of the capital offense.'" (*Id.* at 1172, quoting from *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; emphasis added.)

Thus, *Taylor* does not authorize victim impact evidence concerning any crime other than the capital murder itself, unless the other crime is *directly related* to the capital crime. Given that factor (a) has previously been interpreted to allow consideration of the circumstances of the crimes for which defendant has been convicted in the capital case where the crimes are directly related to the capital murder (*People v. Alvarez* (1996) 14 Cal.4th 155, 244), and that victim impact evidence is admissible only under factor (a), *Taylor* must be read as allowing victim impact evidence relating to the victim of a non-capital conviction in the capital murder proceeding only where the non-capital count is *directly related* to the capital count.

Here, the Oxnard beach rape was completely unrelated to the capital crime, having occurred several months before the capital crime (September 14, 1991), and appellant having entered his plea on November 12, 1992 - a year before the capital trial even began. (See 20 RT 3710-3711.) Under *Payne, Edwards,* and *Taylor,* admission of victim impact evidence from a completely unrelated crime was clear and prejudicial error.

C. Admission of Victim Impact Evidence Concerning the Oxnard Beach Rape Was Prejudicial Error.

Where improper aggravating evidence has been admitted in a penalty phase trial, the appellate court must assess whether the error could have affected the penalty phase verdict. (*People v. Phillips* (1985) 41 Cal.3d 29, 83.) Here, there simply can be no question that it did.

As noted above, the prosecutors took advantage of this evidence in argument, an indication of how effective it was. (See *People v. Powell* (1967) 67 Cal.2d 32, 56-57.) The prosecutors emphasized the testimony about the beach rape in their closing arguments, arguing:

> "You can consider -- you can consider the devastating effect that that crime would have on Jaime and Myra Marquez. That's something they will remember for the rest of their lives. They will remember the horror of that event. They will remember how Jaime laid with his head in the sand feeling Myra's body moving next to him as she prayed to God for the strength to survive the ordeal." (23 RT 4544.)[41]

The crime underlying the capital charge was not overwhelmingly aggravated, and the jury took four days to decide punishment, asking for read-backs of testimony and making a number of other inquiries. The jury was, in fact, at an impasse on the third day of deliberations, when they sent out a note asking, " [I]f we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) Then, on the fourth day of deliberations, the jury's final note asked to have the testimony of the beach rape victims read to them. (3 CT 559.) The jury then delivered a verdict of death before noon. (24 RT 4708.)

The trial court's errors implicated constitutional protections and require reversal unless they were harmless beyond a reasonable doubt.

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[41] In addition, the trial court itself, in denying appellant's modification motion, stated that both the court and the jury also placed great weight upon the testimony of the victims of the Oxnard beach rape, and that the jury had asked that their testimony be re-read during deliberations. (24 RT 4733.)

(*Chapman v. California*, supra, 386 U.S. at p. 24.) However, even if the errors are viewed as only arising under state law, error that affects the penalty determination similarly requires reversal if there was a "reasonable possibility" that it affected the penalty decision. (*People v. Brown, supra*, 46 Cal.3d 432, 447.) These standards are the same in substance and effect. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.)

There is more than a "reasonable possibility" that the error affected the verdict - there is a reasonable certainty. This Court cannot know - and certainly cannot know beyond a reasonable doubt - that the penalty verdict would have been the same absent an error of this magnitude. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown, supra,* 46 Cal.3d at p. 447; *People v. Ashmus, supra,* 54 Cal.3d 932, 965.)

The death judgment must be reversed.

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XVIII. THE TRIAL COURT ERRED IN REFUSING A REQUESTED JURY INSTRUCTION DEFINING THE SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE.

Appellant requested a penalty phase instruction that read as follows:

> "Life without the possibility of parole means exactly what it says – the defendant will be imprisoned for the rest of his life. For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors." (3 CT 506.)

The trial court refused the instruction. (23 RT 4406; 3 CT 506.) This was reversible error, as the trial court is obligated to instruct sua sponte on all principles of law closely or openly connected with the case. (*People v. Wilson, supra*, 66 Cal.2d 749.) "Life without possibility of parole" is a technical term in capital sentencing proceedings, and it is commonly misunderstood by jurors. The failure to define for the jury "life without possibility of parole" thus violated due process by failing to inform the jury accurately of the meaning of the sentencing options. The failure also resulted in an unfair, capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; See *Caldwell v. Mississippi, supra*, 472 U.S. 320.)

A. Because Jurors Misunderstand What "Life Without Possibility of Parole" Means, A Trial Court Is Obligated to Define the Term Where Future Dangerousness Is A Factor.

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law

prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn. 9.)

The *Simmons* rule has been reaffirmed repeatedly by the United States Supreme Court. In 2001, the Supreme Court reversed a South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. (*Shafer v. South Carolina* (2001) 532 U.S. 36.) The Supreme Court observed that where

> "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at p. 52, citation omitted.)

In *Kelly v. South Carolina* (2002) 534 U.S. 246, the Supreme Court again reversed a South Carolina death sentence in a case where the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, " A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (*Id.* at p. 256.)

In *Simmons*, the state had argued that the petitioner was not entitled to the requested instruction because it was misleading, noting that circumstances such as legislative reform, commutation, clemency and escape might allow the petitioner to be released into society. (*Simmons, supra*, 512 U.S. at p. 166.) In rejecting this argument, the United States Supreme Court stated that, while it is possible that the petitioner could be pardoned at some future date, the instruction as written was accurate and truthful, and refusing to instruct the jury would be even more misleading.

(*Id.* at pp. 166-168.)

This Court has concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is "life without parole." (See, e.g. *People v. Arias* (1996) 13 Cal.4th 92, 172-174.) Empirical evidence, however, has long established widespread confusion about the meaning of such a sentence. One typical study revealed that, among a cross-section of 330 death-qualified Sacramento County potential venirepersons, 77.8% disbelieved the literal language of life without parole. (Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45.)

In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point. (Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45.) The results of a telephone poll commissioned by the Sacramento Bee showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life." (Sacramento Bee (March 29, 1988) at pp. 1, 13; see also Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons*, *supra*, 512 U.S. at p. 168, fn. 9.) In addition, the information given California jurors is not significantly different from that found wanting by the Supreme Court. Given the average California juror's confusion, *Simmons* and its progeny clearly require a California trial court to define "life without possibility of parole" in any case where future dangerousness is an issue.

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B. The Trial Court's Erred in Failing to Define "Life Without Possibility of Parole" Because the Prosecution Raised the Issue of Appellant's Future Dangerousness.

In final argument, the prosecutors told the jury that appellant would present a danger as long as he was imprisoned, arguing that executing people like appellant meant that "no one else will have to fall victim to them again." (23 RT 4598.) The prosecutor went on to explicitly tell the jury that "[n]o one in the Department of Corrections would be safe with that man as a prisoner," raising - without any evidentiary support - the specter of appellant attacking a prison guard. (23 RT 4607.)

The jurors were then instructed that the sentencing alternative to death is life without possibility of parole, but they were not explicitly instructed by the court that life without possibility of parole means that defendant would not be released. During voir dire, trial counsel tried to educate the potential jurors that life without possibility of parole meant just that, life without possibility of parole. (See 10 RT 1799, 1816, 1853, 1865.) However, it was also clear that some prospective and seated jurors did not believe that life without possibility of parole truly meant that. One prospective juror told defense counsel during voir dire, "I see where they get life without parole and they can go up for, for review, for to let [sic] out." (7 RT 1292, see also 11 RT 1977.) Appellant's counsel briefly explained the different options, but the trial court did not. This prompted appellant's attorney to request an instruction that would explicitly inform the jury that defendants sentenced to life without the possibility of parole are not eligible for release from prison. Denial of that instruction left the jury only with the bare statement that " . . . the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole. . .." (CALJIC 8.84; 3 CT 424.)

The instructions regarding the sentence of life without the possibility of parole were inadequate under *Kelly*, *Shafer* and *Simmons*. In *Kelly*, the Supreme Court acknowledged that counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. The Supreme Court also recognized that the trial court told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. (*Kelly*, *supra*, 534 U.S. at p. 257.) Nevertheless, these efforts did not serve to adequately explain the defendant's parole ineligibility. Similarly, in *Shafer*, the defense argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." (*Shafer*, *supra*, 532 U.S. at p.52.) Again, the Supreme Court found these statements inadequate to convey a clear understanding of parole ineligibility. (*Id.* at pp. 52-54.) Moreover, in *Simmons*, the Supreme Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." (*Simmons*, *supra*, 512 U.S. at p. 170.)[42] In this case, the brief instruction that the sentencing alternative to death was life without possibility of parole – – did not adequately inform appellant's jurors that a life sentence for appellant would make him ineligible for release on parole from prison.

Further, the inadequate instructions violated the principles of

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[42] The reliance in *Simmons* on *Gardner v. Florida*, *supra*, 430 U.S. 349, to reject the state's "plain and ordinary meaning" argument indicates that the federal Constitution will not countenance a false perception, whether resulting from incorrect instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence. (See *Simmons*, *supra*, 512 U.S. at pp. 164-165.)

Caldwell v. Mississippi, *supra*, 472 U.S. 320, as interpreted in *Darden v. Wainwright* (1986) 477 U.S.168 at p. 183, fn.15, because it "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without instructional guidance on the meaning of life without possibility of parole, there was a reasonable likelihood that the jurors deliberated under the mistaken, but common, misperception that the choice they were asked to make was between two inherently different alternatives: death and a limited period of incarceration. (See *Simmons*, *supra*, 512 U.S. at p. 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," the decision of the jury was simplified.

C. The Error Was Prejudicial.

The prejudicial effect of the trial court's instructions' failure to clarify the sentencing options is clear. Here, there is a substantial likelihood that at least one of appellant's jurors[43] concluded that the non-death option offered was neither real nor sufficiently severe and chose a death sentence because of the fear that appellant would someday be released if he received any other sentence.[44] Given the existence of the prosecution's evidence in

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[43] See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (conc. opn. of Gould, J.) ("in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence,'" quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, 691-692).

[44] California jury surveys at the time of appellant's trial showed that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were

this case regarding appellant's threats towards Bobby Rollins, as well as the prosecutor's closing argument on this point (see also 23 RT 4596 "[w]e must have closure so that we feel secure knowing that justice is served and not one more person will fall victim to Chris Sattiewhite"), appellant's jurors should have been given an explicit instruction that a sentence of life without the possibility of parole meant that appellant would never be eligible for release from prison on parole.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) Had the jury been instructed concerning appellant's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 123 S.Ct. 2527, 2543; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, the judgment of death must be reversed.

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interviewed; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (C. Haney, L. Sontag, & S. Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994), 170-71; accord, Ramos, *et al.*, *Fatal Misconceptions*, *supra*, at p. 45.)

XIX. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO CONSIDER ONLY THOSE AGGRAVATING FACTORS THAT ALL JURORS HAD FOUND PROVEN BEYOND A REASONABLE DOUBT REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE.

Appellant requested a jury instruction telling the jury that they must find aggravating factors proven beyond a reasonable doubt before they could use that factor in reaching their sentencing decision. Based on California law at that time, the trial court denied that request. (2 CT 501; 23 RT 4402-4404.) This error denied appellant's right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Reversal of the death sentence is required.

A. After the U.S. Supreme Court's Holdings in *Apprendi, Ring, Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. (3 CT 445.) The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a

reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona*, *supra*, 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington*, *supra*, 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California, supra,* 549 U.S. 270 [127 S.Ct. 856 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt. (*Ring, supra,* 536 U.S. at 604.)

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an

"exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used

to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra.*) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

1. After *Cunningham*, any jury fact-finding necessary to the imposition of death must be found true beyond a reasonable doubt.

Prior California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th 1223; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[45] As set forth in California's "principal sentencing instruction" (*People v. Farnam, supra*, 28 Cal.4th at p. 177), which was read to appellant's jury (CT 485-486; RT 4687-4689)," an aggravating factor is *any fact, condition or event attending the*

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[45] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown*, supra, 46 Cal.3d at p. 448.)

commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[46] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[47]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003)

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[46] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[47] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[48] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, pp. 867-868.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra*, 127 S.Ct. at 879.)

Cunningham then examined this Court's extensive development of

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[48] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black, supra*, 35 Cal.4th at 1253; *Cunningham, supra,* 127 S.Ct. at 873.)

why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at p. 876.)

> "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* 'bright-line rule' was designed to exclude. See *Blakely*, *supra*, 542 U.S. at pp. 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 [stating, remarkably, that '[t]he high court precedents do not draw a bright line']." (*Cunningham, supra,* 127 S.Ct. at p. 874.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[49] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 127 S.Ct. at p. 867.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' [530 U.S., at 494, 120 S.Ct. 2348.] In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' [*Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.]" (*Ring, supra,* 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of

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[49] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring, supra,* 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite fact-finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

B. Reversal is Required.

It is clear that the reasonable doubt standard must be applied to jury

findings on aggravating factors, and equally clear that it was not done in appellant's trial despite a specific request that the jury be so instructed. The failure to apply the reasonable doubt standard when its use is required by the Constitution is per se reversible error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.) Reversal of the death sentence is required.

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XX. THE TRIAL COURT'S REFUSAL OF PENALTY PHASE INSTRUCTIONS REGARDING VICTIM IMPACT EVIDENCE AND EVIDENCE REGARDING APPELLANT'S BACKGROUND WAS REVERSIBLE ERROR.

The trial court refused appellant's specially-tailored instructions that explained the proper standards for evaluating victim impact evidence and evidence concerning appellant's background in determining the appropriate penalty. The special instructions were properly designed to inform the jury as to its duty to weigh and consider penalty phase evidence, and correctly stated the law. Accordingly, the trial court erred in refusing to instruct the jury as appellant requested and reversal of the death sentence is required.

A. Legal Principles and Procedural Background.

A criminal defendant is entitled upon request to specially-drafted instructions which either relate the particular facts of his case to any legal issue, or which pinpoint the crux of his defense. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; *People v. Sears* (1970) 2 Cal.3d 180, 190; see *Penry v. Lynaugh* (1989) 492 U.S. 302, overruled on another ground by *Atkins v. Virginia*, *supra*, 536 U.S. 304.) Because the defendant has that right, at the time of appellant's trial it was the rule that "[a] trial judge in considering instructions to the jury shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of California Jury Instructions – Criminal (CALJIC)." (Stds. of Jud. Admin. Recommended by Jud. Council, § 5.) It is well settled that this right to request specially-tailored instructions applies to the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

The requested instructions would have informed the jury about how to evaluate aggravation and mitigation in this case. None of these instructions were argumentative, or contained incorrect statements of law,

and they were not properly refused on either of those grounds. (*See People v. Sanders* (1995) 11 Cal.4th 475, 560; *People v. Mickey* (1991) 54 Cal.3d 612, 697.) Moreover, the instructions were offered to pinpoint appellant's theory of the case, rather than specific evidence, and were thus proper. (*See People v. Kraft* (2000) 23 Cal.4th 978, 1068; *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.)

The trial court's refusal to give the instructions at issue deprived appellant of the right recognized in *Sears* and *Rincon-Pineda*, *supra*, and of his rights to a trial by jury and fair and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and by the applicable sections of the California Constitution. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

B. The Trial Court Erred In Rejecting Appellant's Proposed Instruction Regarding the Appropriate Use of Victim Impact Evidence.

The prosecution presented victim-impact testimony from Gonzales's mother, son, and teachers for two of her children, all of whom gave detailed and emotional testimony describing the grief suffered by Gonzales's children. (20 RT 3742-3790.) This was in addition to the detailed and emotional victim impact testimony given by the victims of the Oxnard beach rape. (See 20 RT 3653-58, 3659-89, 3690-3696.)

Specifically, one of the teachers testified that, several months after the murder, the victim's son had an accident at school, severing the tip of his finger, and ran to the office screaming "Mommy." (20 RT 3761-3763.) The son, Salvador, testified that, after church on Sundays he and the other children went to the cemetery and brought the victim flowers. Salvador talked to her and told her what was happening. Sometimes he woke in the night because he was afraid someone was breaking in to get them. (20 RT

3779.) The victim's mother testified that the death of her daughter had "rendered" her heart; she had been the one who always cared about her. (20 RT 3787.)

Appellant submitted a proposed jury instruction that read as follows:

> "Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.
>
> You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case.
>
> You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence." (3 CT 505.)

The trial court, however, erroneously refused to give the requested instruction. (23 RT 4406.)

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

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that in every case in which victim impact evidence is introduced, the trial court must instruct the jury on the appropriate use – and admonish the jury against the misuse – of the victim impact evidence. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit*, *supra*, 978 S.W.2d at p. 892; *Turner v. State*, *supra*, 486 S.E.2d at p. 842.) Further, the Supreme

Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 158-159.)

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Although the language of the required instruction varies in each state depending on the role victim impact evidence plays in that state's statutory scheme, common features are an explanation of how the evidence can be properly be considered, and the admonition not to base a decision on emotion or the consideration of improper factors. (See, e.g. *Commonwealth v. Means, supra,* 773 A.2d at 158-159 [jury's verdict must be based on rational inquiry into culpability of defendant and not on emotional response, sympathy, prejudice or public opinion].)

The limiting instruction proposed by appellant appropriately conveyed this explanation to the jury. In *People v. Pollock* (2004) 32 Cal.4th 1153, this Court held that the trial court properly refused to give an instruction intended to limit the jury's consideration of victim impact evidence because the instruction incorrectly suggested that the jury could not be influenced by sympathy for the victims, but affirmed that a jury must never be influenced by passion or prejudice. (*Id.* at 195.) The requested instruction in the instant case was neither inaccurate nor misleading, and in its absence there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision.

Consequently, for some of the guilt phase and the entire penalty phase, the jury's view of both the evidence and appellant himself certainly was affected by the raw emotion engendered by the victims' testimony. In view of the emotionally charged victim impact evidence admitted in this case and the reliance the prosecutors placed on that evidence during their

closing argument (See 23 RT 4596-4598), the trial court's failure to give the requested instruction violated appellant's rights to: a fair, non-arbitrary, and reliable sentencing determination, and to have the jury consider all mitigating circumstances (see, e.g., *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 4; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604) and make an individualized determination whether he should be executed, under all the circumstances (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879); it also constituted a deprivation of a state-created right (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346). (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

C. The Trial Court Erred In Rejecting Appellant's Proposed Instruction Regarding The Appropriate Use of Evidence Concerning Appellant's Background.

Under section 190.3, subdivision (k), the trier of fact shall consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." It is well established that such "factor (k)" evidence can only be considered as mitigating. (See, e.g., *People v. Kipp* (2001) 26 Cal.4th 1100, 1134; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1076; *People v. Whitt* (1990) 51 Cal.3d 620, 654; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 775-776.)

Appellant submitted a proposed jury instruction which read as follows:

> "Evidence has been presented of defendant's lifestyle or background. You cannot consider this evidence as an aggravating factor, but may consider it only as a mitigating factor." (3 CT 496.)

The trial court refused to give the instruction on the ground that the principle was adequately covered by CALJIC 8.87 [evidence of other criminal activity introduced at penalty phase must be proven beyond a reasonable doubt]. (23 RT 4399-4400.) The trial court erred in failing to

give the instruction.

Appellant's requested instruction properly stated the law, notwithstanding that once the defendant puts his general character in issue at the penalty phase, the prosecutor may rebut "with evidence or argument suggesting a more balanced picture of his personality." (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 791.) Therefore, the trial court's error violated appellant's rights to: a fair, non-arbitrary, and reliable sentencing determination, to have the jury consider all mitigating circumstances (see, e.g., *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 4; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604) and make an individualized determination whether he should be executed, under all the circumstances (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879); and, constituted a deprivation of a state-created right (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346). (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

D. The Trial Court's Failure To Give The Requested Instructions Was Prejudicial.

The requested instructions were correct statements of law that related to one of the central tasks faced by appellant's penalty phase jury: the weighing of aggravating evidence (including victim impact evidence) and mitigating evidence. Accordingly, the trial court's erroneous refusal to give those instructions requires reversal of appellant's death sentence, whether that error is evaluated as federal constitutional error, or as a violation of California statutory or decisional law.

The United States Supreme Court has consistently held that, under the Eighth and Fourteenth Amendments, "'the sentencer [in a capital case] may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" (*Mills v. Maryland*, *supra*, 486 U.S. at pp. 374-375, quoting *Eddings v. Oklahoma*, *supra*, 445 U.S. at p. 114.) That

constitutional requirement is not satisfied by merely allowing the defendant to introduce mitigating evidence; the jury's proper consideration of that evidence must also be ensured by the giving of proper instructions. "In the absence of jury instructions . . . that would clearly direct the jury to consider fully [the defendant's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence . . . ." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 323.)

Indeed, recent opinions of the United States Supreme Court reaffirm the trial court's duty to ensure that its jury instructions "allow the jury to give '"*full* consideration and *full* effect to mitigating circumstances"' in choosing the defendant's appropriate sentence." (*Smith v. Texas* (2004) 543 U.S. 37, 125 S.Ct. 400, 401, citing *Penry v. Johnson (Penry II)* (2001) 532 U.S. 782, 797; accord, *Tennard v. Dretke* (2004) 542 U.S. 274, 124 S.Ct. 2562, 2566-2567.) That is, "the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a 'low threshold for relevance,'" which is satisfied by "'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*Tennard v. Dretke*, *supra*, 124 S.Ct. at p. 2570.)[50]

Similarly, it was critical that the jury be instructed as to the proper consideration of aggravating evidence. (See *Godfrey v. Georgia*, *supra*, 446 U.S. at p. 429 [plurality opn. of Stewart, J., joined by Blackmun, Powell and Stevens, JJ.].)

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[50] This principle was reaffirmed in *Abdul-Kabir v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 1654, 1664: "Sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future."

Here, there was no dispute that appellant had been born with significant brain damage at birth. (See 21 RT 3968, 3992, 22 RT 4168-69, 4282, 4300, 4316-4317, 23 RT 4470, 4472.) His neuro-developmental age was between 6 and 7 years old, but his ability to deal with moral judgments, consequences, or relationships with people was below that of an average 6 or 7-year-old. (21 RT 3981, 3991-3992.) Because of this, he had undergone a lifetime of beatings by his father, who would also have appellant watch violent pornographic movies with him. (See 21 RT 3832-33, 3865.) After appellant was abandoned by his father, he took up with Rollins, the gang member who first directed appellant's actions and then testified against him at trial. (21 RT 3836-37, 14 RT 2490.)

This case was a close one. During penalty deliberations the jury sent a note to the trial court asking "if we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.)

This Court cannot determine the specific point at which the jury decided that death was the appropriate penalty. (*People v. Robertson, supra,* 33 Cal.3d at p. 54.) However, the instructions at issue here went to the heart of appellant's case. Had the jury been instructed in how to consider the mitigating evidence before it, there is a reasonable possibility of a different verdict. Accordingly, the trial court's refusal to give requested instructions was not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The judgment of death must be reversed.

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XXI. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR FELONY-MURDER BEFORE FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE.

The trial judge instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 2 CT 278-279; 19 RT 3408-3409) and on first degree felony murder as an aider and abettor and predicated on rape or kidnapping. (CALJIC No. 8.27; 2 CT 280; 19 RT 3410.) The trial judge also instructed that if the jurors found that appellant had committed an unlawful killing, in order to convict him, they had to agree unanimously on whether he was guilty of first degree murder or second degree murder. (CALJIC No. 8.74; 2 CT 284; 19 RT 3411.)

The trial judge failed, however, to instruct the jurors that they must agree unanimously on a theory of first degree murder in order to find appellant guilty of that charge. This error denied appellant's right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

A. The Jury Must be Unanimous on the Theory of First-Degree Murder.

Appellant acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See, e.g., *People v. Carey* (2007) 41 Cal.4th 109, 132-133; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1132; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 394-395.) However, this

conclusion should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court consistently has held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon*, *supra*, 34 Cal.3d 441, this Court acknowledged first that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.]" (*Id.* at p. 475 .) The Court next declared that "in this state the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.) [51]

In subsequent cases, this Court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712, holding that "[f]elony murder and premeditated murder are not distinct crimes"), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, 34 Cal.3d at p. 476, quoted above, "meant that the elements of the two types of murder are not the same." Similarly, the Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th at p. 367) and that "the two forms of murder [premeditated murder and felony murder]

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[51] "It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference . . . ." (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 476-477, fn. omitted.)

have different elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131.)

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title in reality are different and distinct offenses (see *People v. Henderson*, *supra*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.)) and to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply. (See *Jones v. United States* (1999) 526 U.S. 227, 232.) Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those are different or the same. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not. (*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause

of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697); the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173); the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[52] see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.).)[53]

Malice murder and felony murder are defined by separate statutes and "each . . . requires proof of an additional fact that the other does not." (*Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Rather, felony murder requires the commission or the attempted commission of a felony listed in Penal Code section 189 as well as the specific intent to commit that felony; malice murder does not. (Pen. Code,

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[52] "The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence provides the foundation for our entire double jeopardy jurisprudence – including the 'same elements' test for determining whether two 'offence[s]' are 'the same,' see *Blockberger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause [regarding double jeopardy] protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.).)

[53] The Fifth Amendment guarantee against double jeopardy, like other fundamental trial protections secured by the Bill of Rights, is enforceable against the States through the Due Process Clause of the Fourteenth Amendment. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717.)

§§ 187 & 189; *People v. Hart*, *supra*, 20 Cal.4th at pp. 608-609.)

Therefore, it is incongruous to say, as this Court did in *People v. Carpenter*, *supra*, 15 Cal.4th 312, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which appellant relies "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, first italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges they are, malice murder and felony murder are perforce different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime also is the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 476.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Because this is a capital case, the right to a unanimous verdict also is

guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) Jury unanimity is therefore required in capital cases.

This conclusion cannot be avoided by simply re-characterizing premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*, 501 U.S. 624.) First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts repeatedly have characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony likewise has been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

Furthermore, this Court has recognized that the Legislature intended to make premeditation an element of first degree murder. In *People v. Stegner* (1976) 16 Cal.3d 539, the Court declared:

> "We have held, 'By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.]

(*Id.* at p. 545, emphasis added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[54]

As the United States Supreme Court has explained, the *Schad* decision held only that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*,

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[54] Specific intent to commit the underlying felony, the *mens rea* element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written by the Legislature." (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; accord, *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839.) Moreover, Penal Code section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

supra, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (Pen. Code, § 189), not means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (Pen. Code, §§ 189 & 190, subd. (a).) Therefore, they must be found by procedures which comply with the constitutional right to trial by jury (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, includes the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice, while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608; accord, *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Under any interpretation, malice is a true "element" of murder.

Accordingly, the trial court should have instructed the jury that it must agree unanimously on whether appellant had committed a premeditated murder or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree

murder, there is no valid jury verdict in this case on which harmless error analysis can operate. The failure to instruct was a structural error; therefore, reversal of appellant's murder conviction is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

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XXII. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD NOT RETURN A VERDICT OF SECOND DEGREE MURDER UNLESS IT UNANIMOUSLY ACQUITTED APPELLANT OF FIRST DEGREE MURDER.

The jury was instructed with CALJIC No. 8.75 that "The court cannot accept a verdict of guilty of second degree murder as to Count 1 unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree in the same count." (2 CT 310-312.)

This Court has held that a jury must unanimously agree to acquit a defendant of a greater charge before returning a verdict on a lesser charge. (*People v. Nakahara, supra,* 30 Cal.4th at pp. 712-713; *People v. Kipp, supra,* 26 Cal.4th at p. 1132; *People v. Carpenter, supra,*15 Cal.4th at pp. 394-395.) However, the Court should reconsider the propriety of this rule. Reconsideration is necessary because the acquittal first instruction precludes full jury consideration of lesser-included offenses, and thereby implicates the due process and jury trial guarantees of the Sixth and Fourteenth Amendments and the Eighth Amendment's requirement for heightened reliability in capital cases. (*Zant v. Stephens, supra*, 462 U.S. at pp. 884-885; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)

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

lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." (*Id.* at p. 634.) An instruction that the jury cannot convict on the lesser charge unless it unanimously votes to acquit on the greater charge prevents the jury from making use of lesser-included offense instructions in the way contemplated by *Beck*, and subjects jurors to the same pressure to ignore the reasonable doubt standard that they would face if no lesser-included offense instruction were given at all. (See also *Jones v. United States* (D.C. 1988) 544 A.2d 1250, 1253; *United States v. Tsanas* (2nd Cir. 1978) 572 F.2d 340, 346; *Cantrell v. State* (Ga. 1996) 469 S.E.2d 660, 662.) The unanimity requirement also prevents the jury from giving effect to lesser-included offense instructions because it gives an unfair advantage to the prosecution. (*Cantrell v. State, supra*, 469 S.E.2d at p. 662 [acquittal-first instruction "gives the prosecution an unfair advantage"].)

Accordingly, the acquittal-first instruction violates the settled principle that "[tlhere should be absolute impartiality as between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instruction that favors one party over the other deprives the defendant of his due process right to a fair trial. (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay* v. *Normet* (1972) 405 U.S. 56, 77.) Reversal is therefore required.

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XXIII. THE PROSECUTOR'S PENALTY PHASE ARGUMENT IMPROPERLY PRESENTED AN EMOTIONAL PLEA TO THE JURORS TO PROTECT PRISON GUARDS, SATISFY SOCIETY'S DEMANDS AND PROVIDE VENGEANCE FOR THE VICTIM'S FAMILY.

The prosecutors' penalty phase arguments went beyond the limits of acceptable advocacy by using emotion in order to inflame the jury and by arguing that the death sentence was required to protect prison guards, satisfy society's demands for safety and closure, and to make the victim's family whole. The arguments violated appellant's federal and state constitutional rights to due process, a fair trial, equal protection, and a reliable jury determination on penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15-17.)

A. The Prosecutor Improperly Argued that the Death Sentence was Needed to Protect Prison Guards and Satisfy Society's Need for Closure and Safety.

A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Accordingly, a prosecutor violates state law by using "deceptive or reprehensible methods" to attempt to persuade the jury. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) A prosecutor's misconduct also implicates federal due process guarantees if it infects a trial with fundamental unfairness. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643.) Moreover, the Eighth and Fourteenth Amendment guarantees of reliability in capital sentences requires exacting scrutiny of a prosecutor's conduct and a trial court's errors. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

The prosecutor's argument plays a particularly important role in the penalty phase. The death penalty must be a "reasoned moral response to the defendant's background, character and crime." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.) Accordingly, it is misconduct for the prosecutor "to

make comments calculated to arouse passion or prejudice." (*People v. Mayfield* (1997) 14 Cal.4th 668, 803.) Improper appeals include arguments designed to inflame a juror's personal fears and emotions. (*Newlon v. Armontrout* (8th Cir. 1989) 885 F.2d 1328, 1335; see *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 180-181 [improper argument that death penalty was only guarantee against a future similar act]; *People v. Haskett*, *supra*, 20 Cal.3d at p.864 ["irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed"]; *Bertolotti v. State* (Fla 1985) 476 So.2d 130, 133 [prosecutor's appeal to consider the message sent to the community was "obvious appeal to the emotions and fears of the jurors"].) The prosecutors violated these limits in their closing arguments to the jury.

1. The prosecutor improperly told the jury that appellant was a threat to prison guards as long as he was imprisoned.

The prosecutors' argument told the jury that appellant would present a danger as long as he was imprisoned, arguing that executing people like appellant meant that "no one else will have to fall victim to them again." (23 RT 4598.) The prosecutor went on to explicitly tell the jury that "[n]o one in the Department of Corrections would be safe with that man as a prisoner," raising, without any evidentiary support, the spectre of an attack on a prison guard. (23 RT 4607.) While an objection was then sustained (*ibid.*), the bell could not be un-rung. This Court has allowed prosecutors to argue that a defendant presents a future danger, based upon the evidence. (See *People v. Davenport*, *supra*, 41 Cal.3d at p. 288.) Here, there was no such evidence, and this Court should reconsider its opinion in any event because future dangerousness is not a proper aggravating factor under California law. (See Pen. Code § 190.3; *People v. Boyd*, *supra*, 38 Cal.3d

at pp. 772-776.) The prosecutor's argument that the death penalty was necessary to prevent appellant from committing future crimes therefore violated due process by arbitrarily depriving appellant of his state-created liberty interest in a sentencing determination based solely on the statutory factors. (*Hicks v. Oklahoma*, *supra,* 447 U.S. at p. 346 [due process liberty interest in the requirements of state law].)

2. The prosecutor improperly told the jury that society demanded imposition of the death penalty.

According to prosecutor, the jurors bore the responsibility for making society feel secure by punishing appellant with death. (23 RT 4596.) This argument misled the jury because the law was satisfied with either life imprisonment without parole or the death sentence. (See *People v. Brown*, *supra*, 40 Cal.3d at p. 537, fn. 7.) It prevented the jurors from considering mitigation and reaching an individualized judgment about appellant, because if society's demand for "closure" and security warranted the death penalty in and of themselves, no amount of mitigation could ever overcome it. (See *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 105 [8th and 14th Amendments require consideration of mitigating evidence].) In arguing this way, the prosecutor diminished the jurors' sense of personal responsibility for an individualized penalty verdict. (See *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-329; *Darden v. Wainwright*, *supra*, 477 U.S. at p. 183, fn. 15 [*Caldwell* extends to any argument that diminishes a juror's sense of personal responsibility.)[55]

The prosecutor's argument improperly inflamed the jurors' emotions

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[55] The issue is preserved regardless of any failure to object at trial because no objection was required at the time of appellant's trial. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1416; *People v. Moon* (2005) 37 Cal.4th 1, 17.)

by suggesting that the death penalty was necessary to society's well-being. (See *United States v. Williams* (9th Cir. 1993) 989 F.2d 1061, 1072 [improper to use community role of jurors to appeal to their passions].) It is a juror's emotional response to such appeals that renders such arguments egregious in the guilt phase. (See *Viereck v. United States* (1943) 318 U.S. 236, 247 [prosecutor's statements suggesting that others were relying on the jurors for protection compromised the verdict]; *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146 [improper for prosecutor to appeal to community conscience and fear of future crime].) It was similarly improper in the penalty phase to for the prosecutor to have stirred the emotions of the jurors by suggesting that they are under a societal duty to impose death. (See *Newlon v. Armontrout*, *supra*, 885 F.2d at p. 1335 [improper to appeal to jurors' personal fears and insinuate that all murders should be punished with death]; *Cunningham v. Zant* (11th Cir. 1991) 928 F.2d 1006, 1019-1021 [numerous comments, including, "how do you know that if you let him go this time it won't be done again" were designed to appeal "to the jury's passions and prejudices" and required reversal].)

The prosecutors made it appear as if the survival of some unnamed prison guards and society as a whole depended upon a death verdict. The impact of this argument would have been overwhelming to the jurors. Accordingly, this Court should find that the prosecutors violated due process by infecting the trial with fundamental unfairness and compromised the Eighth Amendment's requirements for a reliable penalty verdict.

B. The Prosecutors Improperly Contrasted Life in Prison with the Victim's Family Visiting the Grave Site.

"[D]ramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." (*Hance v. Zant* (11th

Cir. 1983) 696 F.2d 940, 952.) The prosecutors in this case ignored this limitation and described Gonzales's family visiting the grave site with flowers every Sunday after church, in order to contrast their loss with appellant serving a life sentence without parole. (23 RT 4597.) The prosecutor invited the jury to weigh the comparative pain of the victim's family against appellant's life in prison. This argument was designed solely to inflame the emotions of the jurors. It set up a standard that no defendant in a capital case could ever overcome because the victim's loss will always be real and a defendant's sentence to life in prison will always mean that he or she lives. The prosecutor's argument violated appellant's constitutional rights to due process and a reliable penalty verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

1. The argument was an inflammatory call for vengeance.

Both prosecutors emphasized the comparison between the victim's family's loss and appellant's supposed "king-of-the-hill" life as a prisoner:

> "Now if you impose life without parole, certainly Christopher Sattiewhite will spend the rest of his Christmases and Thanksgivings and 4th of Julys and birthdays behind bars, but that is a whole lot better deal than he gave Genoveva Gonzales.
>
> She will never get to bake cookies and cakes at Christmas again for her children. She will never get to root for Chava at a baseball game or encourage him in his school work, or watch Chava and Sandy, Vanessa and Edgar grow up and get married and have children.
>
> And Christopher Sattiewhite, he will have – he will have his 150 bucks every two weeks compliments of Wayne Walker in his account. And he will be able to – he will be able to sit in his cell and enjoy the recounting of how he

executed the girl in the ditch after his friend murdered [sic] her.

And he will be able to enjoy recounting how he terrorized the young boy on the beach and pull him off of his girlfriend and how he threw the blanket over his head while his two buddies raped the fellow's girlfriend...." (23 RT 4548.)

The second prosecutor repeated the theme for the jury:

"As a society we must redress our outrage for this. We must have closure so that we feel secure knowing that justice is served and not one more person will fall victim to Chris Sattiewhite. That is what we need as a society, and as incongruent as it seems, sentencing the Defendant to life in prison is sentencing the Defendant to a life of opportunities that Genoveva Gonzales will never have again.

The Defendant in prison will get to wake up every day. He will get to see the seasons change. He will get to watch TV. He will listen to music. He will get to read books. He will get to read the newspaper. His family gets to visit him on visiting days and holidays, and his birthday. And he gets to write letters. He gets to read letters. And he gets to go to school if he wants and he gets to work if he wants. And although his sister said they would rather visit him in prison than in a graveyard, think about what the Gonzales family does every Sunday after church. They bring their mother flowers at the cemetery.

And what about Mr. Walker [appellant's brother-in-law]? Mr. Walker wanted to say all of the right things and he wanted to do all of the right things. He's going to give Chris Sattiewhite $300 a month in his bank. Christopher Sattiewhite is going to be king of the hill in the Department of Corrections with $300 a month.

He is going to run the show. He is going to act out his fantasy. He will have the plan. And what do you think the Gonzales family could do with $300 a month? That would be

a god send [sic] to them.

> So when you think about the opportunities that Chris Sattiewhite will have in prison, you have to ask yourself, 'Well, where is the justice in that? Where is the fairness?' That should really offend your sense of justice." (23 RT 4596-4598.)

References to visits to the victim's grave site are inflammatory. In *Duckett v. State* (Okla.Crim.App. 1995) 919 P.2d 7, the prosecutor argued in words strikingly similar to the present case:

> "Ladies and Gentlemen, is it justice to send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while John Howard [the victim] lies cold in his grave? Is that justice? Is that your concept of justice? How do Jayme and Tom and John's son [the victim's family] go visit him?" (*Id.* at p. 19.)

The reviewing court unhesitatingly found this to be error: "These kinds of comments cannot be condoned. There is no reason for them and counsel knows better and does not need to go so far in the future." (*Ibid.*; see also *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373, [evidence that the victim's son put flowers on his mother's grave and brushed the dirt away "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative"]; *Walker v. Gibson* (10th Cir. 2000) 228 F.3d 1217, 1243 [prosecutor improperly appealed to the jury's emotions by referring to one victim as being "cold in his grave"]

Here, the prosecutor's argument was particularly inflammatory in light of the fact that the victim's family did not want appellant to receive the death penalty. The prosecutor misleadingly told the jury that "to fix the penalty in this case at life in prison would be to minimize the suffering and

death of Genoveva Gonzales and continued suffering of her family." (23 RT 4596.)[56]

Under these circumstances, the prosecutor's argument was a call for vengeance, presented in a way that no juror could ignore. (See *Furman v. Georgia*, *supra*, 408 U.S. at pp. 344-345 (conc. opn. of Marshall, J.) [8th Amendment limits the role of retribution and vengeance in the penalty determination].)

2. The argument improperly used victim impact evidence.

The United States Supreme Court allowed victim impact evidence in order to offer a "quick glimpse" into a victim's life that showed one's "uniqueness as an individual human being." (*Payne v. Tennessee, supra,* 501 U.S. at 823.) Although such evidence was permissible, the Court emphasized that "victim impact evidence is not offered to encourage comparative judgments" between the defendant and the victim. (*Ibid.*) Nor does it permit the prosecutor to use inflammatory evidence that renders the trial fundamentally unfair. (*Id.* at p. 825.) The prosecutor's argument misused the victim impact evidence in this case by inviting the jury to compare the loss suffered by the victim's family with the value of appellant's life in prison. The comparison inflamed appellant's jury against him and violated due process and Eighth Amendment standards.

The argument was similar to one that invites comparisons between the life of a victim and that of a defendant. A number of state courts have found that such comparisons are unduly inflammatory. (See *State v.*

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[56] As shown in arguments XV and XVI, *supra*, the prosecution knew that the victim's family did not want appellant to receive the death penalty, even as it asked the jury for vengeance for that family.

Koskovich, supra, 776 A.2d 144 at p. 182 ["Common experience informs us that comparing convicted murderers with their victims is inherently prejudicial because defendants in that setting invariably will appear more reprehensible in the eyes of jurors"]; *State v. Storey* (Mo. 1995) 901 S.W.2d 886, 902 [jury must "consider a wide array of aggravating and mitigating circumstances," but the question of whose life was more important was not among them.]; *State v. Rizzo* (Conn. 2003) 833 A.2d 363, 419-420 [improper to argue that jury should balance the life of the defendant against that of the victim]; see also Utah Crim. Code, § 76-3-207, subd. (2)(a)(iii) [permitting the introduction of victim impact evidence but only "without comparison to other persons or victims"].)

Overemphasizing the permanency of the victim's death, as contrasted to life in prison, is also erroneous because all homicides by definition involve this situation. As the Oklahoma court has found, "the State's contention – it is unfair for [the defendant] to live since [the victim] is dead – creates a super-aggravator applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence." (*Le v. State* (Okla.Crim App. 1997) 947 P.2d 535, 554-555; see also *Eddings v. Oklahoma, supra,* 455 U.S. at p. 105 [8th and 14th Amendments require individualized consideration of mitigating evidence].) Accordingly, the trial court erred in allowing the prosecutor to compare appellant's life in prison with the loss to the victim's family.

C. Reversal is Required.

The prosecutors' argument focused on extremely emotional matters that led the jury to believe that the death penalty was required without any real consideration of mitigating evidence – whether it be for protection of

Department of Corrections personnel and society as a whole - or that the loss suffered by the victim's family inherently made it unjust or unfair for appellant to live.

The prosecutors offered the jury an easy way to make a hard choice. If death were required to protect society or prison guards in this case – if it were necessary to avenge the victim's loss – then the jury need not determine an individualized sentence. Given the great weight afforded a prosecutors' words and the improper arguments used by those prosecutors, it is clear that the jury took the prosecutors' invitation and imposed the death penalty without the kind of determination required under the federal and state constitutions. (See *Berger v. United States*, *supra*, 295 U.S. at p. 88 [prestige of prosecutor carries great weight]; *People v. Talle* (1952) 111 Cal.App.2d 650, 677 [prosecutor given great weight]; *People v. Sandoval* (1992) 4 Cal.4th 155, 205 (dis. opn. of Mosk, J.) [prosecutor improperly offered jurors an easy way to avoid a hard choice].)

In the penalty phase, any substantial error requires reversal. (*People v. Robertson, supra,* 33 Cal.3d at p. 54; *People v. Ashmus* (1991) 54 Cal.3d 932, 965; *Chapman v. California*, *supra*, 366 U.S. at p. 24 [federal constitutional error requires reversal unless it is harmless beyond a reasonable doubt].) In this case, the emotional and far-reaching impact of the prosecutors' argument affected the jurors understanding of their duty and ensured that they would automatically vote for death. The error requires that the judgment of death be reversed.

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XXIV. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT AND AS APPLIED IN THIS CASE FALLS SHORT OF INTERNATIONAL NORMS.

It has long been settled that international law is part of the law of this nation and state. (*The Paquete Habana, supra,* 175 U.S. at p. 700.) It is also something that guides the interpretation of our own constitution and the evolving standards of decency under the Eighth Amendment. This Court, however, has rejected all claims that the death penalty violates international law. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow, supra,* 30 Cal.4th at p. 127.) These opinions should be reconsidered in light of the international community's overwhelming rejection of the death penalty as a regular form of punishment. Moreover, even if the death penalty may be imposed, this Court must consider the specific application of international law to the circumstances of this case.

International law is determined by both treaty obligations and customary practices that define the law of nations. (*Siderman de Blake v. Republic of Argentina, supra,* 965 F.2d at p.715 [content of international law determined by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators"].) Even treaties and international agreements that are not ratified by a particular country may still be binding as demonstrating the customary law of nations. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." (Rest.3d Foreign Relations Law of the United States, § 102.)

Moreover, international law provides an important basis for

interpreting our own Constitution, particularly the evolving standards of the Eighth Amendment's prohibition against cruel and unusual punishment. (See *Roper* v. *Simmons* (2005) 543 U.S. 551, 567] [abolition of juvenile death penalty]; *Lawrence* v. *Texas, supra,* 539 U.S. at pp. 572-573 [recognizing importance of international law in determining constitutional issues]; *Atkins v. Virginia, supra,* 536 U.S. at 316, fn. 21 [citing practices of the world community in prohibiting death penalty for mentally retarded offenders]; *Trop* v. *Dulles, supra,* 356 U.S. at p. 102 [referring to unanimity of the "civilized nations"].) Indeed, "'[c]ruel and unusual punishments' and 'due process of law' [are not] static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 (dis. opn. of Powell, J.) Thus, the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 100.)

The use of the death penalty in this country is increasingly at odds with the practice of other nations:

> "The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. .. [and] with China, Iran, Nigeria, Saudi Arabia, and South Africa [under the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions."

(*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16.

Crim. and Civ. Confinement 339, 366[57] ; see also *Ring* v. *Arizona, supra,* 536 U.S. at p. 618 (conc. opn. of Breyer, J.) [other nations have abolished capital punishment].

Article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable. (See Second Optional Protocol to the International Covenant on Civil & Political Rights, Aiming at the Abolition of the Death Penalty. Adopted by the General Assembly, December 15, 1989.) Thus, United Nations reports have noted an "encouraging trend" towards abolition of the death penalty in most countries. (Executive Summary, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Report of the Secretary-General to Economic and Social Council, E/2005/3, Session July 29, 2005.)

The Supreme Court of Canada has also emphasized the international context for ending the death penalty:

> "Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CNA/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist de facto (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major

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[57] Since this article was published in 1995, South Africa has abandoned the death penalty.

> democracies except some of the United States, India. and Japan.... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran."

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) In particular, the nations of Western Europe are uniform in not using the death penalty. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 (plur. opn. of Stevens, J.).) Eighth Amendment jurisprudence must therefore recognize that the international standards of decency have evolved, and re-examine the use of the death penalty in this state. This Court should prohibit the use of a form of punishment that is generally rejected apart from a handful of countries whose "standards of decency" are supposedly antithetical to our own.

Even assuming that the death penalty may be imposed, international law imposes a particularly high standard that must be met in such cases. As discussed above (Argument IV [insufficient evidence]), international law allows use of the death penalty only if the evidence leaves "no room for alternative explanation of the facts." ("Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (1984) ECOSOC Res.1984/50.) It also protects the right of a fair trial. (Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II(1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. LJ. 321 (1990) 141["in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial. .. is even more imperative"].) Appellant was denied his right to a fair hearing throughout his trial, as shown by the cumulative effect of all claims raised in this brief, which are incorporated

herein by reference. In particular, appellant's competency to even stand trial was never properly determined. He was then convicted based primarily upon the testimony of an accomplice whose unbelievable testimony was bolstered by an erroneous jury instruction that barred the jury from considering the accomplice's motive for testifying. The trial court then failed to instruct on the voluntary manslaughter charge that would have resulted from appellant's duress defenses, skewing the verdict toward first degree murder. The trial court also gave numerous instructions that diminished both the reasonable doubt standard and the jury's consideration of mitigating evidence. Appellant was then sentenced to death by a jury under time pressure that went from deadlock to death verdict after re-hearing improper victim-impact evidence from an unrelated crime that inflamed the jury against appellant. These factors rendered appellant's trial unfair. Moreover, under international law standards, this Court should reconsider those claims - such as the limitation on considering mitigating evidence that did not rise to the level of an extreme impairment under Penal Code section 190.3, factor (d) (Argument XXV, *infra*), that it has previously rejected to ensure that the claims raised did not impact appellant's trial. It must reverse the death penalty in this case.

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XXV. 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 has consistently rejected 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. Appellant provides more detail where recent United States Court decisions or the facts in this case call this Court's previous decisions in question, particularly in the way that this Court has considered the burden of proof involved in the penalty decision (section C, *infra*), how it has interpreted the limitations requiring an "extreme mental or emotional disturbance" under Penal Code section 190.3, factor (d) (section E, *infra*), and the disparate treatment of civil and criminal litigants in their access to procedural safeguards (section G, *infra*.) Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad.

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty

is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman* v. *Georgia, supra,* 408 U.S. at p. 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective standards, the class of murderers eligible for the death penalty. (*Zant v. Stephens, supra,*462 U.S. at p. 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty.

At the time of the offense charged against appellant, Penal Code section 190.2 contained 21 special circumstances. Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights.

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 3 CT 446-447.) 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 that cover the entire spectrum of circumstances inevitably present in every homicide, 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. 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 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 charged murder without some narrowing principle. (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.

C. 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, supra,* 25 Cal.4th at p. 590; *People* v. *Fairbank, supra,* 16 Cal.4th at p. 1255; see *People* v. *Hawthorne, supra,* 4 Cal.4th at p. 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. A consistent line of cases from the United States Supreme Court require that 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. (*Apprendi v. New Jersey, supra,* 530 U.S. at 478; *Ring v. Arizona, supra,* 530 U.S. at p. 604; *Blakely v. Washington, supra,* 542 U.S. at pp. 303-305, *Cunningham v. California, supra,* 549 U.S. 270.) 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; 3CT 485-86.) Because these additional findings were required before the jury could impose the death sentence, *Apprendi, Ring, Blakely,* and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." *(People* v. *Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter* v. *Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of

the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn.14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) In so doing, this Court has repeatedly compared the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias, supra,* 39 Cal.4th at p. 41; *People v. Dickey, supra,* 35 Cal.4th at p. 930; *People* v. *Snow, supra,* 30 Cal.4th at p. 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra,* 30 Cal.4th at p. 263.)

This Court applied similar reasoning to reject the application of *Apprendi* in cases where the trial court imposed the maximum verdict under California's determinate sentencing law ("DSL"). The Court upheld the DSL because it simply provided for the type of fact-finding incident to choosing "an appropriate sentence within a statutorily prescribed sentencing range." (*People v. Black, supra,* 35 Cal.4th at p. 1254.) However, in *Cunningham,* the High Court made clear that this rationale does not comport with Sixth Amendment standards. (*Cunningham, supra,* 127 S.Ct. at pp. 868-871.)

In *Cunningham,* the High Court emphasized that any fact that exposes a defendant to a greater potential sentence must be found true by a jury and established beyond a reasonable doubt. (*Id.* at pp. 863-864.) The Court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant

rules of court. (*Id.* at pp. 862-863.) Accordingly, the DSL violated the bright-line rule that requires all facts necessary to elevate a sentence to be found by a jury "employing a beyond-a-reasonable-doubt standard." (*Id.* at p. 870.) Since this Court has recognized that the DSL is comparable to the capital sentencing scheme, it is clear that the Sixth Amendment standards adopted in *Apprendi* must be applied here.

Cunningham also rejected the rationale that *Apprendi* does not apply because the maximum penalty for one convicted of first degree murder with a special circumstance is death. In the DSL, the aggravated sentence is obviously the maximum sentence that can be imposed for a crime, but the High Court recognized that the *middle* sentence was the most severe penalty that could be imposed by the sentencing judge without further factual findings. (*Cunningham* v. *California, supra,* 127 S.Ct. at p. 862.) Similarly, to elevate a sentence from life to death, a jury must find that aggravation. substantially outweighs mitigation. (*People v. Brown, supra,* 40 Cal.3d at p. 541, fn. 13.) Since this decision involves further fact-finding, the Sixth Amendment's requirements for a unanimous jury verdict, beyond a reasonable doubt, must apply. 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.*

Apart from the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant also 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, supra,* 36 Cal.4th at p. 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, supra,* 447 U.S. at p. 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.

CALJIC Nos. 8.85 and 8.88 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, supra,* 13 Cal.4th at p. 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 the 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, supra,* 428 U.S. at p. 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 Ca1.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring* v. *Arizona.* (See *People v. Prieto, supra,* 30 Cal.4th at p.275.)

As discussed above, appellant submits that *Prieto* was incorrectly decided, and application 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, supra,* 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant 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; 3 CT 452.) 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), violated due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering the death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People* v. *Anderson, supra,* 25 Cal.4th at pp. 584-585.)

Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant - the Oxnard beach rape and the threatening letter to Rollins - and devoted a considerable portion of its closing argument to arguing these alleged offenses (See 23 RT 4504-4548.) In fact, the prosecutor specifically underlined for the jury that there was no unanimity requirement, telling them that the front row could use the Oxnard beach rape as an aggravator while the back row might not. (23 RT 4504-4505.)

The United States Supreme Court's recent decisions in *Cunningham v. California, supra,* 549 U.S. 270, *Blakely v. Washington, supra,* 542 U.S. 296, *Ring v. Arizona, supra,* 536 U.S. 584, and *Apprendi v. New Jersey, supra,* 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be

made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this 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." (CALJIC No. 8.88; 3 CT 485-486.) 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, supra,* 486 U.S. at p. 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. (3 CT 485-486.) 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 fmd 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.

Penal Code 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, supra,* 494 U.S. at p. 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 Penal Code 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 non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life without parole 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) __ U.S. __ [127 S.Ct. 1706, 1712-1724]; *Mills v. Maryland, supra,* 486 U.S. at p. 374; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina, supra,* 428 U.S. at p. 304.) 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.) Such error occurred here because the jury was left with the impression that appellant bore some particular burden

in proving facts in mitigation.

A similar error occurred when the trial court failed to instruct the jury that unanimity was not required as to mitigating facts. 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 limited 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 instructions improperly failed to inform the penalty jurors 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 law (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 was constitutionally required.

D. Failing to Require the Jury to Make Written Findings Violates Appellant's Right to Meaningful Appellate Review.

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth,

and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg* v. *Georgia, supra,* 428 U.S. at p. 195.) This Court has rejected these contentions. (*People* v. *Cook, supra,* 39 Cal.4th at p. 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

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

1. The use of restrictive adjectives in the list of potential mitigating factors prevented the jury from giving full effect to appellant's mitigating evidence.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code § 190.3, factors (d) and (g); 3CT 446-447) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. at p. 384; *Lockett* v. *Ohio, supra,* 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration in this case because appellant's jurors were led to believe that they could not consider evidence of mental impairment mitigating if it did not rise to the level required under factor (d). The United States Supreme Court recently reaffirmed that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." (*Abdul-Kabir v. Quarterman, supra,* __ U.S. __ [127 S.Ct. 1654, 1664].) Indeed, it has long been recognized:

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

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

This Court has assumed that Penal Code section 190.3 and CALJIC No. 8.85 allow meaningful consideration of all mental states because jurors will somehow understand that factor (k) permits consideration of a defendant's less-than-extreme mental or emotional disturbance as mitigating evidence. (See,. e.g., *People* v. *Wright* (1990) 52 Ca1.3d 367, 443-444.) That assumption was incorrect in the present case. Appellant presented substantial evidence that he was intoxicated at the time of the crime, and that he had mental deficits that impaired his judgment. (See e.g. 13 RT 2413-14; 2419; 16 RT 2849 [appellant drinking "everything" that night]; 21 RT 3968-3981 [appellant was born with brain damage and had a neuro-developmental age of 6 to 7].) Yet the prosecutor argued that this impairment did not meet the standards of an extreme mental or emotional disturbance (23 RT 4511) - and nothing in the instructions told the jury it could still consider that evidence as mitigation.

The erroneous interpretation of factor (d) was understandable because in both law and logic there is a principle that the specific overrides the general. (See, e.g., *People v. Trimble* (1993) 16 Cal.App.4th 1255,

1259.) Related to this is the idea that the inclusion of a specific item will exclude its application in other general contexts: *inclusio unius est exclusio alterius.* (*People* v. *Castillo, supra,* 16 Cal.4th at p. 1020 (conc. opn. of Brown, J.) ["Although the average layperson may not be familiar with the Latin phrase *inclusio unius est exclusio alterius,* the deductive concept is commonly understood ...."]; *Alcaraz v. Block* (9th Cir. 1984) 746 F.2d 593, 607 ["maxim *expressio unius* is a product of logic and commonsense"].) Thus, appellant's jurors would have certainly have understood that the specific instruction on mental and emotional disturbances under Penal Code section 190.3, factor (d) would control over the general application under factor (k). To conclude that factor (k) overrides factor (d) would be tantamount to declaring factor (d) extraneous. Just as another fundamental rule of logic and construction requires that "a construction that renders [even] a [single] word surplusage ... be avoided" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799), so too one would expect a juror to have rejected an interpretation of the court's instructions that would have rendered all of factor (d) surplusage.

Finally, the language of factor (k) in no way compelled a juror to interpret it as overriding factor (d). To the contrary, the pertinent portion of factor (k) merely directed the jurors to consider "any sympathetic or other aspect of the defendant's character ... that the defendant offers as a basis for a sentence less than death...." (3 CT 447.) There was no reason a juror would necessarily interpret appellant's mental or emotional impairment at the time of the killings - the subject of factor (d) - as an "aspect of his character." A juror more likely believed that factors (d) and (k) dealt with different subjects.

In many ways, this case is similar to *Brewer v. Quarterman, supra,*

__ U.S.__ [127 S.Ct. 1706], where the prosecutor's argument limited the jury's consideration of mitigating evidence. (*Id.* at p. 1711 [argument "de-emphasized any mitigating effect that such evidence should have on the jury's determination"].) The Supreme Court found that the jury was likely to have accepted the prosecutor's reasoning, which required reversal even if the mitigating evidence in *Brewer* was not as strong as in other cases. (*Id.* at p. 1712.) In so doing, the Court rejected the claim that there had to be evidence of a chronic or immutable mental illness before an error that foreclosed consideration of evidence was prejudicial.

> "Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime."

(*Id.* at pp. 1712 -1713.) Thus, it found that the Texas courts had "failed to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." (*Id.* at p. 1714.)

Here, the instructions foreclosed consideration of appellant's mitigation under factor (d). If appellant's impairment was not applicable under factor (d), then the jury was left with a wilful and deliberate crime, with a mental state that was not mitigated or explained. When jurors are unable to give meaningful effect or a reasoned moral response to a defendant's mitigating evidence, "the sentencing process is fatally flawed." (*Abdul-Kabir v. Quarterman, supra,* 127 S.Ct. at p. 1675.) Appellant

therefore requests that the Court reconsider its previous opinions in light of *Brewer* and *Abdul-Kabir* and reverse the penalty judgment.

2. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators.

In accordance with customary state court practice, the instructions did not identify which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (3CT 446-447.) 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), (t), (g), (h), and G)-were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People* v. *Davenport, supra,* 41 Cal.3d at pp. 288-289). Appellant's jury, however, was free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors, thus precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black, supra,* 503 U.S. at pp. 230-236.) As such, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other

similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People* v. *Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The State of California Violates The Equal Protection Clause of the Federal Constitution By Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Civil Litigants.

A greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons facing civil penalties. Appellant repeatedly moved the trial court for an order directing the prosecution's main witness, Bobby Rollins, to be interviewed by the defense. (2 RT 245-247, 333-337; 1 CT 56-57.) The court found it had no authority to order a deposition under California law and noted that it would have no such problem in a civil proceeding. (2 RT 336.)

California's disparate treatment of criminal and civil defendants in the power it gives them to depose the witnesses against them violates the Equal Protection provisions of the United States and California Constitutions.

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1. Procedural background.

Defense counsel made a written motion for a court order directing Bobby Rollins to submit to a defense interview. (1 CT 56-57.) At the hearing, counsel noted that Rollins had testified before the Grand Jury and therefore had not been subject to cross-examination at a preliminary hearing. (2 RT 336.) The court held that it had no authority to order a deposition, commenting that "[w]ere we in a civil proceeding the problem would be resolved, but we are not there." (*Ibid.*) The court ordered that Rollins and his counsel meet with defense counsel so that defense counsel could ask Rollins to talk with him. (*Ibid.*) Rollins refused to do so. (14 RT 2494-96.) As shown in Argument IV, *supra*, Rollins told a contradictory and absurd story of what happened that night in an attempt to distance himself from what happened. A deposition would have allowed appellant to pin down Rollins on his story before trial and know exactly what he faced. Instead, parts of Rollins' testimony at trial surprised even the investigating officer.[58]

2. The right to life is a fundamental interest requiring strict scrutiny.

The equal protection clause of the Fourteenth Amendment to the United States Constitution[59] guarantees every person that he or she will not

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[58] Rollins testified that appellant was wearing gloves during the killing (13 RT 2427) and that, after the killing, appellant had told him " I always wanted to do that." (13 RT 2444-2445.) However, Sergeant Barnes, the investigating officer who had interviewed Rollins countless times about the crime, testified that the trial had been the first time he had heard Rollins say that. (17 RT 3107.)

[59] The California Constitution also contains an equal protection clause, article 1, section 7. In some cases the state guarantee may provide

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 also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles* 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

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broader protection than the federal equal protection clause. (*People v. Leung* (1992) 5 Cal.App.4th 482, 494.)

The State cannot meet this burden. Equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply a monetary judgment, but life itself. To the extent that there may be differences between capital defendants and civil defendants[60], those differences justify more, not fewer, procedural protections for capital defendants.

3. Criminal defendants are treated less favorably than are civil litigants under California law.

There can be no dispute that the defendant in a capital case is treated less favorably than the defendant in a civil proceeding with regard to depositions. A criminal defendant with some very limited exceptions, simply cannot take depositions in a criminal case. (See *People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523; Penal Code section 1054.) In contrast, a civil defendant has broad powers to subpoena parties and witnesses for cross-examination under oath as to any matter, not privileged, that is relevant to the subject matter involved if the matter is admissible in

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[60] Criminal and civil litigants are "similarly situated" for the purposes of the equal protection analysis applicable here. In *People v. Hofsheier* (2006) 37 Cal.4th 1185, this Court noted that:

> "Under the equal protection clause, we do not inquire 'whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged."(*Id.* at p. 1199; citations omitted.)

Here, the purpose of depositions is to ensure a fair trial and intelligent defense in light of all relevant and reasonably accessible information. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 960.) Criminal and civil litigants are thus similarly situated in that regard.

evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (See California Code of Civil Procedure sections 2025.010 et seq.; 1985-1987; 2017.010.) This right is construed broadly, so as to uphold the right to discovery wherever possible. (*Greyhound Corp. v. Superior Court* (*Clay*) (1961) 56 Cal.2d 355, 377-378; *Emerson Elec. Co. v. Superior Court* (*Grayson*) (1997) 16 Cal.4th 1101, 1108.)

While all litigants, civil as well as criminal, have a right to a fair trial, the interest of criminal defendants is greater. A criminal defendant's right to a fair trial is a fundamental personal right. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) As this Court has noted, "a criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. [Citations.]'" (*People v. Gonzalez, supra,* 38 Cal.4th at p. 960.) In a system where there is no longer a right to cross-examine prosecution witnesses at a preliminary hearing, depositions are simply a crucial procedure for insuring that a defendant receives a fair trial and an intelligent defense. (*Ibid.*)

4. Conclusion.

For all of the foregoing reasons, this Court should find that California's disparate treatment of criminal and civil defendants in the power it gives them to depose the witnesses against them violates the Equal Protection provisions of the United States and California Constitutions. Because this type of constitutional error is comparable to improper cause challenges under *Wainwright v. Witt* (1985) 469 U.S. 412, 424 and *Davis v. Georgia* (1976) 429 U.S. 122, 123; the error requires reversal of defendant's convictions and death sentence without inquiry into prejudice. (*People v. Stewart* (2004) 33 Cal.4th 425, 454.)

H. 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 reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.420, (b) & (e).) In a capital case, there is no burden of proof at all; the jurors need not agree on what aggravating circumstances apply; and specific findings to justify the defendant's sentence are not required. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider.

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XXVI. CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED.

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

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].)

Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace, supra*, 848 F.2d at p. 1476.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional

magnitude combined with other errors].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt-phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial.

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

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Other courts similarly have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty

is death." (*Irving v. State* (Miss.1978) 361 So.2d 1360, 1363.) Accordingly, even if the individual errors are harmless on their own, the cumulative effect of these errors upon the penalty verdict must be examined with special caution. (See *Burger v. Kemp*, *supra*, 483 U.S. at p. 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

Here, appellant's trial was fundamentally flawed by the trial court's failure to have his competency properly evaluated in violation of Due Process (Argument I). He was then convicted based primarily upon the testimony of an accomplice whose unbelievable testimony was bolstered by an erroneous jury instruction that barred the jury from considering the accomplice's motive for testifying (Arguments IV & IX). The trial court then failed to instruct on the voluntary manslaughter charge that would have resulted from appellant's duress defense, skewing the verdict toward first degree murder (Argument VIII). The trial court also gave numerous instructions that diminished the reasonable doubt standard (Arguments X, XI, XXI & XXII) and lowered the prosecution's burden of proving the kidnapping charge and special circumstance (Argument V). In the penalty phase, the instructions allowed the jury to dismiss appellant's mitigation evidence of mental impairment because it did not rise to the level of extreme disturbance required under Penal Code section 190.3, factor (d), so that the jury could not have given full consideration to this evidence. The trial court then refused requested defense instructions that would have correctly guided the jury in its task (Arguments XVIII, XIX & XX). That jury was also under external time pressures (Argument XIII) and went from deadlock to death verdict after re-hearing improper victim-impact evidence from an unrelated crime that inflamed the jury against appellant (Argument

XVII).

The cumulative effect of these errors so infected appellant's trial with unfairness as to deprive appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) This Court can have no confidence in the reliability of the guilt and penalty verdicts in light of the combined effect of all the errors in this case, constitutional and otherwise. It cannot be satisfied that the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at 24.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

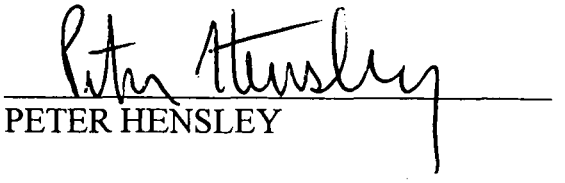
***

CONCLUSION

For all the reasons stated above, reversal of the convictions, the special circumstance findings, and the death judgment is required.

DATED: July 11, 2008

Respectfully submitted,



PETER HENSLEY

Attorney for Appellant
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CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Peter Hensley, represent appellant in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 79,309 words in length.

Dated: July 11, 2008

PETER HENSLEY
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Re: *People v. Sattiewhite*

No. S039894
(Ventura Sup. Ct. No. CR 31367)

I, Peter Hensley, declare that I am over 18 years of age, and not a party to the within cause; my business address is 315 Meigs Road, Suite #A-382, Santa Barbara, CA 93109. A true copy of the attached:

APPELLANT'S OPENING BRIEF

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

Christopher James Sattiewhite
P.O. Box H-60700
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Each envelope was then, on July ___, 2008, sealed and deposited in the United States Mail at Santa Barbara, California, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July ___, 2008 at Santa Barbara, California.

PETER HENSLEY