No. S042346

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

BRYAN MAURICE JONES,

Defendants and Appellants.

APPELLANT'S OPENING BRIEF

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

HONORABLE LAURA P. HAMMES, JUDGE

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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BRYAN MAURICE JONES, Defendant and Appellant.	) No. S042346) San Diego County) Sup. Court No.) CR 136371

APPELLANT'S OPENING BRIEF

INTRODUCTION

Six times zero is still zero. Although the prosecution hoped it would add up to six, it didn't even add up to one.

The prosecution charged appellant Bryan Maurice Jones with crimes against six victims on six different occasions. It took the prosecutor six years to file the charges. One might be able to understand that *one* particularly complex crime might be difficult to solve, and therefore might require many months or even years to unravel. But six crimes against six different victims *each* requiring six years to file raises serious questions about whether each crime was actually solved.[1]

[1]The six year delay was not for lack of resources. The San Diego Police Department has over 2,000 police officers. (See www.iacptechnology.org/Programs/San%20Diego%20PD.htm.)

As the prosecutor candidly admitted about two of the cases, "You can't examine them one at a time because they don't make sense." (RT 336.) And about a third case, the court stated, "The Simpson count is clearly the weakest count here. It would not stand on its own." (RT 469.)

When the People prosecute a defendant with six crimes against six different victims in the same trial, the natural tendency is for a juror to assume that the defendant must have done *something* wrong. In trying these cases together, the prosecutor exploited that tendency in the likely hope that the sheer number of cases would overwhelm the jury and result in compromise verdicts. And that's exactly what happened. A careful examination of the evidence in this case reveals, however, that all six cases were weak and should have resulted in not guilty verdicts.

Six times zero is still zero. It simply does not add up to more.

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)[2] The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

The San Diego County District Attorney filed an information against appellant Bryan Maurice Jones on January 14, 1993 (CT 34)[3], amended the information on January 19, 1994 (CT 5622) and January 27, 1994, and

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

[3] "CT" means the 51-volume Clerk's Transcript. "RT" means the 60-volume reporter's transcript (volumes 1 through 58, 6A, and 9A) . "PX" means the five-volume transcript of the preliminary hearing. "PT" means the six-volume transcript of pretrial hearings.

charged Mr. Jones with the following: count one, attempted murder of Maria Ramirez on August 15, 1985 (§§ 664\187) committed with a deadly weapon, a rope (§ 12022(b)); count two, murder of Tara Simpson on August 29, 1985 (§ 187(a)); count three, murder of Trina Carpenter on February 11, 1986 (§ 187(a)); count four, murder of JoAnn Sweets on May 9, 1986 (§ 187(a)); count five, murder of Sophia Glover on August 15, 1986 (§ 187(a)); and counts six, seven, eight, and nine, respectively, attempted murder (§§ 664\187), rape (§ 261(a)(2)), sodomy (§ 286(c)), and oral copulation (§ 288a(c)) of Karen Mitchell on October 20, 1986. (CT 5803-5806.)

Counts three and five also alleged the special circumstances that each murder was committed while appellant was engaged in the commission of rape within the meaning of section 190.2(a)(17). (CT 5804-5805.)

Counts four and five also alleged the special circumstance that each murder was committed while appellant was engaged in the commission of sodomy within the meaning of section 190.2(a)(17). Finally, the information alleged a multiple-murder special circumstance with respect to counts two, three, four, and five within the meaning of section 190.2(a)(3). (CT 5804-5805.)

Mr. Jones brought several motions, which the court denied, including motions to: exclude other crimes evidence (CT 1053, 7193; RT 471-474); sever counts (CT 1134, 7193; RT 471); dismiss for lack of speedy trial (CT 1216, 7192); exclude evidence of PCR DNA testing (CT 1276, 7213; RT 1238); exclude testimony of Dr. Reid Meloy regarding sexual homicides (CT 5007, 7199; RT 772); and exclude victim impact evidence (CT 5767, 7282; RT 5276).

Trial began with jury selection on February 8, 1994. (CT 7215.) On March 31, 1994, the jury returned guilty verdicts on counts one and four through nine, and true findings as to the deadly weapon enhancement alleged in count one, and each special circumstance alleged, except the jury did not return a finding on the rape-murder special circumstance alleged in count five. (CT 7286-7295; RT 5236.) The jury also did not reach verdicts on counts two and three. The court declared a mistrial on these counts, and the rape-murder special circumstance. (CT 7285; RT 5248.)

The penalty phase began on April 6, 1994 (CT 7297), and the jury returned a verdict of death on April 12, 1994 (CT 6948). The court denied Mr. Jones's motions for a new trial (CT 7055, 7316) and to reduce the sentence to life without the possibility of parole (CT 7074, 7316). The court imposed a sentence of death. (CT 7155, 7161.)

STATEMENT OF FACTS

Guilt Phase

A. Maria Ramirez

The prosecution charged Bryan Jones with the attempted murder of Maria Ramirez with a rope. (CT 5804.)

On Thursday, August 15, 1985, Maria Ramirez, a penniless 42-year-old prostitute and heroin user with several felony convictions, met 23-year-old Bryan Jones in downtown San Diego, and agreed to have sex with him for $20; she intended to use the money to buy drugs. (RT 2041-2043, 2052, 2069, 2073, 2088, 3920, 4219.) Ms. Ramirez had been with Mr. Jones at least one other time two months before. (RT 2103, 2107.)

Ms. Ramirez and Mr. Jones rode on a bus to his apartment at 4424 51st Street in San Diego, where he lived with his mother. (RT 2044-2045, 2052.) Ms. Ramirez testified that they had consensual "straight" sex, Mr.

Jones paid her the $20, she made herself a sandwich, and then she took a shower. (RT 2046-2047, 2080.)

According to Ms. Ramirez, when she came out of the shower, she was ready to have sex again, but instead Mr. Jones choked her with his hands and a rope, causing her to lose consciousness two or three times. (RT 2048-2050, 2077, 2080.) Ms. Ramirez further testified that he told her he would let her go if she orally copulated him. She complied even though, as Ms. Ramirez told the jury, "I don't like to do that usually. I usually don't like to do that." When she finished, he took the $20 back. (RT 2051, 2082.)

According to Ms. Ramirez, Mr. Jones did not bother her while she put on her clothes because "he act like if he just wanted me to do that, you know, so he would feel good." (RT 2082.) Ms. Ramirez freely left the apartment, but then called the police. (RT 2052-2053.) When the police arrived, Ms. Ramirez was very loud and angry, and demanded that Mr. Jones be arrested. (RT 2053, 2094.) The police saw discoloration type marks around the base of her neck. (RT 2097.)

Mr. Jones invited the police in. (RT 2095.) The police described Mr. Jones as very cooperative; he said that he knew Maria Ramirez. (RT 2101.) In the bedroom the police found black and brown interwoven raw hide strips, which Ms. Ramirez identified as the rope that Mr. Jones used to choke her. (RT 2099.) The police arrested Mr. Jones for forced oral copulation and took him to a substation, where he was processed and where Ms. Ramirez threw a rock at him. (RT 2100.)[4]

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[4]A police report reflects that Ms. Ramirez called the police department on August 19, 1985 to say that she was not pursuing the matter. The report noted that "[t]he case was taken to the district attorney and will

A few days or a week later, Ms. Ramirez returned to Mr. Jones's apartment with some church people. Ms. Ramirez stayed in the car while the church people spoke to someone at the apartment. (RT 2082-2084.) Mr. Jones's mother, Ann Jones, testified that in August 1985, two Spanish speaking people, a Mexican woman and a male preacher, came to her apartment looking for Mr. Jones. (RT 2082-2084; 3945-3946.)[5]

Although Ms. Ramirez said that she was attacked in 1985, she did not pursue her claim until at least five years later, when the police contacted her in jail. (RT 2084.) The prosecution did not charge Mr. Jones in connection with Ms. Ramirez until almost seven years after the alleged incident. (CT 6, 8.)

Mr. Jones's defense was that Ms. Ramirez and her story were not credible: she concocted a tale of "attempted murder" because she was furious with Mr. Jones when, after Ms. Ramirez voluntarily performed a sex act that she disliked, Mr. Jones nonetheless reneged on their agreement and took back the $20 that she desperately needed to support her heroin addiction. Moreover, the attempted murder charge was legally untenable because it was based on the implausible notions that (1) a powerful six-foot, five-inch, 300-pound man (RT 2093) would not have accomplished his goal if he intended to kill Ms. Ramirez, an element of attempted murder, and (2) although he allegedly intended to kill his victim, he let her go instead. Ms.

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be rejected due to her failure to appear." (CT 4118.)

[5]The factual narrative is awkward here because the court excluded statements to Ms. Jones by the woman, translated into English by the man, that she was sorry for having falsely accused Mr. Jones. (RT 3959, 3969.) As argued later in this brief, the court should have allowed the apology into evidence because the woman was either Maria Ramirez or an agent speaking on her behalf.

Ramirez's neck injuries were likely the result of a fight that she had earlier in the day. (RT 2088, 2097.) According to Ms. Ramirez, on the morning of the incident, she was living with Simon Ramirez and had a fight with a "Mexican." (RT 2087-2088, 2097.)

Ms. Ramirez's testimony was impeached with inconsistencies in her trial testimony, as well as her multiple felony convictions. (RT 2052.) First, she told the jury that she had never seen Mr. Jones before the incident. (RT 2064-2065.) Officer Gilbert Ninness testified, however, that Ms. Ramirez told him on the day of the incident that she had met Mr. Jones previously, and had been in his car two months before. (RT 2107.)[6]

Second, Ms. Ramirez testified that on the day of the alleged incident, she had sex with Mr. Jones twice, first consensual straight sex and then forced oral copulation. (RT 2047, 2050-2051, 2080.) She told Officer Ninness, however, that she had sex with Mr. Jones three times: initially straight sex, then oral copulation, then "doggie style." (RT 2104.) Ms. Ramirez denied to the jury that she and Mr. Jones had "doggie style" sex. (RT 2081.)

Finally, Ms. Ramirez testified that she was not going to use the $20 from Mr. Jones to buy drugs. (RT 2069-2070.) After being reminded of her preliminary hearing testimony, however, Ms. Ramirez admitted that she wanted "to get high that day" and was going to use the money to buy drugs. (RT 2073.)

B. Tara Simpson

The prosecution charged Bryan Jones with the murder of Tara

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[6]Witness Karen Mitchell, also a prostitute, referred to an act of oral copulation between a prostitute and a customer in an automobile as a "car date." (RT 2530.)

Simpson. (CT 5804.)

On Thursday, August, 29, 1985, at about 3:30 a.m., the nude body of 18-year old Tara Simpson, an African American prostitute, was found burning in a dumpster in an alley behind 5058 El Cajon Boulevard in San Diego, within a block of the Jones apartment, in an area rampant with prostitution and illegal drug use. (RT 2117-2118, 2132-2133, 2136, 2239, 3074-3075, 3191, 3347-3354, 3446, 3778, 4219.) Ms. Simpson was 5 feet, 8 inches tall, and weighed 137 pounds. (RT 3181-3182.) The fire was intentionally set after Ms. Simpson's death, and involved flammable liquid. (RT 2184, 2186, 3191.) Police found a charred one gallon can in the dumpster. (RT 2156.)

San Diego County pathologist Robert Bucklin determined that Ms. Simpson died from ethyl alcohol and cocaine poisoning. (RT 3197-3198, 3220.) An autopsy showed that Ms. Simpson had a blood alcohol level of .07 percent. (RT 3195.) Cocaine was found in her blood, liver, brain, and kidney. (RT 3196-3197, 3222.)[7]

Ms. Simpson also had a three-and-a-half-inch cut in her abdomen; the cut had an irregular or serrated type appearance. (RT 3186.) Dr. Bucklin found that, although the cut happened when Ms. Simpson was alive, it was not that serious, and not necessarily lethal or fatal. (RT 3188-

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[7]Ms. Simpson's body was tested for acid phosphatase, an enzyme that is secreted and concentrated largely in male seminal fluid. A vaginal swab showed 18 IU of acid phosphatase, oral swabs showed 10 IU, and a rectal swab 5 IU. (RT 3197.) No sperm was found. (RT 3193, 3195.) Thus, the prosecutor told the court: "Tara Simpson, there is no sign of any sexual attack at all." (RT 4435.)

3199.)[8]

At about 5 a.m., the police checked for witnesses at nearby properties, and found no one at the Jones apartment. (RT 2134-2136.)

Mr. Jones's defense was that Tara Simpson, suicidal and addicted to drugs, may have intentionally killed herself or accidentally overdosed on cocaine. There was no substantial evidence tying Mr. Jones to her death. The prosecution presented no evidence as to how Ms. Simpson received the cut to her abdomen, or how, after her death, her body was set on fire.

In 1985, at about the age of 18, Tara Simpson moved from Oregon to San Diego, became a prostitute, and sank into drug addition. (RT 3777-3779, 3790, 3805.)[9] Her personality changed drastically; she would have extreme mood swings, crying one moment, happy the next. She became violent and resorted to stealing. She threatened the life of her friend, 16-year-old Danya Cate, on several occasions. Ms. Simpson used a lighter and hair spray various times while threatening to blow up Ms. Cate. (RT 3780, 3789.) She had a fascination with fire, and had a book about it. (RT 3781.)

Once during the summer of 1985, Ms. Simpson had trouble

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[8]Although Ms. Simpson's nose was flattened, Dr. Bucklin was unable to attribute this to a trauma or injury due to the state of the body. (RT 3183-3184.) Dr. Bucklin also found tiny petechial hemorrhages on the surface of the heart. Dr. Bucklin noted that many things can cause petechiae, including asphyxia. (RT 3190-3191.) Nevertheless, he found nothing in the neck area that indicated a strangulation. The hyoid bone was normal. There were also no petechiae identified within the neck region. (RT 3198, 3221.)

[9]Apparently, Ms. Simpson had recently given birth. Dr. Bucklin found that Ms. Simpson's uterus was enlarged consistent with a recent pregnancy; he also found a thick shaggy lining of the uterus and some material that resemble decidua, left after the baby was delivered. (RT 3193.)

breathing. (RT 3782.) She had been using drugs and had been in the bathroom for several hours. When she came out, she was on the floor and appeared as if she was having a heart attack. An ambulance took her to the hospital. (RT 3783.)

Ms. Simpson's emotional health and physical appearance deteriorated dramatically. She lost weight. Her face and her skin were changing colors. Her hair remained uncombed. She perspired profusely and continued her heavy use of drugs. (RT 3784, 3790-3792.) She bought rock cocaine at least two or three times a day. (RT 3785.) On one occasion, Ms. Simpson exposed herself in public, walking nude out into the street. (RT 3806.) Finally, Ms. Simpson began to speak of suicide. (RT 3788.)

At about the time Ms. Simpson's body was discovered, neighbors heard multiple voices and noises coming from the area of the dumpster where her body was found. (RT 3495-3496, 3498, 3507, 3811, 3814, 3825.)

The jury hung on the Simpson murder charge, 8-4 in favor of guilt. (CT 7285; RT 6005.)[10]

C. Trina Carpenter

The prosecution charged Bryan Jones with the murder of Trina Carpenter and alleged a rape-murder special circumstance. (CT 5804.)

On Tuesday, February 11, 1986, at about 9:45 p.m., the nude burned body of Trina Carpenter, was found in a dumpster in an alley between the

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[10]Although the jury hung on the Simpson and Carpenter charges, the court permitted each juror to use them as aggravating penalty factors under Penal Code section 190.3, factor (b) [other violent criminal activity]. (RT 5982.)

4500 block of Altadena Avenue and 51st Street in San Diego, a block and a half from the Jones apartment. (RT 2208-2209, 2240, 2242, 2244-2245, 2316, 3200, 4219.) An older passenger car with blue oxidized paint was seen at about 10 p.m. parked in the alley where Ms. Carpenter was found. (RT 2223.) In 1986, Bryan Jones did not have a car, but occasionally drove a friend's faded blue 1980 Datsun 280-ZX sports car. (RT 2442-2444, 2450.)

Ms. Carpenter was African American, 5 feet, 4 inches tall, 114 pounds, and 22 years old. (RT 3200, 3829.) She was a prostitute who most likely worked in the Bates Street area of San Diego on the evening of her death; she also used crack cocaine, spending between $100 and $200 a day on the drug. (RT 3479, 3829, 4280, 4284-4286.)

Her body was found headfirst in a green cloth duffel bag with her legs outside the bag. (RT 2299, 2321.) The bag had been scorched. (RT 2322.) The name "D. Belman" and the initials "D.B." appeared on the bag. (RT 2413.) What appeared to be a one-gallon gas can was found in the dumpster. (RT 2244, 2300, 2385.) Residue of flammable liquid was detected in the can. (RT 2736, 2740.)

Also found in the dumpster were Ms. Carpenter's purse (containing a red Bible), a pair of red corduroy shorts, a white blouse, a pair of black shoes, and a rust colored pullover shirt. (RT 2381-2385, 3831.)

Dr. Bucklin performed an autopsy. (RT 3199.) The cause of death was asphyxia due to manual strangulation. (RT 3208.) There was no sign of a ligature. Organ damage was consistent with manual strangulation. (RT 3225-3226.)

Her vagina was open and the labia were gaping, suggesting recent sexual activity. (RT 3203.) Sperm was found in the vagina. An acid

phosphatase test showed a high level, 353 IU. No sperm was found in the mouth or rectum. No acid phosphatase was found in the mouth, while only four units were found in the rectum. (RT 2480, 3207.) Dr. Bucklin found no damage to the rectum (RT 3204), but a picture showed blood dripping from Ms. Carpenter's anus, which Dr. Bucklin suggested was most likely caused by trauma. (RT 3233.) Nevertheless, Dr. Bucklin was not able to find any signs of forced sexual contact. (RT 3225.) Cocaine was detected in her body. (RT 3207.)

Two cotton balls containing sperm were found in the duffel bag, one in Ms. Carpenter's hand and the other near her vagina, where drainage from the vagina could have occurred. (RT 2419, 2478.) After subjecting the sperm sample to the polymerase chain reaction (PCR) DNA process and employing dot-intensity analysis, Dr. Edward Blake opined that the primary sperm donor had a DQ alpha genotype of 1.2,2, while a secondary donor of a lesser amount had a 3,4 DQ alpha genotype. (RT 2913, 3026-3027, 4876.) He also detected female epithelial cell DNA with a DQ-alpha type of 1.2,4, consistent with Ms. Carpenter's DQ-alpha genotype. (RT 2912-2913, 2916.)

Although Dr. Blake conceded that an individual with a DQ alpha type of 1.2,1.2 and another person with a DQ alpha type of 2,2 could have been co-contributors of the majority of the sperm, he viewed this conclusion as "artificial." Instead, Dr. Blake insisted that "the straightforward interpretation of the data is that most of the sperm come from an individual that is a 1.2,2." (RT 3033.)

Mr. Jones's DNA was tested and showed a DQ-alpha type of 1.2,2. (RT 2935-2936.) According to Dr. Blake, this genotype occurs in approximately six percent of the African American population, about five

percent of the white population (RT 2942), and slighter greater than two percent of the Mexican American population (RT 2944). Dr. Blake declined to provide additional frequency data for other groups, such as Asians, because, according to Dr. Blake, it was "not relevant." (RT 3044-3046.)

Mr. Jones's defense was that Trina Carpenter was killed by Bates Street drug dealers, Randy Lockwood and La-Jon ("Little John") Van Reed, or by their "crew" of gang underlings because Ms. Carpenter failed to pay Lockwood and Van Reed for drugs she bought from them. Van Reed even admitted that they killed Ms. Carpenter. Ms. Carpenter was seen on Bates Street just before her death, and was working as a prostitute that evening. She likely had consensual sex with various customers including someone who had the same DNA type as Mr. Jones.

Within one hour before her death, Ms. Carpenter was at an apartment on Bates Street. (RT 3475-3477.) She seemed to be in a hurry and did not stay long at the apartment. (RT 3477.) She had to leave because two men were waiting for her. (RT 3493-3494.)

In 1985-1986 Bates was a notorious dead-end street in San Diego, known for its high drug traffic, 24 hours a day, 7 days a week, generating up to $1 million a week in drug sales. (RT 3476, 3573-3577, 3673, 3714.) Prostitutes – including Trina Carpenter and Michelle Hicks – often bought illegal narcotics on Bates Street. (RT 3577-3578, 3604-3605, 3673, 3831, 3836, 3839, 3881-3882, 4286.) Both Trina Carpenter and Michelle Hicks bought drugs on credit from Van Reed, a Bates Street drug dealer. (RT 3487, 3574-3576, 3605, 3616-3617, 3622, 3638, 3672, 3713, 3719, 3828, 3831, 4278.)

On February 21, 1986, 10 days after the death of Trina Carpenter,

Ms. Hicks was at an apartment on Bates Street using drugs. (RT 3573, 3579, 3610, 3616, 3739.) Van Reed had been looking for Ms. Hicks because she owed him money for drugs, and he found her at the apartment. (RT 3719.) Randy Lockwood, Prince Johnson, and Van Reed's crew accompanied Van Reed. (RT 3609-3610, 3612, 3695-3696, 3715.) Van Reed demanded that Ms. Hicks pay him for the drugs that he had provided her. She said that she did not have the money. (RT 3610.) Van Reed punched Ms. Hicks in the side of the head, trying to knock her out. (RT 3721.) Randy Lockwood, a self-proclaimed "enforcer" and "muscle" on Bates Street, grabbed Ms. Hicks by the throat. (RT 3581, 3610, 3632, 3674.) The crew beat up Ms. Hicks and pushed her down the stairs. (RT 3722.)

Michelle Hicks was taken to Van Reed's apartment on Bates Street where he forced her at gunpoint to strip naked. (RT 3607, 3612, 3681, 3685, 3699.) Van Reed had two machetes and some kitchen knives in his apartment. (RT 3700, 3740, 4013-4014.) When Van Reed subjected Ms. Hicks to a game of Russian roulette, the gun went off and a bullet skinned her wrist. (RT 3612-3613, 3689, 3718, 3734, 3739.) They then took her to a bedroom where Ms. Hicks saw a dark green or blue duffel bag. (RT 3624.) Prince Johnson stuck a gun up her vagina and performed oral sex on her, while one of the crew sprayed peanut butter with Raid and tried to make her eat it. (RT 3614-3615, 3620, 3624, 3687-3688.)

Van Reed said, "we're going to kill you like we did the other girl," "burn" her up, and put her in a "dumpster." (RT 3615; see also RT 3912.) The "other girl" was Trina Carpenter. (RT 3616-3617, 3828, 3831, 4278.) Van Reed testified that he may have told the police that Randy Lockwood said to Michelle: "I ought to shoot you and put you in the dumpster like

that other bitch and set you on fire. I did that, and if you don't get the money, that is what we're going to do to you. Do you remember that girl in the trash can? I did that. It wouldn't be shit to do that to you." (RT 3737.) Van Reed also testified that he vaguely remembered Randy Lockwood talking about Lady Capricorn, a nickname for Trina Carpenter. (RT 3737, 3828, 3831, 3881-3883.)

Randy Lockwood testified that when he would intimidate women verbally, "I would tell them that this would be the last time I tell them anything else, and if I don't get the money by such and such, when I come back, there won't be no talk. ... Then I would do whatever it takes. It depends on what they owe me." He would not beat them up, he would have his crew do that. (RT 3694.)[11]

Margaret Anna Walker testified that Randy Lockwood was always insulting and humiliating women, and if they said something wrong, he would slap, beat, and spit on them. On one occasion she witnessed Randy Lockwood slap, knock down, and kick an anorexic woman. (RT 3886.) He wanted $50 by midnight from the woman, and told her that if she did not pay, he would take her "black skinny ass" and put her in a "Hefty" trash bag and then in a "Dixie" dumpster. (RT 3887.)

The parties stipulated that in "the Trina Carpenter case, La-Jon Van Reed, Prince Johnson, and Randy Lockwood cannot be eliminated as a potential source of the trace 4 allele associated with the sperm from the cotton balls found near Trina Carpenter's body." (RT 3868.) Nevertheless, Dr. Blake testified that he conducted additional DNA tests (polymarker)

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[11]Randy Lockwood was arrested in February 1986, while La-Jon Van Reed was in custody by March 1986; both were convicted in connection with the Michelle Hicks incident. (RT 3704, 3741, 3859, 4005-4007.)

that excluded Van Reed, Lockwood, and Johnson as sperm contributors to the cotton balls found in the Carpenter duffel bag. (RT 4817-4819.) Defense expert Marc Taylor, however, disagreed with Dr. Blake's results and did not exclude them. (RT 4937-4938.)

The jury hung on the Carpenter charges, 11-1 in favor of guilt. (CT 7285; RT 6005.)

D. JoAnn Sweets

The prosecution charged Bryan Jones with the murder of JoAnn Sweets and alleged a sodomy-murder special circumstance. (CT 5804.)

At about 10 a.m. on Friday, May 9, 1986, the body of JoAnn Sweets was found in a dumpster in an alley just outside the back door of the Jones apartment at 4424 51st Street in San Diego. (RT 2302, 2343-2345, 2347, 2358-2359, 2362, 3980, 4219.) Ms. Sweets was an African American female, 5 feet, 9 inches tall, 152 pounds, and 34 years old. (RT 3211.)[12]

The body was unclothed except for a bra and blouse. (RT 2398.) Ms. Sweets had been severely beaten, had a broken hyoid bone, and died from manual strangulation. (RT 3212-3215, 3218.) A toxicology exam revealed an alcohol level of .01 percent. Cocaine was also detected. (RT 3218.) Though not in enough quantity to subject to DNA testing, some sperm was detected on rectal swabs taken from the body. (RT 2486, 2511, 3218.)

An old afghan blanket, tattered and not worth keeping, covered the body, which was wrapped in a floral print sheet, a white mattress pad, and

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[12]Although the prosecutor repeatedly stated that JoAnn Sweets was a prostitute (see, e.g., CT 762, 772, 841, 4341), he introduced no evidence of this at trial. Nevertheless, he persisted in suggesting to the jury that JoAnn Sweets was a prostitute, all the way up to closing argument. (RT 5001.)

two large plastic trash bags. Tape was attached to the ends of the bags as if someone had tried, unsuccessfully, to tape the bags together. Although the afghan may have been made by Bryan Jones's mother or sister, the sheet and mattress pad were not from the Jones apartment. (RT 2303-2304, 2307, 2345-2346, 2353, 2363, 2399, 2404, 2432, 2485, 2783-2785, 3932.) Hairs that did not match Mr. Jones or Ms. Sweets were found on the sheet (5 hairs), mattress pad (8 hairs), and afghan (29 hairs). (RT 2932, 3534-3535, 3868.)

Just days before the body was found in the dumpster, Ann Jones moved down the street to a new home, leaving her son Bryan and his girlfriend living in the old apartment. (RT 3068-3069, 3932-3933, 3982.) Ann Jones was "sort of picky," "like[d] things sort of neat," and "like[d] things in place." (RT 3984.)

Carpet fibers from the Jones apartment were consistent with fibers found on the body, afghan, mattress pad, and sheet. (RT 3128-3132.) Ann Jones had afghan blankets that probably fell from her lap and lay on her carpet every now and then. (RT 3995.)

Prosecution witness, Melvyn Kong, a supervising criminalist for the San Diego Police Department crime lab (RT 3076), testified that because "a dumpster is a trash receptacle, it is, in essence, a cesspool of many different sources of fiber and hair contamination. So there is possibility of cross-contamination between anything which is in the dumpster and anything that's removed from the dumpster." (RT 3102-3103.)

Prosecution witness Michael Malone, an FBI Special Agent and Senior Examiner with the Hairs and Fibers Unit of the FBI lab in Washington D.C., testified that he would expect apartments in the same building to be carpeted with the same fiber. (RT 3141.) The Jones

apartment was located in a large apartment complex. (RT 2045, 2093.) According to Special Agent Malone, the police should have tested the carpet in the other apartments to determine if there was another source of the fibers found with JoAnn Sweets. (RT 3141-3142, 3159-3160.)

Four packages of garbage were left in the dumpster. (RT 2319, 2412, 2809.)[13] Mr. Malone told the jury that the prosecution did not inform him of this (RT 2319), and he would have wanted to analyze these bags to determine whether they either contaminated or contributed to the fibers found with Ms. Sweets. (RT 3143, 3159.) Finally, Mr. Malone opined that the police should have examined JoAnn Sweets's residence on Bates Street for fibers and other evidence. (RT 3165, 3885.)

A fingerprint from the exterior of the dumpster matched Mr. Jones. (RT 2401-2403, 2824.)[14] A fingerprint lifted from one garbage bag and a hand print from the other garbage bag also matched Mr. Jones. (RT 2847-2851.) No fingerprints were detected on the tape attached to the ends of the garbage bags. (RT 2744-2745.) Special Agent Malone testified that the police should have processed the other bags in the dumpster for Mr. Jones's fingerprints. (RT 3162.)

Dr. Blake testified that DNA extracted from a semen stain on the sheet wrapped around the body showed a DQ-alpha type of 1.2,2 (RT 2483, 2512, 2515, 2927-2928), but added that "a person with the alleles 1.2,1.2 ... could be a co-contributor of the sperm." (RT 3037.) Dr. Blake's earlier

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[13]Other garbage was outside the dumpster. (RT 2303.) There was also loose trash inside the dumpster. (RT 2327.)

[14]Given that the dumpster was outside the back door of the Jones apartment, "You would expect the defendant's prints to be on the dumpster" (RT 5094), as the prosecution conceded to the jury.

testimony regarding Trina Carpenter suggested that another co-contributor to the sheet sperm could have been a person with 2,2 alleles. (RT 3033.) Lastly, Dr. Blake tested a portion of the sheet where there was no sperm, and detected a 1.1 allele, which Dr. Blake opined was the dx pseudogene. (RT 4878, 4881.)

Mr. Jones's defense was that someone else murdered JoAnn Sweets, perhaps two men who were seen on the morning that she died, lifting a rolled up carpet near the dumpster where the body was found. The defense theory was that the two men transferred the body from the carpet to garbage bags taken from the dumpster. They emptied the trash already in the bags, as shown by the loose trash in the dumpster. It was highly probable and not surprising that Mr. Jones's fingerprints would be found on the dumpster outside *his* apartment. It is also not surprising that Mr. Jones's fingerprints were found on the trash bags and that the unraveled afghan was in the dumpster, especially since his mother had recently moved from the apartment. DNA tests showed that there were multiple sperm donors to the sheet, which contradicts the prosecution's theory that the perpetrator acted alone.

Joyce Euwing, who lived at the Travelodge Motel located on 51st Street and El Cajon, testified that while she was walking to work at about 5:30 a.m. on May 9, 1986, she saw two men standing next to a small, dark four-door car near the dumpster in which JoAnn Sweets was found. The men were struggling to lift what looked like a big roll of carpet out of the back seat. (RT 3363, 3369-3370, 3382, 3389-3390, 3393-3394, 3397.) Ms. Euwing testified that it looked like the men were trying to dump the carpet; but because she was just walking by, she did not see the men put the carpet in the dumpster. (RT 3369, 3394.) She recognized one of the men as Ike

Jones. (RT 3371, 3374.) Ms. Euwing testified that the defendant, sitting at counsel's table, was not one of the men. (RT 3372.)

Ike Jones had been seen with JoAnn Sweets's boyfriend on Bates Street, where Ms. Sweets and her boyfriend lived. (RT 3884-3885.) Ike Jones's girlfriend corroborated that he drove a small, dark brown car. (RT 4231.)

Joyce Euwing had been living with a friend, Donna, when Donna's boyfriend, Ike Jones, told Ms. Euwing to move out. Joyce Euwing and Ike Jones had a fight in which he grabbed her around the neck and began choking her. Her husband, Marvin Euwing, was able to pull Ike Jones off of her. (RT 3364-3365.) Ms. Euwing was angry at Ike Jones because she lost $400 as a result of her eviction. (RT 3404-3406, 3433.) She was also angry at him when he tried to get Marvin Euwing to sell drugs. (RT 3407.)

Joyce Euwing wears glasses and needs them to see street signs when driving. She did not have her glasses on when she saw Ike Jones in the alley. It was just turning light when she saw him. (RT 3385-3386, 3396, 3449.)

Gwendolyn Sue Mosley, Ike Jones' girlfriend, testified that she was "pretty sure" Ike Jones was with her eight years before on the night of May 8, 1986, and the morning of May 9, 1986, and that he took her children to a bus stop at about 7 a.m. (RT 4227-4229.)

Joyce Euwing told the police that she had seen two black males take some large brown carpeting material out of a blue Pinto and put it in the dumpster. She described the first man as 20-30 years old, 6 feet to 6 feet, 1 inch tall, approximately 185 pounds, and muscular build, and the second man as approximately 24 years of age, approximately five feet, ten inches tall, approximately 160 pounds and having a medium build. (RT 4249-

4252.) Ike Jones was a 43-year-old black male, approximately 5 feet, 11 inches tall, and approximately 224 pounds. (RT 3424, 4258.) Ms. Euwing did not give the police the name of Ike Jones until her fifth police interview. (RT 4257, 4288-4289.)

After Dr. Blake testified that a man with the DQ-alpha genotype of 1.2,1.2 could be a co-contributor of the sperm found on the sheet with JoAnn Sweets (RT 3037), the parties stipulated that Ike Jones's DQ-alpha genotype was 1.2,1.2 (RT 3867). Later Dr. Blake conducted DNA PCR polymarker testing and concluded that Ike Jones was eliminated as a contributor to the sheet. (RT 4813.) Dr. Blake reached these conclusions, even though his polymarker tests on the Sweets sperm samples each failed to produce a visible sensitivity or "s" dot (RT 4797, 4874-4875, 4880, 4926), and even though the manufacturer of the polymarker testing kit recommends against typing a DNA sample where no "s" dot is visible (RT 4841 ["It is recommended that a DNA probe strip with no visible 's' dot not be typed for any locus"]).

The prosecution called Patrick O'Donnell, a doctor of molecular biology and head of the San Diego Police Department Forensic DNA Laboratory, who initially testified at a hearing that polymarker testing was suitable for forensic case work. (RT 4618, 4666, 4898.) The defense later called Dr. O'Donnell at trial, where he told the jury that if the "s" dot on a polymarker test strip is not visible, then there is always the possibility that a DNA source would go undetected, so that he would not exclude someone, for example, Ike Jones, based on the fact that his allele had not been detected. (RT 4903-4905, 4908.)

Finally, forensic scientist Marc Taylor agreed with Dr. O'Donnell that it was dangerous to assign a genotype to test results where an "s" dot

was not present because a contributor may not be detectable due to the low level of DNA in the sample. (RT 4926, 4936.) Thus, Mr. Taylor concluded that Ike Jones should not be excluded as a contributor to the sheet found with JoAnn Sweets. (RT 4937-4938.)

The jury convicted Mr. Jones of murder, and found the sodomy-murder special circumstance true. (CT 7287-7288.)

E. Sophia Glover

The prosecution charged Bryan Jones with the murder of Sophia Glover, and alleged rape-murder and sodomy-murder special circumstances. (CT 5805.)

On Friday, August 15, 1986, the deceased body of Sophia Glover was found at about 6:30 a.m. on the grass portion between the curb and the sidewalk of the 2200 block of Madison at Louisiana Street in San Diego, about a block from the Wilsie house, where Ann Jones worked and her son Bryan helped out on occasion. (RT 2247-2248, 2287, 2308-2309, 2607, 3936, 4220.) The body was nude, except for a scarf around the neck, and covered by a green blanket. (RT 2248, 2309.) At about 4:30 p.m., Ms. Glover's clothes were found in a neat pile a half block down the alley near an apartment building at 4665 Mississippi Street, next door to the Wilsie residence. (RT 2264-2265, 2268-2269, 2290-2291, 2294, 2601-2607.)

Ms. Glover was African American, 37 years old, 5 feet, 3 inches tall, and 111 pounds. (RT 3236.) She was last seen about 11 o'clock at an apartment in East San Diego the night before her body was found. (RT 2286-2287, 3236.)[15]

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[15]Although, as with JoAnn Sweets, the prosecutor repeatedly stated that Sophia Glover was a prostitute (see, e.g., CT 763, 772, 4342), he introduced no evidence of this at trial. Moreover, the prosecutor told the

Dr. John Eisele performed the autopsy. He found petechiae in the eyes, a broken hyoid bone, a cut to the head, and bruises on the neck, chest, and back. He detected cocaine in her system. The cause of death was asphyxia by manual strangulation. (RT 3234, 3237, 3239-3244, 4399.)

Oral, vaginal, and anal swabs were taken from Sophia Glover's body. Dr. Eisele, a pathologist who had performed about 6500 autopsies (RT 3235), saw a few sperm on the vaginal smear, but did not see any on the oral or anal smears. (RT 3244.) San Diego Police Department criminalist Patricia Lawson found sperm on the vaginal slides, but not on the anal or oral slide. (RT 2471-2472, 2487.) Three years later, fellow criminalist Larry Turner found sperm on the anal swabs. (RT 2457, 2459, 2461, 2468-2469.)

At first, Dr. Blake testified at trial that he analyzed the anal swabs in the Glover case, and concluded that "the sperm DNA type was 1.2,2." (RT 2930-2931.) Dr. Blake's PCR analysis revealed a single sperm DQ alpha type of 1.2,2. (RT 2931.) Dr. Blake further testified that this matched Mr. Jones's DQ alpha type of 1.2,2 (RT 2935-2936), as well as about six percent of the African American population, about five percent of the white population (RT 2942), and slighter greater than two percent of the Mexican American population (RT 2944).

Later, however, Dr. Blake conducted additional DNA tests with the polymarker system, a PCR-based analysis of five genes. (RT 4779.) According to the prosecution, Dr. Blake performed the new tests to rebut evidence that Ike Jones, with a DQ alpha genotype of 1.2,1.2, could not be

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jury during opening statement that Sophia Glover was a prostitute (RT 2020), but then later objected to a question by the defense that assumed Sophia Glover was a purported prostitute. (RT 4851.)

eliminated as a suspect in the JoAnn Sweets case (CT 6444; RT 3867); and that La-Jon Van Reed (DQ alpha type: 4,4), Prince Johnson (DQ alpha type: 4,4), and Randy Lockwood (DQ alpha type: 2,4) could not be eliminated as a potential source of the trace 4 allele detected on the sperm from the cotton balls found near Trina Carpenter's body. (CT 6444; RT 3868.)

On subjecting the Glover anal swab to polymarker testing, Dr. Blake learned that there was a fairly evenly balanced mixture of two sources of sperm (RT 4799, 4803, 4857), and possibly a third source (RT 4861). He concluded that instead of one genotype – the 1.2,2 that matched Mr. Jones – there were three possible genotypes present in the anal swab – 1.2,2; 1.2,1.2; and 2,2. (RT 4803-4804; see also RT 4553 [polymarker hearing].) Dr. Blake also concluded that it was no more likely that a donor had the 1.2,2 genotype than the 1.2,1.2 or 2,2 genotype. (RT 4848.)

Dr. Blake further testified that the anal swab contained a 1.1 allele (RT 4853-4856), which could have come "from a very low level of sperm from an individual possessing the 1.1 allele" (RT 4856). He acknowledged that this allele could not have been contributed by Mr. Jones. (RT 4854.) Dr. Blake admitted that he could not prove that there were "two versus three" donors to the anal swab. (RT 4849-4850.)

As a result of the Glover polymarker analysis, Dr. Blake changed his opinion about the percentage of African Americans that could have contributed sperm to the Glover anal swab. Rather than six percent, Dr. Blake opined that 15.1 percent of the African American population matched the possible genotypes found on the swab. (RT 4846.) Dr. Blake arrived at this percentage by adding the percentage of African Americans who have the 1.2,2 genotype (6 percent), to the percentage of African Americans who have the 1.2,1.2 genotype (8 percent), and then to the percentage of African

Americans who have the 2,2 genotype (1+ percent). (RT 4545 [polymarker hearing]; see RT 4546 [Dr. Blake: "So the bottom line here is 15 percent of the black population would have genotypes compatible with being in a mixture with somebody of Mr. Jones' type"].) Although Dr. Blake agreed that the anal swab contained a 1.1 allele, he did not factor the 1.1 allele in arriving at the percentage of the population, African American or otherwise, from which the contributors to the anal swab could have originated. (RT 4853-4856.)

Mr. Jones's defense was that nothing connected him to Sophia Glover. No hairs matching Mr. Jones's hair were found on the body, including the pubic area, or on the green blanket. (RT 3544-3546, 3549, 3564-3566.) DNA tests showed there were two and possibly three contributors of sperm to the Sophia Glover anal swabs. (RT 4799-4800, 4811, 4861.)

One witness saw a man, not Bryan Jones, beat up Sophia Glover a day or so before her death. The attacker left her stripped naked and bruised, lying on the ground. (RT 3440-3441, 3456, 3460.)

The jury convicted Mr. Jones of murder, found the sodomy-murder special circumstance true, but hung on the rape-murder special circumstance, 6-6. (CT 7289-7290; RT 6005.)

F. Karen Mitchell

Karen Mitchell, a prostitute and heroin addict with several felony theft convictions, testified that she spent the night of October 19, 1986, injecting her daily mix of cocaine and heroin, and drinking alcohol. Ms. Mitchell, an African American, was approximately 30 years old. On Monday morning, October 20, 1986, she met Mr. Jones in downtown San Diego and, according to Ms. Mitchell, agreed to commit acts of prostitution

in return for $50. They rode in a dusty blue Datsun 280-Z to the Wilsie house at 4659 Mississippi Street in San Diego, where Mr. Jones's mother cared for Tillie Wilsie, an elderly woman who had recently died. Mr. Jones had been given a key to the house to watch over it during the funeral. (RT 2523-2528, 2532, 2562-2563, 2564-2565, 2568-2570, 2602, 2605-2607, 2612, 2614, 3645, 4220.)

Ms. Mitchell testified as follows: that when she started to take her clothes off, Mr. Jones choked her, causing her to almost lose consciousness. She was told that she would be killed if she did not cooperate. On a sheet placed on the floor of the house, she was forced to engage in sexual intercourse, sodomy, and oral copulation. Ms. Mitchell had brought a half of a fifth of Jack Daniels with her, which she was forced to drink. Mr. Jones left, and she continued to drink until she eventually passed out. (RT 2536-2537, 2550-2556, 2569, 2581, 2584.)

That same day Marjorie Wilsie went to 4659 Mississippi Street about noon, and found Karen Mitchell, fully dressed and passed out on a mattress in the bedroom. Ms. Wilsie called the police, who arrived shortly. (RT 2602, 2612, 2614-2615.)

Ms. Mitchell testified that she told the police that a man had taken her to the house and raped her. (RT 2558.) Nevertheless, police officer Mark Andrew Marcos, who answered the call, testified that Karen Mitchell did not complain of being raped or choked on the day that she was picked up at the Wilsie home. She also showed no signs of any injuries. (RT 3651-3652.)

Officer Marcos believed that Ms. Mitchell was a drunk homeless person, who probably bedded down for the evening in an abandoned house and needed to be taken to detox to sober up. The police offered to take Ms.

Mitchell to detox or jail; she chose the former, where she stayed for four hours until her release. The police made no report of any attempted murder or rape. Officer Marcos testified that if any woman – including a prostitute – told him that she had been raped or injured, he would have taken her to get an examination and done a full rape investigation. (RT 2575, 3470, 3646-3647, 3649, 3652, 3656.)

Mr. Jones told the police that he picked up Ms. Mitchell downtown and she was extremely drunk. He took her up to the house on Mississippi Street to give her a place to dry out. (RT 2705.)

Ms. Mitchell first made her allegations to the police while she was in custody in 1989, three years after the alleged incident. In exchange for testimony implicating Mr. Jones, Ms. Mitchell sought a sentence reduction for one of her many felonies. (RT 2562-2564, 2588-2589.)

Ms. Mitchell testified that she has given false information to the police innumerable times to avoid longer prison sentences, and that she could not count the number of her convictions for prostitution. (RT 2566-2567, 2590.)

G. Other Evidence

1. Bertha Richmond

At about 8 a.m. on Thursday, October 16, 1986, Bertha Richmond, an African American, was in a telephone booth on El Cajon Boulevard in San Diego looking for the address of a check cashing outlet, when Mr. Jones drove up to her in a blue 280-Z. Ms. Richmond accepted Mr. Jones's offer to take her to the outlet.[16] Ms. Richmond went into the outlet, and was told to come back later because the computers were down. Mr. Jones drove

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[16]Bertha Richmond was not a prostitute. (RT 2637.)

Ms. Richmond to her home, where she accepted his invitation to hang out with him. They next drove to the Wilsie residence at 4659 Mississippi Street. (RT 2635-2640, 4220.)

There they smoked a marijuana joint. Mr. Jones asked to kiss her, but she said no. Ms. Richmond testified that while they were sitting on the sofa watching television, Mr. Jones swung his right arm from behind the sofa and tightly grabbed her by the neck with one hand. He had a kitchen or hunting knife in one hand, and told her that he would kill her if she did not do what he wanted. He then had vaginal and anal intercourse with her on the floor. While she was getting dressed, Mr. Jones went through her purse. Later she discovered that some money was missing from her purse. (RT 2642-2649.)

Mr. Jones then drove Ms. Richmond to Fiesta Island. He told her that he knew where she lived and would kill her family. While they were in the car at Fiesta Island, he forced her to orally copulate him. Next they drove to Old Town, to Golden Hill, and then to 28th Street, in the southeast part of town by a Burger King, where Mr. Jones got some water for Ms. Richmond. Mr. Jones drove the car for a block or two and stopped in an alley, where Ms. Richmond got out of the car and escaped. (RT 2651-2657.) Mr. Jones was convicted in a separate trial for assaulting Ms. Richmond and sentenced to 22 years in prison. (CT 48.)

2. John Reid Meloy

Dr. John Reid Meloy, a forensic psychologist, opined that a sexual homicide is "the intentional killing of another human being during which there is evidence of sexual activity by the perpetrator." (RT 3250, 3258.) He also testified that psychologically, the motivation of a sexual homicide is different than a common homicide. (RT 3259.) He suggested that the

motivation that drives a sexual homicide is the perpetrator's rage or violence toward women, and the woman's suffering under his domination is his "biggest sexual turn on;" he is sexually aroused by the act of violence toward the woman, and usually will get an erection and want to reach orgasm before, during, or after the killing. (RT 3259.)

Penalty Phase

La Vern R. Allen testified that when her brother, Bryan Jones, was 11 and 12 years old, he molested her. She was 10 and 11 years old at the time. Her brother got her to go along with vaginal and oral sex by threatening that he would tell their parents other things that she had done. She believed that her father would hit her if Bryan told on her. She told the jury that her father, who she believed was crazy, had already been molesting her before Bryan. (RT 5392-5397; 5403.)

Ms. Allen considered having sex with Bryan a game. She thought it was no big deal because they were kids. Ms. Allen never told Bryan that what he was doing was wrong because he was just a kid, and she did not understand why she would tell him. She would not even call what they did incest because she did not know it was wrong to have sex with a sibling. Finally, Ms. Allen testified that her father, who told her that she should engage in prostitution because the family needed the money, was the one, not Bryan, who hurt her. Her father was the cause of the psychological trauma that she suffered. (RT 5399, 5405-5412.)

Tracy (Entzminger) Davison testified she met Bryan at the San Diego Job Corps in Imperial Beach in 1981 or 1982 when she was 15 years old and he was 16 or 17. (RT 5419-5420.) After they completed the Job Corps program, they lived together and had a child, Maurice Alexander Jones. (RT 5422-5424.)

The first time Bryan got violent with Ms. Davison was when he saw her kissing another man; Bryan choked her very hard and long until she passed out. She did not sustain any injuries. (RT 5425-5426.) On another occasion, Bryan chipped her tooth. (RT 5439.)

In 1985, Mr. Jones, who weighed 300 pounds and stood 6 feet, 6 inches, and Ms. Davison's husband at the time, David Entzminger, who was in his 50s, weighed 130-140 pounds, and was 5 feet, 7 inches tall, had a fist fight on the street. Mr. Entzminger got in Mr. Jones's face and in a nasty tone said, "I got your woman and your child." According to Ms. Davison, that started it all. Mr. Jones took Mr. Entzminger and threw him against the car. Mr. Jones then picked him up by the neck. (RT 5426-5428, 5451.)

Between September 1985 and July 1986, while working as a prostitute, Ms. Davison, who had been diagnosed as a schizophrenic, saw Mr. Jones with a prostitute about a block from the Jones apartment. Ms. Davison heard him tell the woman, "Bitch, get my money." His tone was very hostile and aggressive. Although Ms. Davison did not know the woman's name, she identified her from a picture as Trina Carpenter. (RT 5440-5441, 5443, 5462.)

Mr. Jones cared for his son Maurice quite a bit when Ms. Davison and he lived together. She would get up late and Mr. Jones would bathe their son and take care of him. (RT 5458, 5467.) According to Ms. Davison, Mr. Jones threw some keys at their son when he was a year old, and blackened and cut his eye. (RT 5445-5446.) After Ms. Davison was arrested for assault with a deadly weapon, she gave up custody of Maurice to Ann Jones, who also has custody of Ms. Davison's other son Malcom, whose father is David Entzminger. (RT 5525-5536, 5459.) Ms. Davison would cuss at the defendant because he would say negative things about

her. He responded by hitting her. (RT 5466.)

Aida Lopez, a prostitute and heavy heroin user with a felony record, testified that on the evening of February 13, 1986, Bryan Jones choked and raped her and committed forced oral copulation. He also threatened to kill her if she went to the police. (RT 5486-5487, 5491, 5493-5495, 5501.) Ms. Lopez testified that although she told a police officer that she had been raped, she did not press charges. (RT 5496-5497, 5503-5504, 5507.)

Bertha Richmond testified that after Mr. Jones attacked her, police officers took her to the hospital, where she was tested for venereal disease and pregnancy. She did not hear that the results were negative until her case went to trial. (RT 5511-5512.)

When she told her boyfriend about the attack, he started to treat her differently and did not show any compassion. After Ms. Richmond told him that she did not feel like having sex, he told her that she deserved it. (RT 5513.)

The attack also had an impact on her relationship with her son. She started secluding herself in her room and drinking a lot; she sent her son to her sister's house so she would not be bothered by him. She used to drink occasionally before the attack. After the incident, she started drinking every day after work. She would take anything that she could find to make her numb including cocaine and methamphetamine. (RT 5513-5514.) Sometimes she would even drink and take drugs them before she went to work. It would make her numb and she would not be scared. She could do whatever she wanted to do and then just take care of her business.

At the time of the incident, Ms. Richmond worked at the naval hospital in the cafeteria. She eventually lost that job. She sought help for what happened and found a therapist through the victim/witness program.

Most of the time she had been drinking or using a drug when she went to the therapist. She told the therapist what had happened to her, but she did not tell her about her home life. She lied to her therapist because she was a single parent taking care of her son by herself, and she did not want anybody to know that she was weak. (RT 5514-5515.)

After she lost her job, she was a homemaker. She did other things to make money. She started to smoke more cocaine and to drink more. This enabled her to become a prostitute on the streets and make some money so she could buy more drugs and alcohol. (RT 5515.)

Ms. Richmond quit seeing the therapist because she was too ashamed of what she was doing. At some point after that, she made a serious effort to turn her life around. She went to a 14-day detox and then to an outpatient program, where she went to classes and meetings six days a week. (RT 5516.)

Ms. Richmond went back to the same counselor and told her that she was sorry for lying to her and not telling her how she really felt. She quit taking drugs and drinking alcohol. She became a security guard for the shipyards. (RT 5517.) Her son, however, is not with her. He stays on the streets. (RT 5518.)

William Lee Frew, a San Diego police officer, testified that ten years earlier, Bryan Jones was walking down a street when officer Frew and his partner stopped him, patted him down for weapons, and found a loaded handgun. Mr. Jones cooperated with the officers, waived his *Miranda* rights, and told them that he carried the gun for protection after someone had recently pulled a knife on him. (RT 5842-5845.)

Linda Tate, Tracy Davison's older sister, counseled Tracy on abortion as an alternative to having a child with Bryan Jones. Tracy chose

to have the baby. (RT 5522-5526.) Mr. Jones was a loving father, and always played with Maurice. Tracy separated from Mr. Jones when Maurice was about two years old, and went to live with Ms. Tate. (RT 5527.) Tracy did not accuse Bryan Jones at that time of any abuse. Ms. Tate never saw Bryan abuse Tracy. During the time that Tracy lived with her sister, Bryan Jones came over to visit his son. (RT 5528.)

Tracy hooked up with David Entzminger, who was mean, cruel, and just nasty. He treated Tracy terribly. He would gloat that "I have Tracy and you can't do anything about it. I can make her do whatever I want her to and you can't do anything. If you hit me, I will have you arrested." He flaunted what he did to Tracy. (RT 5529.)

David Entzminger told Mr. Jones's son, "Maurice, get me this. Maurice, do that for me." Maurice was three or four years old and afraid of David Entzminger. Although she did not see how it happened, Maurice had a black eye when he was with David Entzminger. Ms. Tate was not aware of any incident where Bryan abused or injured Maurice. Tracy could not prevent David Entzminger from hurting her or Maurice. At one point Ms. Tate refused to let David Entzminger stay at her house. (RT 5530, 5537.) Bryan had reason to be concerned about Maurice being with David Entzminger. (RT 5552.) Tracy would lie to benefit David Entzminger. (RT 5533.)

Ms. Tate only recently heard that Mr. Jones had choked Tracy. Tracy had brought a man over to the apartment to make Bryan jealous. Bryan walked in on her kissing the man and Bryan got mad. (RT 5533-5534.) Tracy said that Bryan chipped her tooth, though Ms. Tate never saw it. (RT 5548, 5550.) When Tracy arrived back in San Diego from Alabama in 1993, she was missing a tooth, which she said someone had knocked out.

(RT 5553.)

Ann Jones testified that she has three children, Bryan, La Vern, and Dina. Bryan is a year older than La Vern, who is older than Dina. Bryan was born in 1962 when they were living at Camp Pendeleton, where they remained until 1963. At that time, Bryan's father was a sergeant in the Marine Corps. (RT 5554.)

In 1963, the family moved to Elmington, Tennessee. Bryan's father was sent to Vietnam in 1965, while the rest of the family returned home to San Diego where Bryan's maternal grandparents resided. Bryan's father returned from Vietnam in late 1966, and the family moved to Barstow when Bryan was four. (RT 5555.)

The Jones family had a good life in Barstow, living on the Marine base. Bryan started kindergarten and his mother taught "hard to handle children" at a school on the base. Eventually, the family moved off the base and bought a home in Monterra, an area in Barstow, in about 1969. (RT 5556, 5558, 5566.) The family continued to have a good life. They put in a pool at their home, went camping, and took vacations, including the Grand Canyon. They went to different amusement parks and art galleries because Bryan's parents wanted to expose their children to many things. They drove to Los Angeles and San Diego. They often visited Bryan's grandparents in San Diego. They lived in a safe area and the children went to a good school. (RT 5557, 5618.)

In the early 1970s, Bryan's father was transferred to Okinawa, where he was stationed for 13 months. When he returned home, he was "just strange," according to Ms. Jones. He did not allow his wife to talk to him in the house. (RT 5557.) He became very suspicious of her, who her friends were, what she did, whom she talked to, and what they said to each

other. (RT 5558.)

Bryan's father was pretty much the disciplinarian in the family. He spanked the children when they were young, although not very often. (RT 5558.)

La Vern was very bright, and was always a pretty exceptional student who did very well in school. Dina was also very bright. Although Bryan was very bright, too, he seemed bored with school. He liked school, but did not seem to want to put forth any type of effort. His grades were not as good as his sisters', and not what his parents thought they should have been. (RT 5558-5559.)

There came a time when Bryan's father was abusive towards the children beyond spanking. On one occasion Ann Jones came home from work to find her husband beating La Vern, who was probably about 12 years old. Bryan and Dina were huddled in the living room in the dark, afraid to talk. Mrs. Jones asked them where La Vern was, but they would not answer. She found her husband in the den beating La Vern, whom he had stripped naked. Mr. Jones stopped beating his daughter when her mother threatened to shoot him. (RT 5559-5560.)

Another time Bryan's father ordered Bryan to shoot the family's rabbit, who suffered from a deformity. Bryan became hysterical and began to cry. His father told him he had to be strong, and that he could not be a crybaby. Bryan would not shoot the rabbit and ran away. (RT 5561.)

On another occasion, Mr. Jones tried to kill Bryan's mother, and Bryan intervened. Mr. Jones became a serious gambler and one night tried to get some money from his wife. She refused to give him "a dime." Mr. Jones jumped on top of Bryan's mother, put his hands around her throat, and began choking her. Bryan came in, jumped on his father's back, and

tried to pull him off his mother. Bryan fought with his father, which was unusual because Bryan was not a fighter. He was very calm and very peaceful. (RT 5562-5563.)

Once a boy in the neighborhood punched Bryan in the mouth and busted his lip. Bryan cried and went home, his lip swollen and bloody. Bryan's father responded by forcing Bryan to fight the other boy. (RT 5564.)

Unbeknownst to his parents, Bryan took a three-day trip with family friends. When he returned home, Mr. Jones beat Bryan, breaking his arm or wrist. Bryan reacted by growing a little quieter, though he did not show that he had lost respect for his father. (RT 5565.)

When Bryan was 13, he got involved in some burglaries with some friends on his basketball team. Bryan was caught and landed in juvenile hall for two weeks or so. (RT 5566, 5622, 5625.) When he was 15, he was involved in about a half dozen burglaries at a trailer park. (RT 5624-5625.)

Bryan played basketball, football, and drums in the school band. (RT 5569-5570.) According to his mother, his grades, however, were a "joke." (RT 5571.) When he was about 17, Bryan fathered a daughter, who was put up for adoption. (RT 5626-5627.)

Bryan's father continued to gamble to the point where money was very tight for the Jones family. Mr. Jones went through the savings first, the savings bonds, and the checking accounts, whatever he could get his hands on. The family went from plenty to nothing. Ms. Jones explained the situation to her children, and they understood it. Ms. Jones relied on her mother for money for food and the house payment. (RT 5567.)

This happened during a time when Bryan got into trouble with the law. Ms. Jones believed that Bryan was acting out because he was hurt by

the change in his father. Mr. Jones had been a very good father, who cared about his children a great deal. He did not drink or curse. But then he started to gamble and became someone else. When he came back from Okinawa, his children said, "That looks like our father, but it's not our father." (RT 5568.)

Ms. Jones grew to hate her husband, and moved back to San Diego. Mr. Jones went with her and the children after he swore he would be different and asked for another chance. Bryan was 17 years old and a senior in high school when the family returned to San Diego. (RT 5569.)

Bryan was then about 5 feet, 8 inches tall and heavy, about 190 pounds. (RT 5570.)

The Jones family arrived in San Diego in September. Ms. Jones and her children moved out the first of January because she learned that her husband had been molesting La Vern. La Vern had run away from home and then called her mother. Although Ms. Jones begged La Vern to tell her where she was, La Vern refused. Bryan then pleaded with La Vern to let them say goodbye to her before she left. La Vern relented. Fearful that his mother would kill herself, Bryan drove her downtown to see La Vern. Bryan parked the car, got out, and was gone for 30-40 minutes before returning with La Vern. Bryan told his mother, "you don't want to know." La Vern would not tell her. The three returned home, Ms. Jones still asking her daughter. Either Bryan or La Vern finally told her the truth. The 20-year marriage was over. (RT 5571- 5574.)

Bryan played football at Montgomery High School in San Diego. He did not graduate, but received a diploma and later went to continuation school and obtained his G.E.D. (RT 5575.) He ranked 422nd out of a class of 426. (RT 5619.) Bryan went into the Job Corps and became involved

with Tracy Davison. (RT 5576.)

After Maurice was born, Bryan and Tracy lived with Ann Jones, and Bryan changed. He started trying to make sure that he worked because he had a son to take care of. Bryan was a good father to Maurice. Bryan would get up at 4:30 a.m., bathe his son, and then go to work. Bryan was very proud of Maurice. He never abused or hit his son. (RT 5577-5578.) Although Bryan was trained as a welder through Job Corps, he was unable to find a job. (RT 5636-5637.)

Ann Jones paid for the food and housing because Bryan did not have a job and Tracy was on welfare. (RT 5638.) Eventually though, Ann moved out of the apartment because she felt that she was not helping Bryan, who knew that he could always rely on her. (RT 5640.) Bryan did not help his mother move because he was mad at her for letting him down. (RT 5641-5642.) Bryan threw an antique dresser in anger. (RT 5642.)

Ann Jones once witnessed Tracy beating one-year old Maurice with a belt. (RT 5579.) She described more beatings by Tracy and a cut inflicted on the boy by David Entzminger. After Tracy and Bryan separated, Bryan made efforts to find his son. (RT 5580.) When Ann Jones reported Tracy and David Entzminger to the child protective agency, David called her and said that he was going to make her regret what she did. Tracy and David disappeared with Maurice. (RT 5582.) Ann lost track of Maurice for three years, but got him back when he was five and Bryan was in prison. (RT 5581.)

Bryan pushed for his mother to obtain custody of Maurice. While in prison, Bryan signed papers agreeing to release Maurice to her custody. (RT 5582.) Ann Jones also took custody of Tracy's younger son, Malcom. (RT 5586.)

After Bryan went to prison, he tried to reestablish a relationship with Maurice. (RT 5586.) He called Maurice often and never forgot to send him a birthday card. Bryan had some belts made for Maurice and Malcolm. (RT 5587.)

When Bryan called his mother, Maurice and Malcolm would try to get to the phone first. To Malcom, Bryan is his father too. Malcom talks to Bryan whenever he calls, and tells him about school and what he is doing. Ann Jones has custody of a third child, Mariah, who calls Bryan, "Daddy." (RT 5588-5589, 5604.) The children visit Bryan along with Mrs. Jones. Bryan helps his mother when there is trouble with the children. For example, when Maurice's mother returned to town, he ran away out of fear of his mother. Bryan has spoken to his son to reassure him that he will be safe with his grandmother, and that Maurice's mother is not going to hurt Maurice. (RT 5590-5591, 5606.) Bryan counseled Maurice in his studies and talked to him about the importance of getting an education. Maurice responded to the advice and encouragement from his father by making a greater effort in school and making better grades. Maurice really listened to his father. According to Ann Jones, if Bryan was removed from the children's lives, they would miss him. Visiting Bryan has also helped the children. (RT 5591-5592, 5607-5608.)

Ann Jones testified that she and her son are very close. She tries not to think what effect his execution would have on her. She does not appreciate the alternative either, but at least if Bryan was alive she could talk to him and that would mean a great deal to her. Bryan is her only son. Her biggest nightmare is the fear of what she would say to Maurice if Bryan was executed. (RT 5608-5609.)

When Bryan Jones was in prison following the Bertha Richmond

conviction, he married a woman named Maureen ("Maggie"), whom he knew before prison. They divorced just before the trial. (RT 5639, 5644-5645].)

Bryan's son, 11-year-old Maurice Jones, testified that his father was very important to him. Bryan Jones encouraged Maurice in general and specifically in his schoolwork. He phoned Maurice and wrote him letters. (RT 5650.) He told Maurice to study hard in school, and was very proud of him when he got good grades. Mr. Jones tried to get his son to practice more and try harder in his activities including band. Maurice liked when his father encouraged him. Maurice loves his father, and likes hearing from him. (RT 5651-5652.) Maurice was on crutches because he had a bone that disconnected from the joint. His father was concerned and told Maurice to stay off his leg so that it could heal. Maurice was doing very well in school. (RT 5653.)

Maurice told the jury that it would be horrible and he would be very sad if his father was not there to talk to him. Bryan Jones is also important to Malcolm and Mariah, and they love him a lot, too. (RT 5654.)

Maurice talked to his father about sports and his playing football. Mr. Jones has been worried about Maurice getting injured and advised Maurice to be careful. (RT 5657.)

Adam Chavez Ybarra counseled Bryan Jones at the Job Corps. (RT 5658.) Mr. Ybarra evaluated Mr. Jones and concluded that he was doing an excellent job. (RT 5660.) Bryan Jones did very well in the program and was good in the dorm. He progressed through the whole welding program and completed it. (RT 5660.) When he was at the Job Corps, there was racial tension that resulted in a confrontation between African Americans and Mexican Americans. A "peace committee" was formed. Bryan Jones

was chosen as a member because he could keep the peace and be counted on to quell things and keep his cool. (RT 5661-5663.) Mr. Ybarra witnessed situations where Bryan Jones kept people calm. Once the committee was formed, there was never another racial problem. Mr. Jones was never a problem in the structured setting of the Job Corps. (RT 5664.)

William F. Jacobsen was in jail for the first time in December 1993 and met Bryan Jones, who was the tank captain and whose job was to keep things in line. (RT 5676.) Mr. Jacobsen saw stabbings and fights in the jail, and was very scared. Mr. Jones put him at ease by stating in front of the other inmates that Mr. Jacobsen had nothing to worry about and Mr. Jones would look out for him. The inmates respected Mr. Jones. (RT 5674-5675.) There was no racial tension in Mr. Jones's tank, which had about 30 inmates. Mr. Jones treated non-African Americans very well. Mr. Jones's tank was like a big family. (RT 5677, 5683.) Mr. Jones seemed to relate to the other inmates the same way he related to Mr. Jacobsen. (RT 5679.)

Michael Coy taught Bryan Jones welding at the Job Corps five days a week, eight hours a day for about five months. (RT 5688.) Once he witnessed Mr. Jones break up a bloody confrontation between two students, one of whom had a knife. (RT 5689-5690.) Mr. Coy made Mr. Jones a superintendent, the highest student position in Mr. Coy's class. He chose Mr. Jones because he was impressed with the way Mr. Jones handled the confrontation. The other students – regardless of race, age, or gender – listened to Bryan Jones and respected him, and Mr. Jones respected them. (RT 5692.) Mr. Jones was a natural leader, who was even-tempered and treated everyone equally. Mr. Jones was an excellent student, never got in trouble, and was completely trustworthy. (RT 5693.)

Scott Anthony Walker, a Department of Corrections employee, was the supervisor of the sign shop at Folsom State Prison in 1988 when Bryan Jones came to work for him. Mr. Walker testified that Mr. Jones was self-motivated and did more than the job required. Mr. Walker trusted Mr. Jones to do his job and make sure that others did theirs. (RT 5702, 5704.) Mr. Jones had a sincere concern for his son, Maurice. He seemed most interested in talking to his son and trying to help him out to go down the right road and do the right thing. (RT 5705.) It was very important to Bryan Jones to help his son be a better person. (RT 5706.) In supervising Mr. Jones, Mr. Walker had no problems with him. (RT 5709-5710.) He saw Mr. Jones counsel some of the younger inmates about the reality of prison life and the consequences of doing things they might not have thought about. (RT 5710.) Mr. Jones had reached the highest level of an inmate, thereby showing the younger inmates what could be accomplished by his example. (RT 5711.) Mr. Walker would want Mr. Jones back as a worker because he did more than his job, he helped others, the other inmates respected him, and he was a calming force on the younger inmates. (RT 5712.)

Jerome Wright, the industry sign shop supervisor at Folsom State Prison, testified that Bryan Jones worked for him for about six months. As a worker, Mr. Jones was very attentive to his job and a quick learner; he had a good work ethic and good attendance. Mr. Jones took orders, got along well with the rest of the crew, and tried to do a good job while he was there. (RT 5728-5730.) Mr. Jones stood on his own and was not part of any gang or clique. (RT 5731.) His demeanor was fairly calming in the work environment. If given the opportunity, Mr. Wright would certainly want Mr. Jones to work for him again. (RT 5732.) Mr. Wright consistently gave

Mr. Jones above average ratings for his job performance. (RT 5737.)

Mark Buscaglia, a Folsom Prison employee in the vocational shops, was one of Bryan Jones's bosses on a landscaping crew for seven months. Mr. Jones worked six hours a day, five days a week, and was a very good worker. (RT 5739-5740.) He was self-motivated and needed little supervision. Mr. Jones was one of Mr. Buscaglia's lead men, and was someone whom Mr. Buscaglia trusted. One of Mr. Jones's responsibilities was to account for the tools. (RT 5741.) The other crew members respected Mr. Jones and followed him. (RT 5742.) Mr. Jones set an example for the other inmates. (RT 5743.) If he had the chance, Mr. Buscaglia would want Mr. Jones back on his crew. (RT 5744.)

Warren Baxter, a correction officer at Folsom Prison, testified that he was Bryan Jones's supervisor on a landscaping crew that built concrete walls. Mr. Baxter found Mr. Jones to be an exceptional worker, who did outstanding work with a positive attitude. (RT 5753-5755, 5759.) Mr. Jones was a lead man, was dependable, and did not need supervision. On days when Mr. Baxter could not be there to supervise, he would tell Mr. Jones what needed to be accomplished and by the end of the day everything would be done. Mr. Baxter chose Mr. Jones as a lead man in part because the other crew members respected Mr. Jones. (RT 5756, 5758.) He treated the other inmates with respect as well. (RT 5761.) Mr. Baxter trusted Mr. Jones and would want him to work for him again. (RT 5762.)

Curtis Allen Adams was incarcerated with Bryan Jones in the San Diego County jail. (RT 5768-5769.) Mr. Jones was the tank captain and offered Mr. Adams toiletries on Mr. Adams' arrival. Mr. Jones kept the tank in good condition, like somebody's living room. He treated the other inmates with respect, regardless of race or ethnicity. Although he is a large

man, he did not use his size to intimidate. He was a "teddy bear." (RT 5770-5771.) There were inmates of different races in Mr. Jones's tank, and everyone was considered equal. (RT 5772.)

Vertis Elmore was a correctional counselor at Corcoran Prison, where he knew Bryan Jones. Lieutenant Elmore testified that although Mr. Jones was in a fight while he was at Folsom, his security classification was reduced from maximum to medium, and he was transferred from Folsom to Corcoran. Folsom obviously saw Mr. Jones as a "positive programmer," who could be trusted to go to a lower level institution. (RT 5776-5777, 5815.) Mr. Jones adjusted well at Corcoran, getting along with both the staff and other inmates. Lieutenant Elmore used Mr. Jones to talk to the younger inmates about their incarceration and how to stay out of prison. Mr. Jones set a good example for the younger inmates. (RT 5784-5785.)

John Wells, a vocational machine shop instructor at Corcoran Prison, testified that Bryan Jones was in his program for five months. (RT 5800.) Mr. Jones did an excellent job in the program and displayed a good work ethic. (RT 5801.) Mr. Jones helped the younger students. He was a positive influence on the other students. (RT 5805.)

David Dwayne Hollie, a San Diego County deputy sheriff, testified that he was assigned to the county jail where Bryan Jones was a tank trustee. (RT 5833-5834.) On one occasion, an inmate had a seizure. The inmate refused to lie on a gurney. He was confused and probably still convulsing. Mr. Jones took over, helped to calm the inmate down, and got him on the gurney. The other inmates were upset because they apparently believed the inmate was dying and officials were responding too slowly. Mr. Jones helped the other inmates calm down and quelled the situation. (RT 5835, 5840.)

ARGUMENT

1.

THE JUDGMENT MUST BE REVERSED BECAUSE THE COURT ERRED IN FAILING TO FIND A PRIMA FACIE *BATSON/WHEELER* VIOLATION.

A. Introduction

After finding three prima facie cases of discrimination by the prosecution against African American women, the trial court refused to find a fourth when the prosecution struck yet another African American women, Nilda Springfield, and Mr. Jones objected under *People v. Wheeler* (1978) 22 Cal.3d 258.[17] The court erred. Accordingly, the judgment must be reversed. (*People v. Snow* (1987) 44 Cal.3d 216, 227.)

B. Proceedings Below

When the prosecution used a peremptory challenge to strike a fourth African American woman, Nilda Springfield, Mr. Jones moved to dismiss the jury panel under *Wheeler*. (RT 1520, 1640, 1669, 1746, 1989.) Mr. Jones asserted that as a black female, Ms. Springfield was a member of "two groups that are cognizable by the case law." (RT 1989.) Mr. Jones argued that Ms. Springfield's answers regarding the death penalty were quite clear, and that she could impose it. He further pointed out that although Ms. Springfield's husband was incarcerated, her sons were involved in law enforcement as correctional officers. (RT 1991.) He objected to the striking of Ms. Springfield based on her background as a

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[17]Although Mr. Jones did not mention *Batson v. Kentucky* (1986) 476 U.S. 79 in making his *Wheeler* motion, this Court will consider a *Batson* claim on the merits where a party cites only *Wheeler*. (*People v. Yeoman* (2003) 31 Cal.4th 93, 211.)

care-giver given that the persons whom she helped were African Americans. He also noted that the prosecution accepted other care-givers as jurors. (RT 1992.)

By the time Ms. Springfield was excused, the prosecution had exercised 16 peremptory challenges against 12 women and 4 men, or against three times as many women as men (RT 1519-1520, 1639-1640, 1746-1747, 1856-1857, 1967), even though the number of men and women eligible as jurors (those not excused for cause, by stipulation or by the court sua sponte) were about equal, 27 women and 26 men (RT 1303-1979). Thus, although 51 percent (27/53) of the eligible jurors were women, the prosecution used 75 percent (12/16) of its peremptory challenges against women.

Ten African Americans were eligible to serve as jurors in this case. (RT 1948, CT 7707 [Williams]; RT 1520, CT 8619 [Jackson]; RT 1504, CT 7683 [Harper]; RT 1967, CT 8450 [Springfield]; RT 1961, CT 8739 [Battle]; RT 1624, CT 7443 [Richardson]; RT 1640, CT 8086 [Gatson]; RT 1746, CT 9244 [Young]; RT 1857, CT 8206 [Holden]; RT 1953, CT 7731 [Pires].) The prosecution struck 5 African Americans, or 50 percent of them. (RT 1520, 1640, 1746, 1857, 1967.) In contrast, at the time Ms. Springfield was removed, 41 nonminority whites had been eligible to serve (RT 1303-1967), yet the prosecutor struck just ten or 24 percent of them. (RT 1519, 1520, 1639, 1651, 1746, 1747, 1856, 1857.)[18] Thus, the prosecution struck African Americans at twice the rate as nonminority whites.

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[18]The prosecutor also struck Rosemary Enriquez (RT 1519), who wrote on her juror questionnaire that she was of "the Mexican race." (CT 8043.)

The prosecution's 16 peremptory challenges included 5 African Americans. (RT 1520, 1640, 1746, 1857, 1967.) African Americans constituted 19 percent (10/53) of the eligible prospective jurors, yet the prosecution used 31 percent (5/16) of its peremptory challenges against African Americans. (RT 1993.) In contrast nonminority whites were 77 percent (41/53) of the eligible jurors, but the prosecutor used just 62 percent (10/16) of his peremptory challenges against them.

Five African American women – Jackson, Harper, Springfield, Gatson, and Young – were eligible to serve as jurors. The prosecution struck four or 80 percent of them. (RT 1520, 1640, 1746, 1967, 1992.) And although African American women were just 9 percent (5/53) of the eligible jurors, the prosecution used 25 percent (4/16) of its peremptory challenges to exclude them from the jury.

Although the trial court previously found that Mr. Jones had established prima facie cases of discrimination by the prosecution against three other African American women, the court declined to find a prima facie case with respect to Ms. Springfield. (RT 1642, 1789, 1995.) The court stated that because the prosecution was willing to accept the jury when it included four African Americans – three men and one woman – no prima facie case of discrimination existed against Ms. Springfield, an African American woman. (RT 1993 [The court: "So there were four and that was pretty good, and given what we had as total choices of the numbers in the audience. That was a good settlement. And so I cannot say there is a prima facie case right now. There are too many left."].)

The trial court went on to note that "looking at Ms. Springfield, she's got very, I guess, black skin, but is she black? I do not know." (RT 1993.) After defense counsel stated that Ms. Springfield was Puerto Rican, the

prosecutor asserted:

> If you look at her questionnaire, she was born in Puerto Rico. She speaks Spanish as her first language. She spoke English with a Spanish accent here in court. I thought her nose and facial features were Hispanic, not black, although her skin was dark. And the questionnaire she says *she likes to think of herself as black*, not that she is black. I think she's Hispanic.

(RT 1993 [italics added].) The jury questionnaire referred to by the prosecutor asked, "How would you describe your feelings toward African-Americans?" Ms. Springfield answered, "I consider myself African-American." (CT 8450.) Ms. Springfield also responded to the question, "Do you feel that *race* is a barrier to success in our society?" as follows: "I myself feel that there [are] persons in every aspect in this society that will always look at my *color* before they hear me speak." (CT 8456 [italics added].)

The court further remarked that because Ms. Springfield was a "care-giver," was married to a convicted murderer, and "came across rather weakly toward the penalty," it was "very evident" that Ms. Springfield would have been subject to a peremptory challenge by the prosecution, and "it would not have mattered what color" she was. (RT 1994.) Although the court invited the prosecutor to put on the record ***his*** reasons for striking Ms. Springfield, the prosecutor declined. (RT 1995.) On the other hand, when the prosecutor struck another African American and the court found no prima facie case, the court asked for an explanation, and the prosecutor offered one. (*Ibid.*)

C. Law

The discriminatory use of a peremptory challenge to remove a prospective juror based on race or sex violates both the United States and

California Constitutions. (*Batson v. Kentucky* (1986) 476 U.S. 79, 91 [under the Equal Protection Clause, it is "impermissible for a prosecutor to use his challenges to exclude blacks from the jury 'for reasons wholly unrelated to the outcome of the particular case on trial'"]; *J.E.B. v. Alabama* (1994) 511 U.S. 127, 129 [exercise of peremptory challenges based on gender violates equal protection]; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277 ["the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community"]; U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16.) "[T]hat African American women comprise a cognizable class for *Wheeler* purposes is clear." (*People v. Boyette* (2002) 29 Cal.4th 381, 422; cf. *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812 ["neither the Supreme Court nor the Ninth Circuit has recognized that the combination of race and gender, such as 'black males,' may establish a cognizable group for *Batson* purposes"].) The party objecting to the exclusion of jurors need not be a member of the group excluded to raise the objection. (*Powers v. Ohio* (1991) 499 U.S. 400, 415 ["a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race"]; *People v. Wheeler*, *supra*, 22 Cal.3d at 281 ["the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule"].)

To bring a successful *Batson* challenge, a defendant must first establish a prima facie case of discrimination by the prosecutor in striking the prospective jurors. "That is, the defendant must demonstrate that the facts and circumstances of the case 'raise an inference' that the prosecution has excluded venire members from the petit jury on account of their race"

(*Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1195 [citing *Batson*, *supra*, 476 U.S. at p. 96].)

To prevail on a *Wheeler* motion, a party "must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler*, *supra*, 22 Cal.3d at p. 280 [fn. omitted].)

Once the defendant has made out a prima facie case of impermissible discrimination (step one), the burden of production shifts to the prosecutor to come forward with a neutral explanation (step two). If a neutral explanation is tendered, the trial court must then decide (step three) whether the defendant has proved intentional discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 767; *People v. Silva* (2001) 25 Cal.4th 345, 384.)

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

On appellate review, courts may look at various factors to determine whether a prima facie case of discrimination was established: (1) whether

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

Thus, courts have considered whether the percentage of African Americans excluded from the jury was significantly higher than that for whites (*Miller-El v. Cockrell* (2003) 537 U.S. 322 [123 S.Ct. 1029, 1036]), and whether the percentage of peremptory challenges used against African Americans was significantly higher than their percentage in the venire (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813). Moreover, disparate questioning of African American venire members to develop grounds for peremptory challenges may show discriminatory intent. (*People v. Jones* (2003) 30 Cal.4th 1084, 1105 [citing *Miller-El*].) And a party's perfunctory questioning of an excused juror who was a member of a cognizable group, together with peremptory challenges to all or most of the members of that group, may also be used to make a prima facie showing. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1068.)

D. Standard of Review

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

> [W]hen a trial court denies a *Wheeler* motion without

> finding a prima facie case of group bias the reviewing court considers the entire record of voir dire. [Citations omitted.] As with other findings of fact, we examine the record for evidence to support the trial court's ruling. Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with "considerable deference" on appeal. [Citations omitted.] If the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question, we affirm.

(*People v. Howard* (1992) 1 Cal.4th 1132, 1155.) But, as this Court has recognized, "deference is not abdication...." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1325 [quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1212]; see also *Miller-El*, *supra*, 537 U.S. 322 [123 S.Ct. at p. 1041] ["deference does not imply abandonment or abdication of judicial review"].)

Nevertheless, as explained below, this Court should *not* show deference to the trial court's refusal to find a prima facie case of discrimination in this case for five distinct reasons: (1) the trial court acknowledged that it did not clearly understand what constitutes a prima facie case of discrimination (RT 1642); (2) at the time of trial, there was confusion among California courts as to the appropriate test to apply in evaluating a prima facie claim; (3) assuming that the trial court required Mr. Jones to prove a "strong likelihood" of discrimination by the prosecutor, there is no reason to believe that the court interpreted "strong likelihood" to mean "more likely than not;" (4) an appellate court is in the same position as a trial court to determine whether an inference of discrimination may be drawn; and (5) scouring the record and finding a hypothetical reason (not necessarily the prosecutor's real reason) to support the prosecutor's use of a peremptory challenge would violate the guarantee of the Equal Protection Clause that the State will not exclude members of Mr. Jones's race from the

jury on account of race and also undermine the United States Supreme Court's "unceasing efforts to eradicate racial discrimination" in the jury selection process. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 85.) Accordingly, this Court should review the issue de novo and conclude that Mr. Jones established a prima facie case of discrimination by the prosecutor against Nilda Springfield.

1. This Court Should Not Defer to the Trial Court's Prima Facie Ruling in Light of the Lower Court's Admitted Lack of Clarity Regarding the Issue.

This Court will defer to the trial court's ruling on a *Wheeler* motion at step three *only* if the lower court has made a "sincere and reasoned attempt to evaluate the prosecutor's explanation," provided at step two. (*People v. Williams* (1997) 16 Cal.4th 153, 189; *People v. Fuentes* (1991) 54 Cal.3d 707, 718 ["Notwithstanding the deference we give to a trial court's determinations of credibility and sincerity, we can only do so when the court has clearly expressed its findings and rulings and the bases therefor"].) Similarly, the Court should only show deference to the trial court at step one if the court's ruling was based on a sincere and reasoned attempt to evaluate whether a prima facie case of discrimination had been made.

Here, the trial court candidly admitted that it was unclear as to what constituted a prima facie case of discrimination. The court stated:

> This is not an issue that is very clear to me. I do not feel that the case law gives a lot of help on this regard with respect to when that prima facie case has been made. And I'm going to just be very frank. I think that the trial court does not have enough guidance to be real firm.

(RT 1642.) This was the extent of the trial court's disclosure regarding its

unclear understanding of a prima facie case. Given the lower court's admitted state of confusion, the court's ruling was not based on a reasoned understanding of the controlling law. (*People v. Williams*, *supra*, 16 Cal.4th 153, 189.) Thus, this Court should decide the issue de novo and not give any deference to the trial court's prima facie ruling.

2. This Court Should Not Defer to the Trial Court's Prima Facie Ruling Because the Lower Court Applied an Incorrect Legal Standard.

As demonstrated, the trial court was confused about the test for finding a prima facie case of discrimination. In fact the lower court pointed to a specific source of its confusion – the relevant "case law." (RT 1642.) The court's confusion, though understandable in light of the conflicting case law that existed when Mr. Jones's trial began on February 8, 1994 (CT 7215), led it to apply an incorrect legal standard, contrary to *Batson*, that should not be deferred to by this Court. (*Fernandez v. Roe* (9th Cir.2002) 286 F.3d 1073, 1077.)

In the 1978 *Wheeler* opinion, this Court initially stated that to establish a prima facie case of discrimination, the opponent of a peremptory challenge must show "a strong likelihood" that the prospective juror was struck because of group association rather than any specific bias on the part of the prospective juror. (*Wheeler*, *supra*, 22 Cal.3d at p. 280.) On the next page, however, the *Wheeler* opinion provided that the trial "court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone." (*Id* at p. 281 [italics added].) The *Wheeler* opinion did not explain how the two different phrases were to be reconciled. In fact it was not until six years after Mr. Jones's trial that this Court clarified the apparent contradiction by spelling

out that "a 'strong likelihood' means a 'reasonable inference.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1188, fn.7; *People v. Ayala* (2000) 24 Cal.4th 243, 260 [the opponent of the strike must show a "strong likelihood" or "reasonable inference" that the person was challenged because of group association].)

The inclusion of apparently inconsistent standards to describe the prima facie burden gave rise to confusion about whether *Wheeler* required a "strong likelihood" or merely a "reasonable inference" of discrimination at the prima facie stage. In *People v. Fuller* (1982) 136 Cal.App.3d 403, the appellate court observed that the inclusion of the two phrases – strong likelihood and reasonable inference – in *Wheeler* could be construed to "create different options for trial judges." (*Id.* at p. 423, fn.25.) Nevertheless, the Court concluded that "a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias." (*Id.* at p. 423.)[19]

The trial court in this case admitted that the *Wheeler* issue was "not ... very clear" and that the "case law" did not provide "enough guidance" as to when a prima facie case is established. (RT 1642.) One would expect that when the court mentioned the "case law," it obviously meant *Wheeler* itself, but it likely also meant recent California Supreme Court cases. An examination of this Court's ten *Wheeler* opinions immediately preceding the trial in this case reveals that in applying *Wheeler*, six opinions mentioned "strong likelihood," but failed to mention an "inference" at all. (*People v. Garceau* (1993) 6 Cal.4th 140, 171; *People v. Montiel* (1993) 5

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[19]Four years after *Fuller*, the United States Supreme Court confirmed in *Batson* that the prima facie burden case was to "raise an inference"of discrimination. (*Batson v. Kentucky*, *supra*, 476 U.S. 79, 96.)

Cal.4th 877, 909; *People v. Sims* (1993) 5 Cal.4th 405, 428; *People v. Fuentes* (1991) 54 Cal.3d 707, 714; *People v. Stankewitz* (1990) 51 Cal.3d 72, 105; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092.) Two decisions mentioned neither. (*People v. Mason* (1991) 52 Cal.3d 909, 937; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215-1216.)

People v. Sanders (1990) 51 Cal.3d 471 and *People v. Howard* (1992) 1 Cal.4th 1132 referred to both strong likelihood and an inference, but only added to the confusion. In *Sanders*, this Court concluded that even though the prosecution's "removal of all members of a certain group may give rise to an inference of impropriety," the defendant still "failed to demonstrate a strong likelihood" of discrimination, and therefore no prima facie case had been established. (*People v. Sanders*, *supra*, 51 Cal.3d at pp. 500-501.) Similarly, in *Howard*, this Court observed that "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive." (*People v. Howard*, *supra*, 1 Cal.4th at p. 1156 [citing *Sanders*, *supra*, 51 Cal.3d at 500].) Applying the prima facie standard that the defendant must show "from all the circumstances in the case ... a strong likelihood" of discrimination (*id.* at p. 1154), *Howard* concluded that the trial court had not erred in finding no prima facie case. (*Id.* at p. 1156.) Indeed, the Court even italicized "*strong likelihood*" to emphasize the strictness of that requirement. (*Id.* at p. 1154.) A reasonable jurist could conclude from *Sanders* and *Howard* that a strong likelihood imposed a greater burden than an inference.

Not surprisingly, therefore, in 1994 the Fourth District Court of Appeal in *People v. Bernard* (1994) 27 Cal.App.4th 458, expressly disagreed with *Fuller*, and rejected the contention that *Wheeler's* strong

likelihood requirement "has been reduced to a 'reasonable inference.'" (*Id.* at p. 490.) *Bernard* held that the prima facie burden is a "strong showing, not a mere inference." (*Ibid.*) *Bernard's* conclusion that a "strong likelihood" requires a stronger showing than a "reasonable inference," and that such a stronger showing must be made to establish a prima facie case under *Wheeler*, has been followed by other appellate courts in this state. (See, e.g., *People v. Buckley* (1997) 53 Cal.App.4th 658, 665-666; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067.)

Thus, while *Fuller* and *Bernard* came to opposite conclusions about whether the prima facie standard was a "strong likelihood" or a "reasonable inference," it is clear that they agreed that the two standards were not equivalent and that the former imposed a greater burden of proof than the latter. (See *Wade v. Terhune*, *supra*, 202 F.3d 1190, 1192 [concluding that the "strong likelihood" burden "does not satisfy the constitutional requirement laid down in *Batson*" and subjects "a lower standard of scrutiny to peremptory strikes than the federal Constitution permits"]; *King v. Moore* (11th Cir. 1999) 196 F.3d 1327, 1331 [holding that a "strong likelihood" of discrimination at the prima facie stage is a greater burden than that mandated by *Batson*, which merely requires that a party raise an inference of improper motive].) Again, not until this Court's decision in *People v. Box*, *supra*, 23 Cal.4th 1153, did a California case clearly state that the two terms had the same meaning.

This Court has found that the *Bernard* opinion "created some uncertainty" and may have even created some uncertainty "for a few years." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1313, 1314.) The uncertainty, however, did not simply arise on the day *Bernard* was published. As *Bernard* noted, the trial court there believed that a *Wheeler* violation

required a "strong likelihood" of group bias. (*People v. Bernard*, *supra*, 27 Cal.App.4th 458, 467-468.) If the *Bernard appellate* court, sitting in San Diego, did not understand that "strong likelihood" means a "reasonable inference" (*People v. Box*, *supra*, 23 Cal.4th 1153, 1188, fn.7), then the *Bernard trial* court, also sitting in San Diego, might very well have misunderstood the same thing. And given the trial court's conceded uncertainty in this case, it very likely did not understand that "strong likelihood" means a "reasonable inference," particularly since it too sat in San Diego, and Mr. Jones's trial probably occurred down the hall just a short time after Mr. Bernard's trial.[20]

Moreover, that the trial court in this case did not expressly mention either a strong likelihood or a reasonable inference is of no import because it mentioned *Wheeler* and not *Batson*. (RT 1669, 1989.) (*Fernandez v. Roe*, *supra*, 286 F.3d 1073, 1073 [although state trial court did not expressly articulate the "strong likelihood" standard, Ninth Circuit concluded that state court applied incorrect "strong likelihood" standard because trial court treated motion under *Wheeler*, not *Batson*].) In addition, when the prosecutor informed the trial court that "the law is clear that there must be a substantial showing that the challenges are being exercised for race and race alone," the trial court did not disagree. (RT 1642.) Accordingly, because the trial court applied the incorrect legal standard of "strong likelihood," and must have believed that this imposed a greater burden on Mr. Jones than "reasonable inference," this Court should not defer to the trial court's

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[20]The *Bernard* appellate opinion is dated August 3, 1994, Mr. Bernard was arrested on January 31, 1992 (*Bernard*, *supra*, at pp. 458, 463), and Mr. Jones's *Wheeler* motion concerning Nilda Springfield was made on February 10, 1994 (RT 1796, 1989).

prima facie ruling.

3. This Court Should Not Defer to the Trial Court's Prima Facie Ruling Because There Is No Reason to Believe That the Trial Court Understood Mr. Jones's Burden Was to Establish That it Was "More Likely than Not" That the Prosecutor Had Discriminated Against Ms. Springfield.

The *Johnson* majority attempted to deal with the uncertainty reflected in *Bernard* by stating that "reasonable inference" and "strong likelihood" both mean "more likely than not." (*People v. Johnson*, *supra*, 30 Cal.4th 1302, 1306 .) The issue, therefore, is whether the trial court in this case understood that the proper standard in evaluating the evidence for a prima facie case was whether it is "more likely than not" that the prosecutor had discriminated against Ms. Springfield. As shown below, there is no reason to believe that the trial court was aware of this burden. Hence, this Court should not defer to the trial court's failure to find a prima facie case.

Johnson explained that "likelihood ... or the equivalent 'likely,' has a range of meanings, including some lower than more likely than not." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1317 [quoting *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 917.) But *Ghilotti*, which interpreted a statute using the word "likely" as not requiring a showing of a "better than even" chance, was decided in 2002, and depended on "modern legal references," which virtually all postdated *Wheeler*. (*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th 888, 916-917, 922.) *Johnson* was wrong to focus on the meaning of "likelihood" in 2002. The important question is what did "strong likelihood" mean to this Court when it used the phrase in *Wheeler* in 1978, 25 years ago.

As *Johnson* stated, "*Wheeler* 'define[d] a burden of proof....' (*Wheeler*, *supra*, 22 Cal.3d at p. 278, 148 Cal.Rptr. 890, 583 P.2d 748.)" (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1317 .) *Johnson* further observed that proof by a preponderance of the evidence is the default burden of proof in California unless "otherwise provided by law." (*Ibid.* [citing Evid. Code, § 115].) Presumably the *Wheeler* Court was also aware of Evidence Code section 115 in 1978, which is why it did not defer to the default burden, "preponderance of the evidence," and instead expressly imposed a different burden, "strong likelihood."

Moreover, as stated by *Ghilotti*, "We further note that when the Legislature wishes to employ a 'more likely than not' standard, it has demonstrated its ability to do so in express terms." (*People v. Superior Court (Ghilotti)*, *supra*, 27 Cal.4th 888, 918.) Similarly, in several cases decided around the time of *Wheeler*, but in contrast to *Wheeler*, this Court used the phrase "more likely than not." (See, e.g., *People v. Barksdale* (1972) 8 Cal.3d 320, 334; *People v. Perry* (1972) 7 Cal.3d 756, 774; *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 386; *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 819, fn. 5; *Pollack v. Hamm* (1970) 3 Cal.3d 264, 269.) If the *Wheeler* Court intended to impose a "more likely than not" burden, it was perfectly capable of doing so. But *Wheeler* did not. And significantly, not in the long history of this Court has one of its decisions, other than *Johnson*, equated "more likely than not" with "strong likelihood."

Significant, too, is that when Justice Mosk wrote *Wheeler* in 1978 and used the term "strong likelihood," he did not mean "more likely than not." In 1975, three years before *Wheeler*, the foremost legal dictionary defined likely as "probable," likelihood as "probability," and probable as

"[h]aving more evidence for than against." (Blacks Law Dict. (4th ed rev. 1975) p. 1076, col. 1; p. 1365, col. 1.) As *Ghilotti* acknowledged, "likely" is often defined as "'having a better chance of occurring than not.' ... (see, e.g., 8 Oxford English Dict. (2d ed. 1989) p. 949, col. 1; Webster's 3d New Internat. Dict. (1965) p. 1310, col. 3) ...." (*People v. Superior Court (Ghilotti), supra*, 27 Cal.4th 888, 916.) Moreover, in 1975 Blacks defined strong as "[c]ogent, powerful, forcible." (Blacks Law Dict., *supra*, at p. 1592, col 1.) Thus, when Justice Mosk wrote "strong likelihood," he meant something much greater than "more likely than not."

In addition, six years before composing *Wheeler*, Justice Mosk penned a dissent in *Decker v. Department of Motor Vehicles* (1972) 6 Cal.3d 903. The *Decker* majority had agreed with the "rationale and conclusion" of an appellate court decision, *Giomi v. Department of Motor Vehicles* (1971) 15 Cal.App.3d 905, a case involving the Vehicle Code warning that an officer must give to a suspected drunk driver who refuses to submit to a blood alcohol test. Vehicle Code section 13353(a) provided that the driver "shall be told that his failure to submit to or complete such a chemical test will result in the suspension of his privilege to operate a motor car for a period of six months." *Decker* concurred with *Giomi's* view that the language used by the officer should "'adequately convey[] to the driver the *strong likelihood* that the adverse result would follow upon refusal'" to take the test. (*Decker v. Department of Motor Vehicles*, *supra*, 6 Cal.3d 903, 906 [quoting *Giomi v. Department of Motor Vehicles*, *supra*, 15 Cal.App.3d at pp. 906--907] [italics added].)

In dissent Justice Mosk wrote: "I agree: strong likelihood of adverse result should be reflected [in the language used by the officer], but not absolute certainty." (*Decker*, *supra*, 6 Cal.3d at p. 908 [dis. opn. of Mosk,

J.).) Thus, although the Vehicle Code demanded that a suspected drunk driver "shall be told" that failure to take the test "will result" in a license suspension, Justice Mosk considered it adequate if the warning to the driver reflected the "strong likelihood," though not the absolute certainty, that suspension would result. Clearly, Justice Mosk and the rest of the *Decker* Court understood that "strong likelihood," though less than "absolute certainty," was greater than "more likely than not," especially given that, as Justice Mosk stated, "[p]roper warning of the consequences of refusal to comply with Vehicle Code section 13353 is one of the elements essential to suspension of a license under the code." (*Decker*, *supra*, 6 Cal.3d at p. 907 [dis. opn. of Mosk, J.).)

That a "strong likelihood" is widely understood as a much greater burden than "more likely than not" is also reflected in the United States Supreme Court's decision, *Victor v. Nebraska* (1994) 511 U.S. 1. There the Court acknowledged that the American Heritage Dictionary, which the Court described as "a widely used modern dictionary," defined moral certainty as "'[b]ased on strong likelihood or firm conviction ....'" (*Id.* at p. 15 [quoting American Heritage Dictionary (3d ed. 1992) at p. 1173].) The Court also mentioned that two other dictionaries "define[d] moral certainty in terms of probability. E.g., Webster's New Twentieth Century Dictionary [(2d ed. 1979)] at 1168 ('based on strong probability'); Random House Dictionary of the English Language 1249 (2d ed. 1983) ('resting upon convincing grounds of probability')." (*Victor v. Nebraska*, *supra*, 511 U.S. 1, 14.) Finally, the Court observed that in a previous decision, it equated "moral certainty" with "beyond a reasonable doubt." (*Victor v. Nebraska*, *supra*, 511 U.S. at p. 12 ["Indeed, we have said that '[p]roof to a "moral certainty" is an equivalent phrase with "beyond a reasonable doubt"'"

(quoting *Fidelity Mut. Life Assn. v. Mettler* (1902) 185 U.S. 308, 317)].) If moral certainty is "based on strong likelihood" and indicative of proof beyond a reasonable doubt, then it is plain that in the view of the United States Supreme Court, "strong likelihood" is a much greater burden than "more likely than not."

Finally, at least one California appellate court, the Fourth District sitting in San Diego, has concluded the obvious, that "strong likelihood" does *not* mean "more likely than not." (*Jabro v. Superior Court (Hill)* (2002) 95 Cal.App.4th 754, 758 [applying the plain meaning rule, "strong likelihood" means "very likely" or "substantial probability;" "more likely than not" is a lower threshold].)

Because no case law, equating "strong likelihood" with "more likely than not," existed at the time of the trial in this case, there is no reason to believe that the trial court understood that the terms were equal, and no reason to believe that the court applied the correct standard. For this separate reason, this Court should not defer to the lower court's prima facie ruling.

4. This Court Should Not Defer to the Trial Court's Prima Facie Ruling Because an Appellate Court Is in the Same Position as a Trial Court to Determine Whether an Inference of Discrimination May Be Drawn.

Although this Court employs a deferential standard of review when a trial court does not find a prima facie case under *Wheeler* (*People v. Howard*, *supra*, 1 Cal.4th at p. 1155), several state and federal courts have held that the proper standard of review for a prima facie case ruling under *Batson* is de novo review. (See e.g., *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 484; *United States v. Hartsfield* (10th Cir. 1992) 976 F.2d 1349,

1355-1356; *State v. Sledd* (Kan. 1992) 825 P.2d 114, 119; *State v. Butler* (Tenn. Crim. App. 1990) 795 S.W.2d 680, 687; *State v. Pharris* (Utah Ct. App. 1993) 846 P.2d 454, 459; *Valdez v. People* (Colo. 1998) 966 P.2d 587, 591.) Mr. Jones urges this Court to reconsider its previous rulings in light of these authorities and the dissent in *Tolbert* (*Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 686 [dis. opn. of McKeown, J.]), and hold that de novo review is the appropriate standard where a trial court has not found a prima facie case.

To justify its deferential standard of review, this Court has relied on the ability of trial judges to make difficult and often close judgments based on their knowledge of local conditions and prosecutors, powers of observation, understanding of trial techniques, and broad judicial experience. (*Wheeler*, *supra*, 22 Cal.3d at p. 281.) While such deference may be appropriate at step three of the *Batson* inquiry (*Hernandez v. New York* (1991) 500 U.S. 352, 364 ["the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal"]), it is not appropriate at step one.

Under *Batson* and *Wheeler*, the facts that are potentially relevant to a step one determination are whether the challenged jurors are members of a cognizable group, the race of the defendant and the victims, the number of members challenged from a cognizable group, whether a disproportionate number of peremptory challenges were used against members of that group, whether the challenging party failed to engage the challenged jurors in more than desultory voir dire or any voir dire at all, whether the challenging party engaged in disparate questioning of the identified group to develop grounds for peremptory challenges, and whether the challenged jurors shared only one characteristic – their membership in the group – but were otherwise as

heterogenous as the community as a whole. (*Miller-El v. Cockrell*, *supra*, 537 U.S. 322 [123 S.Ct. 1029, 1036]; *Batson*, *supra*, 476 U.S. at p. 97; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813; *People v. Jones* (2003) 30 Cal.4th 1084, 1105 [citing *Miller-El v. Cockrell*, *supra*, 537 U.S. 322]; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) These facts are not the type of credibility or observation-based facts that the trial court is in the best position to decide at step three, but are instead historical facts that are readily apparent from the record. (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 509 [the step two "burden-of-production determination necessarily precedes the credibility- assessment stage"].) Thus, the trial court is in no better position than an appellate court to decide whether a party met its burden at step one.[21]

This Court's deferential standard of review is also apparently based on its view that although the step one inquiry "broadly resolves a predominantly factual mixed law-fact question," it is "reducible to an answer to a purely factual question," "whether the prosecutor acted with the prohibited intent." (*People v. Alvarez* (1996) 14 Cal.4th 155, 196-197; *People* v. *Howard*, *supra*, 1 Cal.4th at p. 1155 ["As with other findings of fact, we examine the record for evidence to support the trial court's ruling"].) This view is unfounded because in actuality, step one involves a paradigmatic mixed question of law and fact, which should be subject to de

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[21]This Court has also stated it will "generally 'accord great deference to the trial court's ruling that a particular reason is genuine,' [but] only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva*, *supra*, 25 Cal.4th 345, 385-386.) Clearly, this reason for according deference to the trial court in this case does not apply because the prosecutor never stated *his* reason for striking Nilda Springfield.

novo review. (*Mahaffey v. Page*, *supra*, 162 F.3d 481, 484 ["T]he preliminary question of whether a prima facie case has been shown presents a mixed question of law and fact"); *United States v. Bergodere* (1st Cir.1994) 40 F.3d 512, 516 ["A careful reading of *Batson* convinces us that ... this determination can be characterized as a mixed question of law and fact"].)

This Court examined the scope of review of mixed questions of law and fact in *Crocker National Bank v. San Francisco* (1989) 49 Cal.3d 881:

> Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.

(*Id.* at p. 888; cf. *Salve Regina College v. Russell* (1991) 499 U.S. 225, 233 ["we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine"].)

Here, the historical facts that support a prima case are reviewed for substantial evidence. (*Crocker National Bank v. San Francisco*, *supra*, 49 Cal.3d 881, 888.) The rule of law in evaluating a prima facie case is whether the historical facts raise an inference of intentional discrimination.

(*Batson v. Kentucky*, *supra*, 476 U.S. 79, 96.) The selection of the rule is subject to de novo review. (*Crocker National Bank v. San Francisco*, *supra*.)

The mixed question of law and fact applies the selected rule to the historical facts and determines whether the rule is satisfied. (*Ibid.*) The pertinent inquiry here does not require application of experience with human affairs, and thus is not predominantly factual. (*Ibid.*) Rather, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values. (*Ibid.*) Here, the legal principles and their underlying values are constitutionally based in the Equal Protection Clause of the Fourteenth Amendment and Mr. Jones's right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community.

Moreover, the inquiry is *how strong* must an inference be to establish a prima facie case of intentional discrimination. (*People v. Johnson*, *supra*, 30 Cal.4th 1302, 1317, fn. 4 ["The *Wheeler* court certainly understood that an inference is a logical deduction of fact. But the question here ... is how strong the inference must be"].) As *Johnson* observed, "*Batson* seems to have 'left to lower courts the task of determining the type and quantum of proof necessary for a defendant to establish a prima facie case.'" (*Id.* at p. 1314 [quoting *State v. Duncan* (La. 2001) 802 So. 2d 533, 545].) But *Batson* could not have intended that every *trial* court in the country was free to determine the type and quantum of evidence to establish a prima facie case. Surely *Batson* was leaving this determination to the *appellate* courts. (See, e.g., *Fernandez v. Roe*, *supra*, 286 F.3d at p. 1078 [finding a prima facie case when the prosecutor struck four out of seven (57 percent) Hispanics, and prosecutor exercised 21 percent (4 out of 19) of his

challenges against Hispanics – "standing alone," this was "enough to raise an inference of racial discrimination"].) Therefore, the question of whether the historical facts suggest invidious discrimination is predominantly legal and its determination should be reviewed independently.

Mixed questions of law and fact are often subject to de novo review. (*Mahaffey v. Page*, *supra*, 162 F.3d at p. 484.) For example, this Court applied a de novo standard to evaluate a mixed question of law and fact as to whether a defendant received effective assistance of counsel. (*In re Resendiz* (2001) 25 Cal.4th 230, 248.) And although the issue of whether reasonable suspicion or probable cause supports a warrantless search involves a mixed question of law and fact, the United States Supreme Court settled on a de novo standard for reviewing the issue in cases on direct review. (*Ornelas v. United States* (1996) 517 U.S. 690, 699.)

Appellate courts should reserve the ultimate resolution of the prima facie case issue to themselves to create uniformity of decisions. The existence of varied results based on similar facts is inconsistent with a unitary system of law, and "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." (*Id.* at p. 697.) These concerns have led other courts to apply a de novo standard of review to the prima facie case determination. (See, e.g., *Mahaffey v. Page*, *supra*, 162 F.3d at p. 484.)

Moreover, transforming this threshold question of whether a prima facie case has been established into an intense "factual inquiry" improperly merges the first and third steps of *Batson* and insulates from review a trial court's decision to reject a *Batson* challenge. (*Tolbert v. Page*, *supra*, 182 F.3d at p. 686 [dis. opn. of McKeown, J.].) Because the step one decision precedes the proponent's duty to come forward with a neutral explanation

for the challenge, it must be based on the historical facts that occur at trial, not on the credibility or perceived good faith of the proponent. (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 509.) Facts that affect credibility and good faith come into play *after* the proponent has tendered a neutral reason for a strike. (*Ibid.*; *Purkett v. Elem*, *supra*, 514 U.S. 765, 768-769.) Thus, the trial court's ability to perceive such facts and rule on those issues need not be accorded deference until the step three ruling.

Granting deference to the trial court's step one determination, when the historical facts on which it was based are a matter of record and do not rely on personal observation, results in an abdication of the appellate court's role as the guardian of constitutional rights and denies the defendant meaningful appellate review. Accordingly, this Court should apply a de novo standard of review and decide for itself whether Mr. Jones met his burden of establishing an inference of discrimination by the prosecution's use of a peremptory challenge against Nilda Springfield.

5. This Court Should Not Scour the Record to Find a Hypothetical Reason (Not Necessarily the Prosecutor's Real Reason) to Justify the Prosecutor's Use of a Peremptory Challenge Against Nilda Springfield.

When a trial court has determined that there is no prima facie case of intentional discrimination by the prosecutor, this Court will accord deference and affirm the lower court "[i]f the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question." (*People v. Howard*, *supra*, 1 Cal.4th 1132, 1155 [quoting *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092].) What this means, of course, is that this Court will affirm even in those situations where the prosecutor *actually intended to discriminate*, simply because the Court was able to

discover somewhere in the record grounds on which the prosecutor might reasonably have struck the prospective juror. (See, e.g., *People v. Yeoman*, *supra*, 30 Cal.3d 93, 209 ["While each of the three prospective jurors gave appropriate answers to oral questions intended to confirm his or her willingness to follow the court's instructions and to vote for the death penalty if appropriate, each prospective juror's written responses to the jury questionnaire might reasonably have caused the prosecutor to prefer other jurors"].)

Affirming the trial court and rubber-stamping the prosecutor on this basis violates *Batson*, the Equal Protection Clause, and the United States Supreme Court's "unceasing efforts to eradicate racial discrimination" in the jury selection process. (*Batson v. Kentucky*, *supra*, 476 U.S. 79, 85.) Accordingly, this Court should not scour the record in this case to hypothesize a reason that would have the effect of (a) absolving the trial court for its clear failure to discern a prima facie case, (b) relieving the prosecutor from the consequences of his prima facie racial discrimination, and (c) thwarting Mr. Jones in his effort to assert his and Ms. Springfield's rights to be free of government sponsored racism.

In *Batson*, the high court reaffirmed the principle stated in *Swain v. Alabama* (1965) 380 U.S. 202, 203-204, "that a 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.'" (*Batson*, *supra*, 476 U.S. 79, 84.) *Batson* declared further that "[t]he Equal Protection Clause *guarantees* the defendant that the State will not exclude members of his race from the jury venire on account of race." (*Id.* at p. 86 [italics added].) Finally, *Batson* instructed that "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of *intent* as

may be available.' [Citation omitted.] Circumstantial evidence of invidious *intent* may include proof of disproportionate impact." (*Id.* at p. 93 [italics added].) Thus, as part of its "unceasing efforts to eradicate racial discrimination" in the jury selection process, the United States Supreme Court has directed lower appellate courts to reverse convictions where a prosecutor has practiced intentional racial discrimination. (*Id.* at pp. 85, 100; see also *Powers v. Ohio* (1991) 499 U.S. 400, 402 [emphasizing the high court's clear "commands to eliminate the taint of racial discrimination in the administration of justice"].)

Batson offered the following example of intentional discrimination:

> a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, [strikes] Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries."

(*Id.* at pp. 91-92.) As suggested by *Batson*, if a prosecutor consistently strikes all African Americans from all juries, that prosecutor clearly commits purposeful racial discrimination against every challenged African American. Nevertheless, it is just as clear that the record would "suggest[] grounds upon which the prosecutor might reasonably have challenged" at least *some* of the African American jurors in question. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1155.) But under *Batson* it matters not that there may have existed reasonable grounds for a hypothetical prosecutor to strike a prospective juror if the *real reason* that the actual prosecutor exercised the peremptory challenge was race.

The issue at step one in *Batson* is whether the objecting party has established a "prima facie showing of *intentional* discrimination," while the

"ultimate question" at step three for the trial court to decide is one of "*intentional* discrimination." (*Hernandez v. New York*, *supra*, 500 U.S. at p. 359 [plur. opn. by Kennedy, J.] [italics added].) Moreover, "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (*Id.* at p. 360 [quoting *Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 264-265].) "Discriminatory purpose ... implies that the decisionmaker ... selected ... a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (*Ibid.* [internal quotations and citation omitted].) The proper inquiry is therefore whether the party who exercised the peremptory challenge was "motivated by discriminatory intent." (*Purkett v. Elem*, *supra*, 514 U.S. at p. 769.)

If the "proper inquiry" is whether the party who exercised the peremptory challenge was actually motivated by discriminatory intent, then it necessarily follows that the proper inquiry is *not* whether some hypothetical reason might have existed for the challenge. A prosecutor motivated by discriminatory intent violates the Equal Protection Clause at the precise moment that the prosecutor strikes a prospective juror on racial grounds, notwithstanding that someone else might later be able to postulate non-racial reasons for the strike.

In *Hardcastle v. Horn* (E.D.Pa. June 27, 2001, No. 98-CV-3028) 2001 WL 722781, a habeas corpus proceeding where the petitioner challenged his state conviction on *Batson* grounds, the state court had not required the prosecutor to offer neutral reasons for her peremptory challenges of African American jurors. On direct appeal, the Pennsylvania Supreme Court independently searched the voir dire transcript and discovered reasonable bases for the challenges. The federal district court

held "that the Pennsylvania Supreme Court's legal conclusion that judicially-inferred justifications for the prosecutor's challenges are sufficient to satisfy *Batson 's* requirement that the prosecutor advance a justification for the challenges is contrary to or, alternatively, an unreasonable application of *Batson*." (*Id.* at p. 9.)

The district court reasoned as follows: "Longstanding United States Supreme Court precedent clearly states that a party asserting a violation of the Equal Protection Clause must prove that the opposing party acted with discriminatory intent or purpose." (*Id.* at p. 10 [citing *Batson*, 476 U.S. at p. 93; *Arlington Heights v. Metropolitan Housing Dev. Corp.* (1977) 429 U.S. 252, 265; *Washington v. Davis* (1976) 426 U.S. 229, 239-240].) "In accordance with this principle, *Batson* proscribes only intentional or purposeful discrimination in exercising peremptory challenges." (*Hardcastle, supra* [citing *Batson*, 476 U.S. at p. 98].) "*Batson* clearly focuses the court's inquiry on the prosecutor's state of mind, namely the presence or absence of an intent to discriminate on the basis of race." (*Ibid.*) "Given *Batson's* emphasis on the prosecutor's intent, reliance on apparent or potential reasons is objectively unreasonable because they do not shed any light on the prosecutor's intent or state of mind when making the challenge." (*Id.* at p. 11; see also *Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 282 (en banc) ["Apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge"]; *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d at p. 484 [reasonable explanations by someone other than the prosecutor "cannot be mistaken for the actual reasons for the challenges"]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1253 ["arguments that the State has made since the evidentiary hearing do not form part of the prosecution's

explanation"]; *United States ex rel. Pruitt v. Page* (E.D. Ill. 1999, No. 97-C2115) 1999 WL 652035 ["To say that certain facts known about a juror could have supported a non-discriminatory challenge cannot establish that nondiscriminatory reasons existed"].)

This Court, too, has acknowledged that in determining whether the prosecutor actually intended to discriminate, the important issue in a *Batson* challenge is the prosecutor's state of mind. "The proper focus of a *Batson/Wheeler* inquiry, of course, is on the *subjective* genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (*People v. Reynoso* (2003) 31 Cal.4th 903, 924 [citing *Purkett, supra*, 514 U.S. at p. 769].) *"It matters not that another prosecutor would have chosen to leave the prospective juror on the jury."* (*Ibid.* [italics added].)

Similarly, it matters not that another prosecutor might have had an objectively reasonable basis for striking the prospective juror if the actual prosecutor's subjective reason was racial discrimination. Therefore, it also matters not that this Court can find objective reasons in the record that might support a peremptory challenge. The real issue is the subjective intent of the party exercising the peremptory challenge. Thus, the question here is: did the prosecutor strike Ms. Springfield because of her race and sex? Given the state of the record, which demonstrates an unrebutted inference of discrimination, the answer is yes. Moreover, that the prosecutor declined the court's invitation to provide an explanation (RT 1995) should not redound to the detriment of Mr. Jones and Ms. Springfield. It would be a bizarre result indeed if, although the prosecutor intended to discriminate against Ms. Springfield, the trial court erred in failing to find a prima facie case, and the prosecutor refused to explain why

he struck Ms. Springfield, this Court ruled adversely to Mr. Jones on his *Batson* challenge.

Thus, that some other prosecutor might have struck Ms. Springfield because she was married to an incarcerated individual is irrelevant to the subjective intent of the prosecutor in this case. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [peremptory challenge justified because prospective juror's relative had been convicted of crime].) Moreover, under *Batson*, it is of no consequence that a reviewing court is able to unearth objective reasons why Ms. Springfield could have been struck. The only meaningful focus – if *Batson* is to have any teeth – is whether the prosecutor committed invidious discrimination against Ms. Springfield and thereby deprived Mr. Jones *and* Ms. Springfield of equal protection.

As its decisions make clear, the United States Supreme Court is not concerned about hypothetical reasons that might explain a prosecutor's strike of a prospective juror. Rather the Court is concerned about whether actual racial discrimination occurred. Thus, the Court has repeatedly stressed in the Title VII context that the aggrieved party must show that "discrimination was the real reason" for the adverse action against the employee. (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502 at p. 511, fn.4; *id.* at p. 517 ["the real reason was intentional discrimination"].)[22] According to the Court, "'the ultimate factual issue in the case,' ... is 'whether the defendant intentionally discriminated against the plaintiff'" (*id.* at p. 519), while the "central fact" is the "state of mind" of the person responsible for the adverse action (*id.* at p. 520).

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[22]Decisions under Title VII of the Civil Rights Act of 1964 are "authoritative in the *Batson* context." (*People v. Johnson*, *supra*, 30 Cal.4th 1302, 1314.)

Similarly, the crucial question in the *Batson* context is whether the real reason for the peremptory challenge was race and/or gender. To determine this the trial court must decide the central fact – the prosecutor's actual state of mind when striking the prospective juror. Conjecturing a hypothetical reason why another prosecutor might have possibly struck the prospective juror does not answer this question.

Furthermore, *Howard* is inconsistent with the position taken by this Court in *People v. Ervin* (2000) 22 Cal.4th 48, that "ordinarily the [trial] court should not attempt to bolster a prosecutor's legally insufficient reasons with new or additional factors drawn from the record." (*Id.* at p. 76.) Suppose the trial court failed to find a prima facie case, but the prosecutor volunteered that his reason for striking Ms. Springfield was her status as a care-giver. Because white care-givers were acceptable to the prosecutor, the prosecutor's reason would be a pretext. Suppose then that the trial court hypothesized that the prosecutor might reasonably have rejected Ms. Springfield because of her marriage. This would be impermissible under *Ervin*, but if *this* Court had hypothesized the same reason, it would be allowable under *Howard*. As this example makes clear, the holding in *Howard* is untenable.

Under *Batson* a prosecutor who intended to discriminate and exercised a peremptory challenge based on race *should* suffer the consequences of a reversal. Yet the deference shown by *Howard* effectively insulates from review intentional discrimination by a prosecutor. And where, as here, the trial court guessed as to the prosecutor's reasons for striking a prospective juror, the lower court, at the very least, should have required the prosecutor to confirm that the tendered reasons actually motivated the peremptory challenge. "[T]he trial court must determine not

only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.) Accordingly, this Court should not show deference to an admittedly unclear trial court that speculated as to the prosecutor's reasons for striking Ms. Springfield; nor should this Court look for a reason in the record that might have supported the challenge.[23]

Furthermore, if this Court persists in according trial courts *and* prosecutors the deference required by *Howard*, then the Court will never reverse a capital case where the trial court failed to find a prima facie case, even though the prosecutor committed intentional discrimination. This is because (1) a prosecutor may reasonably challenge a juror for virtually any reason, including the apparently trivial and highly speculative (*People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9 [even a "trivial" reason will suffice]; *People v. Hall* (1983) 35 Cal.3d 161, 170 [jurors may be excused based on "hunches" and even "arbitrary" exclusion is permissible]; *Wheeler*, *supra*, 22 Cal.3d at p. 275 ["a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality [ranging] from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative"]), and (2) as evidenced by the 25-page, 105-question juror questionnaire used in this case (CT 7435), lengthy

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[23]As one appellate court stated, "where a defendant fails to make a prima facie case and, because of that, the prosecutor has not been called upon to state race-neutral reasons for exercising a peremptory, the appellate court, under the position taken by the California Supreme Court in *Howard*, is placed in the almost untenable position of culling from the record possible race-neutral reasons for excusal." (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1069; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667 ["It is clearly uncomfortable for an appellate court to postulate hypothetical reasons a prosecutor might have challenged each juror"].)

juror questionnaires are routine in capital cases (see, e.g, *People v. Navarette* (2003) 30 Cal.4th 458, 486 [31-page juror questionnaire]; *People v. Waidla* (2000) 22 Cal.4th 690, 713-714 [25 pages]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1251 ["lengthy jury questionnaires" of at least 82 questions]; *People v. Fuentes* (1991) 54 Cal.3d 707, 712, fn. 2 [18-page questionnaire with 111 questions]; see also Cal. Rules of Court, rule 39.51 [the record in a capital appeal includes "juror questionnaires of all potential jurors"]).

One would have to have very little imagination not to be able to find in a 25-page, 105-question document at least one piece of apparently trivial, highly speculative evidence suggestive of juror partiality on which the prosecutor might reasonably have challenged *every* prospective juror. (See, e.g., *People v. Yeoman*, *supra*, 30 Cal.3d at p. 209 ["While each of the three prospective jurors gave appropriate answers to oral questions intended to confirm his or her willingness to follow the court's instructions and to vote for the death penalty if appropriate, each prospective juror's written responses to the jury questionnaire might reasonably have caused the prosecutor to prefer other jurors"].)[24]

Consider the questionnaires of the following prospective jurors in this case:

William T. Richardson, Jr. was married twice, which suggests

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[24]Compare this Court's willingness to look for facts in the appellate record not discussed at trial to support a finding of no *Wheeler/Batson* violation to its refusal to do a comparative juror analysis that might support a finding of a *Wheeler/Batson* violation. (*People v. Johnson*, *supra*, 30 Cal.4th 1302, 1318 ["engaging in comparative juror analysis for the first time on appeal is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts"].)

instability, according to the prosecutor. (CT 7439; RT 1644.) Mr. Richardson had taken a college course in psychology, suggesting an openness to behavior modification, such that a "bad" person can change to "good" through proper rehabilitation. (CT 7441.) He believed that a major cause of crime is lack of education and opportunities, suggesting that one's environment can cause criminal behavior. (CT 7448.) He had seen a psychiatrist about his problem dealing with anger, suggesting that he might have a difficult time working with 11 others in reaching unanimous decisions on guilt and penalty. (CT 7451.)

James D. Hartman was an emergency medical technician. (CT 7465.) As the trial court viewed it, "the prosecution desire[s] to take away the caregivers, the nurturers, the sustainers." (RT 1994.) Given his occupation, Mr. Hartman would qualify for a peremptory challenge by the prosecution, at least according to the trial judge, a former prosecutor. (6PT 2.) Mr. Hartman also weakly supported the death penalty. (RT 7477.) As the prosecutor stated below, "The numbers are such that I can kick everyone who has a weak support for the death penalty. There are enough people who are strong support or better who I can accept." (RT 1644.)

Kathleen N. Foxx was a teacher; teachers are often viewed as liberals, not a prosecution favorite. (RT 7486.) She also had training in child psychology. (CT 7489.) She believed that a cause of crime was the failure to nurture children in the home. (CT 7496.) She appears to be someone who would be open to a penalty phase argument that blames the parents for the child's conduct. She also called the death penalty "unfortunate." (CT 7501.)

Dolores Gomez lived with someone out of wedlock, a lifestyle that might reasonably support a peremptory challenge by a traditional

prosecutor. (CT 7511.) Her two brothers had three "DUIs" among them, suggesting family instability to those who believe alcohol abuse can be a family trait due to nature or nurture. (CT 7517.) Another suggestion of instability to this prosecutor was that she had seen a psychologist. (CT 7523.) Finally, she was not aware of Robert Alton Harris's execution. (CT 7528.) This lack of awareness bothered the prosecutor enough that he struck another prospective juror for this reason. (RT 1645.)

Thirty-four year old Robert J. Camp had never been married and lived alone (CT 7534-7536), perhaps suggesting an inability to compromise. He studied psychology in college and his stepfather had a Ph.D. in psychology. (CT 7537, 7546.) He did not agree that the death penalty was worse than life in prison without parole. (CT 7551.)

Richard W. Soule had an MBA (CT 7561), suggesting that he might be too bright and independent. (*People v. Reynoso*, *supra*, 31 Cal.4th 903, 925, fn. 6] ["an attorney could peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects too much education"].) He did not want to be a juror due to his heavy workload, which would require him to work evenings during the trial (CT 7561-7562, 7570), suggesting that he might be distracted during the trial and grow to resent the lawyers and court for not releasing him. (*Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 628 [a difficulty focusing on the evidence may justify a peremptory challenge].) He blamed the criminal justice system for not being very responsive, suggesting that he would be impatient during a long trial. (CT 7568.)

Cathy H. Simmons was married twice and had taken college courses in psychology. (CT 7582, 7585.) She thought it would be difficult for her to be a juror because of her four children, though she thought it could be

worked out, suggesting that she might still feel pressured and distracted during the trial, especially a long one. (CT 7586). She was bothered by "threatening white people," a description that might match any white trial lawyer, whose job includes cross-examining adversarial witnesses. (CT 7587.) She thought a cause of crime included "the unfortunate lessons being taught to children by parents," suggesting that she might be open to a defense penalty argument blaming the parents. (CT 7592.) She had used drugs and had seen a psychiatrist. (CT 7595.) She thought life without parole was a viable option to the death penalty, and did not agree that death is worse than life without parole. (CT 7597.) Richard M. Barker never married and lived with his parents, suggesting a difficulty in adapting to strangers in a close environment like a jury room. (CT 7606-7608.) He thought life without parole could be more humane than death. (CT 7621.)

Frances Cochran came from a traditional Catholic family, suggesting that she might have second thoughts about voting for death, notwithstanding her avowed support for the death penalty. (CT 7632, 7645.) She disagreed that the death penalty was worse than life with parole. (CT 7647.) She studied psychology in college. (CT 7633.) She smoked marijuana. (CT 7643.)

Laura A. Armstrong was a special education tech, married twice, and currently separated. (CT 7654, 7655.) She studied psychology in college. (CT 7657.) To her the cause of crime was "children not being given the proper care, time, love and respect they need and deserve." (CT 7664.)

Lydia Harper believed that "nonparental guidance" caused crime. She also wrote: "I do not feel anyone is guilty if I have not witnessed any crime. How can I say what went on and I wasn't there." (CT 7688.) Apparently she used drugs when she was younger. (CT 7691.) She did not

believe in an "eye for an eye." (CT 7694.)

Charles M. Williams, III thought that drug use was a personal decision, suggesting an openness to lawlessness. (CT 7716.)

These 12 prospective jurors could have been subject to legitimate peremptory challenges by the prosecutor below, yet none was. In fact they were all accepted by the prosecutor and sat on the guilt phase jury.

The point of this exercise is to show that one will *always* be able to scour the record in capital cases where lengthy jury questionnaires are routine, and find "grounds upon which the prosecutor might reasonably have challenged" *every* prospective juror. Thus, when a trial court denies a *Batson/Wheeler* motion without finding a prima facie case of group bias, this Court will invariably affirm in a capital case.

The Court's decisions since 1989 bear this out. Beginning with *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092, the decision cited by *Howard* for the notion that an appellate court will affirm if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors in question (*People v. Howard, supra*, 1 Cal.4th 1132, 1155), this Court has not reversed any capital case on the ground that the trial court failed to find a prima facie case. (See, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93; *People v. Jones* (2003) 30 Cal.4th 1084; *People v. Boyette* (2002) 29 Cal.4th 381, 29 Cal.4th 1018A; *People v. Gutierrez* (2002) 28 Cal.4th 1083; *People v. Farnam* (2002) 28 Cal.4th 107; *People v. Box* (2000) 23 Cal.4th 1153; *People v. Jones* (1998) 17 Cal.4th 279; *People v. Mayfield* (1997) 14 Cal.4th 668; *People v. Alvarez* (1996) 14 Cal.4th 155; *People v. Davenport* (1995) 11 Cal.4th 1171; *People v. Crittenden* (1994) 9 Cal.4th 83; *People v. Garceau* (1993) 6 Cal.4th 140; *People v. Howard* (1992) 1 Cal.4th 1132; *People v. Sanders* (1990) 51 Cal.3d 471; *People v.*

Bittaker (1989) 48 Cal.3d 1046.) Before *Bittaker*, however, the Court had reversed such cases. (*People v. Snow* (1987) 44 Cal.3d 216; *People v. Allen* (1979) 23 Cal.3d 286.)

The United States Supreme Court has stated that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) But given that this Court always affirms in capital cases because of the deference required by *Howard*, capital cases, with their lengthy questionnaires, are subjected to a lesser degree of reliability than non-capital criminal cases where lengthy questionnaires are not the norm. *Howard* therefore violates the Eighth Amendment. (*Monge v. California* (1998) 524 U.S. 721, 732 ["we have recognized an acute need for reliability in capital sentencing proceedings"])

Batson is thus a dead letter in this state in capital cases where no prima facie case has been found. As *Wheeler* stated: "It demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right." (*Wheeler*, *supra*, 22 Cal.3d at p. 287.)

Furthermore, this Court should not overlook the fact that the United States Supreme Court does *not* walk the path of *Howard* in analyzing whether a trial court has erred in failing to find a prima facie case of intentional discrimination. In *Miller-El*, the Court concluded that the trial court committed "clear error" in finding no prima facie case. (*Miller-El*, *supra*, 123 S.Ct. 1029, 1045.) Yet nowhere in *Miller-El* did the Court mention any obligation on its part to scour the record so that it might possibly find grounds on which the prosecutor might reasonably have challenged the jurors in question. And surely the Court could have easily

found some legitimate reasons to support the challenges because the district attorneys in *Miller-El* struck so many African Americans – ten. (*Id.* at p. 1034; see also *Turner v. Marshall* (9th Cir.1995) 63 F.3d 807, 814, fn. 4, overruled on other grounds by *Tolbert v. Page* (9th Cir.1999) 182 F.3d 677 (en banc) ["Although we normally give great deference to a trial court's factual findings regarding purposeful discrimination in jury selection, this deference applies to the court's assessment of the prosecutor's state of mind and credibility. ... Because the trial judge made no inquiry into the prosecutor's reasons for excluding the African-American venirepersons, we need not defer to the judge's conclusory determination that there was no discrimination."].)

Under *Batson*, if a defendant establishes a prima facie case of discrimination at step one, the prosecutor must then state a non-discriminatory reason for the challenge at step two. Because a prosecutor might reasonably have challenged a prospective juror for virtually any non-discriminatory reason, *Batson* does not quit at step two. But that is precisely where this Court stops by virtue of *Howard*. On appeal once this Court has found in the record a reasonable basis for the challenge, it ends the inquiry. In effect the Court rubber stamps the prosecutor's imaginary step two explanation without actually having heard from the prosecutor and without doing the step three analysis required by *Batson*. This procedure violates *Batson*.[25]

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[25]For example, in *Hicks*, the employer-defendant stated two legitimate, non-discriminatory reasons for firing the employee – the severity and the accumulation of rules violations committed by the employee. Both reasons turned out to be pretexts. (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 507.) Applying the *Howard* deference approach would mean that if the *Hicks* trial court had failed to find a prima facie case of

The United States Supreme Court has commanded courts to "eliminate the taint of racial discrimination" in the selection of jurors. (*Powers v. Ohio*, *supra*, 499 U.S. 400, 402.) Moreover, the Court has instructed that "deference does not imply abandonment or abdication of judicial review." (*Miller-El*, *supra*, 537 U.S. 322 [123 S.Ct. at p. 1041].) Because *Howard's* deference frustrates the high court's command and abandons capital defendants, Mr. Jones respectfully requests that this Court disapprove *Howard* and review de novo whether the prosecutor committed a prima facie case of discrimination against Ms. Springfield.

E. Mr. Jones Need Only Have Shown That the Circumstances Raised an Inference of Discrimination When the Prosecutor Struck Ms. Springfield; He Need Not Have Shown That Discrimination Was More Likely than Not.

This Court held in *People v. Johnson* that, to state a prima facie case under both *Batson* and *Wheeler*, "the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1306.) On the contrary, although the objector must prove certain underlying facts by a preponderance of the evidence, once those facts are shown, the law imposes a presumption [or inference] of discrimination, which the prosecutor may in turn rebut by producing a non-discriminatory reason for striking the prospective juror. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253, 254, fn. 7.) Thus, as

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discrimination, the trial court would nevertheless have been affirmed because the two legitimate, non-discriminatory reasons for firing the employee appeared on the record, even though both reasons were lies. This is not what *Batson* intended.

shown below, *Johnson* was wrong about *Batson*; to state a prima facie case under *Batson*, an objector like Mr. Jones need only demonstrate that the facts and circumstances of the case "raise an inference" of impermissible discrimination by the prosecutor. (*Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1195 [citing *Batson v. Kentucky*, *supra*, 476 U.S. 79, 96].)

Johnson correctly stated that when *Batson* requires a party objecting to a peremptory challenge to establish a prima facie case by raising "'an inference of discriminatory purpose' (*Batson*, *supra*, 476 U.S. at p. 94, 106 S.Ct. 1712), the high court means establishing a legally mandatory rebuttable presumption, and not merely presenting enough evidence to permit the inference." (*People v. Johnson*, *supra*, 30 Cal.4th 1302, 1315.) Where *Johnson* went awry was in its failure to understand what the United States Supreme Court means by a legally mandatory rebuttable presumption, and why the high court would choose to rely on this "procedural device" (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 521), rather than require a plaintiff to prove discrimination at step one by a preponderance of the evidence.[26]

A little history is in order. "The law of evidence is full of presumptions either of fact or law." (*Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed* (1910) 219 U.S. 35, 42.) In *Turnipseed*, the Court upheld the constitutionality of a Mississippi statute, which provided that in actions against a railroad company, proof of injury inflicted by the running of a train is prima facie evidence of negligence by the railroad. (*Id.*

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[26]As described by McCormick, a "'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'" (McCormick on Evidence (5th ed. 1999) § 342, at p. 519.)

at p. 41.) The Court noted: "The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law." (*Ibid.*) Thus, proof of a prima facie case created a legally mandatory rebuttable "presumption of liability" by the railroad company. (*Id.* at p. 43.)

The Court explained the relationship between the fact or facts shown by the evidence (the prima facie case) and the fact that is presumed as a result: "there shall be *some rational connection* between the fact proved and the ultimate fact presumed, and ... the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." (*Ibid.* [italics added].) Thus, there had to be some rational connection between the fact that was presumed (the railroad's negligence) and the proven facts (the prima facie case establishing that an injury arose from the operation of a train). The Court made the further point that it was not an "unreasonable inference" that a derailment of railway cars was due to some negligence. (*Id.* at p. 44.) Finally, the Court stated that the statutory rebuttable presumption rested on considerations of public policy. (*Ibid.*)[27]

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[27]In *Western & Atlantic Railroad Co. v. Henderson* (1929) 279 U.S. 639, the United States Supreme Court struck down a somewhat similar Georgia state statute that the Court nevertheless distinguished from the *Turnipseed* statute: "The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. [The Georgia statute] creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate." (*Id.* at pp. 643-644.) Thus, in *Turnipseed* the Court permitted a prima facie case to raise a rebuttable

As *Johnson* observed, decisions under Title VII of the Civil Rights Act of 1964 are "authoritative in the *Batson* context." (*People v. Johnson*, *supra*, 30 Cal.4th 1302, 1314.)[28] In *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, the Court stated the "critical issue" before it: "the order and allocation of proof in a private, non-class action challenging employment discrimination." (*Id.* at p. 800.) The Court then immediately set forth the purpose of Title VII: "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." (*Ibid.*) The Court thus concluded that "it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." (*Id.* at p. 801.)

With this public policy as guidance, the Court fashioned a procedure for proving Title VII violations. Initially, the plaintiff must establish a prima facie case by "showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and

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presumption that shifted the burden of *producing evidence* to the defendant. But in *Henderson*, the Court would not sanction a law that allowed a prima facie case to actually shift the *burden of proof* to the defendant.

[28]Although the *Johnson* majority opinion cited four older Title VII cases, *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, *Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576, *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, and *United States Postal Service Board of Governors v. Aikens* (1983) 460 U.S. 711, it curiously failed to cite two more recent Title VII decisions, *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, and *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, discussed below.

(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (*Id.* at p. 802.) The plaintiff must prove these four facts by a preponderance of the evidence. (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. 248, 252-253.)

On proof of a prima facie case, the burden shifts to the employer to produce evidence that the adverse employment action was "taken 'for a legitimate, nondiscriminatory reason.'" (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 507 [quoting *Burdine*, *supra*, at p. 254].) "'If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,' and 'drops from the case.' The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision,' and that race was. He retains that 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.'" (*Id.* at pp. 507-508 [citations omitted].)

The high court used the phrase *prima facie case* to "denote the establishment of a legally mandatory, rebuttable presumption." (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at p. 254, fn. 7.) "Under the *McDonnell Douglas* scheme, '[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.'" (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 506 [quoting *Burdine*, *supra*, at p. 254].) "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."

(*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 577 [citing *Teamsters v. United States* (1977) 431 U.S. 324, 358, fn. 44].)

"The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection" (*Burdine*, 450 U.S. at pp. 253-254), that no position was available or that the plaintiff was not qualified for the position (*Teamsters v. United States*, *supra*, 431 U.S. 324, 358, fn. 44). As then Justice Rehnquist explained,

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination *only because we presume these acts*, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. [Citation.] And we are willing to *presume* this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

(*Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. 567, 577 [italics added].) Justice Scalia further explained in *Hicks* that "the *McDonnell Douglas* presumption is a *procedural device*, designed *only* to establish an order of proof and production." (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 521 [italics added].)

The Supreme Court has spelled out that the purpose of this series of burden-shifting mechanisms is to facilitate the factfinder's inquiry "into the elusive factual question of intentional discrimination." (*Texas Dept. of Community Affairs v. Burdine*, *supra* 450 U.S. 248, 255, fn.8.) The Court

has also said that "[p]lacing this burden of production on the defendant thus serves ... to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." (*Id.* at pp. 255-256.) This enables the "the factual inquiry [to] proceed[] to a new level of specificity" (*id.* at p. 255), such that it "now turns from the *few generalized factors that establish a prima facie case* to the specific proofs and rebuttals of discriminatory motivation the parties have introduced." (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 516 [italics added].) The Court has further declared that a "prima facie showing is not the equivalent of a factual finding of discrimination." (*Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. 567, 580.)

Accordingly, it should be apparent that, although the United States Supreme Court demands that each underlying fact of a Title VII prima facie case be proven by a preponderance of the evidence, the Court has never said that discrimination must be factually proved by a preponderance of the evidence at step one. Instead of demanding that the plaintiff produce *facts* at step one that make it more likely than not that discrimination occurred, the Court invokes a "procedural device" known as a legally mandatory rebuttable presumption, designed only to establish an order of proof and production, which requires that discrimination be assumed, until rebutted. (*Ibid.*; see Cal. Evid. Code, § 600(a) ["A presumption is an *assumption* of fact that the *law requires to be made* from another fact or group of facts found or otherwise established in the action"] [italics added].)[29]

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[29]To illustrate with a common example: Suppose that a plaintiff is required to prove that notice was given to the defendant. To carry the burden of proof, the plaintiff's secretary testifies that he typed the notice, placed it in an envelope addressed to the defendant, affixed the proper

The operation of this procedural device means that if the employer satisfies its burden of producing a non-discriminatory explanation for the action taken against the plaintiff, then the presumption is rebutted and "drops from the case." (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 507.) As the Court noted in *Hicks*, the *McDonnell Douglas* presumption "operates like all presumptions, as described in Federal Rule of Evidence 301: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.'" (*Ibid.*)

Thus, and this is key, if the Court required at step one that the plaintiff prove discrimination by a preponderance of the evidence, then there would no need for the procedural device of a rebuttable presumption because the burden of production would necessarily shift to the defendant once the plaintiff proved that discrimination was more likely than not.

Hicks, not mentioned by the majority in *Johnson*, is instructive on this point. There, the Eighth Circuit had held that the plaintiff was entitled to summary judgment where the trial court found a prima facie case and that

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amount of postage stamps, and deposited the envelope in a mail box. This evidence would, of course, give rise to an inference that the letter was then delivered to the defendant. Because the inference of delivery is not necessarily more likely than not, however, California law – presumably for policy reasons – makes the proof of mailing give rise to a rebuttable presumption of receipt. (Evid. Code, § 641.) Similarly, the inference of discrimination under *Batson* and the Title VII cases is not necessarily more likely than not. Thus, the law imposes a presumption of discrimination that can be easily rebutted.

the employer's explanation was pretextual. The United States Supreme Court reversed, reasoning that a finding of a prima facie case does not mean that the plaintiff has necessarily proved discrimination. (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 515 ["Quite obviously, however, what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands"].)

Reeves v. Sanderson Plumbing Products, Inc. (2000) 530 U.S. 133, also ignored by the *Johnson* majority, is enlightening as well. There, the Court concluded that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may permit* the trier of fact to conclude that the employer unlawfully discriminated." (*Id.* at p. 148 [italics added].) But significantly, the Court went on to note: "This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, *no rational factfinder could conclude that the action was discriminatory*." (*Ibid.* [italics added]) Under *Johnson's* view of a prima facie case, however, the plaintiff's showing would always be adequate to sustain a jury's finding of liability because proof of discrimination by a preponderance of the evidence would have already been established at step one.

Turnipseed and the Title VII cases thus track each other very closely. Each requires that the plaintiff first prove a prima facie case, and that on such proof, the law imposes a presumption. Under *Turnipseed*, the law will impose the presumption so long as there is "*some rational connection* between the fact proved and the ultimate fact presumed," and "the inference

of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." (*Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*, *supra*, 219 U.S. 35, 43 [italics added].) Clearly, *Turnipseed* does not require that the thing presumed be proven by a preponderance of the evidence or that the evidence shows that it is more likely than not. It merely demands some rational connection between the prima face case and the presumption, and that the inference of one fact from proof of another not be arbitrary or unreasonable.[30]

The Title VII cases also do not require that the presumed discrimination be proven more likely than not. "The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at p. 253; see also *St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 506 [prima facie case requirements are "minimal"].) As *Burdine* observed: "In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally

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[30]*Johnson* seems to suggest that even an inference must be proven more likely than not. But this ignores the possibility that the same facts can give rise to conflicting inferences. (*Swales v. Barr* (1948) 83 Cal.App.2d 291, 295 ["two conflicting reasonable inferences may be drawn from the same evidence"]; see also Evid. Code, § 600(b) ["An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action"].) It also disregards the reality that inferences can range from weak to strong. (*People v. Farnam* (2002) 28 Cal.4th 107, 156-157.)

was rejected in favor of a male, Walz, who had been under her supervision." (*Id.*, at p. 506, fn. 6.)

The burden of establishing a Title VII prima facie case is clearly not onerous. In fact it is minimal and even quite light. As shown by the *Burdine* footnote, it takes very little to make a prima facie case. Qualified men and women obviously apply for the same position with regularity in our society. But to establish a prima facie case, a woman need only show by a preponderance of the evidence that she satisfied the job's minimal qualifications and that a man was hired instead. While this supports a rebuttable presumption of discrimination *under the law* (thereby requiring the employer to offer a non-discriminatory explanation), these few simple facts do not mean that it was more likely than not that the employer discriminated.

The prima facie case was also easy to satisfy in *McDonnell Douglas*, where the plaintiff merely had to show that he belonged to a racial minority, applied for and was qualified for a job for which the employer was seeking applicants, was rejected despite his qualifications, and the position remained open while the employer continued to seek applicants from persons of plaintiff's qualifications. (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2002) ¶ 7:395 [citing *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at p. 802]; see also *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 659 [evidence that employer offered African American employees permanent employment while laying off equally performing white coworkers established a prima facie case of reverse discrimination].)

Despite the fact that the four facts mandated by the United States Supreme Court in its Title VII cases are easily demonstrated, Justice Chin,

citing no authority, wrote for the majority in *Johnson* that the Title VII prima facie burden was "substantial." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1316.) On the other hand, Justice Chin's treatise states that the prima facie burden is "only a minimal evidentiary burden. Plaintiff need only offer evidence giving rise to an inference of unlawful discrimination." (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2002) ¶ 7:393.) Moreover, Justice Chin's treatise cites *St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. at p. 506, for authority that the requirements are "minimal," and *Sutera v. Schering Corp.* (2nd Cir. 1995) 73 F.3d 13, 16, for authority that the burden is "de minimis." (Chin, *supra*.)

Another Rutter Group treatise cited the Ninth Circuit case, *Wallis v. J.R. Simplot Co.* (9th Cir.1994) 26 F.3d 885, 889, to support the observation that "not much evidence is required" to prove a prima facie case. (Hittner et al., Cal. Practice Guide: Federal Civil Procedure Before Trial (The Rutter Group 2002) ¶ 14:159.2.) *Wallis* also stated that the "requisite degree of proof necessary to establish a prima facie case ... is *minimal* and does *not* even need to rise to the level of a preponderance of the evidence." (*Wallis v. J.R. Simplot Co.*, *supra* [italics added].) Finally, in *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, the Court repeatedly emphasized that the amount of evidence to establish a prima facie case was "minimal," did "not even rise to the level of a preponderance of the evidence, and was "very little." (*Id.* at pp. 1112-1113; see also Malamud, *The Last Minuet: Disparate Treatment After Hicks* (1995) 93 Mich. L. Rev. 2229, 2244 ["The minimal *McDonnell Douglas- Burdine* prima facie case does no more than identify the plaintiff's case as one in which discrimination might conceivably have been operating"]; Blumoff & Lewis, *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task* (1990) 69 N.C. L. Rev. 1, 10

[arguing that the inference of intentional discrimination from the proven prima facie case "is rather weak. The prima facie case, far from establishing with any conviction that intentional discrimination was likely, really only eliminates two or three common nondiscriminatory reasons for the plaintiff's rejection"].)

The *Johnson* majority opinion seemed to justify its belief that a *Batson* claimant's burden was "substantial" because of the burden placed on the other party to explain the reasons for its peremptory challenge. (*People v. Johnson*, *supra*, 30 Cal.4th at pp. 1316-1317.) But this slight burden pales next to the burden of the employer who must defend a Title VII case where a plaintiff need only raise a de minimis prima facie case of discrimination before shifting the burden to the employer to offer a non-discriminatory explanation. Yet the United States Supreme Court readily imposes this latter burden "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." (*McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at p. 800.) Likewise *Batson* prescribes a negligible burden on the responding party to achieve the goal of eliminating invidious discrimination in the jury selection process. (*Batson*, *supra*, 476 U.S. at p. 99, fn. 22 ["The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike *any* black juror because of his race"] [italics added]; see also *Powers v. Ohio* (1991) 499 U.S. 400, 402 [acknowledging the Court's prior "commands to eliminate the taint of racial

discrimination" in jury selection].)[31]

In support of its conclusion that discrimination must be proved more likely than not at step one, *Johnson* stated the following:

> One of the decisions the court cited in *Batson*, *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, made clear that the plaintiff carried the initial burden of showing actions "from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were 'based on a discriminatory criterion illegal under the Act.'" (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576, 98 S.Ct. 2943, 57 L.Ed.2d 957, italics added.)

(*People v. Johnson*, *supra*, 30 Cal.4th at pp.1314-1315.) But as the *Furnco* Court explained on the next page of its decision: "A prima facie case under *McDonnell Douglas* raises an inference of discrimination *only because we presume* these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." (*Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. 567, 577 [italics added].) So again, proving the four underlying *McDonnell Douglas* facts by a preponderance of the evidence raises the *presumption under the law* that discrimination is more likely than not the reason for the adverse action. And as a result of the presumption imposed by the law, the plaintiff is spared the actual burden of proving factually that discrimination was more likely than not.

Johnson also quoted from *Texas Dept. of Community Affairs v. Burdine*, *supra*, (1981) 450 U.S. 248, 252-253, that the plaintiff has to show "by the preponderance of the evidence a prima facie case of

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[31]A minimal evidentiary showing at the prima facie stage is also consistent with *Turnipseed's* mandate that a prima facie case need only have some rational connection to the presumed fact, here discrimination.

discrimination." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1315.) *Johnson* misunderstands the import of these words, which mean that the plaintiff must prove the four facts that make a prima facie case by a preponderance of the evidence. And based on proof of these four facts by a preponderance of the evidence, the courts will presume discrimination as a matter of law.

Later in its opinion, the *Johnson* majority misconstrued the following excerpt from Wigmore, that a prima facie case applies

> "where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge or the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence."

(*People v. Johnson*, *supra*, 30 Cal.4th at pp. 1315-1316 [quoting 9 Wigmore, Evidence (Chadbourne rev. ed.1981) § 2494, p. 379].) *Johnson* mistakenly concluded from this excerpt that *Batson* permits a court to require the party objecting to the peremptory challenge to proffer "'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." (*Ibid.*)

Johnson's mistake is likely based on the fact that it omitted from discussion the sentence that followed the above excerpt: "Though this usage of the term is less usual, and being ambiguous, is objectionable, yet it serves to subsume under one name the similar legal effects (c∩) and (c‖) produced by a specific presumption or by a ruling on the mass of evidence in the particular case." (9 Wigmore, Evidence (Chadbourne rev. ed.1981) § 2494, p. 379.) Wigmore writes in (c∩): "In the ordinary case, this

overwhelming mass of evidence, bearing down for the proponent, will be made up of a variety of complicated data, differing in every new trial and not to be tested by any set formulas." (*Id.* at § 2487, p. 295.) In (c‖), Wigmore discusses "a fixed rule of law, i.e., *a presumption*, applicable to *inferences from specific evidence to specific facts forming part of the issue*, rather than to the general mass of evidence bearing on the proposition in issue." (*Ibid.* [italics in original].)

Thus, Wigmore tells us that the term "prima facie" can be used to describe the situation where the plaintiff has produced an overwhelming mass of evidence or has produced enough evidence to raise a specific presumption recognized by the law. There is no mention of a "mass of evidence" in the Title VII cases, let alone an "overwhelming mass." Rather those cases repeatedly speak of a specific presumption, which is raised by the "minimal requirements" of the prima facie case set out in *McDonnell Douglas*. (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 506.) Hence, Wigmore is no support for *Johnson's* view that under *Batson*, strong evidence is required to show a prima facie case.

Johnson is wrong for a more fundamental reason as well. Striking even one prospective juror based on race is a denial of equal protection. (*People v. Silva* (2001) 25 Cal.4th 345, 386; *United States v. Battle* (10th Cir. 1987) 836 F.2d 1084, 1086.) Yet striking the sole African American on a venire does not make it more likely than not that race was the reason. Nevertheless, given that a "defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'" (*Batson*, *supra*, 476 U.S. at p. 96 [quoting *Avery v. Georgia* (1953) 345 U.S. 559, 562]), striking the only African American may raise

an *inference* of discrimination. (See, e.g., *Hollamon v. State* (Ark. 1993) 846 S.W.2d 663 ["the defendant must first establish a prima facie case of purposeful discrimination, which the appellant clearly did in this case when he pointed to a peremptory strike by the state dismissing the sole black person on the jury"]; *Commonwealth v. Harris* (Mass. 1991) 567 N.E.2d 899 [peremptory challenge of only African American in venire established prima facie case]; *Stanley v. State* (Md. 1988) 542 A.2d 1267; *Mitchell v. State* (Ark. 1988) 750 S.W.2d 936; *Pearson v. State* (Fla.App. 1987) 514 So.2d 374, 375- 376; *Saadiq v. State* (Iowa 1986) 387 N.W.2d 315, 326 (Iowa), appeal dismissed (1986) 479 U.S. 878; *Brown v. State* (Okla.Crim.App. 1988) 762 P.2d 959, 961-962; *State v. Henderson* (Or. 1988) 764 P.2d 602.)

In this instance discrimination only becomes more likely than not when the prosecutor explains the strike and the court does not believe the explanation. (*Miller-El, supra*, 537 U.S. 322 [123 S. Ct. 1029, 1041] ["The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis"].) Requiring a defendant to show at step one that it is more likely than not that the prosecutor engaged in intentional discrimination by striking a single African American would make it virtually impossible for the defendant to protect his or her constitutional right to equal protection, and that of the prospective juror. (*Powers v. Ohio* (1991) 499 U.S. 400, 415 [prospective juror holds the right not to be excluded from a jury on account of race, and either the excluded juror or the criminal defendant, on behalf of the juror, may raise the *Batson* challenge].)

Lastly, it would be fundamentally unfair to require a defendant to prove discrimination at step one by a preponderance of the evidence, while at the same time deprive the defendant of access to the one person who

possesses the most compelling evidence of discrimination – the prosecutor. Thus, if *Batson* had intended to impose a preponderance of the evidence burden on the defendant, then it would have permitted the defendant to gain information from the prosecutor with respect to the prosecutor's motive. But this *Batson* did not do because it elected a procedural device instead that would allow the defendant access to the prosecutor only after the defendant met the minimal burden of establishing a prima facie case.

Accordingly, to establish a prima facie case of discrimination, Mr. Jones was required to show the following facts by a preponderance of the evidence: Ms. Springfield was an African American woman, Mr. Jones was African American, the prosecutor disproportionately struck African American women, and any other relevant circumstances. Once these facts were proved more likely than not, the trial court should have presumed discrimination and found a prima facie case of discrimination by the prosecutor against Nilda Springfield.

F. Whether the Burden Is "More Likely than Not" or a "Raise an Inference," the Trial Court Erred by Failing to Find That the Prosecutor Committed a Prima Facie Case of Discrimination Against Nilda Springfield.

Despite having found that Mr. Jones had established three times that the prosecutor had committed prima facie cases of discrimination against African American women, the trial court declined to find a fourth case of discrimination against Nilda Springfield. When the prosecution used a peremptory challenge to strike Ms. Springfield, Mr. Jones moved to dismiss the jury panel under *Wheeler*, while noting that Ms. Springfield was a black female, like three other African American women struck by the prosecution, and therefore a member of two cognizable groups under the case law. (RT 1669, 1989.) Mr. Jones argued that Ms. Springfield's answers regarding the

death penalty were quite clear, and that she could impose it. He further pointed out that although Ms. Springfield's husband was incarcerated, her sons were involved in law enforcement as correctional officers. (RT 1991.) He objected to the striking of Ms. Springfield based on her background as a care-giver given that the persons whom she helped were African Americans.[32] He also observed that the prosecution accepted other care-givers as jurors. (RT 1992.)

The court denied the motion, reasoning that (1) at one time the prosecutor passed on further peremptory challenges when the jury had one African American woman and three African American men, (2) the defense had struck one of the three African American men, (3) the court did not "know" whether Ms. Springfield was black, and (4) "it was very evident to" the court that Ms. Springfield was not "going to get past the prosecution peremptory," regardless of her color, because she was a care-giver, was married to a convicted murderer, and "came across rather weakly for the penalty." (RT 1992-1995.) The court's ruling was wrong. Mr. Jones established a prima facie case of discrimination, whether he was required to show that discrimination was more likely than not or raise an inference of discrimination.

Preliminarily, it should be noted that the trial court considered Mr. Jones's motion with respect to Ms. Springfield at the same time it dealt with his *Wheeler* motion concerning Ivan Holden, an African American man. (RT 1989-1995.) Thus, it is unclear whether the court's first and second

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[32]Strikes related to membership in African American organizations have been deemed surrogates for race. (See, e.g., *Parker v. State* (Ala. Crim. App. 1990) 568 So.2d 335, 336-37; *Randolph v. State* (Ga. Ct. App. 1992) 416 S.E.2d 117, 119.)

reasons (stated above) for denying the motions pertained to both Ms. Springfield and Mr. Holden, or whether the fact that one African American woman remained on the jury related only to Ms. Springfield, and that three African American men remained on the jury and Mr. Jones had challenged one of them related only to Mr. Holden. Mr. Jones assumes that the court intended each stated reason to apply to Ms. Springfield.

In *People v. Snow* (1987) 44 Cal.3d 216, chief justice Lucas, writing for a unanimous Court and finding *Wheeler* error, stated: "the fact that the prosecutor 'passed' or accepted a jury containing two Black persons [does not] end our inquiry, for to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." (*Id.* at p. 225.) Adopting the reasoning of a Court of Appeal opinion, the Court further noted:

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

(*Ibid.* [internal quotations and citation omitted]; *People v. Fuentes*, *supra*, 54 Cal.3d 707, 721 [finding a *Wheeler* violation even though the trial jury contained three African American jurors and three African American alternates; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 1254 [*Batson* "does not hold that a prosecutor can strike as many African-Americans as he wishes as long as he leaves one or two on the panel"].) Under *Snow* and *Fuentes*, the trial court erred in relying primarily on the fact that the prosecutor passed when the jury had one African American woman and

three African American men.[33]

That the defense properly used a peremptory challenge against an African American man, who played in a band with a district attorney and strongly supported the death penalty (RT 1570, 1575, 1961), is irrelevant to whether the *prosecutor* improperly committed intentional discrimination. (*People v. Reynoso*, *supra*, 31 Cal.4th 903, 927 ["It is of course settled that 'the propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges'"].)

As the defense observed, Ms. Springfield was a black female. (RT 1989.) The trial court even noted that Ms. Springfield's skin color was "very black." (RT 1993.) Ms. Springfield wrote on her questionnaire that she was born in Puerto Rico and considered herself African American. (CT 8450, 8455; RT 1993.) She also equated race with skin color. To the question, "Do you feel that *race* is a barrier to success in our society?" she responded on her questionnaire, "I myself feel that there [are] persons in every aspect in this society that will always look at my *color* before they hear me speak." (CT 8456 [italics added].) People born in Puerto Rico are Americans, and may identify with their African ancestry. (*Katzenbach v. Morgan* (1966) 384 U.S. 641, 658, fn. 21 [1917 Jones Act conferred United States citizenship on all citizens of Puerto Rico]; *Bermudez Zenon v.*

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[33]It seems odd that the prosecutor did not strike the one remaining African American woman on the jury given that she believed "nonparental guidance" caused crime; wrote that "I do not feel anyone is guilty if I have not witnessed any crime" (CT 7688); apparently used drugs when she was younger (CT 7691); and did not believe in an "eye for an eye" (CT 7694). Perhaps the prosecutor was just being savvy in retaining one African American woman in light of the fact that the trial court used this in denying the *Wheeler* motion.

Restaurant Compostela, Inc. (D.Puerto Rico 1992) 790 F.Supp. 41, 43, fn. 1 [distinguishing between Puerto Ricans' cultural ethnicity and their race: "In this Opinion, the term 'Black' shall be used to describe Puerto Ricans who closely identify with their African ancestry"].) Thus, as Ms. Springfield stated, she was African American.

In denying the motion, the trial court apparently ignored that Ms. Springfield married her husband long after his conviction, did not discuss the conviction with him, and did not know the details of the conviction. (RT 1917.) Moreover, Ms. Springfield stated unequivocally that she could "completely separate out" her husband's from Mr. Jones's case, and that she could be fair to both sides. (RT 1918.)

The trial court also ignored the fact that Ms. Springfield worked for the Department of Corrections, which in her view, was "too" lenient on inmates. (RT 1921.) She especially objected to inmates being given too many chances to commit the same crimes. (RT 1922.) Also, her two children were correctional officers, something that should have suggested a pro-law enforcement bias. (RT 1918.) Ms. Springfield underscored her strong feelings against crime when, exhibiting no sympathy for her husband, she told the court that her husband's current incarceration for a parole violation was his responsibility: "He brought it onto himself, whatever happened. He's an adult, and he was aware that if ... he was still on parole and if he went and did something that eventually [he] was going to get caught, he was going to get sent back." (RT 1920.) Ms. Springfield was also the victim of a hold-up at knife-point, when a gang broke into her home and "terrorized" her and her children. (RT 1920.) All of this points to Ms. Springfield being an excellent candidate to serve on the jury from the prosecution's perspective. A prosecutor's challenge of a prospective juror

with a pro-prosecution background supports an inference of discrimination. (*People v. Bolling* (N.Y. 1992) 582 N.Y.S.2d 950, 955 [79 N.Y.2d 317, 325, 591 N.E.2d 1136, 1141]; cf. *People v. Farnam* (2002) 28 Cal.4th 107, 138 ["a prosecutor may reasonably surmise that a close relative's adversary contact with the criminal justice system might make a prospective juror unsympathetic to the prosecution"].)

Moreover, the *prosecutor* may very well have *believed* Ms. Springfield and did not see her marriage as a basis for a peremptory challenge. But we do not know the prosecutor's view because he declined to answer when the court invited him to explain why he challenged Ms. Springfield.

As for Ms. Springfield being a weak supporter of the death penalty (RT 1924-1925), perhaps this was of no concern to the prosecutor just like it was no concern when he accepted Mr. Hartman, who too only weakly supported the death penalty. (CT 7477; RT 1343.) Thus, it makes no sense for the trial court (or *this* Court under *Howard*) to speculate that Ms. Springfield's weak support for the death penalty justified a peremptory challenge when the prosecutor already proved that he would accept such jurors.

Finally, the trial court's reliance on Ms. Springfield's experience as a care-giver – she worked with state prisoners in "A. A. and the Narcotics Anonymous" (RT 1954) – is contradicted by the prosecutor's repeated acceptance of care-givers on the jury, as pointed out by the defense. (See RT 1498 [emergency medical technician]; CT 7486 [elementary school teacher]; CT 7654 [special education tech helping severely handicapped students]; CT 7774 [elementary school teacher].) This prosecutor did not strike Ms. Springfield because she worked with prisoners trying to

overcome addictions.

Although the court invited the prosecutor to put on the record ***his*** reasons for striking Ms. Springfield, the prosecutor declined. (RT 1995.) The court also invited the prosecutor to put his reasons on the record for striking another African American, Ivan Holden, and the prosecutor accepted this invitation. (*Ibid.*) At no time did the prosecutor state on the record why *he* struck Ms. Springfield. Thus, the prosecutor did not confirm the trial court's apparent view that any prosecutor would have used a peremptory challenge against Ms. Springfield.

Moreover, it is plain that Mr. Jones established a prima facie case of discrimination against Nilda Springfield, just as he had done (and the court so found) three times before when the prosecutor struck three other African American women. By the time Ms. Springfield was excused, the prosecution had exercised 16 peremptory challenges against 12 women and four men, or against three times as many women as men (RT 1519-1520, 1639-1640, 1746-1747, 1856-1857, 1967), even though the number of men and women eligible as jurors were about equal, 27 women and 26 men (RT 1303-1979). Thus, although 51 percent (27/53) of the eligible jurors were women, the prosecution used 75 percent (12/16) of its peremptory challenges against women.

Ten African Americans were eligible to serve as jurors in this case. (RT 1948, CT 7707; RT 1520, CT 8619; RT 1504, CT 7683; RT 1967, CT 8450; RT 1961, CT 8739; RT 1624, CT 7443; RT 1640, CT 8086; RT 1746, CT 9244; RT 1857, CT 8206; RT 1953, CT 7731.)[34] The prosecution struck

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[34]The trial court acknowledged that there were "so few African-Americans in the potential audience." (RT 1642.)

five or 50 percent of them. (RT 1520, 1640, 1746, 1857, 1967.) In contrast, at the time Ms. Springfield was removed, 41 non-minority whites had been eligible to serve (RT 1303-1967), yet the prosecutor struck just ten or 24 percent of them. (RT 1519, 1520, 1639, 1651, 1746, 1747, 1856, 1857.) Thus, the prosecution struck African Americans at twice the rate as non-minority whites.

The prosecution's 16 peremptory challenges included five African Americans. (RT 1520, 1640, 1746, 1857, 1967.) African Americans constituted 19 percent (10/53) of the eligible prospective jurors, yet the prosecution used 31 percent (5/16) of its peremptory challenges against African Americans. (RT 1993.) In contrast non-minority whites were 77 percent (41/53) of the eligible jurors, but the prosecutor used just 62 percent (10/16) of his peremptory challenges against them.

Five African American women were eligible to serve as jurors. The prosecution struck four or 80 percent of them. (RT 1520, 1640, 1746, 1967, 1992.) And although African American women were just nine percent (5/53) of the eligible jurors, the prosecution used 25 percent (4/16) of its peremptory challenges to exclude them from the jury.

"[S]eriously disproportionate exclusion of Negroes from jury venires ... is *itself* such an unequal application of the law ... as to show intentional discrimination." (*Batson v. Kentucky*, *supra*, 476 U.S. 79, 93 [internal quotations and citations omitted; italics added].) Thus, statistical evidence alone may raise an inference of discrimination. *Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 682 ["Statistical facts like a high proportion of African-Americans struck and a disproportionate rate of strikes against African-Americans can establish a pattern of exclusion on the basis of race that gives rise to a prima facie *Batson* violation"]; *Fernandez v. Roe* (9th

Cir.2002) 286 F.3d 1073, 1078 [prima facie case when the prosecutor struck four out of seven (57 percent) Hispanics, and prosecutor exercised 21 percent (four out of nineteen) of his challenges against Hispanics – "standing alone," this was "enough to raise an inference of racial discrimination"]; *Turner v. Marshall* (9th Cir.1995) 63 F.3d 807, 813, overruled on other grounds by *Tolbert v. Page* (9th Cir.1999) (en banc) 182 F.3d 677 [prima facie case when five of nine (56 percent) African Americans struck, and 56 percent (five out of nine) of the challenges were made against African Americans who constituted only 29 percent of the venire]; *United States v. Alvarado* (2d Cir.1991) 923 F.2d 253, 255 [prima facie case when prosecutor struck four of seven minority venirepersons]; see *Miller-El*, *supra*, 537 U.S. 322 [123 S. Ct. 1029, 1042 ["the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors"]; *Batson*, *supra*, 476 U.S. at p. 94 ["a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination"].)

Here, the prosecutor struck 80 percent of the available African American women, and though African American women constituted only nine percent of the venire, the prosecutor exercised 25 percent of his challenges against African American women. Standing alone, this was enough to raise an inference of discrimination.

But there was more. Three times previously, the trial court had found prima facie cases of discrimination against African American women. This too supports an inference of discrimination. (*Fernandez v. Roe*, *supra*, 286 F.3d 1073, 1079 [the prosecutor's previous behavior had already supported an inference of discrimination and later supported another inference of racial discrimination]; *People v. Irvin* (1996) 46

Cal.App.4th 1340, 1351-1352 [subsequent *Wheeler* motion can be based on evidence presented in earlier motion to extent necessary to establish discriminatory pattern of peremptory challenges].)

Another factor on which a defendant is entitled to rely in establishing a prima facie case is the fact, "as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Batson*, *supra*, 475 U.S. at p. 96 [citation omitted].)

Moreover, as this Court noted in *Wheeler*, a trial court may determine whether there has been a "true case" of discrimination based on the court's knowledge of local prosecutors. (*People v. Wheeler*, *supra*, 22 Cal.3d 258, 281). Although the court's knowledge of a local prosecutor should not come into play until step three of *Batson* at "the credibility-assessment stage" (*St. Mary's Honor Center v. Hicks*, *supra*, 509 U.S. 502, 509), it is likely that the trial judge, a former prosecutor (6PT 2), had good reason to be suspicious of the prosecutor in this case based on her knowledge of him. After all, three times she found a prima facie case of discrimination against him.

This Court should be distrustful of this prosecutor for an additional reason: he attempted to mislead the trial court when the court asked whether Ms. Springfield was black. (RT 1993.) The prosecutor represented to the court that Ms. Springfield's questionnaire "says she likes to think of herself as black, not that she is black. I think she's Hispanic." (RT 1993.) But as previously noted, the juror questionnaire did not state that Ms. Springfield "likes" to think of herself as black. Ms. Springfield plainly wrote, "I consider myself African-American." (CT 8450.) Moreover, Ms. Springfield responded to the question, "Do you feel that

race is a barrier to success in our society?" as follows: "I myself feel that there [are] persons in every aspect in this society that will always look at my *color* before they hear me speak." (CT 8456 [italics added].) That the prosecutor sought to mislead the trial court on this issue demonstrates that he was not acting in good faith and struck Ms. Springfield because of her race and sex. (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 699 [rejecting the prosecutor's race-neutral reasons for peremptory challenges where other reasons proffered by prosecutor were false].) it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury

Finally, a factor that is especially relevant to finding a prima facie is the fact that both Mr. Jones and Ms. Springfield are African American. (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1323; *People v. Howard*, *supra*, (1992) 1 Cal.4th 1132, 1156.) As stated by the United States Supreme Court:

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

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

The evidence strongly suggests that in February 1994, the prosecutor struck pro-law enforcement Nilda Springfield because of her black African American heritage and gender, not because of her husband, her job, or her

feelings about the death penalty. (RT 1796, 1967.)[35] Accordingly, Mr. Jones established a prima facie showing of discrimination by the prosecutor against Nilda Springfield, and the judgment must be reversed. (*People v. Snow* (1987) 44 Cal.3d 216, 227 [reversing for failure to find a prima facie case where voir dire occurred six years before and it was unrealistic that the prosecutor and court could recall sufficient details for any rehearing].)

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[35]The Ninth Circuit has stated that in the prima facie analysis, "it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury." (*Chinchilla*, *supra*, 874 F.2d at p. 698, fn. 5.)

2.

THE COURT ERRED IN DENYING MR. JONES'S *WHEELER* MOTIONS AFTER FINDING PRIMA FACIE CASES OF DISCRIMINATION AND THE PROSECUTOR OFFERED UNSUPPORTED AND IMPLAUSIBLE EXCUSES FOR STRIKING TWO AFRICAN AMERICAN WOMEN.

Mr. Jones, an African American (RT 1523), raised *Wheeler* objections to the prosecution's peremptory challenges of Yilandra Jackson and Cquvator Gatson. (RT 1520, 1522, 1640, 1669.) The trial court found that Mr. Jones had established prima facie cases of discrimination by the prosecution with respect to both African American women. (RT 1642.) Once a defendant has made out a prima facie case of impermissible discrimination, the burden of production shifts to the prosecutor to come forward with a neutral explanation. If a neutral explanation is tendered, the trial court must then decide whether the defendant has proved intentional discrimination. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 767; *People v. Silva*, *supra*, 25 Cal.4th at p. 384.)

After hearing the prosecutor's explanations for the challenges, the court denied Mr. Jones's motions. (RT 1646.) The trial court, however, was unreasonable in failing to find purposeful discrimination as the prosecutor's stated reasons for striking the two African American women were either unsupported by the record, inherently implausible, or both; reversal is required. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 84-89; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *People v. Silva*, *supra*, 25 Cal.4th at p. 386.)

A. Yilandra Jackson

When confronted with the trial court's finding that the prosecution had committed a prima facie case of discrimination against Yilandra Jackson, the prosecutor offered a shotgun response of reasons for striking Ms. Jackson, no doubt hoping one would stick. The court accepted the proffered explanations wholesale. (RT 1646.) Nevertheless, as shown below, the prosecutor's reasons were either unsupported by the record, inherently implausible, or both.

Preliminarily, the prosecutor stated that he had developed a rating system of the prospective jurors based on their questionnaires, and "without knowing what they looked like." (RT 1642-1643.) Ms. Jackson's questionnaire, however, stated that her race was African American (CT 8624), and that she read "various black magazines" (CT 8623). Clearly, the prosecutor was at least being disingenuous when he suggested that, in evaluating her, he did not know that Yilandra Jackson was African American. Thus, from the outset, the prosecutor's credibility was seriously undermined.

> "The trial court has a duty to determine the credibility of the prosecutor's proffered explanations" (*McClain v. Prunty* (9th Cir.2000) 217 F.3d 1209, 1220), and it should be suspicious when presented with reasons that are unsupported or otherwise implausible (see *Purkett v. Elem*, *supra*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 [stating that at step three "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"]; *McClain v. Prunty*, *supra*, at p. 1221

["Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised."]).

(*People v. Silva*, *supra*, 25 Cal.4th at p. 385.) Moreover, because a biased prosecutor can simply add traits to a shopping list to achieve a combination that no white juror possesses, some courts have viewed shopping-list claims with disfavor. (See, e.g., *United States v. Stewart* (11th Cir. 1995) 65 F.3d 918, 926; *United States v. Alvarado* (2d Cir. 1991) 951 F.2d 22, 25; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698-699.) And at least one court has held that giving one false reason makes all other reasons irrelevant. (*United States v. Chinchilla*, *supra*, 874 F.2d at p. 699.) Each item tendered below by the prosecutor on his shopping list was unfounded.

The first reason offered by the prosecutor for striking Ms. Jackson was that she worked at the Job Corps where Bryan Jones had been enrolled for a time. (RT 1643.)

Ms. Jackson worked for the Job Corps beginning in 1990. (RT 8619.) Mr. Jones attended the Job Corps about *nine years* earlier. (RT 5419, 5633, 5688; CT 7107; exh. VV.) Thus, without more, it was not reasonable for the prosecutor to assume the remote possibility that Ms. Jackson knew someone, out of the hundreds of employees at the Job Corps, who remembered a single student out of the many thousands who had attended the Job Corps in the nine years before Ms. Jackson's arrival. (See http://www.sandiegojobcorps.org/ ["The San Diego Job Corps Center site is on 27 acres of land, employs nearly 300 people and houses 650 students"].) The trial court has a duty to ask probing questions to determine the credibility of the prosecutor's proffered explanations. (*Silva*, *supra*, 25

Cal.4th 345, 385.) The prosecutor's plainly implausible justification was more than likely pretextual and demanded more from the trial court than unquestioned acceptance.

The second purported excuse for striking Ms. Jackson was that she was twice divorced and her children were either divorced or separated. The prosecutor stated that this demonstrated instability with which he was not comfortable. (RT 1643.) On the contrary Ms. Jackson's questionnaire reflects a stable life. She was 50 years old and owned her own home, where she had lived for 20 years. She had worked for the Job Corps for four years and the University of California at San Diego for 16 years before that. Although she had been married twice, there was no indication how or when her first marriage ended (her first husband could have died many years before), and there was no evidence of when she and her second husband were divorced. (CT 8619-8620.) Given the well-known statistic that half of all California marriages end in dissolution, Ms. Jackson's divorce is no sign of instability. Moreover, her daughters' marital status, one separated, the other divorced, cannot seriously be taken as a mark of their *mother's* stability. (RT 8621.) Any suggestion that it can smacks of pretext. Furthermore, five others acceptable as jurors to the prosecution had multiple marriages; one was even married four times. (CT 7487; 7583; 7655; 7751 [married three times]; 8860 [married four times].) (See *Miller-El v. Cockrell, supra*, 537 U.S. 322, 343 [endorsing comparative juror analysis in *Batson* context: "three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury"].)

Moreover, under *Wheeler*, "peremptory challenges 'are permissible so long as they are based on specific bias'" (*People v. Williams*, *supra*, 16 Cal.4th at p. 188 [quoting *People v. Johnson* (1989) 47 Cal.3d 1194, 1215]), defined as"'reasonably relevant to the particular case on trial or its parties or witnesses" (*ibid.* [quoting *People v. Wheeler*, *supra*, 22 Cal.3d at p. 282]). Similarly, *Batson* "permits the challenges so long as they may be justified by a 'neutral explanation related to the particular case to be tried.'" (*Ibid.* [citing *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98].) The marriages and divorces of Ms. Jackson and her daughters were irrelevant to any bias Ms. Jackson may have had about this case, its parties, or its witnesses. Again the trial court should have been suspicious of the prosecutor's implausible explanation and probed further. (*Silva*, *supra*, 25 Cal.4th at p. 385.)

The prosecutor's third scattershot justification for peremptorily challenging Ms. Jackson was because she wished to be a secretary or counselor. (RT 1643-1644; see CT 8622.) How genuine was the prosecutor in making this excuse in light of the fact that four others acceptable to the prosecution as jurors were actually helpers, unlike Ms. Jackson, who merely *wanted* to be a secretary or counselor? (See RT 1498 [emergency medical technician]; 7486 [elementary school teacher]; 7654 [special education tech helping severely handicapped students]; 7774 [elementary school teacher].) Thus, the prosecutor's third offering must be seen as mere pretext particularly given his previously suspicious and farfetched excuses.

Next, according to the prosecutor, was that Ms. Jackson appeared to be a loner and may not be a "people person" because she was not involved in any clubs and was choosy about her friends. (RT 1644.) How this

related to a specific bias concerning this case, the prosecutor did not explain. Moreover, this rationale for striking Ms. Jackson was contradicted by another excuse offered by the prosecutor, that Ms. Jackson wanted to help people. It also ignored other responses Ms. Jackson made on her questionnaire. At work she supervised approximately 10 to 15 people including the students who helped her. She enjoyed it, and those working with her enjoyed helping her. (RT 8619.) She spent her spare time with her grandchildren and went camping. (RT 8623.) And again she wanted to be a secretary or counselor, someone who works with people. (RT 8622.) The genuineness of the prosecutor's conclusion was also drawn into question by his lack of concern about *13* others who did not belong to any clubs, but whom the prosecutor found suitable for jury duty in this case. (See CT 7466 [Hartman]; 7514 [Gomez]; 7562 [Soule]; 7586 [Simmons]; 7610 [Barker]; 7706 [Williams]; 7726 [Pires]; 7754 [Porter]; 7778 [Rostedt]; 7922 [Carl]; 9080 [Preston]; 9272 [Butikofer]; 9391 [Sele].)

The prosecutor's fifth stated reason for striking Ms. Jackson was that she supposedly wrote on her questionnaire that San Diego police officers shoot too quickly. This, according to the prosecutor, indicated a tendency towards an anti-law enforcement background. (RT 1644.) The prosecutor took Ms. Jackson's statement out of context. What she actually wrote was: "I respect law enforcement members while performing their duties. Some are too quick in drawing their guns and shooting." (CT 8627.) One would have to live in a cave not to be aware that "some" officers have been too quick to shoot. Nevertheless, as Ms. Jackson expressly indicated, she still respected law enforcement. (CT 8627.) Moreover, when her house was burglarized, the police officers who responded to her call for help were very professional, according to Ms. Jackson, and she never had a bad experience

with the police. (CT 8628.) Without followup questioning, the prosecutor was presumptuous to conclude that Ms. Jackson had an anti-law enforcement tendency.

The prosecutor's sixth excuse was that Ms. Jackson had seen a psychiatrist. To the prosecutor this meant that she was mentally weak and unstable, something he was not looking for because of the difficult task he would ask the jury to accomplish. (RT 1644.) Ms. Jackson had seen a psychiatrist *four years* before when she had lost her job of 16 years. (RT 8619, 8632). Again the prosecutor did not explain how seeing a psychiatrist to deal with the potentially devastating loss of a long held position translates into a bias towards a capital case, the parties or its witnesses. (*People v. Williams*, *supra*, 16 Cal.4th at p. 188 [peremptory challenges are permissible so long as they are based on specific bias, defined as reasonably relevant to the particular case on trial or its parties or witnesses]; *People v. Fuentes* (1991) 54 Cal.3d 707, 720 [the prosecutor did not articulate how being a customer service representative and lacking education related to jury service in this case].) Moreover, when the prosecutor expressed that "[t]hey will be asked to do a very difficult task here today, and I do not want someone who has been through that experience" of seeing a psychiatrist (RT 1644), the prosecutor was stating unequivocally that he did not want anyone on the jury, not just Ms. Jackson, who had seen a psychiatrist. Notwithstanding this avowed reason for striking Ms. Jackson, the prosecutor found acceptable as jurors three others who had seen a psychiatrist or psychologist: Richardson (CT 7451), Gomez (CT 7523), and Simmons (CT 7595). Clearly, the prosecutor was not credible in offering this sixth reason for striking Ms. Jackson.

The prosecutor also maintained that Ms. Jackson's views on the death penalty justified the peremptory challenge:

> Her attitudes on the death penalty, she was weak support. The numbers are such that I can kick everyone who has a weak support for the death penalty. There are enough people who are strong support or better who I can accept. Her attitude on the death penalty *scares* me. [¶] She says she dislikes making this very crucial decision. Fine. But I'm going to ask her to do it and I don't want her to do something she doesn't *like* to do.

(RT 1644 [italics added].)

On her questionnaire, Ms. Jackson answered that she weakly supported the death penalty. (CT 8634.) She explained: "I would dislike making this very crucial decision, but if there is no reasonable doubt in my mind regarding the case and all evidence I could make this decision." (*Ibid.*) She also explained that making the penalty decision is "hard, but it has to be done and someone has to do it." (CT 8635.) Regarding life without the possibility of parole, Ms. Jackson expressed: "Sometimes prisoners do not remain in prison the remainder of life. Do the crime do the time." (CT 8634.)

According to the prosecutor, Ms. Jackson's views on the death penalty "scared" him, and he could strike any prospective juror who did not strongly support the death penalty. (RT 1644.) Nevertheless, the prosecutor had no apparent difficulty in accepting James Hartman as a juror, even though Mr. Hartman only weakly supported the death penalty. (CT 7477; RT 1343 ["I just kind of weakly support the death penalty"].) If in fact the prosecutor was so "scared" about prospective jurors' weak

support for the death penalty, why did he fail to ask Mr. Hartman a single question concerning his views on the death penalty? (RT 1497-1499.) Furthermore, the prosecutor did not even ask Ms. Jackson one question concerning her death penalty attitudes, but only asked her nine questions that covered less than a page and a half of reporter's transcript. (RT 1503-1504.) "[T]he failure to engage group members in more than desultory voir dire" is evidence of purposeful discrimination. (*Batson*, *supra*, 476 U.S. at p. 97; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) Here, purposeful discrimination is patent particularly given the prosecutor's disparate treatment of Ms. Jackson, an African American woman, and Mr. Hartman, a white male. (RT 1962, 1993.)

One must also question the sincerity of the prosecutor's statement that he did not want jurors doing something they did not "like to do." It is hard to imagine any civilized person liking the job of condemning someone to death. But as Ms. Jackson explained, someone has to make that decision and she could be that someone. (CT 8634-8635.) Moreover, four prospective jurors acceptable to the prosecution responded on the juror questionnaire that they would *not like* to be jurors in this case. (CT 7570, 7810, 7930, 9088.) Notwithstanding the prosecutor's purported distaste for asking jurors to do something that they did not like to do, the prosecutor asked these four individuals to do precisely that, serve as jurors.

The prosecutor claimed a seventh reason for striking Ms. Jackson: she saw a TV show that "demonstrated defendants sitting in a room where they were waiting apparently for the execution. That, again, shows me a leaning towards the poor defendant rather than the concern for the victims and enforcing the law." (RT 1644.) The prosecutor clearly misrepresented Ms. Jackson's statement. She wrote on her questionnaire that she was

influenced about the death penalty by "the news when they show the inside of the room where the guilty person sits and the procedure that is performed." (CT 8637.) Obviously Ms. Jackson did not write that she saw a demonstration of defendants waiting to be executed. Moreover, the prosecutor was plainly wrong to assert that Ms. Jackson leaned "towards the poor defendant rather than the concern for the victims and enforcing the law." In fact Ms. Jackson showed that she was very troubled about crime when she wrote: "Crime has really gotten out of hand. Live [sic] doesn't mean anything to some people anymore." (CT 8637.) She also reflected a tough view about punishment in her statement, "Do the crime do the time." (CT 8634.)

Finally, in positing an eighth excuse to strike Ms. Jackson, the prosecutor misstated the substance of Ms. Jackson's questionnaire in representing to the court: "And that she also said that even though she is now weakly supporting the death penalty, she used to be even less in favor of it than now." (RT 1644.) Ms. Jackson answered on her questionnaire that she was aware of the Robert Alton Harris execution. She then wrote: "I felt that if more people know the penalty that maybe they will think twice before committing the crime." Ms. Jackson also answered that her views on the death penalty had changed over the last 10 years. That is when she wrote: "I have matured and am more concerned about what is going on around me. Crime has really gotten out of hand. Live [sic] doesn't mean anything to some people anymore." (CT 8637.) Thus, Ms. Jackson did not state that she used to be *less* in favor of the death penalty.

B. Cquvator Gatson

The prosecutor purportedly had multiple reasons for striking Cquvator Gatson. First, according to the prosecutor, were her "liberal

tendencies" because she was "involved with the Famosa slough, San Diego environmental project, [and] equal employment opportunity counsel [sic]." Notwithstanding the fact that Ms. Gatson supported the death penalty without reservation (CT 8101), the prosecutor stated: "Those people scare me. I don't like them on death penalty cases." (RT 1645.)

On her questionnaire Ms. Gatson wrote that she belonged to the "Federal Equal Employment Opportunity Council of San Diego." (CT 8090.) This sounds suspiciously like the United States Equal Employment Opportunity Commission, which is charged under federal law with enforcing laws against employment discrimination based on race. (See 42 U.S.C. §§ 2000e-2 et seq.)[36] Thus, Ms. Gatson's perceived involvement with a group charged with enforcing laws against discrimination based on race could hardly be a race-neutral explanation for exercising a peremptory challenge. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768 [quoting *Hernandez v. New York*, *supra*, 500 U.S. 352, 360 [plur. opn. of Kennedy, J.].) Here, discriminatory intent was plainly inherent in the prosecutor's explanation.

According to its website, the "Friends of Famosa Slough is a group of concerned citizens whose goal is to restore Famosa Slough as a natural wetland preserve. To do this, we have scheduled cleanups and nature walks, work to prevent the degradation of the slough, act as a community

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[36]The Equal Employment Opportunity Council of San Diego may actually be a group that represents 100 of San Diego County's largest employers. (See http://www.nctimes.net/news/052000/zzzz.html.) The point, however, remains that the prosecutor thought it was a liberal organization related to equal employment, no doubt equal employment for all races.

voice on the restoration, act as an information source to public agencies, and will work on restoration projects." (See http://www.geocities.com/famosa_slough/.)

Ms. Gatson was a park ranger supervisor. (CT 8086.) She had a B.S. in zoology in 1977 from Cal Poly, Pomona. (CT 8089.) She read environmental books and magazines and animal stories. She watched any and all TV nature specials. (CT 8090.) Not surprisingly, she belonged to a group, Friends of Famosa Slough, whose goal is to restore the slough to a natural wetland preserve. Under *Batson*, the prosecutor was required "to provide a race-neutral explanation *related to the particular case* to be tried for the peremptory challenge." (*People v. Welch* (1999) 20 Cal.4th 701, 745 [italics added].) According to the prosecutor, he was "scared" of those involved with the Famosa Slough and did not like them on death penalty cases. The prosecutor, however, did not explain the connection between restoring a slough and the death penalty. The prosecutor's explanation was thus pretextual, especially given Ms. Gatson's acknowledged support for the death penalty and her feeling "that some crimes are so heinous, and show such obvious disregard for life and human suffering that they are punishable only by death" (CT 8101), as well as her view that "boogie men do exist and sometimes need to be eliminated." (CT 8104; *Purkett v. Elem*, *supra*, 514 U.S. 765, 768 ["implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"].)

The next excuse offered by the prosecutor was that Ms. Gatson supposedly did not read the newspaper and that she was not aware of Robert Alton Harris. The prosecutor stated: "That's *scares* me, if she's so isolated that she doesn't interact with papers or even knows about Robert Harris." (RT 1645.)

The prosecutor was inaccurate in asserting that Ms. Gatson did not read the newspaper. Although she responded that she did not read a newspaper on a "regular basis" (CT 8090), she also wrote that she had read about DNA technology in "newspapers" (CT 8099), and she found herself "exposed to crime on a daily basis thanks to ... newspapers." (CT 8104.) Moreover, the prosecutor again applied a double standard because he accepted as jurors five others who did not read a newspaper on a regular basis. (CT 7514, 7586, 7682, 8863, 9268.) And as for Robert Alton Harris, Ms. Gatson had moved to San Diego in 1990 (CT 8086), before that had lived in an isolated area that was virtually crime free (CT 8104), and therefore was not exposed to the many years of the Harris case, which began in 1978, 12 years before Ms. Gatson moved to San Diego. (See http://www.cdc.state.ca.us/CommunicationsOffice/CapitalPunishment/executed_inmates/robert_harris.asp.) In any event, again applying a double standard, the prosecutor accepted as jurors four others who were not aware that Harris had been executed. (CT 7528, 7624, 7816, 8877.) One must ask why these individuals did not "scare" the prosecutor. Clearly, the prosecutor's credibility was highly doubtful.

According to the prosecutor, his third reason for excusing Ms. Gaston was that she was purportedly dissatisfied with police response to a burglary. (RT 1645.) The prosecutor's statement was accurate, though incomplete. Although Ms. Gatson was upset that her home had been burglarized twice (CT 8094), she also wrote: "But with no prints on file, no witnesses & perpetrators long gone, what can you do?" (CT 8095.) Thus, she was unhappy that the burglars were not caught and her property was not recovered, but she also understood that there was nothing the police could do under the circumstances. Moreover, she had friends in law enforcement

(CT 8093), had only good and no bad experiences with the police (CT 8095), and acknowledged that "[l]aw enforcement officers have a hard, sometimes thankless job. Most of them do it well." (CT 8094.) The prosecutor's alleged concern over Ms. Gatson's response to the burglaries must be viewed in light of her overall opinion of law enforcement, and accordingly must be seen as pretextual.

The prosecutor also claimed that in Ms. Gatson's mind, the meaning of proof beyond a reasonable doubt and that of proof beyond a shadow of a doubt "may not be that far apart." (RT 1645.) On her questionnaire Ms. Gatson wrote: "I feel I can be an impartial juror because I truly believe that a person is innocent until proven guilty beyond the shadow of a doubt." (CT 8096.) During voir dire the court asked Ms. Gatson about this, and she replied: "I have been educated since then. I can live with beyond a reasonable doubt." (RT 1544.) Later the prosecutor asked why she used the phrase, "proof beyond a shadow of a doubt." Ms. Gatson responded: "Well, it's a serious case. So I require that it be handled just as seriously. I would not want to come to any snap decisions without hearing everything, and I would like to be as certain as possible before passing a judgment, whether that judgment be for guilty or innocent, and then if we do proceed to the penalty part, then I would like to be comfortable in my mind which penalty." (RT 1627-1628.) The prosecutor then asked: "will that require me to prove this case beyond a shadow of a doubt?" Ms. Gatson answered, "Beyond a reasonable doubt. That's what I have been educated about so far. But because he's – anybody is considered innocent until they are proven guilty. So I am expecting that the prosecutor would have to prove beyond a reasonable doubt that this person is guilty." Ms. Gatson added that before the orientation, where the court instructed on reasonable doubt,

she understood the two phrases "proof beyond a reasonable doubt" and "beyond a shadow of a doubt" to mean about the same thing. Nevertheless, as she apprised the court and counsel, she no longer had that view as a result of the court's instruction. (RT 1628.) Thus, there was no basis for the prosecutor's purported concern over Ms. Gatson's confusing beyond a reasonable doubt with beyond a shadow of a doubt.

The prosecutor's fifth expressed reason for using a peremptory challenge against Ms. Gatson was based on her prior perspective of circumstantial evidence. The prosecutor stated:

> She talks about circumstantial evidence being deceiving. She wants something more substantial. On page 78 of her questionnaire. And she even gave us the example here in court about the problems with circumstantial evidence. My case is based a great deal on circumstantial evidence. If I have someone who is not going to accept it as readily as something more substantial, I am in trouble.

(RT 1645-1646.) As Ms. Gatson explained in court, she wrote on her questionnaire – *before* she was instructed by the court on circumstantial evidence – that circumstantial evidence can be deceiving. She previously had held this view because of a story that she had read when *she was in the fifth grade*. The story was about a person who had been convicted on circumstantial evidence. The defendant served some time before it was discovered that he was innocent. Ms. Gatson remembered that the hero in the story said, "Listen, always remember these words: circumstantial evidence can be deceiving." The prosecutor then asked Ms. Gatson, "you're not real trusting of circumstantial evidence?" Ms. Gatson answered, "I wasn't, again, prior to the orientation, prior to everything – the

events yesterday." (RT 1629.) Thus, after being instructed by the court regarding circumstantial evidence, Ms. Gatson was no longer distrusting of it and proved once again that she would follow the law despite her former understanding. The prosecutor's explanation was pretextual.

Next the prosecutor stated that Ms. Gatson equated beyond a reasonable doubt with being positively proven. (RT 1646.) Ms. Gatson answered "yes" on her questionnaire to the question, "If, after hearing all the evidence, you believe the defendant's guilt has been proven beyond a reasonable doubt, would you be able to return to court, face the defendant, and announce your guilty verdict?" Ms. Gatson explained her affirmative answer: "The operative words are, 'beyond a reasonable doubt.' If guilt is or is not positively proven, the only recourse is to respond with a 'guilty' or 'not guilty' verdict." (CT 8098.) By the prosecutor's remark, he seemed to suggest that "positively proven" was a greater burden than beyond a reasonable doubt. Yet, at the time of trial, beyond a reasonable doubt was defined as

> not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(RT 5078-5079.) The prosecutor did not explain how "positively proven" was somehow a greater burden than "an abiding conviction to a moral certainty of the truth of the charge." Nor did the prosecutor ask Ms. Gatson what she meant by "positively proven." Thus, this was another instance of

the prosecutor failing to ask followup questions in order to use pretext to excuse a prospective juror.

Finally, the prosecutor's seventh excuse, a "big factor," so he said, was that Ms. Gatson was seeing a therapist for depression. (RT 1646.) The prosecutor stated:

> No matter what she says, this will be a depressing case. *I don't want the responsibility of harming this woman.* I think she is going to be harmed based on what she has to hear in this case and what she has to do in this case. And I don't want that or someone with that background, that current background, sitting on a case of this magnitude.

(*Ibid.* [italics added].) Notwithstanding the prosecutor's claim that he did not want the responsibility of harming Ms. Gatson, a 44-year-old park ranger supervisor with a college degree, she was willing to accept the responsibility of serving on the jury, and after having heard the Court's orientation and procedures for a death penalty trial, stated that she could follow the instructions of the Court. (CT 8086, 8105.) Moreover, as *Wheeler* held, "peremptory challenges 'are permissible so long as they are based on specific bias.'" (*People v. Williams*, *supra*, 16 Cal.4th at p. 188 [quoting *People v. Johnson*, *supra*, 47 Cal.3d at p. 1216].) *Wheeler* defined specific bias as "a bias relating to the particular case on trial or the parties or witnesses thereto." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 276.)

> The law therefore presumes that each party will use his challenges to remove those prospective jurors who appear most likely to be biased against him or in favor of his opponent; by so doing, it is hoped, the extremes of potential prejudice on both sides will be eliminated, leaving a jury as

> impartial as can be obtained from the available venire. [¶]The purpose of the challenges also dictates their scope: *they are to be used to remove jurors who are believed to entertain a specific bias, and no others.*

(*Id.* at p. 274 [italics added].) Thus, the prosecutor was not entitled to remove Ms. Gatson merely because he did not want to harm her, as this is not relevant to whether she was biased against the prosecution. Moreover, imposing on a prospective juror the unwanted favor of striking her from the jury cannot be taken as a sincere explanation for a peremptory challenge. Thus, nothing in the transcript of voir dire or Ms. Gatson's questionnaire supports any of the reasons offered by the prosecution for striking Ms. Gatson.

C. Conclusion

On hearing the foregoing unsupported and implausible excuses for striking Ms. Jackson and Ms. Gatson, the court did not inquire further but merely made this global finding: "I am very satisfied that the reasons stated are substantial and do not relate to color whatsoever. ... I am completely satisfied with these; that these reasons are independent of color, and, therefore, the *Wheeler* challenge will be denied." (RT 1646.) Nevertheless, as this Court stated in *Silva*, "when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.) Moreover, the court's finding was unreasonable because the *Wheeler* challenge by Mr. Jones was based on race and *sex*, the latter ground completely ignored by the court. Accordingly, because the trial court's ultimate finding is unsupported by the record, Mr. Jones was denied the right to a fair trial in violation of the equal

protection clause of the federal Constitution (*Batson*, *supra*, 476 U.S. at pp. 84-89) and was denied his right under the state Constitution to a trial by a jury drawn from a representative cross-section of the community (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277). Reversal is required. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.)

3.

THE COURT ERRED IN ADMITTING EVIDENCE OF THE BERTHA RICHMOND OFFENSE TO PROVE IDENTITY, MOTIVE, AND INTENT IN THE JOANN SWEETS AND SOPHIA GLOVER CASES.

A. Proceedings Below

Mr. Jones moved to exclude evidence of the uncharged Bertha Richmond offense under Evidence Code sections 1101(a) and 352 because it constituted unduly prejudicial character evidence. (CT 1053.) The prosecution moved to admit the evidence under section 1101(b) to show identity, intent, and motive in the charged offenses. (CT 759, 769.)

The motions were submitted on the parties' filings, the transcript of the preliminary hearing in the Bertha Richmond case (CT 778), and the arguments of counsel, without taking additional evidence. Defense counsel continued to object to Bertha Richmond's testimony up until the time she testified at trial. (RT 2546-2547.)

The court ruled in favor of the prosecution, declaring as follows:

> Again, in this area I think that the marks of distinction outweigh those that would be dissimilarities. And, again, *the clear mark of distinction* that stands out in this case, the Bertha Richmond case, is *the force used on an otherwise willing sexual partner.*
>
> She may not have been a prostitute, but she was willing to go with the defendant to the house on Mississippi Street four days before the Mitchell case.
>
> And, of course, this is – this case tied right into the Mitchell case in proving the Mitchell case because Mitchell is one where Mitchell was so drunk, she's going to have such problems in proof for the People, that it clearly goes right into the Mitchell case, without any question.

> Like Mitchell, again, *the consensual sex* that is turned into forcible assault, multiple forms of sex, going to the Mississippi Street house, the same one involved in Mitchell, choking in addition to at least one other form of assault involved in this case.
>
> And I think *these distinctive marks* tie into Mitchell and tie it into the rest of the cases, and, therefore, it is probative. It's highly probative and goes to the question of *identity*, *motive*, *intent*, which is all at issue in this case.

(RT 472-473 [italics added].)

During the trial, the prosecution suggested that the court instruct the jury with CALJIC No. 2.50 (Evidence of Other Crimes) before Bertha Richmond testified. The court said it would instruct that the jury could consider the Richmond offense on the issues of identity, intent, and motive in the charged crimes, including those involving Sophia Glover and JoAnn Sweets. (RT 2546-2547.)

Later, however, the court stated,

> I am thinking back and I think that we had talked about the issues on which that 1101(b) evidence would be admitted, and it seems to me *identity was not one of them*. That I had said *we did not have a signature*, but we had that crucial issue of intent and motive, which were very problematic issues in this whole case, and that I had let it in for intent and motive, but not identity.
>
> Meaning, the limiting instruction should say you first have to be convinced he did this, one of these, one or more of these crimes, and you have to be convinced he did the Bertha Richmond; then you look to the issues of motive and intent. And that's important that we resolve that before I say anything.
>
> [T]he question is whether I had found that there was such a *signature element of sameness* between the Richmond

> case and all of these that they can go from that mark of Zorro, if you will, on all the cases and then go from that to identity, and *I do not think I found that.* I think I indicated that it was very similar.
>
> There were some crucial issues, but *the real issues that I had in mind were intent and motive*, because of that "why would you kill a *willing prostitute* for sex" issue ....

(RT 2598-2599 [italics added].) Thus, the court believed at *that* moment that there was no "signature" that would permit evidence of the Bertha Richmond incident on the issue of identity in the charged crimes, and that the real issues were intent and motive. The court then took a break to determine what its prior ruling had been, adding, "And I apologize. I usually keep very good notes on what my prior rulings were, but this one I didn't." (RT 2600.)

After apparently discovered the substance of its prior ruling, the court instructed the jury just before Bertha Richmond testified. The court told the jurors that they could consider the Bertha Richmond evidence not only on the issues of intent and motive in the charged cases, but they could also consider the evidence on the issue of *identity*:

> Ladies and gentlemen, please pay attention. This is one of the instructions that I will be giving you at the end of the trial also. It is called a limiting instruction. It means that some evidence may come in and you may consider it for certain purposes, but not for other purposes.
>
> Evidence may be introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial.

> Such evidence, if believed, will not be received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence may be received and may be considered by you only for the limited purpose of determining if it tends to show the existence of the *intent*, which is a necessary element of the crime charged, the *identity* of the person who committed the crime, if any, of which the defendant is accused, or a *motive* for the commission of the crime charged.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose. This would be circumstantial evidence and will be also subject to other instructions on circumstantial evidence as well.

(RT 2633-2634 [italics added].) Thus, the court admitted Bertha Richmond's testimony, as well as the corroborating testimony of Olivia Gonzalez, Detective Alan R. Fragoso, and San Diego Police Officer Delores M. Cirino. (RT 2425, 2547-2548, 2661-2666, 2688, 2701, 3523.)

As shown below, the trial court was correct when it stated the Bertha Richmond offense was *not* a signature crime when compared to the Sophia Glover and JoAnn Sweets charges. Hence, the court was wrong to admit evidence of the Bertha Richmond offense to identify the perpetrator of the Sophia Glover and JoAnn Sweets offenses. Moreover, the court erred in admitting evidence of the Bertha Richmond incident on the issues of intent and motive. The court's errors were prejudicial, mandating reversal of the Glover and Sweets convictions, corresponding special circumstances, and

death sentence.[37]

B. Factual Background

Bertha Richmond testified that at about 8 a.m. on Thursday, October 16, 1986, she was in a telephone booth on El Cajon Boulevard looking for the address of a check cashing outlet, when Bryan Jones drove up to her in a blue 280-Z. Ms. Richmond accepted his offer to take her to the outlet. Ms. Richmond went into the outlet, and was told to come back later because the computers were down. Mr. Jones drove her to her home, where she accepted his invitation to hang out with him. They next drove to the Wilsie residence at 4659 Mississippi Street. (RT 2635-2640, 4220.)

There they smoked a marijuana joint. Mr. Jones asked to kiss her, but she said no. While they were sitting on the sofa watching television, Mr. Jones swung his right arm from behind the sofa and tightly grabbed Ms. Richmond by the neck with one hand. He had a kitchen or hunting knife in one hand, and told her that he would kill her if she did not do what he wanted. He then had vaginal and anal intercourse with her on the floor. While she was getting dressed, Mr. Jones went through her purse. Later she discovered that some money was missing from her purse. (RT 2642-2649.)

Mr. Jones then drove Ms. Richmond to Fiesta Island. He told her that he knew where she lived and would kill her family. While they were in

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[37]In criminal cases the admissibility of other crimes is the single most commonly litigated evidentiary issue on appeal. (MaeEndez & Imwinkelried, *People v. Ewoldt: the California Supreme Court's About-face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct* (1995) 28 Loy. L.A. L. Rev. 473, 474.) More important, the erroneous admission of other crimes evidence is the "largest cause of reversal." (1 Imwinkelried, *Uncharged Misconduct Evidence* (2001) § 1:04, p. 20.)

the car at Fiesta Island, he forced her to orally copulate him. Next they drove to Old Town, to Golden Hill, and then to 28th Street, in the southeast part of town by a Burger King, where Mr. Jones got some water for Ms. Richmond. He drove the car for a block or two and stopped in an alley, where Ms. Richmond got out of the car and escaped. (RT 2651-2657.)

C. Additional Factual Background

Ms. Richmond, a cashier and cook for four years at the Balboa Park Naval Hospital Canteen (CT 820), testified at the preliminary hearing that although she went with Mr. Jones to a house on Mississippi Street in San Diego, she was not a willing sexual partner. Specifically, Ms. Richmond testified that (1) she agreed to hang out with Mr. Jones (CT 823), (2) when Mr. Jones asked her for a kiss, she refused (CT 783), and (3) she did not consent to any sex acts with Mr. Jones (CT 830).

D. The Court Erred in Admitting the Bertha Richmond Evidence on the Issue of Identity Because the Richmond Offense Was Not Highly Similar to the Glover and Sweets Charges.

A defendant's uncharged offense is admissible under Evidence Code section 1101 on the issue of identity only if the offense is "highly similar" to the charged crimes. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation omitted.] 'The pattern and characteristics of the crimes must be *so unusual and distinctive as to be like a signature.*'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403 [citing 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803 (italics

added)].)

Thus, to prove identity, the uncharged misconduct and the charged offense must be "mirror images." (*People v. Huber* (1986) 181 Cal.App.3d 601, 622; *People v. Balcom* (1994) 7 Cal.4th 414, 425 ["The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense"]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1066 ["highly distinctive marks of similarity" between the prior offense and the charged crime are required for admissibility to prove the defendant's identity]; *People v. Wein* (1977) 69 Cal.App.3d 79, 90 [prior offense was "unique and peculiar" to the extent that it constituted defendant's "trademark"]; *People v. Rodriguez* (1977) 68 Cal.App.3d 874, 883-884 [uncharged and charged offenses must have "highly distinctive marks of similarity"].)

"The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks." (*People v. Thornton* (1974) 11 Cal.3d 738, 756 [italics in original]; see, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 333 [the existence of stolen credit cards in Crown Royal bags in both the charged and uncharged offenses is sufficiently distinctive "signature" characteristic to support an inference that the same person committed both the charged and the uncharged acts]; *People v. Catlin* (2001) 26 Cal.4th 81, 120 ["the charged and uncharged crimes bore a number of highly distinctive common marks" – each victim was a close female relative of the defendant (wife or mother); the defendant stood to gain financially from each victim's death; and the victims had died from *paraquat poisoning*, which is "rare"]; *People v. Kipp*, *supra*, 18 Cal.4th at

pp. 370-371 [the charged and uncharged offenses displayed common features that revealed a "highly distinctive" pattern: in *both* rape-murders, the perpetrator strangled a 19-year-old woman in one location, carried the victim's body to an enclosed area belonging to the victim, and covered the body with bedding; the bodies of both victims were found with a garment on the upper body, while the breasts and genital area were unclothed; in neither instance had the victim's clothing been torn, and the bodies of both victims had been bruised on the legs]; *People v. Medina* (1995) 11 Cal.4th 694, 748 [admission of uncharged murders was justified in murder prosecution; both charged and uncharged offenses involved robbery and murder of convenience store employee, each victim was shot in the head execution-style, and ballistics reports indicated use of the *same handgun*, later traced to the defendant]; *People v. Sully* (1991) 53 Cal.3d 1195, 1223-1225 [illicit sex, cocaine and the abuse of prostitutes were common to all crimes, and each crime occurred in defendant's warehouse, where he lived, worked, and controlled "what came in and out"].)

On the other hand, courts will find no signature if the crimes are not uniquely similar. (See, e.g., *People v. Bean* (1988) 46 Cal. 3d 919, 937 [finding no unique signature where the murders occurred three days apart in the same neighborhood, both victims died as a result of brutal blows to the head area, both victims were elderly women who were robbed and their homes burglarized, and in each instance an automobile belonging to the victim was taken and abandoned in the same vicinity]; *People v. Rivera* (1985) 41 Cal. 3d 388, 393 [finding the following characteristics not sufficiently distinctive so as to demonstrate a signature: "(1) both crimes occurred on a Friday night; (2) both occurred at approximately 11:30 p.m.; (3) both involved convenience markets; (4) both markets were in Rialto; (5)

both markets were located on street corners; (6) both crimes involved three perpetrators; (7) both involved getaway vehicles; (8) prior to both crimes, two or three people were observed standing outside the store; (9) defendant used an alibi defense in both cases: when accused of the prior offense, he claimed to have been with his brother all night; in the current case he claims he spent the evening with his sister"]; *People v. Antick* (1975) 15 Cal.3d 79, 94 [fact that charged and uncharged offenses involved removal of personal property from private residence during owner's absence "cannot seriously be asserted as a distinctive and signature-like feature"]; *People v. Nottingham* (1985) 172 Cal.App.3d 484, 500 [finding no logical inference of identity where (a) both victims were young women who were casual acquaintances of defendant; (b) both victims resided in the same neighborhood as defendant; (c) both attacks occurred in remote locations; (d) each victim had force applied to her neck and her clothing ripped; the first victim had hands placed around her neck that startled her and apparently left no permanent physical injuries, while the second victim was strangled to death]; *People v. Alvarez* (1975) 44 Cal.App.3d 375, 385 [similarities between earlier statutory rape of 13-year-old and later forced rape of 14-year-old were simply "necessary concomitants" of the crime, rather than distinctive marks tying defendant to both crimes]; *State v. Dewey* (1998) 93 Wash. App. 50, 55-58, 966 P.2d 414, 417-418 [evidence was neither unique nor sufficiently uncommon where (1) defendant used friendly conversation to develop a level of trust with both female victims; (2) he invited each woman to accompany him on a date to a restaurant or lounge to enjoy music; (3) on both occasions, after they left the public establishment, defendant suggested they go to his home; (4) in both cases, after initially playing the sociable host, defendant forcibly had sexual

intercourse with the women; (5) afterward, defendant was friendly toward the women – allowing them to dress, driving them home, and acting as if they had been on "a regular date" culminating in consensual sex].)

Moreover, "the presence of marked *dissimilarities* between the charged and uncharged offenses is a factor to be considered by the trial court" in determining whether to admit the other crimes evidence. (*People v. Haston* (1968) 69 Cal.2d 233, 249, fn. 18 [italics added]; *People v. Alcala, supra*, 36 Cal.3d at p. 633 [defendant's pattern of sexual conduct was not consistent or distinctive and "[m]ost importantly, [the last victim] was killed, while the earlier victims were not"]; *People v. Guerrero* (1976) 16 Cal. 3d 719, 729 [reversing murder conviction for admitting evidence of other crime where other crime victim was raped, not murdered, and murder victim was not raped].)

Here, the trial court ruled that the offenses against Bertha Richmond, Sophia Glover, and JoAnn Sweets all had the same highly unusual and peculiar characteristic – the "mark of Zorro" (RT 2599) or the "clear mark of distinction" (RT 472) as the court put it – to constitute signature crimes: "the force used on an otherwise willing sexual partner." (RT 472.) Significantly, however, the *prosecution* did not argue that the offenses all had the same extraordinary mark of Zorro. The prosecution merely asserted that the offenses shared certain ordinary features: Richmond, Sweets, and Glover were lone vulnerable females, the type of victim whom the defendant could contact without being noticed; all described or showed signs of strangulation; all were sexually attacked; Sweets had alcohol and cocaine in her system, Glover had cocaine, and Richmond smoked marijuana with the defendant; and Richmond was attacked less than a block from where Glover was found two months earlier. (CT 772-773.)

First, the "signature" aspect of the offenses found by the court is not supported by the facts. As Bertha Richmond testified, she was *not* a willing sexual partner. Ms. Richmond was not a prostitute; she was a cashier and cook for four years at the Balboa Park Naval Hospital Canteen. (CT 820.) Although she agreed to "hang out" with Mr. Jones, she did not agree to have sex with him. (CT 823, 830.) In fact, when Mr. Jones asked her for a kiss, Ms. Richmond declined even this. (CT 783.) The court had no basis for concluding that Ms. Richmond was a willing sexual partner or that she engaged in "consensual sex" with Mr. Jones. (RT 472.)

Second, the record contains no evidence that Sophia Glover and JoAnn Sweets were willing sexual partners at the time they were attacked.[38]

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[38]Although the prosecutor repeatedly stated to the court and jury that Sophia Glover and JoAnn Sweets were prostitutes (see, e.g., CT 762 ["Sweets was another El Cajon Boulevard prostitute"]; CT 763 ["Glover was another prostitute who worked El Cajon Boulevard"]; CT 772 ["Sweets [and] Glover were known working prostitutes"]; CT 841 ["JoAnn Sweets was the third of four prostitute murders"]; CT 4341 ["Sweets was another El Cajon Boulevard prostitute"]; CT 4342 ["Glover was another prostitute"]; RT 2020 [opening statement – Glover "worked as a prostitute"]; RT 5933 [penalty argument – Glover was "not just a prostitute"]), he introduced no evidence of this at trial. Furthermore, in objecting to *defense counsel's* reference to Ms. Glover as a "purported" prostitute when questioning a prosecution witness, the prosecutor stated that there was no "evidence that Sophia Glover was a prostitute." (RT 4851.) Nevertheless, he persisted in suggesting to the jury that JoAnn Sweets was a prostitute up to closing argument, when he told the jury: "Now, if these women are prostitutes, and there is a pretty good indication that most of them were, you would think – well, I will leave that one alone. Something happened to her [JoAnn Sweets] beyond the ordinary to leave these injuries. This is not just, 'you know, $25, let's make love and – at least let's have sex,' and you go on your way." (RT 5001.)

The prosecutor knew that Sweets and Glover's status as prostitutes (willing sexual partners) was critical to the court's thinking in admitting the

For prostitutes, sex is a job, and like most people they engage in activities other than work. They buy groceries, shop for clothes, go to the movies, and visit with friends. They are not full time willing sexual partners. Thus, although the court was concerned with prospective jurors holding the view that prostitutes cannot be raped (see, e.g., CT 8752), the court succumbed to the same stereotype by assuming that prostitutes are always willing to engage in sex.

Third, contrary to the court's view that using force on an otherwise willing sexual partner is a highly distinctive and unusual phenomenon (the court obviously overlooked the prevalence of spousal abuse in our society), such force is tragically commonplace, especially when it comes to prostitutes. A study of San Francisco street prostitutes showed that 70 percent were raped by clients, while 65 percent were battered by them. (Leidholdt, *Prostitution: A Violation of Women's Human Rights* (1993) 1 Cardozo Women's L.J. 133, 138.) Similarly, in an Oregon study, 78 percent of the prostitutes were raped. (*Ibid.*) Finally, the United States Department of Justice estimated that one-third of the women killed by serial murderers in 1982 were prostitutes. (*Ibid.*) Clearly, the trial court's assumption that force is rarely used on prostitutes was unfounded.

Fourth, not only is force commonly used on prostitutes in general, it

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Bertha Richmond evidence. (RT 472, 2599.) But clearly, as reflected by the prosecutor's objection to the defense question referring to Ms. Glover as a purported prostitute, the prosecutor knew at some point that there had been a failure of proof because he presented no evidence that Sophia Glover or JoAnn Sweets was a prostitute. The prosecutor had an ethical duty to disclose the failure of proof to the court so that the court have declared a mistrial, or stricken the Bertha Richmond evidence and admonished the jury to disregard it. (See *Shaw v. Terhune* (9th Cir. 2003) 353 F.3d 697, 707 [dis. opn. of Wallace, J.].)

was apparently so rampant in San Diego in the latter half of the 1980s that the county established the Metropolitan Homicide Task Force to investigate the murders of over 40 women, most of them alleged prostitutes. (CT 661, 1220, 5298.) Applying the trial court's reasoning, that use of force on a willing sexual partner like a prostitute is highly unusual, indeed a veritable mark of Zorro, would mean that Mr. Jones could have been charged with perhaps scores of murders. (RT 1878 [the prosecution names Ronald Porter and Wayne Amundson as suspects in some of the killings investigated by the task force].)[39] But clearly, subjecting prostitutes to force, even those willing to have sex, is all too ordinary.

Fifth, the issue of copycat killers was important in this case. Michelle Hicks, a prostitute who worked in the Jones neighborhood in 1986, testified that her drug supplier threatened to burn her and put her in a dumpster, "like we did the other girl." (RT 3604-3605, 3615.)[40] The drug

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[39]Deputy District Attorney Dick Lewis, the head of the homicide task force investigating the prostitute killings in San Diego, reportedly stated that Porter committed 14 of the murders, which ended when Porter was arrested in October 1988. Lewis also identified Blake Raymond Taylor as the killer of 3 prostitutes, and stated that 10 other murders had resulted in 14 arrests, with 9 defendants convicted and 5 others awaiting trial. (Terry, *Task Force Deems Murders of 26 Women Solved*, L.A. Times (Mar. 25, 1993) p. A-3 [1993 WL 2335569]. Amundson was one of those convicted of murdering a prostitute. (*People v. Amundson* (1995) 41 Cal.Rptr.2d 127, review dism. as improvidently granted and cause remanded Oct. 27, 1999, S047242.)

[40]The prosecutor argued to the jury that the Michelle Hicks incident could not be used to prove the identity of the killer of Trina Carpenter in part because Michelle Hicks "was not killed. ... So the similarities are not there. You can't use it for that." (RT 5092.) Applying the same logic, Bertha Richmond was not killed so the jury could not use her case to prove the identity of the killer of Sophia Glover or JoAnn Sweets.

supplier was aware, as no doubt others were, that a prostitute had been killed, put in a dumpster, and burned. (RT 3706-3707; 3742 [the drug supplier: "prostitutes showing up in dumpsters back then ... was all over the news"].) Tara Simpson, Trina Carpenter, and JoAnn Sweets were killed and found in dumpsters, respectively, on August 29, 1985, February 11, 1986, and May 9, 1986. (RT 4219.) Given the large number of prostitute killings in the San Diego area, the killer of JoAnn Sweets could have simply been a copycat killer who knew about Trina Carpenter and Tara Simpson and sought to divert attention from himself. Thus, the trial court's reliance on the violence against a willing sexual partner as a distinctive mark was completely undermined by the probability that some killings were committed by a copycat killer.[41]

The prosecution's argument that the incidents were sufficiently similar fails as well. The few common features shared by the Richmond offense and the Sweets and Glover charges do not reveal a highly distinctive pattern. (*People v. Kipp*, *supra*, 18 Cal.4th at pp. 370-371.) According to the prosecution, Sweets and Glover were lone, vulnerable women who had illegal drugs in their systems and were strangled and sexually attacked. There is nothing "highly unusual and distinctive" about a sexual assault victim being alone and vulnerable to the degree that the nature of the "offenses virtually eliminates the possibility that anyone other

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[41]The Orange County Register reported that task force investigators believed some of the prostitute killings in San Diego were the work of several copycat killers. (Associated Press, *San Diego Drifter Sentenced for 1 of 43 Killings in Series*, Orange County Register (Jan. 15, 1991) p. A03 [1991 WL 4055487]; Wiegand, *San Diego Police Mired in Controversy Over Alleged Corruption*, Orange County Register (Oct. 8, 1990) p. B07 [1990 WL 7673925].)

than the defendant committed the charged offense." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 425.) In any event, beyond the prosecution's bald assertion, there is no evidence in the record that Sweets and Glover were alone at the time they were attacked.

The presence of illegal drugs in the victims' systems is scarcely noteworthy. That JoAnn Sweets and Sophia Glover had taken cocaine – not something rare like paraquat as in *Catlin*, *supra* – was hardly unusual for a purported prostitute,[42] while Bertha Richmond smoked marijuana, not cocaine. (CT 763, 765, 772-773, 783.)

Although Bertha Richmond testified that the defendant grabbed her by the neck and assaulted her at knife point, she was not strangled to death, as JoAnn Sweets and Sophia Glover – neither of whom showed signs of a knife wound – were. (*People v. Alcala*, *supra*, 36 Cal.3d 604, 633 [defendant's pattern of sexual conduct was not consistent or distinctive and "[m]ost importantly, [the last victim] was killed, while the earlier victims were not"].) Moreover, the use of force to the neck during a sexual assault is quite common. (*People v. Nottingham*, *supra*, 172 Cal.App.3d 484, 500 ["It is ... unfortunately the case that in the repugnant crime of rape it is not uncommon for the perpetrator to apply force to the neck of the victim"].) Any similarities between the Richmond offense and the Sweets and Glover cases are few and ordinary, and do not establish a unique signature.

The only potentially significant similarity between the Bertha Richmond and Sophia Glover incidents is that the offenses occurred less than a block from each other (but nowhere near the JoAnn Sweets crime

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[42] In a Portland, Oregon, study of prostitutes, 85 percent of the women were drug or alcohol abusers. (Leidholdt, *Prostitution: A Violation of Women's Human Rights* (1993) 1 Cardozo L.J. 133, 138.)

scene). (CT 772-773.) Given that the offenses occurred in a neighborhood in the densely populated metropolitan city of San Diego, the similarity does not raise the offenses to the level of signature crimes. (*People v. Harvey* (1985) 163 Cal.App.3d 90, 102 ["it is speculative to assume that the occurrence of the two crimes in the same area of town makes them unique"].) Moreover, that the two offenses were two months apart dilutes any possible significance of their close locations. (*People v. Bean*, *supra*, 46 Cal. 3d 919, 937 [finding no unique signature where the murders occurred three days apart in the same neighborhood, both victims died as a result of brutal blows to the head area, both victims were elderly women who were robbed and their homes burglarized, and in each instance an automobile belonging to the victim was taken and abandoned in the same vicinity].)

Highly distinctive variations among the offenses also compel the conclusion that the other crimes evidence should not have been admitted on the issue of identity. (*People v. Harvey* (1985) 163 Cal.App.3d 90, 101 ["it is necessary not only to compare the number and distinctiveness of the similarities between the two crimes but also the number and distinctiveness of the dissimilarities"].) Significant in the Richmond case was that she was driven to her home, and then to Mississippi Street, Sea World, around some lakes, Fiesta Island, Old Town, the airport, Golden Hill, perhaps a golf course, and a Burger King. (CT 781-782, 788-791.) There is no evidence that JoAnn Sweets or Sophia Glover were driven anywhere.

JoAnn Sweets was found dead in a dumpster, wrapped in garbage bags and bedding. (RT 2302, 2343-2345, 2358, 2362.) Sophia Glover was found dead on the grass portion between a curb and a sidewalk; she was nude, except for a scarf around her neck, and covered by a green blanket;

and strangely, her clothes were found nearby in a neat pile. (RT 2247-2248, 2265, 2269, 2290, 2294, 2308-2309.) The Bertha Richmond case shared none of these features. On the contrary, the assault on Ms. Richmond involved a knife, while those of Ms. Sweets and Ms. Glover did not.

The differences among the three cases are startling, while the similarities are unrevealing of any unusual pattern. Thus, the court plainly erred and abused its discretion in admitting the Richmond evidence to identify the Sweets and Glover perpetrator. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371 [admitting other crimes evidence is reviewed for abuse of discretion].)

E. The Court Erred in Admitting the Bertha Richmond Evidence on the Issues of Intent and Motive in the Sophia Glover and JoAnn Sweets Cases.

It is fundamental that "where the *identity of the actor is in dispute* and the uncharged misconduct fails to satisfy the stringent 'so unusual and distinctive as to be like a signature' standard enunciated in *Ewoldt*, the uncharged conduct is not admissible on such issues as intent, motive or lack of mistake or accident – all of which issues presume the identity of the actor is known." (*People v. Hassoldt* (2000) 84 Cal.App.4th 153, 166 [citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2] [italics added]; *People v. Kelley* (1967) 66 Cal.2d 232, 242 ["the standard framework for admission of evidence of other crimes is if there is *no doubt* that *defendant* has committed an act, but some question as to his intent in doing so"] [italics added].) Thus, the court erred in admitting evidence of the Bertha Richmond incident on the issues of intent and motive because the identity of the Sophia Glover and JoAnn Sweets perpetrators was in dispute.

In *Ewoldt*, this Court provided the following example of when other crimes evidence might be admissible to prove intent: "[I]n a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.) "Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' (2 Wigmore, [Evidence] (Chadbourn rev. ed. 1979) § 300, p. 238.)" (*Ibid.*) Here, it was not conceded or assumed that Bryan Jones committed any act with respect to JoAnn Sweets or Sophia Glover. Hence, evidence from the Bertha Richmond case was inadmissible to prove intent in the JoAnn Sweets and Sophia Glover counts.

The court erred in admitting the Bertha Richmond evidence on the issue of intent for a second reason: evidence of intent was irrelevant. Evidence is only relevant if it has a tendency to prove or disprove a "disputed fact." (Evid. Code, § 210; see 1 Witkin, Cal. Evid. 4th (2000) Circum Evid, § 88, p. 428 [evidence of other offenses is admissible to show intent or motive, where they are *disputed* by defenses such as mistake, accident, or insanity].) The defense did not dispute that Sophia Glover and JoAnn Sweets were intentionally killed. How could it? Both were strangled to death, Glover with a scarf and Sweets manually. (RT 2309, 3218, 3244.)

Even if intent were a disputed issue, any evidence of intent borrowed from the Bertha Richmond evidence would be cumulative, scarcely probative, and unduly prejudicial so that the trial court abused its discretion under Evidence Code section 352 in admitting the evidence. (*People v. Balcom*, *supra*, 7 Cal.4th at pp. 422-423 [although defendant's plea of not guilty put his intent in issue, because the victim's testimony that defendant placed a gun to her head, if believed, constituted compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative and inadmissible on this issue].)

Motive evidence from the Richmond case was also irrelevant and inadmissible because those offenses were not connected to the Glover and Sweets charges. "[T]he motive for the charged crime arises simply from the commission of the prior offense. [Citation omitted.] The existence of a motive requires a *nexus* between the prior crime and the current one ...." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018 [citing *People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23] [italics added]; see, e.g., *People v. Daniels* (1991) 52 Cal.3d 815, 857 [direct relationship between prior robbery where defendant was rendered paraplegic by police and allegedly murdered officers in retribution]; *People v. De La Plane* (1979) 88 Cal.App.3d 223, 245-246 [prior robberies evidence admissible to show motive to murder witnesses].) The Richmond case was unrelated to the Glover and Sweets cases. Lacking a direct connection, evidence from the Bertha Richmond case was inadmissible to supply a motive for the Glover and Sweets offenses.

Finally, evidence from the Richmond case was inadmissible to show motive in the Glover and Sweets cases because even if Richmond did supply a motive for Glover and Sweets, any Richmond evidence was

cumulative, scarcely probative, and unduly prejudicial so that the trial court abused its discretion under Evidence Code section 352 in admitting the evidence. As stated by the prosecution in argument to the jury, the testimony of Dr Reid Meloy gave the jury the motive for the crimes. (RT 5026 ["Dr. Meloy tells us what sexual homicide people do, what they want, what motivates them, what causes them to act. They have that rage, that violence towards women. ... Dr. Meloy gives us the motive for these crimes"].) In light of Dr. Meloy's testimony, the prejudicial effect of the Richmond evidence overwhelmingly outweighed its probative value; the evidence should have been excluded.

F. The Court's Erroneous Admission of the Bertha Richmond Evidence Violated Federal Due Process.

Evidence of other crimes is inherently highly prejudicial (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; *People v. Thompson* (1980) 27 Cal. 3d 303, 318), and may violate federal due process (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775). The Ninth Circuit has held that the admission of irrelevant "other crimes evidence violated due process where: (1) the balance of the prosecution's case against the defendant was 'solely circumstantial;' (2) the other crimes evidence ... was similar to the [crimes] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was 'emotionally charged.'" (*Ibid.* [citing *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1381-1382, 1385-1386].) As shown, the Richmond evidence constituted irrelevant character evidence. Moreover, under *Garceau* and *McKinney*, it violated Mr. Jones's Fourteenth Amendment right to due process.

First, the balance of the prosecution's case against Mr. Jones for the murders of Sophia Glover and JoAnn Sweets was solely circumstantial. There were no eyewitnesses to their deaths and no direct evidence of Mr. Jones's guilt. (Evid. Code, § 410.)

Second, the Richmond offense was similar to the Glover and Sweets charges to the extent that all three women were purportedly sexually assaulted.

Third, the prosecution relied heavily on the Richmond evidence to tie Mr. Jones to the charged crimes. The prosecutor called Ms. Richmond, who testified that Mr. Jones viciously raped and sodomized her at knife point, forced her to orally copulate him, and threatened to kill her and her family. (RT 2642-2657.) In addition the prosecutor called three witnesses to corroborate Ms. Richmond's emotional testimony. (RT 2688-2700; 2701-2719; 3517-3529.) Including Bertha Richmond's testimony, approximately 80 pages of testimony to prove this "other crime." (RT 2635-2668; *McKinney v. Rees*, *supra*, 993 F.2d at p. 1386 [finding erroneously admitted character evidence in approximately 60 pages of testimony].)

The prosecutor initially argued to the jury that the Richmond evidence "gives us some help as to what happened to ... JoAnn Sweets, Sophia Glover. [She] can tell the story and can fill in the blanks that are obviously there on the murder victims." (RT 4987.) Later, he told the jury: "Bertha Richmond ... is here to give you circumstantial evidence, if you will, on identification, on motive, on m.o., on what his intent was. *What he did to her was so similar to what he did to the others*, it's meaningful." (RT 5008-5009 [italics added].) "Now he's on Mississippi Street [with Bertha Richmond]. He had a key to the place. Comes back real close to where

Sophia Glover was hit." (RT 5009-5010.) "Bertha Richmond [was] just down the street from where Sophia Glover was found. Next door where Sophia Glover's clothes were found." (RT 5012.)

The prosecutor continued: "At this point I ask you do we have one person doing these crimes? *The evidence is overwhelming, absolutely overwhelming one person committed these crimes*. Is the defendant that person? That's based upon identification and there are many ways to make identification, and we have many ways in this case. We have many means. First of all, you have eyewitness identification. We have that. Ramirez, *Richmond*, Mitchell. We have a common method of operation, common m.o.. Same thing over and over again. That tells us identification ...." (RT 5013 [italics added].) "Bertha Richmond. Can she identify the defendant *to help us prove these other counts*? *Yes, she can*. I saw and that's him. Couldn't even look at him here in court she was so terrified. Stand over here to question her so she wouldn't look at him. Couldn't look at him. She knows who did it to her. She was taken to the same house on Mississippi Street, in the same car, and *the same thing happened to her that happened to the rest of these women*." (RT 5023 [italics added].)

The prosecution closed with: "The evidence is powerful. The witnesses were powerful. What ... Bertha Richmond told you .... [t]hese are a series of crimes, a series of horrendous crimes. ... [a]ll committed by one man, and that man is with us here in court, the defendant, Bryan Jones." (RT 5029.) In rebuttal, the prosecution argued to the jury that "Bertha Richmond is so unique and matches the rest of them." (RT 5092.) The prosecutor's reliance on the Bertha Richmond evidence was manifest.

Fourth, the Richmond evidence was without doubt "emotionally charged." (RT 2643-2658.) At one point during her testimony, Bertha

Richmond broke down, necessitating a break in the proceedings. (RT 2645.) The court noted that "certainly this witness was distraught on the stand. That was part of the reason I allowed the leading questions, ... she was almost speechless at times and there were long, long pauses ...." (RT 2664.) And as the prosecutor dramatically argued to the jury, Bertha Richmond was "terrified" when she presented her "powerful" testimony. (RT 5023, 5029.)

Although Ms. Richmond was not cross-examined (RT 2659), the court nonetheless permitted the prosecution – over defendant's objection – to call Olivia Gonzalez, Detective Alan R. Fragoso, and Police Officer Delores M. Cirino to support Bertha Richmond's testimony. (RT 2425, 2547-2548, 2660-2666.) Ms. Gonzalez informed the jury that immediately after Ms. Richmond was attacked, she appeared to be in "great fear," was "trembling visibly," was "mumbling and crying," was "terrorized," and appeared to be "in shock." (RT 2694-2697.) Ms. Gonzalez "had never seen anybody so scared in my life." (RT 2694.) Officer Cirino confirmed to the jury that Ms. Richmond was "hysterical," "hyperventilating," and "crying" just after the assault. (RT 3523.) And like Ms. Gonzalez, Officer Cirino essentially recounted for the jury what Ms. Richmond had told her about the attack, so that the jury eventually heard the horrid details of the crime *three times* from three different witnesses. (RT 2697, 3525-3528.) The emotionally charged Bertha Richmond evidence clearly had the intended impact on the jury.

Accordingly, application of the *McKinney* factors leads to the ineluctable conclusion that admission of the Bertha Richmond evidence violated Mr. Jones's federal due process rights.

G. The Court's Erroneous Admission of the Bertha Richmond Evidence Was Prejudicial.

A federal due process violation is subject to the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18 for reversible error. (*Garceau v. Woodford*, *supra*, 275 F.3d at p. 776.) The proper *Chapman* inquiry is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Mr. Jones's convictions for the murders of Sophia Glover and JoAnn Sweets were not surely unattributable to the Bertha Richmond evidence. (See also *People v. Marshall* (1997) 15 Cal.4th 1, 42 [applying *Chapman*, where evidence is not overwhelming, jury could have reasonable doubt].) Hence, the convictions, special circumstances, and death sentence must be reversed.

Absent the Richmond evidence, the evidence that connected Mr. Jones to the Glover killing was so weak that no reasonable juror could have found him guilty. Ms. Glover's nude body, partially covered by a blanket, was found about a block from the Wilsie house, where Ann Jones worked and her son helped out on occasion. (RT 2247-2249, 2287, 2309, 2607, 3936.) Ms. Glover's clothes were located in a neat pile near an apartment building next door to the Wilsie residence. (RT 2264-2265, 2268-2269, 2290-2291, 2294.) DNA was discovered on an anal swab taken from Ms. Glover; over 15 percent of the population, including Mr. Jones, could not be eliminated as a source of the DNA. (RT 4843-4846.) This is the sum total of the evidence "connecting" Mr. Jones to Sophia Glover.

In his defense, Mr Jones introduced evidence that the killer may have been a man who beat Ms. Glover and stripped her naked in public a day or

so before her death. (RT 3440-3441, 3456, 3460, 5066-5067.)[43]

In addition, the DNA tests showed there were at least two contributors of sperm to the Glover anal swabs, suggesting that she was assaulted by more than one person, contrary to the prosecution theory. (RT 4799-4800, 4811, 4861, 5067.) The prosecutor argued to the jury, "I am sure you can appreciate that murder, certainly first degree murder, is not a spectator sport. You don't sell tickets. You don't ask for an audience. [L]et me take you through some of the factors that establish that *one man did these crimes*." (RT 4988 [italics added].)[44]

Without the Richmond evidence, the prosecutor would not have been able to argue that her case provided "help as to what happened to ... Sophia Glover," or that the Richmond evidence "can fill in the blanks that are obviously there on the murder victims." (RT 4987.) The prosecutor would also not been able to use Richmond to argue that because her case was so similar to the Glover case, that Bertha Richmond helped to identify Mr. Jones as the Glover perpetrator, and that because he intended to kill Bertha Richmond, he intended to kill Sophia Glover. (RT 5008-5009, 5023.) Lastly, the prosecutor would not have been able to emphasize the Wilsie house connection between Bertha Richmond and Sophia Glover, that because Mr. Jones attacked Ms. Richmond at the house, then he must have

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[43]The prosecution did not object to the Glover third party culpability evidence, thereby conceding that it was capable of raising a reasonable doubt about the defendant's guilt in her death. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136.)

[44]The trial court found the evidence of two perpetrators "really, really interesting" because it affected "how you read all of these m.o. crimes together." The court concluded that this evidence favored Mr. Jones. (RT 4751.)

been responsible for the Glover killing a block away and putting her clothes in a neat pile next door to the house. (RT 5009-5010, 5012.)

Without the Bertha Richmond evidence, there would not have been a conviction on the weak Sophia Glover charges.

Similarly, the evidence linking Mr. Jones to the JoAnn Sweets homicide was not strong. On May 9, 1986, the body of JoAnn Sweets was found in a dumpster in the alley just outside the back door of the Jones apartment. (RT 2343-2345, 2358, 2362, 2366, 3980.) An old, tattered afghan blanket covered the body, which was wrapped in a heavily soiled sheet, a mattress pad, and two large plastic trash bags. Tape was attached to the ends of the bags as if someone had tried, unsuccessfully, to tape the bags together. (RT 2303-2304, 2307, 2345-2346, 2353, 2363, 2399, 2404, 2432, 2485, 2932.)

Although the afghan might have been made by Mr. Jones's mother or sister, the sheet and mattress pad were not from the Jones apartment. (RT 2783-2785, 3931-3932.) The person who found the body described the afghan as "kind of old," "raveled," "coming apart," and not worth keeping. (RT 2346, 2353.) Thus, an obvious inference is that whoever owned the afghan threw it in the garbage because it was falling apart.

Moreover, just days before the body was found in the dumpster, Ann Jones moved down the street to a new home. (RT 3068-3069, 3932-3933, 3982.) When people move, they typically toss out used or unwanted items, like old unraveling afghans, especially if they are like Ann Jones, "sort of picky," who "like[d] things sort of neat," and who "like[d] things in place." (RT 3984.) Ann Jones testified that sometimes her afghans would fall from her lap and lie on her carpet. (RT 3995.) Thus, assuming the raveled afghan came from the Jones apartment, it could have lain on the carpet,

where it gathered fibers, before being put in the trash, where someone retrieved and used it to cover JoAnn Sweets.

The prosecution's theory was that JoAnn Sweets was attacked while lying on the afghan, which was on the carpet. (RT 4999.) But 29 hairs were recovered from the blanket, none of which matched Bryan Jones or JoAnn Sweets. (RT 3534.) Had this afghan been used in an attack, it surely would have had hair from both JoAnn Sweets and her attacker. Thus, it is more likely that the afghan had nothing to do with Mr. Jones and did not come from the Jones apartment.

Moreover, the discarded sheet had no connection to Mr. Jones, but did have five hairs that did *not* match Mr. Jones or JoAnn Sweets. The mattress pad, too, had no connection to Mr. Jones, but had eight hairs that did *not* match Mr. Jones or Ms. Sweets. (RT 3534-3535.) If, as the prosecutor seemed to suggest, that the mattress pad and sheet were somehow used in the attack on JoAnn Sweets (RT 4999), then it is highly unlikely that there would be no hairs that matched Mr. Jones or Ms. Sweets found on them, given the ease with which people shed hair.

And, as the prosecution acknowledged, JoAnn Sweets put up a ferocious fight to defend herself. (RT 4999.) During this struggle JoAnn Sweets must have lost many hairs. The absence of even a single hair matching JoAnn Sweets on the afghan, sheet, or mattress pad is compelling evidence that these materials were not involved in her attack.

In addition, it is likely that the afghan, sheet, and pad attracted carpet fibers from inside the dumpster, a "cesspool" of "contamination." (RT 3102-3103.) Prosecution witness, Melvyn Kong, a supervising criminalist for the San Diego Police Department crime lab, testified that because "a dumpster is a trash receptacle, it is, in essence, a cesspool of many different

sources of fiber and hair contamination. So there is possibility of cross-contamination between anything which is in the dumpster and anything that's removed from the dumpster." (RT 3076, 3102-3103.)

Prosecution witness Michael Malone, an FBI Special Agent and Senior Examiner with the Hairs and Fibers Unit of the FBI lab in Washington D.C., testified that he would expect apartments in the same building to be carpeted with the same fiber. (RT 3141.)[45] The Jones apartment was located in a large apartment complex, whose tenants likely used the dumpster in which JoAnn Sweets was found. (RT 2045, 2093.) These tenants also likely vacuumed the carpets in their apartments and deposited the vacuumed carpet fibers in the trash. Therefore, the carpet fibers found with JoAnn Sweets could have come from any of the other apartments in the Jones building.

Although Dr. Blake testified that DNA (DQ alpha genotype 1.2,2) found on the sheet wrapped around the body matched about six percent of the African American population (including Mr. Jones), about five percent of the Caucasian population, and about two percent of the Mexican-American population (RT 2930-2931, 2942-2944), Dr. Blake also admitted

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[45]Special Agent Malone testified that police should have tested the carpet in the other apartments in the Jones building to determine if there was another source of the fibers found with JoAnn Sweets. (RT 3141-3142, 3159-3160.) In addition, Mr. Malone testified that he was not informed by the prosecution that four packages of garbage were in the dumpster when the body was found (RT 2319, 2412, 2809); these should have been analyzed to determine whether they either contaminated or contributed to the fibers found with Ms. Sweets (RT 3143, 3159). Finally, Mr. Malone opined that the police should have examined JoAnn Sweets's residence on Bates Street for fibers and other evidence. (RT 3165, 3885.) None of these tasks was performed by law enforcement in this case.

that a second man with a 1.2,1.2 DQ alpha genotype could have contributed sperm to the sheet found with JoAnn Sweets (RT 3037). Furthermore, Dr. Blake's earlier testimony regarding Trina Carpenter suggested that another co-contributor to the sheet sperm could have been a man with 2,2 alleles. (RT 3033.) Finally, Dr. Blake testified that in the case of Sophia Glover, where the possible sperm contributors had the same genotypes of 1.2,2, 1.2,1.2, and 2,2 as in the case of JoAnn Sweets, the portion of the population that could have contributed the sperm to the sheet was approximately 15 percent. (RT 4846.) That same calculation should apply as well to the heavily soiled sheet found with JoAnn Sweets.

As stated, Mr. Jones lived in a big building in an apartment complex. Given that contributors to the sperm found on the sheet could have come from 15 percent of the male population, there must have been many men meeting that profile living in the apartment complex, let alone in the surrounding neighborhood.

A fingerprint from the exterior of the dumpster outside the Jones apartment matched Mr. Jones. (RT 2401-2403, 2824.) As the prosecution conceded to the jury: "There was some explanation tendered here about fingerprints and that, yeah, you would expect the defendant's prints to be on the dumpster. Okay. *Sure, we will give you that.* There might be some explanation for him, because he's using it." (RT 5094 [italics added].)

Not only would one expect to find Mr. Jones's fingerprints on the dumpster right outside his back door, one would also expect to find trash bags in the dumpster with his prints, particularly since a major move had just taken place with his mother relocating from the old apartment into a new one down the street. Thus, a fingerprint lifted from one garbage bag and a hand print from the other garbage bag not surprisingly matched Mr.

Jones. (RT 2847-2851.)[46]

On the other hand, no fingerprints were detected on the tape used in the attempt to tape the ends of the bags together. (RT 2744-2745.) This suggests that whoever put Ms. Sweets's body in the garbage bags wore gloves, which explains why the *killer's* prints were not found on the garbage bags.

Moreover, when the body was found, other garbage was outside the dumpster, and loose trash was inside the dumpster. (RT 2303, 2327.) Thus, whoever put Ms. Sweets's body in the garbage bags likely took the trash-filled bags from the dumpster, emptied the bags in or around the dumpster, and then used them to wrap the body.

The prosecution's theory of the case, that the same person, acting alone, committed all the murders in a similar fashion, supports the conclusion that Bryan Jones did *not* use his property to wrap Ms. Sweets's body. Trina Carpenter's body was found in a green cloth duffel bag. (RT 2299, 2321.) The name "D. Belman" and the initials "D.B." appeared on the bag, indicating that D. Belman owned the duffel bag. (RT 2413.) Thus, whoever killed Trina Carpenter probably took D. Belman's discarded duffel bag from the dumpster and put her body in it. Similarly, whoever killed JoAnn Sweets probably took discarded bags of trash from the dumpster near the Jones apartment and put her body in them. If, as suggested by the prosecution's modus operandi theory, that the same person killed Trina Carpenter and JoAnn Sweets in the same way, then D. Belman did not kill Trina Carpenter, and Bryan Jones did not kill JoAnn Sweets because the

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[46]According to Special Agent Malone, the police should have processed the other garbage bags in the dumpster for Mr. Jones's fingerprints. (RT 3162.)

killer's modus operandi was to wrap the victim in material not associated with him.

Evidence also pointed to Ike Jones rather than Bryan Jones as the killer.[47] Joyce Euwing, who lived at the Travelodge Motel located on 51st Street and El Cajon, testified that while she was walking to work at about 5:30 a.m. on May 9, 1986, she saw two men standing next to a small, dark four-door car near the dumpster in which JoAnn Sweets was found. The men were struggling to lift what looked like a big roll of carpet out of the back seat. (RT 3363, 3369-3370, 3382, 3389-3390, 3393-3394, 3397.) Ms. Euwing testified that it looked like the men were trying to dump the carpet; but because she was just walking by, she did not see the men put the carpet in the dumpster. (RT 3369, 3394.)[48] She recognized one of the men as Ike Jones. (RT 3371, 3374.)[49]

Ike Jones had been seen with JoAnn Sweets's boyfriend on Bates Street, where Ms. Sweets and her boyfriend lived. (RT 3884-3885.) Ike Jones's girlfriend corroborated that he drove a small, dark brown car. (RT 4231.)

Even if some or all of the jurors believed that Ms. Euwing misidentified Ike Jones, whether intentionally (Ms. Euwing did not give the

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[47]The trial court ruled that it was "clear" that testimony regarding Ike Jones was "sufficient to raise a reasonable doubt on the JoAnn Sweets case" with respect to the defendant's guilt. (RT 266-267.) Moreover, according to the prosecution, "Joyce Euwing's testimony directly implicated Ike Jones in the JoAnn Sweets murder." (CT 6444.)

[48]This, of course, may explain where the carpet fibers on JoAnn Sweets originated.

[49]Ms. Euwing testified that the defendant, sitting at counsel's table, was not one of the men. (RT 3372.)

police the name of Ike Jones until her fifth police interview (RT 4257, 4288-4289)) or because she was not wearing her glasses, the fact remains that she saw two men at the dumpster with a big roll of carpet. (RT 3364-3365, 3385-3386, 3396, 3404-3407, 3424, 3433, 3449, 4227-4229, 4249-4252, 4257-4258.) This is consistent with Dr. Blake's testimony that two men could have contributed to the sperm on the sheet found with JoAnn Sweets (RT 3037), and again undermines the prosecution's theory that one man acted alone in committing the charged crimes.

Dr. Blake's original testimony did not eliminate Ike Jones as a contributor of the sperm to the sheet. (RT 3867.) Although, in Dr. Blake's opinion, Ike Jones was eliminated as a result of additional polymarker testing, this is the same Dr. Blake who initially believed that there was only one contributor to the Sophia Glover anal swab (RT 2930-2931), but later recanted to say that there could have been three contributors. (RT 4799, 4803, 4857, 4861.) Moreover, prosecution expert Patrick O'Donnell, a doctor of molecular biology and head of the San Diego Police Department's Forensic DNA Laboratory, and defense expert, Marc Taylor, like Dr. Blake, a forensic scientist, both testified that they would not have eliminated Ike Jones as a contributor of the sperm. (RT 4618, 4666, 4898, 4903-4905, 4908, 4926, 4936-4938.)

The lack of evidence connecting Bryan Jones to JoAnn Sweets starkly illustrates the devastating impact of the Bertha Richmond evidence. Nevertheless, the prosecutor exploited the Richmond case in an effort to shore up that wobbly connection in arguing to the jury that the Richmond evidence helped to identify Mr. Jones as the Sweets perpetrator and even provided proof that Mr. Jones intended to kill Ms. Sweets. (RT 4987, 5008-5009, 5013, 5023, 5029, 5092.)

The Bertha Richmond inflammatory testimony and corroborating evidence was damaging to the defense also because it allowed the jury to conclude that if Mr. Jones did it once, he did it again with Sophia Glover and JoAnn Sweets. After hearing such painful testimony, reasonable jurors would likely have loathed Mr. Jones. The evidence "served only to prey on the emotions of the jury, to lead them to mistrust [the defendant], and to believe more easily that he was the type ... who would kill ... without much apparent motive." (*McKinney v. Rees*, *supra*, 993 F.2d 1378, 1385.)

This is precisely why "other-crimes evidence is so inherently prejudicial" and should be admitted only after careful examination and with "extreme caution." (*People v. Alcala* (1984) 36 Cal.3d 604, 631.) All doubts, moreover, about its connection to the crime must be resolved in the defendant's favor. (*Ibid.*) And, of course, it should be excluded if its probative value does not outweigh its prejudicial effect. (*People v. Simon* (1986) 184 Cal.App.3d 125, 129.)

Here, there was no evidence connecting Mr. Jones to Sophia Glover and very little evidence connecting him to JoAnn Sweets. These cases could not have stood on their own, which is why the prosecutor was so determined to bring in testimony (80-pages worth) of the Bertha Richmond assault and why he relied so heavily on the Bertha Richmond evidence in argument to the jury.

Mr. Jones was convicted of the Glover and Sweets charges based on evidence that he acted in conformity with his character, "his propensity or disposition to engage in a certain type of conduct" (Cal. Law Revision Com. com., Evid. Code, § 1101), as purportedly established by his conduct with Bertha Richmond.

> The rule excluding evidence of criminal propensity is nearly three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647.) Such evidence ... [i]nevitably .. tempts "the tribunal ... to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."

(*People v. Alcala*, *supra*, 36 Cal.3d at pp. 630-631 [Citation omitted].) The Bertha Richmond offense was a vicious crime. And Mr. Jones was sentenced to 22 years in a prison as a result. (CT 48.) But because it was propensity evidence, as *Alcala* noted, it inevitably tempted the jury to give excessive weight to its viciousness and improperly allowed the jury to fill in the obvious evidentiary gaps that existed in the Sweets and Glover cases. (RT 4987 [the prosecutor: Bertha Richmond "can fill in the blanks that are obviously there on the murder victims"].) As the prosecutor effectively acknowledged, the Sweets and Glover verdicts were surely not unattributable to the Richmond evidence. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

Accordingly, the erroneous admission of the Bertha Richmond other crimes evidence was not harmless beyond a reasonable doubt, and warrants reversal of the Glover and Sweets convictions, special circumstances, and death sentence. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

4.

THE COURT ERRED IN INSTRUCTING THAT THE JURY COULD USE EVIDENCE FROM THE BERTHA RICHMOND OFFENSE TO DETERMINE IDENTITY, MOTIVE, AND INTENT IN THE JOANN SWEETS AND SOPHIA GLOVER CASES.

Assuming for the sake of argument that the court's "mark of Zorro" analysis was correct so that the Bertha Richmond evidence was admissible at the time the jury heard the evidence, the trial court nevertheless erred later in instructing the jurors that they could use the evidence to determine identity, intent, and motive in the JoAnn Sweets and Sophia Glover cases. Any such error, moreover, was prejudicial. (*People v. Garceau* (1993) 6 Cal.4th 140, 186 [assuming that *Chapman* reversible error standard applies to erroneous other crimes instruction].)

In his pretrial motion to admit other crimes evidence, the prosecutor represented to the court that "Sweets [] and Glover were known working prostitutes." (CT 772.) The trial court relied on the prosecutor's representation in admitting the Bertha Richmond evidence because, as murdered prostitutes, Sophia Glover and JoAnn Sweets each would have had, according to the court, the signature mark of Zorro – "force used on an otherwise willing sexual partner." (RT 472, 2599 [the court: "why would you kill a willing prostitute for sex"].) But the prosecutor presented no evidence that either Ms. Sweets or Ms. Glover was a prostitute, or that either was a willing sexual partner to Mr. Jones. Thus, there was no evidence that JoAnn Sweets or Sophia Glover was a willing sexual partner to support the court's erroneous instruction.

Over Mr. Jones's objection (RT 2547) the court gave the jury a modified version of CALJIC No. 2.50 as part of the final guilt phase instructions:

> Evidence has been introduced in this trial for the purpose of showing that the defendant committed crimes against Bertha Richmond. Defendant is not charged in this trial with crimes relating to Ms. Richmond.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered only for the limited purpose of determining if it tends to show:
>
> The existence of the *intent*, which is a necessary element of crimes charged;
>
> The *identity* of the person who committed the crimes, if any, of which the defendant is accused;
>
> A *motive* for the commission of the crimes charged;
>
> And for the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.

(RT 5114-5115 [italics added].) The court was not required to give CALJIC 2.50 on its own motion, but "when a trial court does undertake to give a limiting instruction specifically calling attention to the significance of the substantially prejudicial evidence of prior bad acts, it should do so accurately." (*People v. Nottingham*, *supra*, 172 Cal.App.3d at p. 497.) "It is error for a trial judge to instruct as to separate issues in regard to which the evidence may be considered unless the evidence is relevant and admissible with respect to each of the issues." (*Ibid.*)

Without at least proof that Sophia Glover and JoAnn Sweets were prostitutes, there was no evidence that either was a willing sexual partner. Thus, applying the trial court's reasoning, the jury had no basis for determining that the Bertha Richmond, Sophia Glover, and JoAnn Sweets offenses all the same signature.

Accordingly, it was error to instruct the jurors that they could use the Bertha Richmond offense to identify the Sophia Glover and JoAnn Sweets offender. (*People v. Nottingham*, *supra*, 172 Cal.App.3d at p. 497.) Moreover, for the reasons stated above in argument 2E, the court erred in instructing that the Bertha Richmond offense could be used to establish intent and motive in the JoAnn Sweets and Sophia Glover cases; as shown in argument 2F, the errors violated federal due process (*Garceau v. Woodford*, *supra*, 275 F.3d at p. 775 [other crimes jury instruction may violate federal due process]); and, as shown in argument 2G, the instruction was prejudicial (*People v. Garceau*, *supra*, 6 Cal.4th at p. 186.) The Sweets and Glover verdicts, special circumstances, and penalty must be reversed.

5.

THE COURT ERRED IN ADMITTING THE BERTHA RICHMOND EVIDENCE ON THE ISSUES OF IDENTITY, MOTIVE, AND INTENT IN THE MARIA RAMIREZ AND KAREN MITCHELL CASES.

The court admitted the Bertha Richmond on the issues of identity, motive, and intent in the Maria Ramirez and Karen Mitchell cases. (RT 5114-5115.) Again the court erred prejudicially.

A. The Bertha Richmond Evidence Was Inadmissible.

"Evidence of identity is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) Mr. Jones did not concede or assume that anyone attempted to murder Maria Ramirez, or sexually assaulted or attempted to murder Karen Mitchell. Hence, the court erred and abused its discretion in admitting evidence from the Bertha Richmond case to identify Mr. Jones as the Karen Mitchell and Maria Ramirez perpetrator. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371 [admitting other crimes evidence is reviewed for abuse of discretion].)

"[T]he motive for the charged crime arises simply from the commission of the prior offense. [Citation omitted.] The existence of a motive requires a *nexus* between the prior crime and the current one ...." (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1018.) There was no nexus between Bertha Richmond and Karen Mitchell or Maria Ramirez. (Cf. *People v. Daniels*, *supra*, 52 Cal.3d 815, 857 [the defendant allegedly murdered police officers in retribution for having been rendered paraplegic by the police in a prior robbery, thereby making evidence of the robbery admissible].) Hence, the court erred by admitting the Bertha Richmond

evidence on the issue of motive.

"Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 300, p. 238.)" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) Mr. Jones was charged with attempting to murder Karen Mitchell and Maria Ramirez, and sexually assaulting Karen Mitchell. The acts underlying these charges were neither conceded nor assumed. Hence, the court erred in admitting evidence from the Bertha Richmond case to determine intent in the Karen Mitchell and Maria Ramirez cases.[50]

Accordingly, the court abused its discretion in admitting the Bertha Richmond evidence on the issues of identity, motive, and intent in the Maria Ramirez and Karen Mitchell cases.

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[50]As noted, "[e]vidence of intent is admissible to prove ... the intent that comprises an element of the charged offense." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) "Intent, which pertains to the defendant's state of mind, is not an element of a general intent offense." (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1019.) The information charged Mr. Jones with rape, sodomy, and oral copulation of Karen Mitchell. (CT 5803-5806.) All are general intent crimes. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 70 ["Rape is a general intent crime"]; *People v. Davis* (1995) 10 Cal.4th 463, 519 [sodomy is general intent crime]; *People v. Muniz* (1989) 213 Cal.App.3d 1508, 1517 ["Forcible oral copulation does not require a specific intent or purpose"].) Therefore, intent was not an element of these charged offenses so that evidence of intent in the Bertha Richmond case was irrelevant to these charges in the Karen Mitchell case.

B. The Bertha Richmond Evidence Was Prejudicial.

Error in admitting other crimes evidence is subject to review for prejudice under *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Malone* (1988) 47 Cal.3d 1, 22.) Prejudice is apparent here because there is a reasonable probability that the result would have been more favorable to Mr. Jones in the Maria Ramirez and Karen Mitchell cases had the Bertha Richmond evidence been excluded.

Maria Ramirez

On Thursday, August 15, 1985, Maria Ramirez, a penniless 42-year-old prostitute and heroin user with several felony convictions, met 23-year-old Bryan Jones in downtown San Diego, and agreed to have sex with him for $20; she intended to use the money to buy drugs. (RT 2041-2043, 2052, 2069, 2073, 2088, 3920, 4219.) Ms. Ramirez had been with Mr. Jones at least one other time two months before. (RT 2103, 2107.)

Ms. Ramirez and Mr. Jones rode on a bus to his apartment at 4424 51st Street in San Diego, where he lived with his mother. (RT 2044-2045, 2052.) Ms. Ramirez testified that they had consensual "straight" sex, Mr. Jones paid her the $20, she made herself a sandwich, and then she took a shower. (RT 2046-2047, 2080.)

According to Ms. Ramirez, when she came out of the shower, she was ready to have sex again, but instead Mr. Jones choked her with his hands and a rope, causing her to lose consciousness two or three times. (RT 2048-2050, 2077, 2080.) Ms. Ramirez further testified that he told her he would let her go if she orally copulated him. She complied even though, as Ms. Ramirez told the jury, "I don't like to do that usually. I usually don't like to do that." When she finished, he took the $20 back. (RT 2051, 2082.)

According to Ms. Ramirez, Mr. Jones did not bother her while she put on her clothes because "he act like if he just wanted me to do that, you know, so he would feel good." (RT 2082.) Ms. Ramirez freely left the apartment, but then called the police. (RT 2052-2053.) When the police arrived, Ms. Ramirez was very loud and angry, and demanded that Mr. Jones be arrested. (RT 2053, 2094.) The police saw discoloration type marks around the base of her neck. (RT 2097.)

Mr. Jones invited the police in. (RT 2095.) The police described Mr. Jones as very cooperative; he said that he knew Maria Ramirez. (RT 2101.) In the bedroom the police found black and brown interwoven raw hide strips, which Ms. Ramirez identified as the rope that Mr. Jones used to choke her. (RT 2099.) The police arrested Mr. Jones for forced oral copulation and took him to a substation, where he was processed and where Ms. Ramirez threw a rock at him. (RT 2100.)[51]

A few days or a week later, Ms. Ramirez returned to Mr. Jones's apartment with some church people. Ms. Ramirez stayed in the car while the church people spoke to someone at the apartment. (RT 2082-2084.) Mr. Jones's mother, Ann Jones, testified that in August 1985, two Spanish speaking people, a Mexican woman and man, a preacher, came to her apartment looking for Mr. Jones. (RT 2082-2084; 3945-3946.)

Although Ms. Ramirez said that she was attacked in 1985, she did not pursue her claim until at least five years later. (RT 2084.) The prosecution did not charge Mr. Jones in connection with Ms. Ramirez until

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[51]A police report reflects that Ms. Ramirez called the police department on August 19, 1985 to say that she was not pursuing the matter. The report noted that "[t]he case was taken to the district attorney and will be rejected due to her failure to appear." (CT 4118.)

almost seven years after the alleged incident. (CT 6, 8.)

Mr. Jones's defense was that Ms. Ramirez and her story were not credible: she concocted a tale of "attempted murder" because she was furious with Mr. Jones when, after Ms. Ramirez voluntarily performed a sex act that she disliked, Mr. Jones nonetheless reneged on their agreement and took back the $20 that she desperately needed to support her heroin addiction. Moreover, the attempted murder charge was legally untenable because it was based on the implausible notions that (1) a powerful six feet, five inches, 300-pound man (RT 2093) would not have accomplished his goal if he intended to kill Ms. Ramirez, an element of attempted murder, and (2) although he allegedly intended to kill his victim, he let her go instead. Moreover, her neck injuries were likely the result of a fight that she had earlier in the day. (RT 2088, 2097.) According to Ms. Ramirez, on the morning of the incident, she was living with Simon Ramirez and had a fight with a "Mexican." (RT 2087-2088, 2097.)

Ms. Ramirez was impeached with her multiple felony convictions, (RT 2052), as well as inconsistencies in her trial testimony. First, she testified that she had never seen Mr. Jones before the incident. (RT 2064-2065.) Officer Gilbert Ninness testified, however, that Ms. Ramirez told him on the day of the incident that she had met Mr. Jones previously, and had been in his car two months before. (RT 2107.)[52]

Second, Ms. Ramirez testified that on the day of the alleged incident, she only had sex with Mr. Jones twice, first consensual straight sex and then forced oral copulation. (RT 2047, 2050-2051, 2080.) She told Officer

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[52]Witness Karen Mitchell, also a prostitute, referred to an act of oral copulation between a prostitute and a customer in an automobile as a "car date." (RT 2530.)

Ninness, however, that she had sex with Mr. Jones three times: initially straight sex, then oral copulation, then "doggie style." (RT 2104.) Ms. Ramirez denied to the jury that she and Mr. Jones had "doggie style" sex. (RT 2081.)

Finally, Ms. Ramirez swore that she was not going to use the $20 from Mr. Jones to buy drugs. (RT 2069-2070.) After being reminded of her preliminary hearing testimony, however, Ms. Ramirez admitted that she wanted "to get high that day" and was going to use the money to buy drugs. (RT 2073.)

As demonstrated, the Maria Ramirez attempted murder charge was insubstantial, largely because Ms. Ramirez was not a credible witness due to her multiple felony convictions and repeated lies to the jury. On the other hand, Bertha Richmond provided powerful, compelling evidence, which the jury surely used to convict Mr. Jones of the Maria Ramirez charge. Reversal of the Maria Ramirez verdict is warranted.

Karen Mitchell

Karen Mitchell, a prostitute and heroin addict with several felony theft convictions, testified that she spent the night of October 19, 1986, injecting her daily mix of cocaine and heroin, and drinking alcohol. On Monday morning, October 20, 1986, she met Mr. Jones in downtown San Diego and, according to Ms. Mitchell, agreed to commit acts of prostitution in return for $50. They rode to the Wilsie house at 4659 Mississippi Street in San Diego. (RT 2523-2528, 2532, 2562-2563, 2564-2565, 2568-2570, 2602, 2605-2607, 2612, 2614, 3645, 4220.)

Ms. Mitchell testified as follows: that when she started to take her clothes off, the defendant choked her, causing her to almost lose consciousness. She was told that she would be killed if she did not

cooperate. On a sheet placed on the floor of the house, she was forced to engage in sexual intercourse, sodomy, and oral copulation. Ms. Mitchell had brought a half of a fifth of Jack Daniels with her, which she was forced to drink. The defendant left and she continued to drink. She eventually passed out. (RT 2536-2537, 2550-2556, 2569, 2581, 2584.)

That same day Marjorie Wilsie went to 4659 Mississippi Street about noon, and found Karen Mitchell, fully dressed and passed out on a mattress in the bedroom. Ms. Wilsie called the police, who arrived shortly. (RT 2602, 2612, 2614-2615.)

Ms. Mitchell testified that she told the police a man had taken her to the house and raped her. (RT 2558.) Nevertheless, police officer Mark Andrew Marcos, who answered the call, testified that Karen Mitchell did not complain of being raped or choked on the day that she was picked up at the Wilsie home. She also showed no signs of any injuries. (RT 3651-3652.)

Officer Marcos believed that Ms. Mitchell was a drunk homeless person, who probably bedded down for the evening in an abandoned house and needed to be taken to detox to sober up. The police offered to take Ms. Mitchell to detox or jail; she chose the former, where she stayed for four hours until her release. The police made no report of any attempted murder or rape. Officer Marcos testified that if any woman – including a prostitute – told him that she had been raped or injured, he would have taken her to get an examination and conducted a full rape investigation. (RT 2575, 3470, 3646-3647, 3649, 3652, 3656.)

Mr. Jones told the police that he picked up Ms. Mitchell downtown and she was extremely drunk. He took her up to the house on Mississippi Street to give her a place to dry out. (RT 2705.)

Ms. Mitchell first made her allegations to police while she was in custody in 1989, three years after the alleged incident. In exchange for testimony implicating Mr. Jones, Ms. Mitchell sought a sentence reduction for one of her many felonies. (RT 2562-2564, 2588-2589.)

Ms. Mitchell testified that she had given false information to the police innumerable times to avoid longer prison sentences, and that she could not count the number of her prostitution convictions. (RT 2566-2567, 2590.)

The Mitchell case was even weaker than the Ramirez case. First, as the trial court acknowledged, "Mitchell was so drunk, she's going to have such problems in proof for the people ...." (RT 472.) Second, Ms. Mitchell was fully dressed when found by Marjorie Wilsie, did not complain about Mr. Jones when the police arrived, and showed no signs of injuries. Third, she had several felony theft convictions, often lied to the police, and only asserted a claim against Mr. Jones as a means to obtain a sentence reduction. Like Maria Ramirez, Karen Mitchell was not credible and any reasonable jury would have had substantial doubt about her alleged offenses absent the Bertha Richmond evidence.

Even if the Bertha Richmond evidence were admissible based on some other theory, the court limited its jury instruction to identity, motive, and intent. (RT 5114-5115.) "It thus appears reasonably probable that, absent the instructional error, a result more favorable to defendant would have been reached." (*People v. Alcala*, *supra*, 36 Cal.3d 604, 636.) The Mitchell verdicts should be reversed.

6.

THE COURT ERRED IN INSTRUCTING THAT THE JURY COULD USE EVIDENCE FROM OTHER COUNTS TO DETERMINE IDENTITY, MOTIVE, INTENT, AND PLAN IN THE GLOVER AND SWEETS CASES.

A. Introduction

Over defense objection (RT 4457), the trial court instructed the jury that it could use evidence from other counts to decide the issues of identity, motive, intent, and plan, method, or scheme in the Sophia Glover and JoAnn Sweets. (RT 5122-5124.)[53] The court's self-drafted "Other Counts"

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[53]The court instructed the jury as follows:

> Evidence has been introduced in this case of more than one count of murder. As you have been instructed, each count charged must be decided separately. However, you may, if you so choose, use evidence from other counts, together with any count under consideration, for certain limited purposes.
>
> Other counts' evidence may be considered for the purpose of determining whether such evidence tends to show the identity, intent, or motive of the person committing the crime charged in the count under consideration. You may also consider whether such evidence tends to negate the inference of the identity, intent, or motive of the person committing the crime charged.
>
> In determining the value of other counts' evidence you may consider whether or not the evidence as to other counts tends to show a characteristic method, plan, or scheme in the commission of criminal acts which is similar to any method, plan, or scheme used in the commission of the offense in the count then under consideration.

In considering the possible existence of a shared and characteristic method, plan, or scheme involved in the commission of any of the offenses charged, you may look to individual factors of similarity and dissimilarity between the offenses. You should also look to the distinctiveness of marks of similarity and/or dissimilarity.

Factors of similarity that are not distinctive will yield little worth in determining whether two crimes reveal a shared and characteristic method, plan, or scheme. On the other hand, factors of similarity that are distinctive or unique may be of value.

If you should find a unique or highly distinctive method, plan, or scheme shared among other counts and the count under consideration, such that an inference of a single perpetrator for all offenses may be drawn, then you should consider whether it may be logically concluded that if the defendant committed one or more of the other crimes, he also committed the crime under consideration. Or, conversely, if he did not commit one or more of the other crimes, then it may be logically concluded that he did not commit the crime under consideration.

You may also consider other counts' evidence together with the count under consideration to determine whether there existed in the mind of the perpetrator an intent which is a necessary element of the count under consideration, or a relevant motive. You should consider whether any intent or motive is the same, different, or absent in some or all of the offenses considered.

It is a matter solely for your determination whether or not a characteristic scheme, plan, or method is shown in any count, and, if so, whether it is shared by none, some, or all of the other counts. You may find that other crimes' evidence supports or negates inferences of identity, intent, or motive.

instruction violated Mr. Jones's right to federal due process because it permitted the jury to use highly prejudicial, irrelevant matter in determining Mr. Jones's guilt for the Sweets and Glover charges. (*People v. Nottingham, supra*, 172 Cal.App.3d at p. 497 ["[i]t is error for a trial judge to instruct as to separate issues in regard to which the evidence may be considered unless the evidence is relevant and admissible with respect to each of the issues"]; *Garceau v. Woodford*, *supra*, 275 F.3d at p. 775 [other crimes jury instruction may violate federal due process].)

The instruction, moreover, was not harmless beyond a reasonable doubt. (*People v. Garceau*, *supra*, 6 Cal.4th at p. 186 [assuming that *Chapman* reversible error standard applies to erroneous other crimes instruction].) The Glover and Sweets convictions, special circumstances, and death sentence should be reversed.

B. The Instruction Was Erroneous Because Evidence from the Other Counts Was Irrelevant to the Glover and Sweets Charges.

Identity – the Murder Charges

For several reasons the court erred in instructing the jurors that they could use evidence from other *murder* charges to prove identity in the

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> You are cautioned that evidence of other counts cannot be used to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Other counts' evidence is a form of circumstantial evidence. Therefore, you must weigh such evidence in the same manner and subject to the same instructions previously provided regarding circumstantial evidence.

(RT 5122-5124.)

JoAnn Sweets and Sophia Glover murder counts.

First, because Mr. Jones's identity as the person responsible for the deaths of Trina Carpenter, Tara Simpson, JoAnn Sweets, and Sophia Glover was hotly disputed and nowhere near clearly established, no evidence from any other murder count should have been used to identify the Glover or Sweets perpetrator. (*People v. Hernandez* (1997) 55 Cal.App.4th 225, 242 ["'Evidence of other similar crimes linked to no one at all is clearly inadmissible to prove any element of the crime charged against a defendant, even though the crime occurred within a reasonable proximity of time and place'"]; *People v. Dellinger* (1984) 163 Cal.App.3d 284, 298-299 [same]; *People v. Carter* (1975) 46 Cal.App.3d 260, 265 [to prove identity in the charged crime, "[c]ertainly, the facts of uncharged offenses cannot be admitted unless the identity of the perpetrator is clearly established"]; see also *People v. Albertson* (1944) 23 Cal.2d 550, 578 ["collateral offense cannot be put in evidence without proof that the accused was concerned in its commission"]; *People v. Valentine* (1988) 207 Cal.App.3d 697, 702 [same]; *People v. Poulin* (1972) 27 Cal.App.3d 54, 65 [same].)

The Tara Simpson, Trina Carpenter, and Sophia Glover crimes were linked to no *one* at all. Clearly, the court should not have permitted these crimes to be used to identify the JoAnn Sweets perpetrator.

For the same reason, the court should not have instructed the jury that they could use the Tara Simpson or Trina Carpenter crimes to identify the Sophia Glover perpetrator. (*People v. Hernandez*, *supra*, 55 Cal.App.4th at p. 242.) And because the identity of the JoAnn Sweets perpetrator was not clearly established, the court erred in giving the instruction that allowed the jury to use the JoAnn Sweets evidence to find that Bryan Jones was the Sophia Glover perpetrator. (*People v. Carter*,

supra, 46 Cal.App.3d at p. 265.)

Second, before evidence of another offense can be relevant, "ground must first be laid implicating the accused in the charge under trial." (*People v. Poulin*, *supra*, 27 Cal.App.3d at p. 65.) Here, no evidence was presented implicating Mr. Jones in the Sophia Glover case. Therefore, the jury should not have been instructed to use the other charged crimes to determine the perpetrator's identity in the Glover case.

Third, evidence from other crimes may be relevant to prove that the defendant was the Sophia Glover or JoAnn Sweets perpetrator, but only if the other crimes are highly similar to the Glover and Sweets offenses, thereby "eliminat[ing] the possibility that anyone other than the defendant committed the charged offense." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 425.) "The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks." (*People v. Thornton*, *supra*, 11 Cal.3d at p. 756 [italics in original].) Moreover, "the presence of marked dissimilarities between the charged and uncharged offenses is a factor to be considered by the trial court" in determining whether to admit the other crimes evidence. (*People v. Haston*, *supra*, 69 Cal.2d 233, 249, fn. 18.) An examination of the striking *dissimilarities* between the Glover case and the non-Glover cases, and between the Sweets case and the non-Sweets cases demonstrates that the court erred in permitting the jury to use evidence from other counts to determine the identity of the Glover and Sweets perpetrator.

Tara Simpson, Trina Carpenter, and JoAnn Sweets were found in dumpsters, while Sophia Glover was found in a different part of town on a grass strip in between the street and sidewalk. Beyond question, evidence

from the Simpson, Carpenter, and Sweets cases was irrelevant to prove identity in the Glover case.

The dissimilarities between Tara Simpson, Trina Carpenter, and Sophia Glover, on the one hand, and JoAnn Sweets, on the other hand, were compelling as well.

Although Tara Simpson, Trina Carpenter, and JoAnn Sweets were found in dumpsters, Carpenter and Simpson were burned, while Sweets was not.

Tara Simpson and Trina Carpenter were prostitutes. (RT 3479, 3778.) There was no evidence that Sweets was.

Simpson died from ethyl alcohol and cocaine poisoning, had a three and one-half inch cut to her abdomen, and as the prosecution conceded, showed no signs of any sexual attack. (RT 3186, 3197-3198, 3220, 4435.) Carpenter had no sign of forced sexual contact and was not beaten. (RT 3225.) Sweets was allegedly sodomized and severely beaten. (RT 3212-3217.)

Glover was nude and her clothes were placed in a neat pile nearby, while Sweets wore a bra and blouse. (RT 2265.) And again, Glover was found cross-town near the street, while Sweets was found in a dumpster.

Because the Carpenter, Simpson, and Glover cases were not highly similar to the Sweets case, the trial court erred in instructing the jury that it could consider these other cases in determining identity in the Sweets case.

Identity – the Attempted Murder Charges

The trial court also instructed the jurors that they could use evidence from the *attempted* murder counts to identify the Glover and Sweets perpetrator. (RT 5122.) Clearly, the Maria Ramirez and Karen Mitchell attempted murder counts were not highly similar to the Glover and Sweets

murder counts, and should not have been used by the jury to determine the identity of the perpetrator in the Glover and Sweets cases.

Ms. Ramirez, a 42-year-old prostitute, testified that she met Bryan Jones in downtown San Diego, and agreed to have sex with him for $20. (RT 2041-2043, 2052, 2069, 2073, 2088, 3920, 4219.) Ms. Ramirez had been with Mr. Jones at least one other time two months before. (RT 2103, 2107.) This time they rode on a bus to his apartment at 4424 51st Street in San Diego, where they had sex, and he allegedly choked her with his hands and a rope. (RT 2044-2050, 2052, 2077, 2080.) Ms. Ramirez put on her clothes, left the apartment, and called the police. (RT 2052-2053.)

Karen Mitchell, a 30-year-old prostitute, testified that she met Bryan Jones in downtown San Diego and agreed to commit acts of prostitution in return for $50. They rode in a dusty blue Datsun 280-Z to the Wilsie house at 4659 Mississippi Street in San Diego. (RT 2523-2528 2532, 2562-2563, 2564-2565, 2568-2570, 2602, , 2605-2607, 2612, 2614, 3645, 4220.) Ms. Mitchell further testified as follows: when she started to take her clothes off, the defendant choked her, causing her to almost lose consciousness. She was told that she would be killed if she did not cooperate. On a sheet placed on the floor of the house, she was forced to engage in sexual intercourse, sodomy, and oral copulation. Ms. Mitchell had brought a half of a fifth of Jack Daniels with her, which she was forced to drink. The defendant left and she continued to drink. She eventually passed out. (RT 2536-2537, 2550-2556, 2569, 2581, 2584.)

There was no evidence that either Glover or Sweets was a prostitute, transported by car or bus, or *in* the Jones apartment or Wilsie residence. Neither Ramirez nor Mitchell died, and neither was connected to a dumpster. The only feature that the four women had in common was that

each was allegedly choked. This does not make them distinctively similar signature offenses. (*People v. Nottingham*, *supra*, 172 Cal. App. 3d at p. 500 ["It is ... unfortunately the case that in the repugnant crime of rape it is not uncommon for the perpetrator to apply force to the neck of the victim"]; see also *People v. Johnson* (1988) 47 Cal. 3d 576, 588 [rape and murder lacked sufficient distinctive common marks to be cross-admissible to establish the identify of the perpetrator because the only distinctive feature which the rape and murder shared was the bashing of the victim's head]; *People v. Guerrero* (1976) 16 Cal. 3d 719, 729 [reversing murder conviction for admitting evidence of other crime where other crime victim was raped, not murdered, and murder victim was not raped].) Hence, the court erred in permitting the jury to use evidence from the Ramirez and Mitchell cases to determine identity in the Glover and Sweets counts.

Motive, Intent, and Plan

The trial court also erred in instructing the jurors that they could use evidence from other counts in deciding the issues of motive, intent, and plan in the Glover and Sweets counts. (RT 5122.) As stated, "where the identity of the actor is in dispute and the uncharged misconduct fails to satisfy the stringent 'so unusual and distinctive as to be like a signature' standard enunciated in *Ewoldt*, the uncharged conduct is not admissible on such issues as intent, motive or lack of mistake or accident – all of which issues presume the identity of the actor is known." (*People v. Hassoldt*, *supra*, 84 Cal.App.4th at p. 166 [citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2].) Thus, the court erred because the identities of the Glover and Sweets perpetrators were in dispute and the other counts did not satisfy the *Ewoldt* signature standard, as shown.

Motive evidence from the other counts was also irrelevant because the Simpson, Carpenter, Ramirez, and Mitchell were not directly connected to the Glover and Sweets charges. "[T]he motive for the charged crime arises simply from the commission of the prior offense. [Citation omitted.] The existence of a motive requires a *nexus* between the prior crime and the current one ...." (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1018 [italics added] [citing *People v. Thompson*, *supra*, 27 Cal.3d 303, 319, fn. 23].) Moreover, it was beyond dispute that Sophia Glover and JoAnn Sweets were intentionally killed, so that any evidence of intent borrowed from the other counts was irrelevant, or at the very least cumulative. (Evid. Code, § 210 [evidence is only relevant if it has a tendency to prove or disprove a "disputed fact"]; *People v. Balcom*, *supra*, 7 Cal.4th at pp. 422-423 [although defendant's plea of not guilty put his intent in issue, because the victim's testimony that defendant placed a gun to her head, if believed, constituted compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative and inadmissible on this issue].)

Ewoldt stressed that evidence of a plan may be admissible to establish that the defendant committed the act alleged, but only if it was conceded or assumed that the defendant was present at the scene of the alleged crime. (*Id.* at p. 394, fn. 2; 406 ["evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan ... is relevant to demonstrate that, *assuming the defendant was present at the scene of the crime*, the defendant engaged in the conduct alleged to constitute the charged offense" (italics added)].) Here, it was not conceded or assumed that Bryan Jones was present at the deaths of Sophia Glover and JoAnn

Sweets. Hence, evidence of a plan could not be used to show that Mr. Jones committed any alleged acts as to Glover and Sweets.

Summary

"The trial court has a duty to assist the jurors by telling them the precise issues to which the other-crimes evidence relates and to limit their consideration of such evidence accordingly." (*People v. Nottingham*, *supra*, 172 Cal.App.3d at p. 497.) And "when a trial court does undertake to give a limiting instruction specifically calling attention to the significance of the substantially prejudicial evidence of prior bad acts, it should do so accurately." (*Ibid.*) Thus, "[i]t is error for a trial judge to instruct as to separate issues in regard to which the evidence may be considered unless the evidence is relevant and admissible with respect to each of the issues." (*Ibid.*)

Here, the court instructed the jurors that they could use evidence from other counts to prove identity, motive, intent, and plan. As shown above, the evidence was irrelevant. Hence, the trial court erred.

C. The Instruction Violated Federal Due Process.

In *Garceau v. Woodford*, *supra*, 275 F.3d 769, 775, the Ninth Circuit held that a jury instruction denied a defendant federal due process where the *McKinney* factors were satisfied. (*Id.* at p. 775; see also *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1381-82, 1385-86.) Thus, *Garceau* concluded that the trial court's instruction, which permitted the jury to use evidence of the defendant's other crimes for any purpose, "violated due process where (1) the balance of the prosecution's case against the defendant was 'solely circumstantial;' (2) the other crimes evidence ... was similar to the [crime] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence

was 'emotionally charged.'" (*Garceau v. Woodford*, *supra*, 275 F.3d at p. 775.) The *McKinney* test is met here, so that the jury instruction denied Mr. Jones federal due process.

First, the prosecution's case against Mr. Jones for the murders of Sophia Glover and JoAnn Sweets was solely circumstantial. Second, the Simpson, Carpenter, Ramirez, Mitchell, Glover, and Sweets cases were similar in that they were all violent crimes against women.

Third, the prosecution relied heavily on the other crimes evidence to prove the Glover and Sweets offenses. During argument the prosecution implored the jury "to take a two step approach. First question I would ask you to consider is did one person do all these crimes? Is one person responsible for that horror? Second question, is this man in court that one person?" (RT 4986.) The prosecution then argued that the Ramirez and Mitchell cases were "important" because they laid "out the rest of the cases [by giving] us some help as to what happened to ... JoAnn Sweets [and] Sophia Glover. Those are our live witnesses. Those are the people that can tell the story and can fill in the blanks that are obviously there on the murder victims." (RT 4987.)

And in support of the claim that the same person was responsible for all of the crimes charged, the prosecution asserted that all of the victims met the same profile:

> [M]ost of these victims, if not all of them, were available, were vulnerable, and were invisible. Available meaning that they're out there on the streets where they can be found. Anybody driving up and down the streets can find them. Out there alone or maybe with a friend. Who knows. But they are available. They are vulnerable because they had needs that they couldn't meet on a regular basis. ... And they are invisible. And by this I mean coming from the defendant's

> eyes, as he picks them up or whoever this person is that picks them up, they are invisible in the sense that nobody is going to miss them. Nobody is going to miss them.

(RT 4988; see also RT 4999 [regarding JoAnn Sweets: "Again, she meets the profile. Available, vulnerable, invisible."].)

Finally the prosecution argued to the jury as follows:

> The evidence is overwhelming, absolutely overwhelming one person committed these crimes. Is the defendant that person? That's based upon identification and there are many ways to make identification, and we have many ways in this case. We have many means. First of all, you have eyewitness identification. We have that. Ramirez, Richmond, Mitchell. We have a common method of operation, common m.o.. Same thing over and over again. *That tells us identification, if we can prove one of them.* Circumstantial evidence, forensic evidence, and the defendant's own words. All of them come into play in this case.

(RT 5013 [italics added].) Thus, the prosecutor relied extensively on the other crimes evidence at several points during the trial to prove the Glover and Sweets cases.

Fourth, it is evident the Simpson, Carpenter, Ramirez, Mitchell, Glover, Sweets, cases were each emotionally charged, and in the aggregate, overwhelmingly so.

Accordingly, application of the *McKinney* factors compels the conclusion that the court's instruction violated Mr. Jones's federal due process rights.

D. The Instruction Was Prejudicial.

As shown in sections F and G of argument number 2, the Glover and Sweets cases were not strong. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 42 [applying *Chapman*, where evidence is not overwhelming, jury could

have reasonable doubt].) The other crimes evidence, on the other hand, was crushing to the defense. After hearing evidence regarding the Mitchell and Ramirez counts, for which the jury found Mr. Jones guilty beyond a reasonable doubt, as well as evidence of the Carpenter and Simpson charges, the jurors would likely have been strongly influenced by such inflammatory evidence. Thus, it cannot be concluded that Mr. Jones's convictions for the murders of Sophia Glover and JoAnn Sweets were surely unattributable to the other crimes evidence. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) The Glover and Sweets convictions, special circumstances, and death sentence must be reversed.

7.

THE COURT'S OTHER COUNTS INSTRUCTION – WHICH THE COURT REFERRED TO AS "AWKWARD" AND "CONFUSING," COMPARED TO "QUICKSAND," AND NEEDED "MENTAL GYMNASTICS OF THE WORSE ORDER" TO DRAFT – LIKELY MISLED THE JURY TO VIOLATE MR. JONES'S CONSTITUTIONAL RIGHTS.

As set forth in Argument 5, the trial court instructed the jury, over defense objection (RT 4457), that it could use any evidence from other counts to decide the issues of identity, motive, intent, and plan, method, or scheme in the Glover and Sweets cases. (RT 5122-5124.) Because there is a reasonable likelihood that the jury applied the instruction in a way that violates the federal constitution, the court erred in giving it. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Clair* (1992) 2 Cal.4th 629, 663 [the inquiry is "whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation" of the Constitution].)[54] As the error was not harmless (*Chapman v. California*, *supra*, 386 U.S. at p. 24), reversal of the Glover and Sweets verdicts, special circumstances, and death verdict is mandated.[55]

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[54]A "reasonable likelihood" standard is not a "more probable than not" test. Rather, it is "a significant but something-less-than-50 percent likelihood" that the jury was misinstructed. (*People v. Howard* (1987) 190 Cal.App.3d 41, 48; see also *Weeks v. Angelone* (2000) 528 U.S. 225, 236 [must be more than a "slight possibility" that jury was misled].)

[55]"[F]rom our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 252.)

A. The Instruction Was Erroneous.

The court admitted that it had a very difficult time drafting the Other Counts instruction.[56] Indeed the court stated: "This is not a simple prospect, and it is mental gymnastics of the worse order. Kind of like quicksand. The deeper you get into it, the more confusing it is." (RT 4415.) Later the court referred to the instruction as "awkward ... needless to say." (RT 4767.) Although the court thought the instruction would be "helpful" (RT 4415), on examination it remains hopelessly confusing and deeply flawed, to the point that it is reasonably likely that it misled the jury to violate Mr. Jones's constitutional rights. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

The first fault with the instruction arises from the confusing first paragraph, which has been annotated with brackets as follows to suggest some of the problem areas:

> Evidence has been introduced in this case of more than one count of murder. [Does this mean that the instruction will be limited to drawing inferences from other murder counts and applying those inferences only to murder counts? Does this instruction have any application to the attempted murder charges? Does it apply to the rape and sodomy special circumstances?] As you have been instructed, each count charged [of murder? But obviously all counts] must be decided separately. However, you may, if you so choose, use evidence from other counts [does this include the Maria Ramirez and Karen Mitchell attempted murder counts?], together with any count under consideration, for certain limited purposes.

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[56]The instruction is set forth in full at p. 160.

The second mistake is that the instruction failed to mention the prosecution's burden of proof.[57] Evidence Code section 502 provides:

> The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Thus, the court was required to instruct on the prosecution's burden of proof. (*People v. McClellan* (1969) 71 Cal.2d 793, 804 ["during the guilt trial evidence of other crimes may be proved by a preponderance of the evidence"] see also *People v. Nottingham*, *supra*, 172 Cal.App.3d at p. 497 ["when a trial court does undertake to give a limiting instruction specifically calling attention to the significance of the substantially prejudicial evidence of prior bad acts, it should do so accurately"].) Its failure to do so was error.[58]

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[57]Contrast the Other Counts instruction with the Bertha Richmond other crimes instruction where the court expressly stated: "Within the meaning of the preceding instruction, such other crime or crimes purportedly committed by a defendant must be proved by a preponderance of the evidence." (RT 5115.)

[58]In *People v. Medina* (1995) 11 Cal.4th 694, this Court concluded that other crimes offered to prove knowledge, intent or identity are deemed mere "evidentiary facts" that need not be proved beyond a reasonable doubt as long as the jury is convinced, beyond such doubt, of the truth of the "ultimate fact" of the defendant's knowledge, intent or identity. (*Id.* at pp. 762-765.) The Court declined to require that the other crime be proved beyond a reasonable doubt because this "could convert the guilt phase into a series of collateral minitrials conducted whenever the People seek to rely on such evidence to assist in proving defendant's identity, intent or similar element of the charged offense. The risk of 'sidetracking' the trial would

The court's error was compounded by the fact that the court instructed each juror that "you may, *if you so choose*, use evidence from other counts, together with any count under consideration" (RT 5122 [italics added]) to determine identity, intent, motive, and plan. On the other hand, the court instructed that "[y]ou may also consider whether such evidence tends to negate the inference of the identity, intent, or motive of the person committing the crime charged." (RT 5122.) In other words, any juror could choose to consider the evidence or simply ignore it. The court also told each juror, "[i]t is a matter *solely for your determination* whether or not a characteristic scheme, plan, or method is shown in any count, and, if so, whether it is shared by none, some, or all of the other counts." (RT 5123 [italics added].) As a result each juror no doubt believed that he or she was free to choose (or not) whether other counts' evidence could be used to prove (or not) identity, intent, motive, and plan without any requirement that the prosecution prove any fact by a preponderance of the evidence.

The third problem with the instruction is that it gave the jurors no guidance on how other counts' evidence could be used to show intent and motive in the count under consideration. The instruction provided: "Other counts' evidence may be considered for the purpose of determining whether such evidence tends to show the identity, intent, or motive of the person committing the crime charged in the count under consideration." (RT

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be enormous." (*Id.* at p. 764.) That risk was not present here because the other crimes were not collateral, but were other counts charged in the information. In any event, whether the trial court should have instructed the jury to find the other counts by a preponderance of the evidence or beyond a reasonable doubt is besides the point because the court required neither burden of proof, but merely left it to each juror's unfettered discretion.

5122.) It further stated: "You may also consider other counts' evidence together with the count under consideration to determine whether there existed in the mind of the perpetrator an intent which is a necessary element of the count under consideration, or a relevant motive. You should consider whether any intent or motive is the same, different, or absent in some or all of the offenses considered." (RT 5123.) Finally, the court instructed: "You may find that other crimes' evidence supports ... inferences of identity, intent, or motive." (RT 5123.) Read together, these sentences offer no assistance to the jurors as to *how* they could use the other crimes evidence to determine intent and motive. They merely told the jury three times that jurors *could* use other crimes' evidence to find intent and motive.

The court's frequent mention of motive was especially confusing in light of the fact that motive is only relevant where there is a nexus between the crimes (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1018), as for example, where a defendant was rendered paraplegic by the police in a robbery and murdered officers in retribution (*People v. Daniels*, *supra*, 52 Cal.3d at p. 857), or where evidence of prior robberies was admissible to show a motive to murder witnesses to the robberies (*People v. De La Plane*, *supra*, 88 Cal.App.3d at pp. 245-246). There was no nexus between any of the charged crimes in this case. Hence, the court's repeated talk of motive was irrelevant and confusing.

Nevertheless, the court's emphasis on motive likely led the jury to rely heavily on the testimony of Dr. Reid Meloy, who, according to the prosecutor, provided the motive for all the crimes.[59] Thus, if, for example,

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[59]The prosecutor argued to the jury: "Dr. Meloy tells us what sexual homicide people do, what they want, what motivates them, what causes them to act. They have that rage, that violence towards women. 'Make

the jurors found that force in the Karen Mitchell and Maria Ramirez cases (assuming this instruction applies to these counts) sexually stimulated Mr. Jones, then the jurors probably used the court's instruction to conclude that the defendant used force for the purpose of sexual stimulation in the JoAnn Sweets and Sophia Glover cases, particularly given the court's gratuitous remark, "You should consider whether any intent or motive is the *same*, different, or absent in some or all of the offenses considered." (Italics added.)[60] Why should the jurors have considered whether the motive was the same in all the offenses unless the court was suggesting to the jurors a finding of motive in one case could be applied to another case or even that this was a means to determine identity for all the crimes? Under the law, however, this is a plainly inappropriate use of other crimes evidence to determine motive. (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1018.)

The fourth serious flaw with the instruction is that it told the jurors that they could use evidence of a shared plan to identify "a single perpetrator for all offenses." (RT 5123.) But as this Court stated three times in *Ewoldt*, evidence of a common plan cannot be used to prove the

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them hurt, dominate them, hurt them and that makes me feel better. That gives me a better orgasm. That is what I need. That is what I want. That is what I will get.' He talks about the woman suffering being their greatest turn-on, and it had to be. It had to be. And that it is goal directed behavior. 'I want to achieve something. So I am going to do it. I intend to achieve it. I will do it.' Dr. Meloy gives us the motive for these crimes." (RT 5026.)

[60]Karen Mitchell testified that the defendant failed to get an erection from oral sex and thereafter forced her to have anal sex. (RT 2551-2552.) Maria Ramirez testified that she voluntarily had sex once with Mr. Jones, but then when he wanted sex a second time, he resorted to force. (RT 2047-2051.)

defendant's identity or intent. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 394 ["Evidence of a common design or plan, therefore, is not used to prove the defendant's intent or identity"], 399, 406.)

The fifth defect is that the court instructed the jurors that they could "logically conclude[] that if the defendant committed one ... of the other crimes, he also committed the crime under consideration." (RT 5123.) Four of the crimes "under consideration" were first degree murder charges. Thus, the court told the jury that based only on identifying Mr. Jones as the perpetrator of one crime (that is, without consideration of any other evidence), the jurors could logically conclude that Mr. Jones committed another crime, first degree murder – the intentional, deliberate, premeditated killing of another human being with malice aforethought. For example, the instruction meant that if the jury found that Mr. Jones attempted the murder of Maria Ramirez or Karen Mitchell, it could logically conclude from this finding alone that Mr. Jones committed the first degree murders of Sophia Glover and JoAnn Sweets. The court's instruction was irrational in this regard.

Furthermore, even assuming for the sake of argument that the jurors employed a preponderance of the evidence burden of proof in applying the court's instruction, then the instruction so construed would have permitted the jury to find that Mr. Jones committed a murder based on evidence short of proof beyond a reasonable doubt. That is, a preponderance standard would have allowed the jury to find Mr. Jones was the JoAnn Sweets perpetrator simply if it were more likely than not that he was. From this finding alone, the instruction permitted the jury to conclude that Mr. Jones committed the "crime under consideration," for example, the first degree murder of Sophia Glover. But, to convict Mr. Jones of the Sophia Glover

offense, the prosecution was required to prove Mr. Jones's identity as the Sophia Glover perpetrator beyond a reasonable doubt. (*People v. Hogue* (1991) 228 Cal.App.3d 1500, 1505 ["An essential element of any crime is, of course, that the defendant is the person who committed the offense. Identity as the perpetrator must be proved beyond a reasonable doubt."].) Because the instruction permitted the jury to find Mr. Jones guilty based on a lesser standard of proof, the instruction was constitutionally infirm. (*In re Winship* (1970) 397 U.S. 358, 364 [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"].)

The court's error was especially egregious in light of the fact that the jury hung on the Carpenter and Simpson counts. Thus, jurors who did not vote guilty on the Carpenter and Simpson murder counts could have used those counts to determine identity in the Glover and Sweets case without first finding that the prosecution had proved the Carpenter and Simpson counts by a preponderance of the evidence. Hence, the court erred in permitting the jury to use evidence from other murder counts to determine the identity of the Glover and Sweets perpetrator.

The prosecutor's argument to the jury underscores the likelihood that the court's instruction misled the jury to believe that once it found Mr. Jones committed one crime, the jury was free to conclude that he committed other crimes without any concern for other evidence or the burden of proof. The prosecutor argued as follows:

> First question I would ask you to consider is did one person do all these crimes? Is one person responsible for that horror? ... Beginning with *Maria Ramirez at the top. ... Her case is important ... because it lays out the rest of the cases.* It gives us some help as to what happened to Tara Simpson, Trina

> Carpenter, JoAnn Sweets, Sophia Glover. Just like the two ladies at the bottom does, Bertha Richmond and Karen Mitchell. Those are our live witnesses. Those are the people that can tell the story and can fill in the blanks that are obviously there on the murder victims. ... *Maria Ramirez, let me take you through some of the factors that establish that one man did these crimes.*

(RT 4986-4988 [italics added].) The court's instruction, amplified by the prosecutor's argument, permitted the jury to find Mr. Jones guilty of all the charged crimes merely by identifying him, for example, as the Maria Ramirez perpetrator.

For these reasons, there is a reasonable likelihood that the jury applied the court's other crimes' instruction in a way that violates the federal constitution, and the court erred in giving it. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

B. The Instruction Was Prejudicial.

"[I]t is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice, in turn, is presumed unless the government shows that the defect was harmless beyond a reasonable doubt." (*People v. Roybal* (1998) 19 Cal.4th 481, 520.) The government will not be able to show harmlessness beyond a reasonable doubt because the court's instruction permitted the jury to find Mr. Jones guilty of the murders of Sophia Glover and JoAnn Sweets based merely on identifying Mr. Jones as the Maria Ramirez or Karen Mitchell perpetrator, or simply by finding by less than a preponderance of the evidence that Mr. Jones was the Tara Simpson or Trina Carpenter perpetrator. Moreover, the instruction allowed the jury to conclude that Mr. Jones committed the first degree murders, rather than the second degree murders, of Sophia Glover and

JoAnn Sweets based only a finding that Mr. Jones was motivated in the attacks on Maria Ramirez and Karen Mitchell by a desire for a "better orgasm," as the prosecutor interpreted Dr. Meloy's motive testimony (RT 5036), and that therefore he must have had the same motive with respect to Sophia Glover and JoAnn Sweets.

Sophia Glover

The Sophia Glover evidence was so weak that no reasonable juror could have found Mr. Jones guilty, unless the awkward and confusing instruction misled the juror to believe that finding Mr. Jones as the Maria Ramirez or Karen Mitchell perpetrator allowed a finding that Mr. Jones was the Sophia Glover perpetrator. Ms. Glover's nude body, partially covered by a blanket, was found about a block from the Wilsie house, where Ann Jones worked and her son helped out on occasion. (RT 2247-2249, 2287, 2309, 2607, 3936.) Ms. Glover's clothes were located in a neat pile near an apartment building next door to the Wilsie residence. (RT 2264-2265, 2268-2269, 2290-2291, 2294.) DNA was discovered on an anal swab taken from Ms. Glover; over 15 percent of the population, including Mr. Jones, could not be eliminated as a source of the DNA. (RT 4843-4846.) This is the sum total of the evidence "connecting" Mr. Jones to Sophia Glover.

In his defense, Mr Jones introduced evidence that the killer may have been a man who beat Ms. Glover and stripped her naked in public a day or so before her death. (RT 3440-3441, 3456, 3460, 5066-5067.)

In addition, the DNA tests showed there were at least two contributors of sperm to the Glover anal swabs, suggesting that she was assaulted by more than one person, contrary to the prosecution theory. (RT 4799-4800, 4811, 4861, 5067.) The prosecutor argued to the jury, "I am sure you can appreciate that murder, certainly first degree murder, is not a

spectator sport. You don't sell tickets. You don't ask for an audience. [L]et me take you through some of the factors that establish that *one man did these crimes*." (RT 4988 [italics added].)[61]

JoAnn Sweets

Similarly, the evidence linking Mr. Jones to the JoAnn Sweets homicide was not strong. On May 9, 1986, the body of JoAnn Sweets was found in a dumpster in the alley just outside the back door of the Jones apartment. (RT 2343-2345, 2358, 2362, 2366, 3980.) An old, tattered afghan blanket covered the body, which was wrapped in a heavily soiled sheet, a mattress pad, and two large plastic trash bags. Tape was attached to the ends of the bags as if someone had tried, unsuccessfully, to tape the bags together. (RT 2303-2304, 2307, 2345-2346, 2353, 2363, 2399, 2404, 2432, 2485, 2932.)

Although the afghan might have been made by Mr. Jones's mother or sister, the sheet and mattress pad were not from the Jones apartment. (RT 2783-2785, 3931-3932.) The person who found the body described the afghan as "kind of old," "raveled," "coming apart," and not worth keeping. (RT 2346, 2353.) Thus, an obvious inference is that whoever owned the afghan threw it in the garbage because it was falling apart.

Moreover, just days before the body was found in the dumpster, Ann Jones moved down the street to a new home. (RT 3068-3069, 3932-3933, 3982.) When people move, they typically toss out used or unwanted items, like old unraveling afghans, especially if they are like Ann Jones, "sort of

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[61]The trial court found the evidence of two perpetrators "really, really interesting" because it affected "how you read all of these m.o. crimes together." The court concluded that this evidence favored Mr. Jones. (RT 4751.)

picky," who "like[d] things sort of neat," and who "like[d] things in place." (RT 3984.) Ann Jones testified that sometimes her afghans would fall from her lap and lie on her carpet. (RT 3995.) Thus, assuming the raveled afghan came from the Jones apartment, it could have lain on the carpet, where it gathered fibers, before being put in the trash, where someone retrieved and used it to cover JoAnn Sweets.

The prosecution's theory was that JoAnn Sweets was attacked while lying on the afghan, which was on the carpet. (RT 4999.) But 29 hairs were recovered from the blanket, none of which matched Bryan Jones or JoAnn Sweets. (RT 3534.) Had this afghan been used in an attack, it surely would have had hair from both JoAnn Sweets and her attacker. Thus, it is more likely that the afghan had nothing to do with Mr. Jones and did not come from the Jones apartment.

Moreover, the discarded sheet had no connection to Mr. Jones, but did have five hairs that did *not* match Mr. Jones or JoAnn Sweets. The mattress pad, too, had no connection to Mr. Jones, but had eight hairs that did *not* match Mr. Jones or Ms. Sweets. (RT 3534-3535.) If, as the prosecutor seemed to suggest, that the mattress pad and sheet were somehow used in the attack on JoAnn Sweets (RT 4999), then it is highly unlikely that there would be no hairs that matched Mr. Jones or Ms. Sweets found on them, given the ease with which people shed hair.

And, as the prosecution acknowledged, JoAnn Sweets put up a ferocious fight to defend herself. (RT 4999.) During this struggle JoAnn Sweets must have lost many hairs. The absence of even a single hair matching JoAnn Sweets on the afghan, sheet, or mattress pad is compelling evidence that these materials were not involved in her attack.

In addition, it is likely that the afghan, sheet, and pad attracted carpet fibers from inside the dumpster, a "cesspool" of "contamination." (RT 3102-3103.) Prosecution witness, Melvyn Kong, a supervising criminalist for the San Diego Police Department crime lab, testified that because "a dumpster is a trash receptacle, it is, in essence, a cesspool of many different sources of fiber and hair contamination. So there is possibility of cross-contamination between anything which is in the dumpster and anything that's removed from the dumpster." (RT 3076, 3102-3103.)

Prosecution witness Michael Malone, an FBI Special Agent and Senior Examiner with the Hairs and Fibers Unit of the FBI lab in Washington D.C., testified that he would expect apartments in the same building to be carpeted with the same fiber. (RT 3141.)[62] The Jones apartment was located in a large apartment complex, whose tenants likely used the dumpster in which JoAnn Sweets was found. (RT 2045, 2093.) These tenants also likely vacuumed the carpets in their apartments and deposited the vacuumed carpet fibers in the trash. Therefore, the carpet fibers found with JoAnn Sweets could have come from any of the other apartments in the Jones building.

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[62]Special Agent Malone testified that police should have tested the carpet in the other apartments in the Jones building to determine if there was another source of the fibers found with JoAnn Sweets. (RT 3141-3142, 3159-3160.) In addition, Mr. Malone testified that he was not informed by the prosecution that four packages of garbage were in the dumpster when the body was found (RT 2319, 2412, 2809); these should have been analyzed to determine whether they either contaminated or contributed to the fibers found with Ms. Sweets (RT 3143, 3159). Finally, Mr. Malone opined that the police should have examined JoAnn Sweets's residence on Bates Street for fibers and other evidence. (RT 3165, 3885.) None of these tasks was performed by law enforcement in this case.

Although Dr. Blake testified that DNA (DQ alpha genotype 1.2,2) found on the sheet wrapped around the body matched about six percent of the African American population (including Mr. Jones), about five percent of the Caucasian population, and about two percent of the Mexican-American population (RT 2930-2931, 2942-2944), Dr. Blake also admitted that a second man with a 1.2,1.2 DQ alpha genotype could have contributed sperm to the sheet found with JoAnn Sweets (RT 3037). Furthermore, Dr. Blake's earlier testimony regarding Trina Carpenter suggested that another co-contributor to the sheet sperm could have been a man with 2,2 alleles. (RT 3033.) Finally, Dr. Blake testified that in the case of Sophia Glover, where the possible sperm contributors had the same genotypes of 1.2,2, 1.2,1.2, and 2,2 as in the case of JoAnn Sweets, the portion of the population that could have contributed the sperm to the sheet was approximately 15 percent. (RT 4846.) That same calculation should apply as well to the heavily soiled sheet found with JoAnn Sweets.

As stated, Mr. Jones lived in a big building in an apartment complex. Given that contributors to the sperm found on the sheet could have come from 15 percent of the male population, there must have been many men meeting that profile living in the apartment complex, let alone in the surrounding neighborhood.

A fingerprint from the exterior of the dumpster outside the Jones apartment matched Mr. Jones. (RT 2401-2403, 2824.) As the prosecution conceded to the jury: "There was some explanation tendered here about fingerprints and that, yeah, you would expect the defendant's prints to be on the dumpster. Okay. *Sure, we will give you that.* There might be some explanation for him, because he's using it." (RT 5094 [italics added].)

Not only would one expect to find Mr. Jones's fingerprints on the dumpster right outside his back door, one would also expect to find trash bags in the dumpster with his prints, particularly since a major move had just taken place with his mother relocating from the old apartment into a new one down the street. Thus, a fingerprint lifted from one garbage bag and a hand print from the other garbage bag not surprisingly matched Mr. Jones. (RT 2847-2851.)[63]

On the other hand, no fingerprints were detected on the tape used in the attempt to tape the ends of the bags together. (RT 2744-2745.) This suggests that whoever put Ms. Sweets's body in the garbage bags wore gloves, which explains why the *killer's* prints were not found on the garbage bags.

Moreover, when the body was found, other garbage was outside the dumpster, and loose trash was inside the dumpster. (RT 2303, 2327.) Thus, whoever put Ms. Sweets's body in the garbage bags likely took the trash-filled bags from the dumpster, emptied the bags in or around the dumpster, and then used them to wrap the body.

The prosecution's theory of the case, that the same person, acting alone, committed all the murders in a similar fashion, supports the conclusion that Bryan Jones did *not* use his property to wrap Ms. Sweets's body. Trina Carpenter's body was found in a green cloth duffel bag. (RT 2299, 2321.) The name "D. Belman" and the initials "D.B." appeared on the bag, indicating that D. Belman owned the duffel bag. (RT 2413.) Thus, whoever killed Trina Carpenter probably took D. Belman's discarded duffel

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[63]According to Special Agent Malone, the police should have processed the other garbage bags in the dumpster for Mr. Jones's fingerprints. (RT 3162.)

bag from the dumpster and put her body in it. Similarly, whoever killed JoAnn Sweets probably took discarded bags of trash from the dumpster near the Jones apartment and put her body in them. If, as suggested by the prosecution's modus operandi theory, that the same person killed Trina Carpenter and JoAnn Sweets in the same way, then D. Belman did not kill Trina Carpenter, and Bryan Jones did not kill JoAnn Sweets because the killer's modus operandi was to wrap the victim in material not associated with him.

Evidence also pointed to Ike Jones rather than Bryan Jones as the killer.[64] Joyce Euwing, who lived at the Travelodge Motel located on 51st Street and El Cajon, testified that while she was walking to work at about 5:30 a.m. on May 9, 1986, she saw two men standing next to a small, dark four-door car near the dumpster in which JoAnn Sweets was found. The men were struggling to lift what looked like a big roll of carpet out of the back seat. (RT 3363, 3369-3370, 3382, 3389-3390, 3393-3394, 3397.) Ms. Euwing testified that it looked like the men were trying to dump the carpet; but because she was just walking by, she did not see the men put the carpet in the dumpster. (RT 3369, 3394.)[65] She recognized one of the men as Ike Jones. (RT 3371, 3374.)[66]

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[64]The trial court ruled that it was "clear" that testimony regarding Ike Jones was "sufficient to raise a reasonable doubt on the JoAnn Sweets case" with respect to the defendant's guilt. (RT 266-267.) Moreover, according to the prosecution, "Joyce Euwing's testimony directly implicated Ike Jones in the JoAnn Sweets murder." (CT 6444.)

[65]This, of course, may explain where the carpet fibers on JoAnn Sweets originated.

[66]Ms. Euwing testified that the defendant, sitting at counsel's table, was not one of the men. (RT 3372.)

Ike Jones had been seen with JoAnn Sweets's boyfriend on Bates Street, where Ms. Sweets and her boyfriend lived. (RT 3884-3885.) Ike Jones's girlfriend corroborated that he drove a small, dark brown car. (RT 4231.)

Even if some or all of the jurors believed that Ms. Euwing misidentified Ike Jones, whether intentionally (Ms. Euwing did not give the police the name of Ike Jones until her fifth police interview (RT 4257, 4288-4289)) or because she was not wearing her glasses, the fact remains that she saw two men at the dumpster with a big roll of carpet. (RT 3364-3365, 3385-3386, 3396, 3404-3407, 3424, 3433, 3449, 4227-4229, 4249-4252, 4257-4258.) This is consistent with Dr. Blake's testimony that two men could have contributed to the sperm on the sheet found with JoAnn Sweets (RT 3037), and again undermines the prosecution's theory that one man acted alone in committing the charged crimes.

Dr. Blake's original testimony did not eliminate Ike Jones as a contributor of the sperm to the sheet. (RT 3867.) Although, in Dr. Blake's opinion, Ike Jones was eliminated as a result of additional polymarker testing, this is the same Dr. Blake who initially believed that there was only one contributor to the Sophia Glover anal swab (RT 2930-2931), but later recanted to say that there could have been three contributors. (RT 4799, 4803, 4857, 4861.) Moreover, prosecution expert Patrick O'Donnell, a doctor of molecular biology and head of the San Diego Police Department's Forensic DNA Laboratory, and defense expert, Marc Taylor, like Dr. Blake, a forensic scientist, both testified that they would not have eliminated Ike Jones as a contributor of the sperm. (RT 4618, 4666, 4898, 4903-4905, 4908, 4926, 4936-4938.)

Accordingly, like the Sophia Glover case, the evidence implicating Mr. Jones in the JoAnn Sweets case was not overwhelming (*People v. Marshall*, supra, 15 Cal.4th at p. 42 [applying *Chapman*, where evidence is not overwhelming, jury could have reasonable doubt]), and Mr. Jones's convictions for the murders of Sophia Glover and JoAnn Sweets were not surely unattributable to the court's awkward and confusing instruction, which the court compared to quicksand (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279 [the proper *Chapman* inquiry is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error"]). Hence, the convictions, special circumstances, and death sentence must be reversed.

8.

THE COURT'S BERTHA RICHMOND AND OTHER COUNTS INSTRUCTIONS VIOLATED MR. JONES'S DUE PROCESS RIGHTS BECAUSE THERE WAS NO RATIONAL WAY FOR THE JURY TO MAKE THE SCORES OF CONNECTIONS PERMITTED BY THE INFERENCES.

The Bertha Richmond and Other Counts instructions violated Mr. Jones's right to due process under *County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157, and were not harmless beyond a reasonable doubt. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 296, fn. 3 [applying *Chapman* to erroneous jury instructions and constitutional errors]). The Glover and Sweets convictions, special circumstances, and death sentence should be reversed.

In *Ulster County Court*, the Supreme Court held that an instruction that permits a jury to draw an inference violates due process "if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." (442 U.S. at p. 157; *Francis v. Franklin* (1985) 471 U.S. 307, 314-315 ["A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury"].) Here, the court's instructions were unconstitutional because it cannot "'be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'" (*Ulster County Court* at p. 166, fn. 28 [quoting *Leary v. United States* (1969) 395 U.S. 6, 36]; *People v. Snow* (2003) 30 Cal.4th 43, 95 [recognizing the "more likely than not" standard of *Ulster County Court*].)

Based on the preceding arguments, it should be clear that the Bertha Richmond and Other Counts instructions permitted scores of inferences.[67] But it cannot be said with substantial assurance that each inference was more likely than not to flow from the proved fact on which each inference was made to depend; therefore the instructions were unconstitutional. (*Ulster County Court*, *supra*, 442 U.S. at p. 166, fn. 28.)

For example, the Other Counts instruction permitted the Tara Simpson count to be used to determine identity, motive, intent, and plan in the Sophia Glover and JoAnn Sweets murder counts. Before a juror could use the Tara Simpson murder charge as a basis for identifying Mr. Jones as the perpetrator of the Sophia Glover and JoAnn Sweets murders, the juror first had to find that Mr. Jones committed the Tara Simpson murder, even if only by a preponderance of the evidence. (*People v. Medina*, *supra*, 11 Cal.4th.at pp. 762-765.) Then to draw an inference of identify in the Sophia Glover and JoAnn Sweets cases, the juror had to determine whether "[t]he highly unusual and distinctive nature of [the] offenses virtually eliminates the possibility that anyone other than the defendant committed" the Sophia Glover and JoAnn Sweets offenses. (*People v. Balcom*, *supra*, 7 Cal.4th

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[67]The Bertha Richmond instruction permitted two inferences (motive and intent) in all nine counts and four special circumstances (two rape and two sodomy), plus one inference (identity) in six counts for a total of 32 inferences. The Other Counts instruction, presumably limited to inferences in the murder counts drawn from all other counts, permitted four inferences (identity, motive, intent, and plan) from eight counts (including all those charged in the information except for the murder count under consideration) to be used in four counts of murder for a total of 128 inferences. Adding the possible inferences from the Bertha Richmond instruction to the possible inferences from the Other Counts instruction means that the court was inviting the jurors to draw 160 inferences from the instructions.

414, 425.)

The jury failed to find beyond a reasonable doubt that Mr. Jones committed any crime against Tara Simpson. (CT 7285; RT 6005.) But even if the burden of proof were a preponderance of the evidence, the facts show that no reasonable juror could have concluded that it was more likely than not that Mr. Jones was the Tara Simpson perpetrator. Hence, the Tara Simpson crime was not available to the jury to use to identify Mr. Jones as the JoAnn Sweets or Sophia Glover perpetrator.

Ms. Simpson, a prostitute and drug addict, was found at about 3:30 a.m. burning in a dumpster in an alley within a block of the Jones apartment, in an area rampant with prostitution and illegal drug use. (RT 2117-2118, 2132-2133, 2136, 2239, 3074-3075, 3181-3182, 3191, 3347-3354, 3446, 3777-3779, 3790, 3805, 4219.) She died from ethyl alcohol and cocaine poisoning. (RT 3197-3198, 3220.) Ms. Simpson was fascinated with fire and talked of suicide. (RT 3780-3781, 3789.)

At about 5 a.m., the police checked for witnesses at nearby properties, and found no one at home at the Jones apartment. (RT 2134-2136.)

Ms. Simpson was not sexually attacked. (RT 4435.) She had not been strangled. (RT 3198, 3221.) Although not lethal, she had a 3½ inch cut in her abdomen. (RT 3186, 3188-3199.)

Ms. Simpson had no connection to Mr. Jones, other than the fact that she died in his neighborhood in a large metropolitan city. No reasonable person could conclude from this evidence that Mr. Jones was the Tara Simpson perpetrator under any accepted burden of proof. Thus, without the preliminary conclusion that Mr. Jones was the Tara Simpson perpetrator, there was no rational way for the jurors to conclude that Mr. Jones was the

JoAnn Sweets or Sophia Glover perpetrator.

Nevertheless, the court instructed that such a connection was permissible, that the jury could use evidence from any count – including the Tara Simpson charge – to decide the issue of identity as well as the issues of motive, intent, and plan in the Glover and Sweets cases. (RT 5122-5124.) The court even instructed that the jury could "logically conclude[] that if the defendant committed one ... of the other crimes, he also committed the crime under consideration." (RT 5123.) By no stretch of the imagination could evidence from the Tara Simpson count have been rationally used to determine the issues of identity, motive, intent, and plan in the Glover and Sweets cases because no reasonable juror could conclude that Mr. Jones was connected to Ms. Simpson; the Tara Simpson, JoAnn Sweets, and Sophia Glover crimes were not highly similar for purposes of identity; Mr. Jones did not concede that he was present at any of the crimes for purposes of intent and plan; and there was no nexus between Tara Simpson, on the one hand, and JoAnn Sweets or Sophia Glover, on the other hand, relevant to motive. That the court's instruction permitted these inferences violated Mr. Jones's federal due process rights. (*Ulster County Court*, *supra*, 442 U.S. at p. 157.)

Tara Simpson may be the most extreme example, but none of the other victims in this case – Maria Ramirez, Trina Carpenter, JoAnn Sweets, Karen Mitchell, or Bertha Richmond – had any rational connection to Sophia Glover that could provide "substantial assurance" that the inference of identity, intent, motive, or plan was "more likely than not to flow from the proved fact on which it is made to depend." (*Id.* at p. 166, fn. 28.) The persons with the closest connection to Sophia Glover were Karen Mitchell and Bertha Richmond, who were at the Wilsie house, about a block from

where Ms. Glover's body was discovered. (RT 2247-2249, 2308-2309.) But Karen Mitchell, a prostitute, said that she was attacked on October 20, 1986 (RT 2523), and Bertha Richmond, whom the prosecutor said appeared to be a prostitute (RT 5009), testified that she was attacked on October 16, 1986 (RT 2636), while Sophia Glover, who was not a prostitute, was found dead two months earlier on August 15, 1986. (RT 4219.) In a large metropolitan city like San Diego, no rational connection between Sophia Glover and Karen Mitchell or Bertha Richmond sufficient to support the inferences permitted by the instructions could be made from this. Accordingly, the court's instructions violated Mr. Jones's due process rights with respect to the Sophia Glover case.

Similarly, Tara Simpson had such no rational connection to JoAnn Sweets. Neither did Maria Ramirez, Trina Carpenter, Sophia Glover, or Karen Mitchell.

The person with the closest connection to JoAnn Sweets was Maria Ramirez, who testified that she was assaulted in the Jones apartment on October 15, 1985. (RT 2044-2045, 2052.) JoAnn Sweets was found outside the apartment on May 9, 1986, seven months later. (RT 2302, 4219.) Maria Ramirez was a prostitute. JoAnn Sweets was not. Maria Ramirez was purportedly assaulted with a rope. JoAnn Sweets was not. JoAnn Sweets was found in a dumpster. Maria Ramirez was not. JoAnn Sweets was killed. Maria Ramirez was not. (RT 2041-2043, 2048, 2302-2303, 4219.)

The JoAnn Sweets and Maria Ramirez offenses were not highly similar crimes so as to support an inference of identity in the JoAnn Sweets case. And as for the other permissive inferences, Mr. Jones did not concede that he was present at the JoAnn Sweets crimes for purposes of

intent and plan; and there was no nexus between Maria Ramirez and JoAnn Sweets relevant to motive.

For good reason, the Ninth Circuit has criticized the use of permissive inference instructions: "They are most effective when least appropriate: where the evidence supporting the inference is sparse and the inference is most crucial to the government's case." (*United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.)[68]

The existence of scores of permissive inferences was improper in this case because, for each permissive inference, there was a substantial risk "that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous determination." (*Ulster County Court, supra*, 442 U.S. at p. 157.)

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[68]As the concurring judge observed in *Warren*,

> [I]nference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury. Inferences can be argued without benefit of an instruction; indeed, inferences are more appropriately argued by counsel than accentuated by the court. Further, because they are a detour from the law which applies to the case, inference instructions tend to take the focus away from the elements that must be proved. In this way they do a disservice to the goal of clear, concise and comprehensible statements of the law for laypersons on the jury. Balanced inference instructions are also difficult to craft. And, as this case demonstrates, inference instructions create a minefield on appeal.

(*United States* v. *Warren, supra*, 25 F.3d at p. 900 (conc. opn. of Rymer, J.).)

Therefore, the court's instructions containing the numerous permissive inferences were inconsistent with due process because the inferences could not be justified by "reason and common sense ... in light of the proven facts before the jury." (*Francis* v. *Franklin, supra,* 471 U.S. at p. 315.)

Because the instructions permitted the jury to draw irrational inferences of identify, motive, intent, and plan against Mr. Jones, the instructions undermined the reasonable doubt requirement and denied Mr. Jones a fair trial and due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15). They also violated his right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt. (U.S. Const., Amends. 6 & 14; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, they violated his right to a fair and reliable capital trial (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, § 17).

A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt. (*United States* v. *Rubio-Villareal, supra*, 967 F.2d 294, 296, fn.3.) Moreover, an error is harmless beyond a reasonable doubt only when "there is no reasonable possibility that the error materially affected the verdict." (*Ibid.*) Here, there is much more than a reasonable possibility that the jury misapplied the instructions in identifying Mr. Jones as the JoAnn Sweets and Sophia Glover perpetrator; therefore, they adversely affected the verdicts against Mr. Jones. Accordingly, the murder convictions, special circumstances, and death sentence must be reversed.

9.

THE COURT COMMITTED REVERSIBLE ERROR IN DENYING THE MOTION TO SEVER THE ATTEMPTED MURDER FROM THE MURDER COUNTS BECAUSE MR. JONES MADE A CLEAR SHOWING OF POTENTIAL PREJUDICE FROM THE JOINDER, AND ACTUAL PREJUDICE RESULTED.

Mr. Jones moved to sever the four murder counts (Tara Simpson, Trina Carpenter, JoAnn Sweets, Sophia Glover) from the attempted murder counts (Maria Ramirez and Karen Mitchell) under Penal Code section 954 and the due process clauses of the United States and California Constitutions. (CT 1134-1135.) The trial court denied the motion (CT 7193; RT 465, 471), reasoning as follows:

> Certainly the court's experience has been that juries do distinguish between cases and even where strong and weak are put togther. It doesn't infect the entire trial. The juries make those distinctions.
>
> The Simpson count is clearly the weakest count here. *It would not stand on its own.* The question is whether it should be put in there with the others, and I believe that it should because of the overwhelming marked distinctiveness of the m.o. in all the cases, and the proximity of the cases together. They are so close.
>
> *And the cases where the two live victims testified gives your identity, gives your motive, gives your m.o. right there.*
>
> *There is no question that they create an incredible impact.* The question is whether or not that incredible negative impact against the defendant is an unfair one and shouldn't be allowed, in essence, in a balancing test. And here the probative value is extremely high and *the People need their circumstances all together in order to make the case on those counts. There is no question about it.* So the probative value is very, very high.

The negative impact is high, but I don't think it's unfair because of the clear proof that comes about as all these little pieces get put together.

And overriding it all is the marked distinctiveness of a forceful assault used against a – what would be a willing sexual partner, close proximity, extremely close proximity to the two places where the defendant was and combination of assaults that were involved here.

And what becomes overwhelming is you see that these assaults are chest up and then the burning in a dumpster and leaving in a dumpster, those are just very, very unusual types of things that you see all together here.

In the Simpson case you cannot establish both a strangulation and some other form of assault, which is one thing that's a common thread through the others. You have not only a strangulation but you have some other form of assault, as well. But Simpson, of course, was so badly burned you couldn't tell whether or not there would have been any strangulation, and you have the cut in the abdomen.

Now, the defense would argue that that's different because the others did not involve slicing, but at the same time overriding that you have the dead body in the dumpster, the prostitute, the proximity. So it's just an incredible set of circumstances here.

Overall, in looking at this, first I have to say that the charges are initially properly joined under 954 because they are offenses of the same class and they are connected together by common elements of substantial importance, and I believe that severance is not warranted because I do not believe that this appears to be an unjustified negative impact by a joinder against the defendant. The probative value is extremely high, and the negative impact is not unfair, in my estimation, in looking at this overall.

(RT 469-471 [italics added].)

In denying the motion, the court abused its discretion, denied Mr. Jones due process, and committed prejudicial error. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447; *United States v. Lane* (1986) 474 U.S. 438, 446, fn.8.)

A. The Court Abused its Discretion and Committed Reversible Error in Denying the Motion to Sever.

Penal Code section 954 provides as follows:

> An accusatory pleading may charge ... two or more different offenses of the same class of crimes or offenses, under separate counts .... [T]he court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.

That provision reflects a "recognition that severance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial." (*People v. Bean* (1988) 46 Cal.3d 919, 935.)

Murder, attempted murder, and sexual assault charges are of the same class and therefore permitted to be joined. (*People v. Jenkins* (2000) 22 Cal.4th 900, 947; *People v. Alvarez* (1996) 14 Cal. 4th 155, 188; *People v. Johnson* (1988) 47 Cal. 3d 576, 588.) Thus, because the charges were properly joined under section 954, Mr. Jones must make a clear showing of potential prejudice to establish that the lower court abused its discretion in denying his severance motion. (*People v. Valdez* (2004) 32 Cal.4th 73, 119; *People v. Ochoa* (2001) 26 Cal.4th 398, 423.)

Since the attempted murder counts were joined with capital crimes, this Court considers the joined cases separately and together to assess whether joinder would tend to produce a conviction when one might not be obtainable on the evidence at separate trials. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 120.) The Court considers the record before the trial court at the time of Mr. Jones's motion to sever, and assesses the trial court's denial of the motion in light of "whether the evidence is cross-admissible in separate trials; whether some of the charges are likely to inflame the jury; whether a weak case has been joined with a strong case so that a 'spillover' effect might affect the outcome; and whether one of the joined charges is a capital crime. (*Ibid.*) As will be shown below, the trial court abused its discretion in failing to separate the attempted murder counts from the murder charges, and the Simpson murder count from the other murder counts.

1. Evidence Would Not Have Been Cross-Admissible in Two Separate Trials of the Murder and Attempted Murder Counts.

"The first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled." (*People v. Balderas* (1985) 41 Cal. 3d 144, 171-172.) As demonstrated in Argument 5, evidence from the attempted murder counts was inadmissible under Evidence Code section 1101 in the murder counts on the issues of identity, motive, intent, and plan. Similarly, evidence from the murder counts on these issues were inadmissible in the attempted murder counts. Hence, the first factor of cross-admissibility weighs in favor of severance.

2. Charges that Mr. Jones Attempted to Kill Maria Ramirez and Karen Mitchell Could Be Expected to Inflame the Jury on the Weak Murder Counts.

This Court has "held is that it may be error to consolidate an inflammatory offense with one that is not under circumstances where the jury cannot be expected to try both fairly. The danger to be avoided is 'that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime." (*People v. Mason* (1991) 52 Cal.3d 909, 934; see also *People v. Walker* (1988) 47 Cal.3d 605, 623 [discussing *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 138, "where there was danger that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case on a murder charge"].)

This was precisely the situation here, except doubly so. At the time of his severance motion, Mr. Jones was charged with the attempted murder of Maria Ramirez with a deadly weapon, and the attempted murder, rape, sodomy, and oral copulation of Karen Mitchell. (CT 35, 37.) As reflected in the preliminary hearing transcript and the recitation of facts provided by the prosecution and defense, the Maria Ramirez and Karen Mitchell cases had strong evidence of lesser but inflammatory crimes that might be used to bolster the extremely weak Sophia Glover case and the very weak JoAnn Sweets case.

Maria Ramirez testified that, while at his apartment, Mr. Jones choked her into unconsciousness twice with a rope, and forced her to orally copulate him. (CT 1137, 4337-4338.) According to Karen Mitchell, Mr. Jones drove her in a blue Datsun 280Z to the Wilsie house, where he grabbed her around the neck with his arm in a choke hold. He held her so

tightly that he lifted her off the floor until her feet were dangling. As Mr. Jones was choking her, he ordered her to do what he wanted or he would kill her. She started to struggle, but he tightened his choke hold until she was about to pass out. Consequently, she agreed to do whatever he wanted so he would not hurt her. After Mr. Jones forcibly raped, sodomized, and orally copulated her, he forced Ms. Mitchell to drink a half bottle of whiskey. When she said that she could not drink any more, he told her that if she did not, he would kill her. She eventually lost consciousness due to the alcohol. (RT 1139-1140, 4343.) These facts are strong evidence of lesser but inflammatory crimes.

The Sophia Glover and JoAnn Sweets cases, on the other hand, were weak. As explained throughout this brief, there was no evidence tying Mr. Jones to Sophia Glover. But because Karen Mitchell said that she was attacked by Mr. Jones about a block from where Sophia Glover was found, the jury could be expected to use this to tie Mr. Jones to Sophia Glover, even though the offenses were not so highly similar that the Mitchell case could be used to identify the Glover perpetrator.[69] Thus, had the court severed the Mitchell case from the Glover case, as Mr. Jones requested, the trial court would have avoided the danger "'that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime." (*People v. Mason*, *supra*, 52 Cal.3d 909, 934.)

It should be obvious that the jury could also be expected to use the strong but inflammatory Ramirez lesser offense to bolster the weak JoAnn Sweets case. Maria Ramirez testified that Mr. Jones attempted to kill her in

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[69]Indeed, the jurors were erroneously instructed that they could use this evidence for just that purpose. (See Argument 5.)

his apartment. JoAnn Sweets was found in the dumpster just outside the apartment. Again the jury could be expected to use this to tie Mr. Jones to JoAnn Sweets, even though the offenses were not so highly similar that the Ramirez case could be used to identify the Sweets perpetrator.

As the trial court acknowledged in its severance ruling: "There is no question that [the Ramirez and Mitchell cases] create an indelible impact. [¶] The negative impact is high ..." (RT 469-470.) But unfortunately for Mr. Jones, that impact could be expected to cause the jury to use propensity evidence from the Maria Ramirez and Karen Mitchell cases to convict him on the murder counts.

3. In Trying the Attempted Murder Cases with the Weak Murder Counts, the Jury Could Be Expected to Aggregate the Evidence from the Ramirez and Mitchell Cases to Identify Mr. Jones as the Sweets and Glover Perpetrator.

The penultimate factor is whether a weak case has been joined with a strong case, or with another weak case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of the remaining charge. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 120; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1315; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1121 [distinguishing "a situation where a weak case was joined with a strong one in order to produce a spillover effect that unfairly strengthened or bootstrapped the weak case"].)

In *Williams v. Superior Court*, *supra*, 36 Cal.3d 441, this Court discussed *Coleman v. Superior Court*, *supra*, 116 Cal.App.3d 129, which "was concerned with the potentially prejudicial effect of joining a weak case, the murder, with the charges of sexual attacks against minors, for which the evidence was much stronger. The court feared that the jury

would be unable to decide one case exclusively on the evidence relating to that crime, noting that it would be difficult for jurors to maintain doubts about the weaker case when presented with stronger evidence as to the other." (*Williams*, *supra*, 36 Cal.3d at p. 453 [citing *Coleman*, *supra*, 116 Cal.App.3d at p. 138].) *Williams* noted:

> This reasoning should not be limited to situations where the relative strengths of the cases are unequal. Indeed, our principal concern lies in the danger that the jury here would aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges. Joinder in this case will make it difficult not to view the evidence cumulatively. The result might very well be that the two cases would become, in the jurors' minds, one case which would be considerably stronger than either viewed separately.

(*Id.* at pp. 453-454.)

Similarly, Mr. Jones's identity as the JoAnn Sweets and Sophia Glover perpetrator was weak, even non-existent in the case of Sophia Glover. On the other hand, Maria Ramirez and Karen Mitchell each identified Mr. Jones as her attacker. At the time of Mr. Jones's motion to sever, the prosecution had asserted that Maria Ramirez, Karen Mitchell, JoAnn Sweets, and Sophia Glover were all prostitutes. (CT 4337, 4341-4343.) After hearing testimony by Maria Ramirez and Karen Mitchell identifying Mr. Jones as the person who hired them as prostitutes, took them to residences where he had access, sexually assaulted them, and attempted to kill them, a jury could be expected to aggregate such evidence and identify Mr. Jones as the person responsible for the deaths of the alleged prostitutes JoAnn Sweets and Sophia Glover, whose bodies were found near the same residences where Maria Ramirez and Karen Mitchell

said they were attacked. As the trial court observed, "the cases where the two live victims testified gives your identity," and "the People need their circumstances all together in order to make the case on those [murder] counts. There is no question about it." (RT 469.) Severance would have prevented such spillover of evidence.

4. Although This Was a Death Penalty Case, the Trial Court Failed to Exercise the Required Heightened Scrutiny in Ruling on Mr. Jones's Severance Motion.

The final issue is whether any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1315.) Here, the prosecution alleged five special circumstances. (CT 35-36.)

This Court, which held in *Williams* that "the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case" (*Williams*, *supra*, 36 Cal.3d at p. 454), has since repeatedly emphasized that when the joined charges carry the death penalty, the court must use extra scrutiny in addressing the joinder issues. For instance, in *People v. Smallwood* (1986) 42 Cal.3d 415, this Court reversed the denial of the severance motion, holding that although the charges were properly joined under section 954, the defendant had demonstrated substantial prejudice resulting from the joinder. The Court stated that in a capital case, the trial court should analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a non-capital case, given the gravity of the consequences. (*Id.* at pp. 430-431.)

Here, however, the trial court failed to acknowledge its duty of heightened scrutiny as compelled by the presence of the capital charges. (RT 468-471.) The court's failure to apply a higher degree of scrutiny was a clear prejudicial abuse of discretion, particularly since application of heightened scrutiny dictates that the severance motion should have been granted. Moreover, the trial court's error deprived Mr. Jones of his right to the reliable and non-arbitrary determinations of guilt, special circumstances, and penalty guaranteed by the Eighth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280.)

5. Conclusion

The trial court abused its discretion in declining to sever the attempted murder from the murder counts. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1315.) Moreover, the court's error is reversible. This is "a case in which, at the time the ruling was made, the evidence of defendant's guilt of one or more of the joined offenses was weak, while evidence of the other was strong." (*People v. Bean*, *supra*, 46 Cal.3d at p. 935.) That is, there were no eyewitnesses in the murder cases, while the purported victims in the attempted murder cases both identified Mr. Jones as the assailant. And given the eyewitness accounts of Maria Ramirez and Karen Mitchell, those cases were "particularly inflammatory in comparison with the other" cases. (*Ibid.*) Hence, at the time of the court's denial of Mr. Jones's motion to sever, it appeared "reasonably likely, therefore, that the jury would be influenced in determining defendant's guilt of either group of offenses by knowledge of the other." (*Ibid.*) The judgment should be reversed.

B. Reversal Is Required Because Joinder Resulted in Gross Unfairness to Mr. Jones.

Even assuming that the trial court's ruling on the motion to sever was correct at the time it was made, this Court must nevertheless reverse the judgment if the joinder "actually resulted in 'gross unfairness' amounting to a denial of due process." (*People v. Valdez*, *supra*, 32 Cal.4th at p. 120 [quoting *People v. Mendoza*, *supra*, 24 Cal.4th 130, 162] [internal quotes omitted]; see also *United States v. Lane*, *supra*, 474 U.S. at p. 446, fn.8 (1986) ("misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"].)

> "[E]rror involving misjoinder 'affects substantial rights' and requires reversal ... [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" (*U.S. v. Lane* (1986) 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.Ed.2d 814 (*Lane*); *Sandoval v. Calderon* (9th Cir.2000) 241 F.3d 765, 771-772.)
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> The issue is not whether the evidence is sufficient to support the convictions on the joined counts, independent of the evidence on other counts. "'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.'" (*Lane*, *supra*, 474 U.S. at p. 449, 106 S.Ct. 725.)
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> In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts. (*People v. Bean* (1988) 46 Cal.3d 919, 938-940, 251 Cal.Rptr. 467, 760 P.2d 996.)

(*People v. Grant* (2003) 113 Cal.App.4th 579, 587-588; see also *Featherstone v. Estelle* (9th Cir. 1991) 948 F.2d 1497, 1503 ["The simultaneous trial of more than one offense must actually render

petitioner's state trial fundamentally unfair and hence, violative of due process"].) A review of the evidence actually introduced at trial demonstrates the reasonable probability that trying the two attempted murder cases with the four murder cases affected the jury's verdicts as to both groups of cases.

The body of Sophia Glover was found on Friday, August 15, 1986, at about 6:30 a.m. on the grass portion between the curb and the sidewalk of the 2200 block of Madison at Louisiana Street in San Diego, about a block from the Wilsie house, where Ann Jones worked and her son helped out on occasion. (RT 2247-2248, 2287, 2308-2309, 2607, 3936, 4220.) Ms. Glover was nude, except for a scarf around her neck, and covered by a green blanket. (RT 2248, 2309.) At about 4:30 p.m., her clothes were found in a neat pile a half block down the alley near an apartment building at 4665 Mississippi Street, next door to the Wilsie residence. (RT 2264-2265, 2268-2269, 2290-2291, 2294, 2601-2607.)

Ms. Glover was last seen about 11 o'clock at an apartment in East San Diego, the night before her body was found. (RT 2286-2287, 3236.) She died from asphyxia by manual strangulation. (RT 3234, 3237, 3239-3244, 4399.)

No hairs matching Mr. Jones's hair were found on Ms. Glover including her pubic area or on the green blanket. (RT 3544-3546, 3549, 3564-3566.) DNA tests showed there were two and possibly three contributors of sperm to the Sophia Glover anal swabs. (RT 4799-4800, 4811, 4861.) The DNA of approximately 15 percent of the population (including Mr. Jones) was consistent with the DNA found on the anal swabs. (RT 2935-2936, 4846.)

A man, identified by a witness as not being Bryan Jones, beat up

Sophia Glover a day or so before her death. The attacker left her stripped naked and bruised, lying on the ground. (RT 3440-3441, 3456, 3460.)

This evidence was insufficient as a matter of law to convict Mr. Jones of the Sophia Glover charges. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Thus, there is a reasonable probability that Karen Mitchell's testimony affected the jury's verdict on the Glover counts.

Karen Mitchell, a prostitute and heroin addict with several felony theft convictions, testified that she spent the night of October 19, 1986, injecting her daily mix of cocaine and heroin, and drinking alcohol. On Monday morning, October 20, 1986, she met Mr. Jones in downtown San Diego and, according to Ms. Mitchell, agreed to commit acts of prostitution in return for $50. They rode to the Wilsie house at 4659 Mississippi Street in San Diego. (RT 2523-2528, 2532, 2562-2563, 2564-2565, 2568-2570, 2602, 2605-2607, 2612, 2614, 3645, 4220.)

Ms. Mitchell testified as follows: that when she started to take her clothes off, the defendant choked her, causing her to almost lose consciousness. She was told that she would be killed if she did not cooperate. On a sheet placed on the floor of the house, she was forced to engage in sexual intercourse, sodomy, and oral copulation. Ms. Mitchell had brought a half of a fifth of Jack Daniels with her, which she was forced to drink. The defendant left and she continued to drink. She eventually passed out. (RT 2536-2537, 2550-2556, 2569, 2581, 2584.)

That same day Marjorie Wilsie went to 4659 Mississippi Street about noon, and found Karen Mitchell, fully dressed and passed out on a mattress in the bedroom. Ms. Wilsie called the police, who arrived shortly. (RT 2602, 2612, 2614-2615.)

Ms. Mitchell testified that she told the police a man had taken her to the house and raped her. (RT 2558.) Nevertheless, police officer Mark Andrew Marcos, who answered the call, testified that Karen Mitchell did not complain of being raped or choked on the day that she was picked up at the Wilsie home. She also showed no signs of any injuries. (RT 3651-3652.)

Officer Marcos believed that Ms. Mitchell was a drunk homeless person, who probably bedded down for the evening in an abandoned house and needed to be taken to detox to sober up. The police offered to take Ms. Mitchell to detox or jail; she chose the former, where she stayed for four hours until her release. The police made no report of any attempted murder or rape. Officer Marcos testified that if any woman – including a prostitute – told him that she had been raped or injured, he would have taken her to get an examination and conducted a full rape investigation. (RT 2575, 3470, 3646-3647, 3649, 3652, 3656.)

Mr. Jones told the police that he picked up Ms. Mitchell downtown and she was extremely drunk. He took her up to the house on Mississippi Street to give her a place to dry out. (RT 2705.)

Ms. Mitchell first made her allegations to police while she was in custody in 1989, three years after the alleged incident. In exchange for testimony implicating Mr. Jones, Ms. Mitchell sought a sentence reduction for one of her many felonies. (RT 2562-2564, 2588-2589.)

Ms. Mitchell testified that she had given false information to the police innumerable times to avoid longer prison sentences, and that she could not count the number of her prostitution convictions: (RT 2566-2567, 2590.)

Despite the weak evidence, the jury returned a guilty verdict in the Karen Mitchell case. Having found that Mr. Jones sexually assaulted a woman at the Wilsie house, the jury no doubt relied heavily on this finding in concluding that Mr. Jones was responsible for the death of Sophia Glover, whose body was found a block away. This, in turn, may explain why the jury reached the startling conclusion that Mr. Jones, a powerful six feet, five inches, 300-pound man, unsuccessfully attempted to murder Karen Mitchell. (RT 2093.) The attempted murder verdict was also surprising because Mr. Jones let Ms. Mitchell go, after he allegedly killed four other women. Moreover, Ms. Mitchell failed to mention to the police that Mr. Jones tried to kill her, and she showed no signs of injuries. (RT 3651-3652.) The only reasonable explanation is that the jury used the evidence from one case in another – two weak cases artificially bolstered by each other. In the process, Mr. Jones was denied a fair trial.

Similarly, the Maria Ramirez and JoAnn Sweets counts undoubtedly influenced each other. On Thursday, August 15, 1985, Maria Ramirez, a penniless 42-year-old prostitute and heroin user with several felony convictions, met 23-year-old Bryan Jones in downtown San Diego, and agreed to have sex with him for $20; she intended to use the money to buy drugs. (RT 2041-2043, 2052, 2069, 2073, 2088, 3920, 4219.) Ms. Ramirez had been with Mr. Jones at least one other time two months before. (RT 2103, 2107.)

Ms. Ramirez and Mr. Jones rode on a bus to his apartment at 4424 51st Street in San Diego, where he lived with his mother. (RT 2044-2045, 2052.) Ms. Ramirez testified that they had consensual "straight" sex, Mr. Jones paid her the $20, she made herself a sandwich, and then she took a shower. (RT 2046-2047, 2080.)

According to Ms. Ramirez, when she came out of the shower, she was ready to have sex again, but instead Mr. Jones choked her with his hands and a rope, causing her to lose consciousness two or three times. (RT 2048-2050, 2077, 2080.) Ms. Ramirez further testified that he told her he would let her go if she orally copulated him. She complied even though, as Ms. Ramirez told the jury, "I don't like to do that usually. I usually don't like to do that." When she finished, he took the $20 back. (RT 2051, 2082.)

According to Ms. Ramirez, Mr. Jones did not bother her while she put on her clothes because "he act like if he just wanted me to do that, you know, so he would feel good." (RT 2082.) Ms. Ramirez freely left the apartment, but then called the police. (RT 2052-2053.) When the police arrived, Ms. Ramirez was very loud and angry, and demanded that Mr. Jones be arrested. (RT 2053, 2094.) The police saw discoloration type marks around the base of her neck. (RT 2097.)

Mr. Jones invited the police in. (RT 2095.) The police described Mr. Jones as very cooperative; he said that he knew Maria Ramirez. (RT 2101.) In the bedroom the police found black and brown interwoven raw hide strips, which Ms. Ramirez identified as the rope that Mr. Jones used to choke her. (RT 2099.) The police arrested Mr. Jones for forced oral copulation and took him to a substation, where he was processed and where Ms. Ramirez threw a rock at him. (RT 2100.)[70]

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[70]A police report reflects that Ms. Ramirez called the police department on August 19, 1985 to say that she was not pursuing the matter. The report noted that "[t]he case was taken to the district attorney and will be rejected due to her failure to appear." (CT 4118.)

A few days or a week later, Ms. Ramirez returned to Mr. Jones's apartment with some church people. Ms. Ramirez stayed in the car while the church people spoke to someone at the apartment. (RT 2082-2084.) Mr. Jones's mother, Ann Jones, testified that in August 1985, two Spanish speaking people, a Mexican woman and man, a preacher, came to her apartment looking for Mr. Jones. (RT 2082-2084; 3945-3946.)

Although Ms. Ramirez said that she was attacked in 1985, she did not pursue her claim until at least five years later. (RT 2084.) The prosecution did not charge Mr. Jones in connection with Ms. Ramirez until almost seven years after the alleged incident. (CT 6, 8.)

Mr. Jones's defense was that Ms. Ramirez and her story were not credible: she concocted a tale of "attempted murder" because she was furious with Mr. Jones when, after Ms. Ramirez voluntarily performed a sex act that she disliked, Mr. Jones nonetheless reneged on their agreement and took back the $20 that she desperately needed to support her heroin addiction. Moreover, the attempted murder charge was legally untenable because it was based on the implausible notions that (1) a powerful six feet, five inches, 300-pound man (RT 2093) would not have accomplished his goal if he intended to kill Ms. Ramirez, an element of attempted murder, and (2) although he allegedly intended to kill his victim, he let her go instead. Moreover, her neck injuries were likely the result of a fight that she had earlier in the day. (RT 2088, 2097.) According to Ms. Ramirez, on the morning of the incident, she was living with Simon Ramirez and had a fight with a "Mexican." (RT 2087-2088, 2097.)

Ms. Ramirez was impeached with her multiple felony convictions, (RT 2052), as well as inconsistencies in her trial testimony. First, she testified that she had never seen Mr. Jones before the incident. (RT 2064-

2065.) Officer Gilbert Ninness testified, however, that Ms. Ramirez told him on the day of the incident that she had met Mr. Jones previously, and had been in his car two months before. (RT 2107.)[71]

Second, Ms. Ramirez testified that on the day of the alleged incident, she only had sex with Mr. Jones twice, first consensual straight sex and then forced oral copulation. (RT 2047, 2050-2051, 2080.) She told Officer Ninness, however, that she had sex with Mr. Jones three times: initially straight sex, then oral copulation, then "doggie style." (RT 2104.) Ms. Ramirez denied to the jury that she and Mr. Jones had "doggie style" sex. (RT 2081.)

Finally, Ms. Ramirez swore that she was not going to use the $20 from Mr. Jones to buy drugs. (RT 2069-2070.) After being reminded of her preliminary hearing testimony, however, Ms. Ramirez admitted that she wanted "to get high that day" and was going to use the money to buy drugs. (RT 2073.)

On May 9, 1986, the body of JoAnn Sweets was found in a dumpster in the alley just outside the back door of the Jones apartment. (RT 2343-2345, 2358, 2362, 2366, 3980.) An old, tattered afghan blanket covered the body, which was wrapped in a heavily soiled sheet, a mattress pad, and two large plastic trash bags. Tape was attached to the ends of the bags as if someone had tried, unsuccessfully, to tape the bags together. (RT 2303-2304, 2307, 2345-2346, 2353, 2363, 2399, 2404, 2432, 2485, 2932.)

Although the afghan might have been made by Mr. Jones's mother or sister, the sheet and mattress pad were not from the Jones apartment.

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[71]Witness Karen Mitchell, also a prostitute, referred to an act of oral copulation between a prostitute and a customer in an automobile as a "car date." (RT 2530.)

(RT 2783-2785, 3931-3932.) The person who found the body described the afghan as "kind of old," "raveled," "coming apart," and not worth keeping. (RT 2346, 2353.) Thus, an obvious inference is that whoever owned the afghan threw it in the garbage because it was falling apart.

Moreover, just days before the body was found in the dumpster, Ann Jones moved down the street to a new home. (RT 3068-3069, 3932-3933, 3982.) When people move, they typically toss out used or unwanted items, like old unraveling afghans, especially if they are like Ann Jones, "sort of picky," who "like[d] things sort of neat," and who "like[d] things in place." (RT 3984.) Ann Jones testified that sometimes her afghans would fall from her lap and lie on her carpet. (RT 3995.) Thus, assuming the raveled afghan came from the Jones apartment, it could have lain on the carpet, where it gathered fibers, before being put in the trash, where someone retrieved and used it to cover JoAnn Sweets.

The prosecution's theory was that JoAnn Sweets was attacked while lying on the afghan, which was on the carpet. (RT 4999.) But 29 hairs were recovered from the blanket, none of which matched Bryan Jones or JoAnn Sweets. (RT 3534.) Had this afghan been used in an attack, it surely would have had hair from both JoAnn Sweets and her attacker. Thus, it is more likely that the afghan had nothing to do with Mr. Jones and did not come from the Jones apartment.

Moreover, the discarded sheet had no connection to Mr. Jones, but did have five hairs that did *not* match Mr. Jones or JoAnn Sweets. The mattress pad, too, had no connection to Mr. Jones, but had eight hairs that did *not* match Mr. Jones or Ms. Sweets. (RT 3534-3535.) If, as the prosecutor seemed to suggest, that the mattress pad and sheet were somehow used in the attack on JoAnn Sweets (RT 4999), then it is highly

unlikely that there would be no hairs that matched Mr. Jones or Ms. Sweets found on them, given the ease with which people shed hair.

And, as the prosecution acknowledged, JoAnn Sweets put up a ferocious fight to defend herself. (RT 4999.) During this struggle JoAnn Sweets must have lost many hairs. The absence of even a single hair matching JoAnn Sweets on the afghan, sheet, or mattress pad is compelling evidence that these materials were not involved in her attack.

In addition, it is likely that the afghan, sheet, and pad attracted carpet fibers from inside the dumpster, a "cesspool" of "contamination." (RT 3102-3103.) Prosecution witness, Melvyn Kong, a supervising criminalist for the San Diego Police Department crime lab, testified that because "a dumpster is a trash receptacle, it is, in essence, a cesspool of many different sources of fiber and hair contamination. So there is possibility of cross-contamination between anything which is in the dumpster and anything that's removed from the dumpster." (RT 3076, 3102-3103.)

Prosecution witness Michael Malone, an FBI Special Agent and Senior Examiner with the Hairs and Fibers Unit of the FBI lab in Washington D.C., testified that he would expect apartments in the same building to be carpeted with the same fiber. (RT 3141.)[72] The Jones

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[72]Special Agent Malone testified that police should have tested the carpet in the other apartments in the Jones building to determine if there was another source of the fibers found with JoAnn Sweets. (RT 3141-3142, 3159-3160.) In addition, Mr. Malone testified that he was not informed by the prosecution that four packages of garbage were in the dumpster when the body was found (RT 2319, 2412, 2809); these should have been analyzed to determine whether they either contaminated or contributed to the fibers found with Ms. Sweets (RT 3143, 3159). Finally, Mr. Malone

apartment was located in a large apartment complex, whose tenants likely used the dumpster in which JoAnn Sweets was found. (RT 2045, 2093.) These tenants also likely vacuumed the carpets in their apartments and deposited the vacuumed carpet fibers in the trash. Therefore, the carpet fibers found with JoAnn Sweets could have come from any of the other apartments in the Jones building.

Although Dr. Blake testified that DNA (DQ alpha genotype 1.2,2) found on the sheet wrapped around the body matched about six percent of the African American population (including Mr. Jones), about five percent of the Caucasian population, and about two percent of the Mexican-American population (RT 2930-2931, 2942-2944), Dr. Blake also admitted that a second man with a 1.2,1.2 DQ alpha genotype could have contributed sperm to the sheet found with JoAnn Sweets (RT 3037). Furthermore, Dr. Blake's earlier testimony regarding Trina Carpenter suggested that another co-contributor to the sheet sperm could have been a man with 2,2 alleles. (RT 3033.) Finally, Dr. Blake testified that in the case of Sophia Glover, where the possible sperm contributors had the same genotypes of 1.2,2, 1.2,1.2, and 2,2 as in the case of JoAnn Sweets, the portion of the population that could have contributed the sperm to the sheet was approximately 15 percent. (RT 4846.) That same calculation should apply as well to the heavily soiled sheet found with JoAnn Sweets.

As stated, Mr. Jones lived in a big building in an apartment complex. Given that contributors to the sperm found on the sheet could have come from 15 percent of the male population, there must have been many men

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opined that the police should have examined JoAnn Sweets's residence on Bates Street for fibers and other evidence. (RT 3165, 3885.) None of these tasks was performed by law enforcement in this case.

meeting that profile living in the apartment complex, let alone in the surrounding neighborhood.

A fingerprint from the exterior of the dumpster outside the Jones apartment matched Mr. Jones. (RT 2401-2403, 2824.) As the prosecution conceded to the jury: "There was some explanation tendered here about fingerprints and that, yeah, you would expect the defendant's prints to be on the dumpster. Okay. *Sure, we will give you that.* There might be some explanation for him, because he's using it." (RT 5094 [italics added].)

Not only would one expect to find Mr. Jones's fingerprints on the dumpster right outside his back door, one would also expect to find trash bags in the dumpster with his prints, particularly since a major move had just taken place with his mother relocating from the old apartment into a new one down the street. Thus, a fingerprint lifted from one garbage bag and a hand print from the other garbage bag not surprisingly matched Mr. Jones. (RT 2847-2851.)[73]

On the other hand, no fingerprints were detected on the tape used in the attempt to tape the ends of the bags together. (RT 2744-2745.) This suggests that whoever put Ms. Sweets's body in the garbage bags wore gloves, which explains why the *killer's* prints were not found on the garbage bags.

Moreover, when the body was found, other garbage was outside the dumpster, and loose trash was inside the dumpster. (RT 2303, 2327.) Thus, whoever put Ms. Sweets's body in the garbage bags likely took the trash-filled bags from the dumpster, emptied the bags in or around the dumpster,

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[73]According to Special Agent Malone, the police should have processed the other garbage bags in the dumpster for Mr. Jones's fingerprints. (RT 3162.)

and then used them to wrap the body.

The prosecution's theory of the case, that the same person, acting alone, committed all the murders in a similar fashion, supports the conclusion that Bryan Jones did *not* use his property to wrap Ms. Sweets's body. Trina Carpenter's body was found in a green cloth duffel bag. (RT 2299, 2321.) The name "D. Belman" and the initials "D.B." appeared on the bag, indicating that D. Belman owned the duffel bag. (RT 2413.) Thus, whoever killed Trina Carpenter probably took D. Belman's discarded duffel bag from the dumpster and put her body in it. Similarly, whoever killed JoAnn Sweets probably took discarded bags of trash from the dumpster near the Jones apartment and put her body in them. If, as suggested by the prosecution's modus operandi theory, that the same person killed Trina Carpenter and JoAnn Sweets in the same way, then D. Belman did not kill Trina Carpenter, and Bryan Jones did not kill JoAnn Sweets because the killer's modus operandi was to wrap the victim in material not associated with him.

Evidence also pointed to Ike Jones rather than Bryan Jones as the killer.[74] Joyce Euwing, who lived at the Travelodge Motel located on 51st Street and El Cajon, testified that while she was walking to work at about 5:30 a.m. on May 9, 1986, she saw two men standing next to a small, dark four-door car near the dumpster in which JoAnn Sweets was found. The men were struggling to lift what looked like a big roll of carpet out of the

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[74]The trial court ruled that it was "clear" that testimony regarding Ike Jones was "sufficient to raise a reasonable doubt on the JoAnn Sweets case" with respect to the defendant's guilt. (RT 266-267.) Moreover, according to the prosecution, "Joyce Euwing's testimony directly implicated Ike Jones in the JoAnn Sweets murder." (CT 6444.)

back seat. (RT 3363, 3369-3370, 3382, 3389-3390, 3393-3394, 3397.) Ms. Euwing testified that it looked like the men were trying to dump the carpet; but because she was just walking by, she did not see the men put the carpet in the dumpster. (RT 3369, 3394.)[75] She recognized one of the men as Ike Jones. (RT 3371, 3374.)[76]

Ike Jones had been seen with JoAnn Sweets's boyfriend on Bates Street, where Ms. Sweets and her boyfriend lived. (RT 3884-3885.) Ike Jones's girlfriend corroborated that he drove a small, dark brown car. (RT 4231.)

Even if some or all of the jurors believed that Ms. Euwing misidentified Ike Jones, whether intentionally (Ms. Euwing did not give the police the name of Ike Jones until her fifth police interview (RT 4257, 4288-4289)) or because she was not wearing her glasses, the fact remains that she saw two men at the dumpster with a big roll of carpet. (RT 3364-3365, 3385-3386, 3396, 3404-3407, 3424, 3433, 3449, 4227-4229, 4249-4252, 4257-4258.) This is consistent with Dr. Blake's testimony that two men could have contributed to the sperm on the sheet found with JoAnn Sweets (RT 3037), and again undermines the prosecution's theory that one man acted alone in committing the charged crimes.

Dr. Blake's original testimony did not eliminate Ike Jones as a contributor of the sperm to the sheet. (RT 3867.) Although, in Dr. Blake's opinion, Ike Jones was eliminated as a result of additional polymarker testing, this is the same Dr. Blake who initially believed that there was only

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[75]This, of course, may explain where the carpet fibers on JoAnn Sweets originated.

[76]Ms. Euwing testified that the defendant, sitting at counsel's table, was not one of the men. (RT 3372.)

one contributor to the Sophia Glover anal swab (RT 2930-2931), but later recanted to say that there could have been three contributors. (RT 4799, 4803, 4857, 4861.) Moreover, prosecution expert Patrick O'Donnell, a doctor of molecular biology and head of the San Diego Police Department's Forensic DNA Laboratory, and defense expert, Marc Taylor, like Dr. Blake, a forensic scientist, both testified that they would not have eliminated Ike Jones as a contributor of the sperm. (RT 4618, 4666, 4898, 4903-4905, 4908, 4926, 4936-4938.)

Thus, the evidence identifying Bryan Jones as the JoAnn Sweets perpetrator was very weak, even after taking into account Dr. Blake's testimony. In light of the weak evidence of identity, it is reasonably probable that the jury impermissibly used Maria Ramirez's testimony that Mr. Jones sexually assaulted her in his apartment to identify Mr. Jones as the JoAnn Sweets assailant. And as in the case of Karen Mitchell and Sophia Glover, the jury probably relied on its finding that Mr. Jones intended to kill JoAnn Sweets in reaching its determination that he attempted to murder Maria Ramirez, despite the fact that he let her go and given his size, he could have readily accomplished his alleged goal.

This case is similar to *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, and *People v. Grant*, *supra*, 113 Cal.App.4th 579, where in each case the court held that the defendant had been denied a fair trial based on the improper joinder of cases. In both *Bean* and *Grant*, the court found the following errors prejudicial: the evidence was not cross-admissible, the prosecution repeatedly urged the jury to consider the charges in concert, the court did not instruct the jury that it could not consider the evidence on one charge in determining the defendant's guilt on the other, and the evidence in one count was significantly stronger than the evidence that in the other.

(*Bean* at pp. 1083-1086; *Grant* at p. 588.) Each of these errors was also committed in this case.

First, the evidence between the murder counts and the attempted murder counts was not cross-admissible. (See Argument 5.)

Second, the prosecutor repeatedly urged the jury to consider the charges in concert. During argument the prosecution implored the jury "to take a two step approach. First question I would ask you to consider is did one person do all these crimes? Is one person responsible for that horror? Second question, is this man in court that one person?" (RT 4986.) The prosecution then argued that the Ramirez and Mitchell cases were "important" because they laid "out the rest of the cases [by giving] us some help as to what happened to ... JoAnn Sweets [and] Sophia Glover. Those are our live witnesses. Those are the people that can tell the story and can fill in the blanks that are obviously there on the murder victims." (RT 4987.)

And in support of the claim that the same person was responsible for all of the crimes charged, the prosecution asserted that all of the victims met the same profile:

> [M]ost of these victims, if not all of them, were available, were vulnerable, and were invisible. Available meaning that they're out there on the streets where they can be found. Anybody driving up and down the streets can find them. Out there alone or maybe with a friend. Who knows. But they are available. They are vulnerable because they had needs that they couldn't meet on a regular basis. ... And they are invisible. And by this I mean coming from the defendant's eyes, as he picks them up or whoever this person is that picks them up, they are invisible in the sense that nobody is going to miss them. Nobody is going to miss them.

(RT 4988; see also RT 4999 [regarding JoAnn Sweets: "Again, she meets

the profile. Available, vulnerable, invisible."].)

Finally the prosecution argued to the jury as follows:

> The evidence is overwhelming, absolutely overwhelming one person committed these crimes. Is the defendant that person? That's based upon identification and there are many ways to make identification, and we have many ways in this case. We have many means. First of all, you have eyewitness identification. We have that. Ramirez, Richmond, Mitchell. We have a common method of operation, common m.o.. Same thing over and over again. *That tells us identification, if we can prove one of them.*

(RT 5013 [italics added].) Thus, the prosecutor relied extensively on the other charges at several points during the trial to prove the Glover and Sweets cases.

"'[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) It is reasonably probable that the jury applied the prosecutor's arguments in an objectionable fashion, and used the attempted murder counts to identify Mr. Jones as the JoAnn Sweets and Sophia Glover perpetrator.

Third, the court did not instruct the jury that it could not consider the evidence on one charge in determining the defendant's guilt on another. On the contrary the trial court exacerbated the prejudice by instructing the jurors as follows: "If you should find a unique or highly distinctive method, plan, or scheme shared among other counts and the count under consideration, such that an inference of a single perpetrator for all offenses may be drawn, then *you should consider whether it may be logically*

concluded that if the defendant committed one or more of the other crimes, he also committed the crime under consideration." (RT 5123 [italics added].) (See Argument 5.)

Fourth, the evidence of identity in the attempted murder counts was significantly stronger than the evidence of identity in the murder counts. Maria Ramirez and Karen Mitchell each identified Mr. Jones as her assailant, while there was no similar evidence in the JoAnn Sweets and Sophia Glover counts. As the trial court emphatically noted, the Ramirez and Mitchell cases provided the identity and m.o. for the murder counts, and in fact, the prosecution would "need" the attempted murder counts "to make the case on [the murder] counts. There is no question about it." (RT 469.) This substantial disparity between the evidence in the attempted murder counts and the murder counts leads to the conclusion that the Ramirez and Mitchell counts tainted the jury's consideration of the murder counts. (*Bean v. Calderon*, *supra*, 163 F.3d at p. 1085; see also *Lucero v. Kerby* (10th Cir. 1998) 133 F.3d 1299, 1315 ["Courts have recognized that the joinder of offenses in a single trial may be prejudicial when there is a great disparity in the amount of evidence underlying the joined offenses. One danger in joining offenses with a disparity of evidence is that the State may be joining a strong evidentiary case with a weaker one in the hope that an overlapping consideration of the evidence [will] lead to convictions on both."]; *United States v. Lewis* (9th Cir.1986) 787 F.2d 1318, 1322 [considering relative strength of evidence underlying joined charges as factor showing undue prejudice]; cf. *People v. Lucky* (1988) 45 Cal.3d 259, 277-278 ["in capital cases, however, consolidation may be upheld on appeal where the evidence on each of the joined charges is so strong that consolidation is unlikely to have affected the verdict"].)

The inflammatory impact of a joint trial overwhelmed the jurors' ability to weigh the evidence on each charge, so that they returned first degree murder verdicts on charges with extremely weak evidence, especially with respect to the identity of the Sophia Glover and JoAnn Sweets perpetrator. Because Mr. Jones would certainly have fared better if the charges were tried separately, his trial violated the rule that joinder "must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Williams v. Superior Court*, *supra*, 36 Cal.3d at p. 448.) Thus, "joinder actually resulted in 'gross unfairness' amounting to a denial of due process" (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 162 [quoting *People v. Arias* (1996) 13 Cal.4th 92, 127]; U.S. Const., 5th and 14th Amends.; Cal. Const., art I, §§ 15 and 16), deprived Mr. Jones of a fair and impartial trial and equal protection (U.S. Const., 5th, 6th, and 14th Amends.; Cal. Const., art I, §§ 15 and 16; *Bean v. Calderon*, *supra*, 163 F.3d at p. 1084; *Featherstone v. Estelle*, *supra*, 948 F.2d at p. 1503), and denied his federal and state constitutional rights to a fair, reliable, non-arbitrary, and individualized penalty determination (see *Woodson v. North Carolina*, *supra*, 428 U.S. 280; U.S. Const., 5th, 8th, and 14th Amends; Cal. Const., art. I, §§ 16 and 17), because joinder surely influenced the penalty determination as well. Accordingly, it is reasonably probable that the joinder of the murder and attempted murder counts affected the jury's verdicts so that the reversal of all verdicts is mandated. (*People v. Bean*, *supra*, 46 Cal.3d at p. 940; *People v. Grant*, *supra*, 113 Cal.App.4th at p. 588.)

10.

THE TRIAL COURT ERRED PREJUDICIALLY IN ADMITTING DNA EVIDENCE.

A. Proceedings Below

Under *People v. Kelly* (1976) 17 Cal.3d 24, Mr. Jones moved to exclude evidence of DNA testing based on the polymerase chain reaction (PCR) DQ alpha process. (CT 1276, 1316.)[77] In addition, when the prosecution attempted to introduce on rebuttal a second DNA typing procedure known as polymarker testing, Mr. Jones raised a *Kelly* objection. (RT 4706.)

Mr. Jones argued that PCR was not generally accepted (CT 1304, 1316, 1319), the prosecution's witness, Dr. Edward Blake, was not properly qualified (CT 1319), and the prosecution would have to show that correct scientific procedures were followed (CT 1325). Mr. Jones also sought to exclude PCR testing under Evidence Code section 352. (CT 1326.)

1. DNA – PCR – Dot Intensity

"'DNA analysis ... is a process by which characteristics of a suspect's genetic structure are identified, are compared with samples taken from a crime scene, and, if there is a match, are subjected to statistical analysis to determine the frequency with which they occur in the general

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[77]Under the *Kelly* standard, evidence based on a new scientific technique may be admitted only after the reliability of the technique has been foundationally established as generally accepted by the relevant scientific community (first prong), usually by the testimony of an expert witness who first has been properly qualified (second prong). The proponent of the evidence must also demonstrate that correct scientific procedures were used (third prong). (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30.)

population.'" (*People v. Venegas* (1998) 18 Cal.4th 47, 57-58 [quoting *People v. Barney* (1992) 8 Cal.App.4th 798, 805].) Polymerase chain reaction ("PCR") is a DNA analysis procedure that exploits genetic differences in DNA, whereby small pieces of DNA are copied or amplified. (RT 2888-2896; *People v. Morganti* (1996) 43 Cal.App.4th 643, 662.)

PCR was used in Mr. Jones's case to amplify a specific gene, DQ alpha. (RT 2897, 3022.) The DQ alpha gene is known to have alternate forms so that the gene does not look the same in all people. Six variations (or alleles) have been identified and labeled as 1.1, 1.2, 1.3, 2, 3 and 4. Because alleles are inherited in pairs, one from each parent, there are 21 possible combinations that are referred to as genotypes (1.1, 1.1; 1.1,1.2; 1.1,1.3, and so on to 4,4). (RT 2902; *People v. Morganti*, *supra*.)

Each of DQ alpha's six alleles can be distinguished by specific probes. To interpret the results, the PCR procedure uses a test strip with chemical dots. Each dot consists of a specific probe that selectively binds to one of the six DQ alpha alleles. This test strip is then immersed in a solution containing the amplified PCR product. The alleles present in the PCR product then attach to their corresponding probe on the test strip. Where the alleles bond to a probe, the dots turn blue. (RT 2901-3014.)

The defense especially questioned Dr. Blake's view that he could interpret PCR test results based on dot color intensity. (CT 1319.) In other words, according to Dr. Blake, a dot's shade ("intensity") of blue told him whether an allele should be paired with another allele with a similar shade of blue to conclude that the two alleles created a genotype. (RT 2924-2925.)

The prosecution submitted transcripts of PCR *Kelly* hearings from other cases. (CT 1592.) As reflected in one transcript, Dr. Mary Claire

King, a professor of epidemiology and genetics at the University of California, Berkeley, and a member of the Committee on DNA Technology in Forensic Science that issued the National Research Council's 1992 report, *DNA Technology in Forensic Science* ("NRC I" at p. 174), testified: "I know of no published literature, no external validation that would allow one to compare intensity of dots" (CT 3729-3730), and "you cannot try to draw conclusions from dots of varying intensity" (CT 3816).[78]

Another transcript included the testimony of Dr. John Gerdes, Director of Paternity Analysis and Research and Development at Immunological Associates in Denver, a major transplantation support laboratory that matches donors and recipients of organ transplants. (CT 2487-2490.) Dr. Gerdes testified that "dot blot testing in general [is] not a quantitative technique, you cannot put a lot of weight on dot intensity, because there are too many artifactual ways in which those dots can come up with around the same intensity or different intensity because of inhibitors and so forth." (CT 2525.)[79]

A third transcript contained the testimony of Dr. Stephen P. Daiger, professor of medical genetics at the University of Texas Health Science Center in Houston. (CT 3011-3014.) He agreed with this paraphrased statement from the NRC I: "It is well established that if your starting DNA for two types is fifty-fifty, you could end up with a ratio that is ninety-ten or

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[78]Dr. King testified on September 18, 1990 in *People v. Mack* (Super. Ct. Sacramento County, 1990, No. 86116). (CT 3696.)

[79]Dr Gerdes testified on May 21, 1991 in *People v. Moffett* (Super. Ct. San Diego County, 1991, No. CR 103094). (CT 2487.)

vice versa. It's not perfectly quantitative in this amplification. It's just inherent in the technique." (CT 3076; see NRC I at p. 64 ["In some cases, PCR can be qualitatively faithful but quantitatively unfaithful, because some alleles amplify more efficiently than others. *A sample might contain a 50:50 mixture of two alleles and yield an amplified product with a 90:10 ratio.*"] [italics added]; CT 4713, 4726 – Comey et al. (FBI Academy, Quantico, VA), *Validation Studies on the Analysis of the HLA DQ Locus Using the Polymerase Chain Reaction* (Nov. 1991) 36 Journal of Forensic Sciences 1633 ["There may not always be a relationship between the amount of DNA in a sample and the dot intensity. ... Thus, estimates of DNA quantity ... should not be a predictor of the intensity of dot blots."].)[80]

The prosecution also provided the court with the preliminary hearing transcript in this case where Judge Lillian Y. Lim admitted Dr. Blake's testimony, but also stated her belief that "there still exists a true dispute over whether or not an expert like Dr. Blake can give a quantitative opinion versus a qualitative opinion as to what genetic markers are present." (CT 1947.)

In addition, the prosecution submitted a copy of NRC I. (CT 4504-4702.) According to NRC I: "Mixed samples can be very difficult to interpret, because the components can be present in different quantities and states of degradation." (NRC I at p. 59.) "As a rule, mixed samples must be interpreted with great caution. Their interpretation should *always* be based on results from *multiple* assays, so that one can check for consistency across *various loci*. Interpretations based on quantity can be particularly

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[80]Dr. Daiger testified on August 31, 1990 in *People v. Mack* (Super. Ct. Sacramento County, 1990, No. 86116). (CT 3011.)

problematic – e.g., if one saw two alleles of strong intensity and two of weak intensity, it would be *improper* to assign the first pair to one contributor and the second pair to a second contributor, unless it had been *firmly established* that the system was quantitatively faithful under the conditions used." (NRC I at p. 66 [italics added].)

The defense continued to stress that nothing, "including the NRC report, supports Dr. Blake's conclusion that you can tell a primary from a secondary donor, or that you can tell which alleles go together in a situation where maybe you have four alleles as opposed to two. You cannot really tell which of those go together based on the kind of testing that is available." (RT 1227.)

2. The Court's Ruling

After reading and hearing the arguments of counsel and considering numerous exhibits and voluminous transcripts (including Mr. Jones's preliminary hearing where Dr. Blake testified), the court concluded that PCR DQ alpha DNA typing "clearly passes" *Kelly*. (RT 1235.) The trial court found that "[Dr.] Blake's procedures have been substantiated as correct scientific procedures. They are a little bit different, but substantiated." (RT 1236.) The court further "found that the statistical data regarding DQ-Alpha locus has been studied in many populations and there exists a substantial body of peer reviewed literature regarding frequency data, and the scientific community generally accepted as valid and reliable the statistical estimation of frequencies of the sixth alleles in the DQ-Alpha system in each population." (RT 1237.)

The trial court's ruling ran afoul of *Kelly* in four respects: (1) it permitted the prosecution's expert witness to use "dot-intensity" analysis to determine the presence of genotypes in mixed sperm samples, when this

procedure is not generally accepted by the scientific community; (2) it allowed the expert to use incorrect scientific procedures, which were not relevant to or probative of guilt, to identify possible genotypes found in the sperm samples; (3) it erred in admitting the expert's population frequency data, which was limited to his idea of the "average man," rather than including all possible perpetrators as required by correct scientific procedures; and (4) it wrongly admitted polymarker evidence where the expert failed to follow correct scientific procedures in violating the recommendation of the polymarker kit manufacturer not to type samples where a sensitivity dot was not visible. The errors were prejudicial and require reversal of the murder convictions, special circumstances, and death sentence.

Since the trial below, two Court of Appeal decisions have recognized that PCR analysis of the DQ alpha gene is generally accepted as a reliable technique by the relevant scientific community. (*People v. Wright* (1998) 62 Cal.App.4th 31, 37-39; *People v. Morganti* (1996) 43 Cal.App.4th 643, 671.) *Morganti* also found no reason to disturb the trial court's ruling that the same Dr. Blake qualified as a PCR DQ alpha expert. (*Id.* at p. 667.) Finally, *Morganti* held that PCR statistical evidence is subject to *Kelly's* general acceptance requirement (*id.* at p. 669), which the court found satisfied in that case because "no published literature or credible evidence was introduced into this record indicating any flaw or controversy with respect to the population frequency data used to evaluate PCR test results." (*Id.* at p. 670.)

Nevertheless, *Morganti*, which involved an uncontaminated blood stain, did not resolve or even address whether dot-intensity analysis is generally accepted. Moreover, because *Morganti* was not a mixed sample

case, it had no occasion to examine the propriety of admitting evidence, as here, of three possible genotypes in a mixed sample where two of the genotypes actually exonerate the defendant. Finally, in *Morganti*, there was evidence that the perpetrator was white, so it was appropriate to tell the jury the percentage of whites that have the same genotype as found at the scene of the murder. Here, there was no evidence that the perpetrator was African American, so it was inappropriate for Dr. Blake to tell (and the prosecutor to argue to) the jury the percentage of African Americans that have the same genotype as found at the crime scenes. (RT 2024, 2941-2942, 5023.) Moreover, because there was no evidence of the race or ethnicity of the perpetrator, it was improper for Dr. Blake to fail to tell the jury the percentage of the entire population that had the same genotype as found at the crime scenes.

3. Dot-Intensity Analysis at Trial

Trina Carpenter

Employing dot-intensity analysis, which purports to quantify the alleles that are present in a mixed DNA sample and thereby identify the specific alleles contributed by each donor, Dr. Blake testified at trial that the primary sperm donor to the cotton balls found with Trina Carpenter had a DQ alpha genotype of 1.2,2, while a secondary donor of a lesser amount had a 3,4 genotype. (RT 2913, 3026-3027, 4876.) That is, because of the different intensities of the blue dots in his testing, Dr. Blake placed the 1.2 allele with the 2 allele, and the 3 allele with the 4 allele to conclude that the genotypes present in the cotton balls were 1.2,2 and 3,4. (RT 3026 ["the 3 and 4, because they're lighter, they show up lighter, that's why they go together"].)

Dr. Blake explained that one measures an allele's quantity "[b]y observation," and the quantity is "something that's self-evident." (RT 3026.) "You simply look" at the dots, he iterated. (RT 3027). On cross-examination Dr. Blake admitted that it was "a matter of opinion as to whether or not the slight differences [in dot intensity] are dramatic." (RT 3021.) When pressed, Dr. Blake conceded that dot-intensity analysis was not "perfect." (RT 3020.) Nevertheless, he stated that a photograph of the dots "allows one who is knowledgeable in this subject area to pair the 1 and the 2 alleles together and draw the conclusion that the 3 and the 4 alleles come from a secondary source of DNA that's present in the preparation." (RT 3030.) When asked how he was able to quantify dot intensity, Dr. Blake answered: "This is about the fourth time that we have gone into that subject area. You do it by looking at it." (RT 3050.) Finally losing patience with the subject, Dr. Blake exclaimed, "counsel, for the last time, it's something that you can simply look at and see. It's obvious on its face." (RT 3051.)

Although Dr. Blake conceded that an individual with a DQ alpha type of 1.2,1.2 and another person with a DQ alpha type of 2,2 could have been co-contributors of the majority of the sperm, he viewed this conclusion as "artificial." Instead, Dr. Blake insisted that "the straightforward interpretation of the data is that most of the sperm come from an individual that is a 1.2,2." (RT 3033.)

Notwithstanding the NRC's declarations that (1) the interpretation of mixed samples "should *always* be based on results from *multiple* assays, so that one can check for consistency across *various loci*,"(2) "[i]nterpretations based on *quantity* can be particularly problematic," and (3) "if one saw two alleles of strong intensity and two of weak intensity, it would be *improper*

to assign the first pair to one contributor and the second pair to a second contributor, unless it had been *firmly established* that the system was quantitatively faithful under the conditions used" (NRC I at p. 66 [italics added]), Dr. Blake held fast to his view that no "knowledgeable person in this subject area" disagreed with his "belief that you can tell a primary from a secondary source strictly by dot blot intensity." (RT 3032.)

Lastly, Dr. Blake testified that an experiment described in an article he wrote "illustrate[d] when you can make inferences about a primary DNA source and a secondary DNA source and when you cannot." (RT 2978.) In the experiment, two samples with different DQ alpha types – for example, 1,2 and 3,4 – were mixed together in different ratios of the quantity of DNA material. (*Id.*) Dr. Blake concluded that "when the ratio is on the order of 4 to 1 to 8 to 1, you cannot pair up the alleles. You can simply say that the four alleles are present, but you don't know whether allele 1 goes with allele 3 or allele 2 or allele 4. Beyond that point, that is, when the mixture is more skewed than about 4 to 1 or 8 to 1, then you can pair up the alleles." (RT 2980.)

Thus, for example, if two men with DQ alpha genotypes of 1.2,1.2 and 2,2, respectively, deposited similar amounts of sperm in the vagina of a prostitute so that there were two times as much 1.2 allele and two times as much 2 allele than if there had been a single contributor, then Dr. Blake would not be able to tell through dot-intensity analysis (simply looking at the shade of the blue dot) whether there was a single contributor of 1.2,2 or two contributors of 1.2,1.2 and 2,2 because the ratio would be 2 to1 rather than the minimum 4 to 1 needed to discern which allele goes with which allele to create a genotype. As explained below, Dr. Blake's experiment proves that an expert, using PCR DQ alpha testing and dot-intensity

analysis, should not be allowed to testify that there was a single contributor of sperm when the evidence supports the existence of two or three contributors, as in the case of a working prostitute.

To counter Dr. Blake's testimony, the defense called forensic scientist Marc Taylor, who testified that it was possible to identify at least seven different genotypes from a mixed sample in which the 1.2 and 2 alleles were approximately equal in concentration, and the 3 and 4 alleles were weaker in concentration. (RT 4058, 4067-4068, 4071.) Mr. Taylor rejected the "very dangerous" conclusion that an allele with a corresponding darker blue dot necessarily combines with another darker blue allele to create a genotype (RT 4071), and opined instead that alleles in the DQ alpha system "can be combined in any way" (RT 4069). He also testified that "[t]here is no way you can really say how many people contributed sperm to anyone."
(RT 4109.)

Sophia Glover

At first Dr. Blake testified at trial that he analyzed the anal swabs in the Glover case and concluded that "the sperm DNA type was 1.2,2." (RT 2930-2931.) Thus, Dr. Blake's PCR analysis revealed a *single* sperm DQ alpha type of 1.2,2. (RT 2931.) Dr. Blake further testified that this matched Mr. Jones's DQ alpha type of 1.2,2 (RT 2935-2936), as well as about six percent of the African American population, about five percent of the white population (RT 2942), and slighter greater than two percent of the Mexican American population (RT 2944).

Later, however, Dr. Blake conducted additional DNA tests with the polymarker system, a PCR based analysis of five genes. (RT 4779.)[81] According to the prosecution, Dr. Blake performed the new tests to rebut evidence that Ike Jones, with a DQ alpha genotype of 1.2,1.2, could not be eliminated as a suspect in the JoAnn Sweets case (CT 6444; RT 3867); and that La-Jon Van Reed (DQ alpha type: 4,4), Prince Johnson (DQ alpha type: 4,4), and Randy Lockwood (DQ alpha type: 2,4) could not be eliminated as a potential source of the trace 4 allele detected on the sperm from the cotton balls found near Trina Carpenter's body. (CT 6444; RT 3868.)

On subjecting the Glover anal swab to polymarker testing, Dr. Blake learned that, rather than there being the single source of sperm that he had identified previously through dot-intensity analysis, there was actually a fairly evenly balanced mixture of two sources of sperm (RT 4799, 4803, 4857), and possibly a third source (RT 4861). He concluded that instead of one genotype – the 1.2,2 that matched Mr. Jones – there were three possible genotypes present in the anal swab – 1.2,2; 1.2,1.2; and 2,2. (RT 4803-4804; see also RT 4553 [polymarker hearing].) Dr. Blake also concluded that it was no more likely that a donor had the 1.2,2 genotype than the 1.2,1.2 or 2,2 genotype. (RT 4848.)

Dr. Blake further testified that the anal swab contained a 1.1 allele (RT 4853-4856), which could have come "from a very low level of sperm from an individual possessing the 1.1 allele" (RT 4856). He acknowledged that this allele could not have been contributed by Mr. Jones. (RT 4854.) Dr. Blake admitted that he could not prove that there were "two versus

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[81]Although PCR polymarker DNA testing was found to have satisfied *Kelly* in *People v. Wright*, *supra*, 62 Cal.App.4th at pp. 37-39, like *Morganti*, *Wright* never even mentioned the word "dot."

three" donors to the anal swab. (RT 4849-4850.)

As a result of the Glover polymarker analysis, Dr. Blake changed his opinion about the percentage of African Americans who could have contributed sperm to the Glover anal swab. Rather than six percent, Dr. Blake opined at trial that 15.1 percent of the African American population matched the possible genotypes found on the swab. (RT 4846.) Dr. Blake arrived at this percentage by adding the percentage of African Americans who have the 1.2,2 genotype (6 percent), to the percentage of African Americans who have the 1.2,1.2 genotype (8 percent), and then to the percentage of African Americans who have the 2,2 genotype (1+ percent). (RT 4545 [polymarker hearing]; see RT 4546 [Dr. Blake: "So the bottom line here is 15 percent of the black population would have genotypes compatible with being in a mixture with somebody of Mr. Jones' type"].) Thus, although Dr. Blake agreed that the anal swab contained a 1.1 allele (RT 4853-4856), he did not factor the 1.1 allele in arriving at the percentage of the population, African American or otherwise, from which the contributors to the anal swab could have originated.

JoAnn Sweets

Dr. Blake also offered testimony in the JoAnn Sweets case. Although he stated that a sperm donor to the sheet found with JoAnn Sweets had alleles of 1.2,2 (RT 2928), he conceded that "a person with the alleles 1.2,1.2 ... could be a co-contributor of the sperm." (RT 3037.) Thus, as the prosecution recognized before the polymarker testing was performed, Ike Jones, with a genotype of 1.2,1.2, was not eliminated as a co-contributor to sperm found on the sheet. (RT 3867-3868.) Dr. Blake's earlier testimony regarding Trina Carpenter suggested that another co-contributor to the sheet sperm could have been a person with 2,2 alleles. (RT 3033.)

Nevertheless, although Dr. Blake conceded that persons with three possible genotypes – 1.2,2; 1.2,1.2; and 2,2 – could have contributed to the sheet sperm, as in the case of the Sophia Glover anal swab, he did not add the frequency that the three alleles appear, as he did with Sophia Glover, in calculating the percentage of the population from which the contributors could have come. Lastly, Dr. Blake tested a portion of the sheet where there was no sperm, and detected a 1.1 allele, which Dr. Blake opined was the dx pseudogene. (RT 4878, 4881.)

4. Polymarker Testing at Trial

As a result of his polymarker testing, Dr. Blake declared that La-Jon Van Reed, Prince Johnson, and Randy Lockwood were eliminated as a source of the trace 4 allele detected on the sperm from the cotton balls found near Trina Carpenter's body (RT 4884), and that Ike Jones was eliminated as a contributor to the sheet in the JoAnn Sweets case (RT 4813). Dr. Blake reached these conclusions, even though his polymarker tests on the Carpenter and Sweets sperm samples each failed to produce a visible sensitivity or "s" dot (RT 4797, 4874-4875, 4880, 4926 [the only sperm fraction that has an "s" dot is the Glover anal swab]), and even though the manufacturer of the polymarker testing kit recommends against typing a DNA sample where no "s" dot is visible (RT 4841 ["It is recommended that a DNA probe strip with no visible 's' dot not be typed for any locus'"]).

The prosecution called Patrick O'Donnell, a doctor of molecular biology and head of the San Diego Police Department's Forensic DNA Laboratory, who first testified at a hearing that polymarker testing was suitable for forensic case work. (RT 4618, 4666, 4898.) The defense later called Dr. O'Donnell at trial, where he told the jury if the "s" dot on a

polymarker test strip is not visible, then there is always the possibility that a DNA source would go undetected, so that he would not exclude someone, for example, Ike Jones, based on the fact that his allele had not been detected. (RT 4903-4905, 4908.)

Finally, forensic scientist Marc Taylor agreed with Dr. O'Donnell that it was dangerous to assign a genotype to test results where an "s" dot was not present because a contributor may not be detectable due to the low level of DNA in the sample. (RT 4926, 4936.) Thus, Mr. Taylor concluded that La-Jon Van Reed, Prince Johnson, and Randy Lockwood should not be excluded as contributors to the cotton balls found with Trina Carpenter, and Ike Jones should not be excluded as a contributor to the sheet found with JoAnn Sweets. (RT 4937-4938.)

B. The Court Erred in Admitting Dr. Blake's Dot-Intensity Analysis to Identify the Presence of Genotypes in Mixed Sperm Samples, When this Procedure Is Not Generally Accepted by the Scientific Community.

In *People v. Pizarro* (2003) 110 Cal.App.4th 530, the appellate court held that band-intensity analysis must satisfy *Kelly* to be admissible because it was a complicated or sophisticated scientific procedure. (*Id.* at pp. 604, 606.) Band-intensity analysis is "the comparison of visually observable band intensities on the autorads" from restriction fragment length polymorphism (RFLP) DNA testing. (*Id.* at p. 601.) *Pizarro* noted that dot-intensity analysis is a "somewhat similar procedure" to band-intensity analysis. (*Id.* at p. 618.) Therefore, like band-intensity analysis, dot-intensity analysis should be subjected to *Kelly's* general acceptance demand

to be admissible.[82] On appeal, general scientific acceptance under *Kelly's* first prong is reviewed independently. (*People v. Venegas* (1998) 18 Cal.4th 47, 91.) As shown below, dot-intensity analysis is not generally accepted.

Pizarro discussed *State v. Harvey* (1997) 151 N.J. 117, 699 A.2d 596, where the defendant challenged the reliability of dot-intensity testing to analyze a mixed DNA sample. While acknowledging that the majority in *Harvey* concluded that dot-intensity analysis was subject to *Kelly* but was generally accepted, *Pizarro* quoted extensively from the dissenting judge in *Harvey*, who articulated some of the *Pizarro* court's concerns:

> "The principal disagreement that I have with the majority concerns the general acceptance of dot-intensity testing. Dot-intensity analysis was the essential evidence relied upon by the State to demonstrate that defendant was in all likelihood the actual person whose blood contributed to the mixed sample found at the scene. *The majority properly, if reluctantly, recognizes that dot-intensity testing, as a scientific method, must meet the standard of general acceptance even if DQ Alpha and polymarker testing are themselves found to be generally accepted scientific tests.* The majority, however, misconstrues the distinctive and distinguishing features of dot- intensity testing as a method of analyzing DNA, denigrates many of defendant's challenges to the testing as not going to the reliability of the procedure, but rather only to its weight, and then, on an embarrassingly deficient record, summarily concludes that the novel scientific procedure passes muster under our long-standing precedent. Dot intensity analysis as used here – a procedure never before used in any court case, successfully documented in any

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[82]Although in his argument that Dr. Blake's PCR DQ alpha testing did not satisfy *Kelly*, Mr. Jones objected to Dr. Blake's use of dot-intensity analysis (CT 1319; RT 1227), the trial court did not specifically address the objection in ruling that PCR DQ alpha testing passed *Kelly* (RT 1235).

laboratory, or validated in any scientific study or published literature – has not been shown to be an established and reliable procedure. Further, no foundation for dot-intensity analysis exists in the record, and the results obtained clearly show that such evidence is grossly unreliable. Finally, the analysis rests on a combination of assumptions that renders the evidence so unpersuasive and speculative that it is inadmissible under New Jersey Rule of Evidence 402." (*State v. Harvey*, *supra*, 699 A.2d at p. 658, Handler, J. diss. opn.)

"The polymarker and DQ-Alpha testing kits were designed *solely* to determine the presence or absence of certain alleles. Dot-intensity analysis, however, purports to determine more. It purports to quantify the alleles that are present and thereby to identify the specific alleles contributed by each donor to the DNA mixture. The majority only grudgingly rejects the State's argument that dot-intensity analysis is nothing new and that no independent basis for its admission need be established. Without discussion, it recognizes, without really appreciating, that that difference requires an independent foundation for admissibility. [Citation.] Notwithstanding its concession, the majority then erroneously devalues and mischaracterizes defendant's challenges to the evidence – challenges to its competency – as merely going to Cellmark's performance of the polymarker test .... [Citation.] That conclusion derives from a distortion of defendant's claims and from a serious misunderstanding of the distinctive nature and purposes of dot- intensity analysis." (*Id.* at pp. 658-659.)

"The issue here is not whether the reverse dot-blots obtained on the polymarker strips can reveal the presence of alleles in the mixture – they can. At issue is whether an interpretation made of those strips that goes beyond what results that the strips were designed to show – *the presence of alleles* – is generally accepted as scientific evidence. [Citation.] Thus, unlike 'an expert's ability to perceive an abnormality on an x-ray,' which concededly 'is a matter within the province of the jury,' [citation] here we must decide, by analogy, whether a doctor's interpretation of an

> x-ray can be admitted without restrictions when he testifies to a condition that the x-ray was not designed to reveal. Therefore, while a doctor's diagnosis of a broken bone from an x-ray may be admissible because it is based on a generally accepted interpretation of a generally accepted test, the doctor's diagnosis of cancer from that same x-ray ought not to be admitted unless and until the doctor can establish that such a diagnosis from an x-ray is generally accepted." (*Id.* at pp. 659-660, fn. omitted.)
>
> "Not only do the results obtained here establish the gross unreliability of this evidence, but the entire practice of visualizing and weighing dot intensities to determine the makeup of a mixture is unavoidably subjective. *A subjective test, especially one that is immune from later challenge, should not be admissible evidence in these circumstances.* The standard for the admissibility of scientific evidence is designed to ensure that the testing procedure 'relies primarily upon objective factors for reaching a conclusion, with subjective factors playing only a minimal role in the analysis.' [Citation.]" (*Id.* at p. 670.)

(*People v. Pizarro*, *supra*, 110 Cal.App.4th at pp. 618-620 [italics added, footnote omitted].) In an exhaustive 64-page analysis, Judge Handler demonstrated in his dissent in *Harvey* that dot-intensity analysis does not satisfy *Kelly*. In the words of Judge Handler, "Dot-intensity analysis cannot, by any measure, be considered reliable or generally accepted. It is not supported by any authority sufficient to establish its scientific reliability or acceptance within any reputable body or community of scientists." (699 A.2d at p. 653.)

Among Judge Handler's findings were the following:

1. "The testing kits were designed to measure only the presence or absence of certain alleles. That point cannot be overemphasized." (*Id.* at p. 655.)

2. The strips on which the dots appear "should be read immediately, even before they are photographed, because the dots become less intense, quickly fade, and even disappear." (*Id.*)

3. The fundamental assumption of dot-intensity analysis is that a dot-intensity imbalance is caused by the relative imbalance in the amount of alleles present. Yet the State's experts offered several other reasons why an imbalance might occur. (*Id.* at p. 657.)

4. Dot-intensity analysis was not supported by Dr. Edward Blake. (*Id.* at p. 659.) In fact, Dr. Blake "resoundingly criticized the State's analysis." (*Id.* at p. 664, fn. 11.)

5. "[N]o court case, no publication, and no scientist ever has concluded that dot-intensity analysis can and does work reliably and consistently." (*Id.* at p. 663.)

Like the dissent, the *Harvey* majority noted that Dr. Blake "disagreed" with the state's expert "on the propriety of dot-intensity analysis." (*Id.* at p. 625.) The majority also quoted from the NRC's 1996 report, *The Evaluation of Forensic DNA Evidence* ("NRC II"): "Mixed samples can also lead to more complicated calculations with DQ [DQ alpha], where some alleles are inferred by subtraction." (*Id.* at p. 626.) The NRC II explained further: "For example, there is no specific probe for the allele 1.2; the presence or absence of this allele is inferred from the reaction of DNA probes with the product of the combination 1.2, 1.3, and 4, but not with the products of 1.3 and 4 individually." (NRC II at p. 130.) Ultimately, the *Harvey* majority found that dot-intensity analysis was acceptable when performing a polymarker analysis, but not when conducting a DQ alpha test because "[i]t was not possible to associate alleles with the DQ Alpha test." (*Harvey*, *supra*, at p. 632.) (The majority

explained earlier in its opinion that the phrase "the association of alleles" is used interchangeably with "dot-intensity analysis." (*Id.* at p. 618.))

Here, there was no showing by the prosecution that dot-intensity is generally accepted in DQ alpha testing. In fact the prosecution's own expert, Dr. Blake, who attacked dot-intensity analysis in *Harvey* (699 A.2d at pp. 625, 659, 664, fn. 11), provided ample evidence that one cannot simply look at the color of the dots and *reliably* determine whether one allele necessarily combines with another to create a genotype. That is, Dr. Blake conceded that the discovery of the 1.2 and 2 alleles on a DNA sample did not necessarily mean that the alleles were contributed by an individual with the 1.2,2 DQ alpha genotype. In fact Dr. Blake acknowledged that the contributors could have been two individuals with the 1.2,1.2 and 2,2 genotypes. But Dr. Blake labeled this conclusion "artificial" because, according to Dr. Blake, the most "straightforward" explanation was not there was only one individual involved with a 1.2,2 DQ alpha genotype, coincidentally the same genotype as possessed by Mr. Jones. (RT 3033.) As Dr. Blake further explained, when he analyzes a mixed sperm sample using dot-intensity, he assumes that all donors are "producing sperm there at equivalent amounts." (RT 4850.) Thus, he "normally assume[s] the simplest situation." (RT 4851.)

But as Mr. Taylor explained to the jury, he had cases where there was "a high concentration of sperm from an earlier incident of sexual activity, and then from a later incident of sexual activity there will be a much lower, because it is dependent on where the ejaculation takes place, the relative sperm counts of the individual, how much of the ejaculate is actually into, say, a vaginal swab, into the vagina itself, those sorts of things." (RT 4094.) Thus, even though (1) Dr. Blake admitted that "you

could have one person that has very much less sperm than some other person" (RT 4850) so that a primary and secondary contributor of sperm (by quantity) could have deposited sperm at about the same time; (2) one victim in this case was a working prostitute, who clearly could have had more than one customer depositing sperm just prior to her death; and (3) multiple assailants have been known to sexually assault prostitutes and non-prostitutes alike, Dr. Blake assumed the "simplest situation," and provided the jury with what he saw as the most straightforward explanations, that all of the victims had been attacked by a lone assailant. Not surprisingly, Dr. Blake's explanation dove-tailed with the prosecution's modus operandi theory – that Mr. Jones acted alone. Accordingly, had Dr. Blake ended his involvement in this case with his DQ alpha work, the jury would have been left with his expert testimony that Trina Carpenter, JoAnn Sweets, and Sophia Glover were each found with the sperm of a single man or primary donor with the same DQ alpha genotype that Mr. Jones has.

Fortunately for Mr. Jones, as stated by the prosecution, "[t]he defense introduced evidence in its case that Ike Jones' PCR DQ alpha genotype was 1.2, 1.2. The defense introduced the DQ alpha genotypes of LaJon VanReed, Randy Lockwood, and Prince Johnson. The defense also produced forensic evidence that VanReed, Lockwood, and Johnson cannot be eliminated from the Carpenter murder. Further, the defense introduced circumstantial evidence and alleged admissions indicating Lockwood and VanReed were responsible for the Carpenter murder. Finally, [] Joyce Euwing's testimony directly implicated Ike Jones in the JoAnn Sweets murder." (CT 6444 – Prosecution's Points and Authorities in Opposition to Defense Motion to Prevent Rebuttal Evidence.)

In response to the defense evidence, the prosecution engaged Dr. Blake to do polymarker testing. (CT 6443.) Through these tests Dr. Blake learned that the so-called "simplest," "straightforward" explanation was not the reliable one. He discovered that there were at least two roughly equal sperm contributors to the Sophia Glover anal swab, and that those two men could possess the 1.2,1.2 and 2,2 genotypes. (RT 4799, 4803, 4857.) This new evidence, which was only uncovered when the prosecution was forced to rebut defense evidence exculpating Mr. Jones, is strong indication that Ms. Glover had multiple attackers (contradicting the prosecution's theory that a single assailant attacked all the victims), and actually serves to exonerate Mr. Jones in the Sophia Glover case, as explained below.

It should be plain that, as Mr. Taylor testified, dot-intensity analysis is not scientifically reliable, and thus its use can be very dangerous. (RT 4071.) As Dr. Mary Claire King, a professor of epidemiology and genetics at the University of California, Berkeley, and a member of the Committee on DNA Technology in Forensic Science that issued the National Research Council's 1992 report, *DNA Technology in Forensic Science*, declared: "I know of no published literature, no external validation that would allow one to compare intensity of dots." (CT 3729-3730.) In her opinion, "you cannot try to draw conclusions from dots of varying intensity." (CT 3816.)

The NRC report also advised that "[m]ixed samples can be very difficult to interpret, because the components can be present in different quantities and states of degradation." (NRC I at p. 59.) Thus, as Mr. Taylor told the jury, over time, sperm will die, degrade, or disappear. (RT 4093.) Trina Carpenter, JoAnn Sweets, and Sophia Glover died in 1986. (RT 4219-4220.) Dr. Blake performed his DNA tests approximately four years later. (RT 2912, 2927, 2929.)

Furthermore, although the NRC acknowledged in its 1996 report that "[i]n *some* cases, it might be *possible* to distinguish the genetic profiles of the contributors to a mixture from differences in intensities of ... dots in a dot-blot typing," (NRC II at p. 129 [italics added]), the NRC certainly did not suggest that dot-intensity analysis was generally reliable and accepted by the scientific community. Nor did the NRC's 1996 report retreat from its earlier view that the interpretation of mixed samples "should *always* be based on results from *multiple* assays, so that one can check for consistency across *various loci*," and that "it would be *improper* to assign the first pair to one contributor and the second pair to a second contributor, unless it had been *firmly established* that the system was quantitatively faithful under the conditions used." (NRC I at p. 66 [italics added]; see also see NRC I at p. 64 ["In some cases, PCR can be qualitatively faithful but quantitatively unfaithful, because some alleles amplify more efficiently than others. *A sample might contain a 50:50 mixture of two alleles and yield an amplified product with a 90:10 ratio.*"] [italics added].)

Obviously, in reaching his conclusions based only on DQ alpha testing, Dr. Blake did not employ multiple tests across various loci. Moreover, there is no evidence in this case that the DQ alpha system used by Dr. Blake was "firmly established as quantitatively faithful." On the contrary, Dr. Blake's own testimony shows that it was not quantitatively faithful because he later discovered during the polymarker testing that there had been multiple donors to the Sophia Glover anal swab, and not simply a single donor that the DQ alpha testing suggested to Dr. Blake.

In addition, Dr. Blake admitted that dot-intensity analysis did not allow him to discern whether one or two men contributed sperm with similar alleles. That is, Dr. Blake was not be able to recognize through dot-

intensity analysis whether there was a single contributor of a 1.2 allele and a 2 allele, or two equal contributors, respectively, of a 1.2,1.2 genotype and a 2,2 genotype where the quantity ratio between the two genotypes was less than four to one. (RT 2980.) Thus, Judge Lim was correct in her assessment that "there still exists a true dispute over whether or not an expert like Dr. Blake can give a quantitative opinion versus a qualitative opinion as to what genetic markers are present." (CT 1947.)

As demonstrated, the prosecution failed to carry its burden under *Kelly* to show that a cross-section of the scientific community generally accepts dot-intensity analysis as reliable. (*People v. Leahy* (1994) 8 Cal.4th 587, 612; *People v. Venegas*, *supra*, 18 Cal.4th at p. 85; *People v. Kelly*, *supra*, 17 Cal.3d at p. 37.) Accordingly, although PCR DQ alpha testing is admissible under *People v. Morganti* to identify *alleles*, because Dr. Blake used unreliable dot-intensity analysis to identify *genotypes*, the court erred under *Kelly* in admitting testimony that identified genotypes found in sperm samples associated with Trina Carpenter, Sophia Glover, and JoAnn Sweets.

C. The Court Erred in Admitting Dr. Blake's Testimony Identifying Possible Genotypes Found in the Sperm Samples Because the Testimony Was Based on Incorrect Scientific Procedures and Was Not Relevant to or Probative of Guilt.

In *People v. Pizarro*, *supra*, 110 Cal.App.4th 530, the FBI conducted DNA tests on a mixed sample from a murder-rape victim and detected three possible genotypes for the perpetrator, including one that matched the defendant. (*Id.* at p. 583.) The defendant contended that all three possible genotypes should have been accounted for in calculating the number of persons who could be the perpetrator. (*Id.* at p. 581.) Although, in the case

of a mixed sample, the National Research Council recommended adding the population frequencies of all detected genotypes to determine the number of possible perpetrators (NRC I at p. 59), *Pizarro* rejected the NRC I's approach as "neither relevant nor probative" because "the perpetrator's genotype has not been established." (*Id.* at p. 600.)

Instead, the appellate court concluded that evidence offered by the prosecution of the perpetrator's possible "genotype should be excluded altogether because of its potential to exonerate the defendant." (*Id.* at p. 597.) That is, "the most compelling reason for demanding proof of the perpetrator's genotype and for refusing to admit evidence of all three possible genotypes was that the other two possible genotypes were more than irrelevant – they potentially proved defendant's innocence." (*Id.* at p. 601.)[83] *Pizarro* further found: "Similarly, only the *perpetrator's* one []

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[83] *Pizarro* reasoned as follows:

> If, in our analogy, the eyewitness is uncertain about the perpetrator's hair color, but can narrow the color down to black, brown, or blond, should all three possibilities be taken into account? The logic supporting an affirmative answer states: all possible perpetrators have black, brown, or blond hair; the defendant has black hair; therefore, the defendant is a possible perpetrator. Although initially appealing, this logic ignores the fact that the perpetrator has only one hair color and thus only that one hair color is relevant to his profile; more importantly, it ignores the fact that if the perpetrator actually has brown or blond hair, the defendant simply is not the perpetrator. The correct logic requires a choice of these three possible syllogisms: (1) all possible perpetrators have black hair; the defendant has black hair; therefore, the defendant is a possible perpetrator; (2) all possible perpetrators have brown hair; the defendant has black hair; therefore, the defendant is not the perpetrator; (3) all possible

genotype was relevant to *his* genetic profile. If the prosecution could not establish which genotype the perpetrator possessed at that locus, there was no relevant evidence to admit from that locus." (*Id.* at pp. 600-601 [italics added].)

Here, Dr. Blake testified at trial that his analysis of the Sophia Glover anal swab revealed a mixture of two sources of sperm (RT 4799) with three possible genotypes – 1.2,2; 1.2,1.2; and 2,2. (RT 4803-4804; see also RT 4553 [polymarker hearing].) Similarly, Dr. Blake conceded that an individual with a DQ alpha type of 1.2,1.2 and another with a DQ alpha type of 2,2 could have been co-contributors of the majority of the sperm on the cotton balls found with Trina Carpenter. (RT 3033.) Finally, although Dr. Blake testified that a sperm donor to the sheet found with JoAnn Sweets had alleles of 1.2,2 (RT 2928), he admitted that "a person with the alleles 1.2,1.2 ... could be a co-contributor of the sperm in [the JoAnn Sweets] case." (RT 3037.) Dr. Blake's earlier testimony regarding Trina Carpenter suggested that another co-contributor to the sheet sperm could have been a person with 2,2 alleles. (RT 3033.)

But as in *Pizarro*, two of the three possible genotypes detected by Dr. Blake – the 1.2,1.2 and the 2,2 – potentially proved Mr. Jones's innocence. That is, under Dr. Blake's analysis, instead of an actual

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> perpetrators have blond hair; the defendant has black hair; therefore, the defendant is not the perpetrator. It would defy the principles of evidence to allow the eyewitness to testify that the perpetrator has black, brown, or blond hair when there is no way of establishing which one hair color the perpetrator actually possesses.

(*People v. Pizarro*, *supra*, 110 Cal.App.4th at p. 600.)

contributor with characteristics like Mr. Jones depositing sperm with a 1.2 allele and a 2 allele, the sperm could have been deposited by two men, one with a 1.2,1.2 genotype and the other with a 2,2 genotype, thereby exonerating Mr. Jones as a contributor in all three cases. Dr. Blake conceded during the polymarker hearing that Mr. Jones would have to be eliminated as a source of the sperm if the actual genotypes were 1.2,1.2 and 2,2. (RT 4548.) Accordingly, as held by *Pizarro*, Dr. Blake's testimony was neither relevant to nor probative of guilt and should have been excluded altogether.

The prosecution therefore failed to carry its burden under *Kelly's* third prong, which requires proof that Dr. Blake used proper scientific procedure to determine that Mr. Jones's DNA and the perpetrator's DNA matched. Accordingly, Dr. Blake's genotype evidence concerning the Trina Carpenter, Sophia Glover, and JoAnn Sweets sperm samples was inadmissible under Evidence Code section 403, and the trial court abusd its discretion in admitting it. (*People v. Pizarro*, *supra*, 110 Cal.App.4th at pp. 600, 621-622.)

D. The Court Erred in Admitting Dr. Blake's Population Frequency Data Because He Limited the Data to His Average Man Rather than Including All Possible Perpetrators.

The statistical phase of DNA analysis is subject to *Kelly* to ensure that (1) the methodology used is generally accepted in the scientific community, and (2) the calculations in the particular case followed correct scientific procedures. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 84; *People v. Morganti*, *supra*, 43 Cal.App.4th at p. 669.)

This Court held in *Venegas* that if there is a match between a suspect's genetic characteristics and DNA samples taken from a crime scene, then a statistical analysis is performed to determine the frequency with which the suspect's genetic characteristics occur in the "general population." (*People v. Venegas*, *supra*, 18 Cal.4th at p. 58.) *Pizarro* held that in following correct scientific procedures, prosecutors have two options where the perpetrator's race or ethnicity is unknown: "present only the most conservative frequency, without mention of ethnicity; or ... present the frequency in a general, nonethnic population." (*Pizarro*, *supra*, 110 Cal.App.4th at p. 633.) Because, in this case, the perpetrator's race or ethnicity is unknown, the procedure in *Pizarro* applies.

Here, the prosecution presented the frequency with which Mr. Jones's genotype occurred in three populations: African American, Caucasian, and Mexican-American. (RT 2942-2944, 3040-3045.) The prosecution did not present only the most conservative frequency, without mention of ethnicity; nor did the prosecution present the frequency in the general population. Accordingly, because the prosecution failed to follow correct scientific procedures, the trial court abused its discretion in admitting the evidence. (*Venegas*, *supra*, 18 Cal.4th at p. 91.)

Dr. Blake declined to provide additional frequency data for other groups, such as Asians, because, according to Dr. Blake, it was "not relevant." (RT 3044-3046.) In fact, Dr. Blake had no reliable frequency data on Chinese and Japanese. As he testified: "There is a small amount of data for some other ethnic groups, and it's not large enough to do anything with. So, I mean, I think that there are probably a few Chinese, probably one or two or three or four Japanese, but it's hard to do anything with a few individuals like that." (RT 2963.) The NRC advises that "an

adequate database [has] at least several hundred persons." (NRC II at p. 33.)

Dr. Blake based his opinion that additional frequency data was "not relevant" on his observation that the "the average man walking down the street is most of the time either a Caucasian or a black, which is certainly the case in most communities, *including this one*." (RT 3046-3047 [italics added].) But according to the U.S. Census, there were more Asians (184,596) than blacks (159,306) living in San Diego County in 1990. (See http://venus.census.gov/cdrom/lookup/1084645793.) Thus, Dr. Blake's "average man" observation was plainly wrong.

Moreover, according to the U.S. Census, in 1990 there were 290,437 persons living in San Diego County who identified themselves as American Indian, Eskimo, or Aleut (20,066); Asian or Pacific Islander (198,311); Puerto Rican (12,163); Cuban (2,862); or other non-Mexican Hispanic (57,035). (See http://venus.census.gov/cdrom/lookup/1084640976; http://venus.census.gov/cdrom/lookup/1084641848; http://venus.census.gov/cdrom/lookup/1084645416.) Thus, Dr. Blake omitted from consideration as possible perpetrators over one hundred thousand men in San Diego alone, because he found them irrelevant to his average man.

In addition to being a major metropolitan area that attracts races and ethnicities from all over the world, San Diego is a well-known Navy town that draws sailors of all races and ethnicities. And as a major city, San Diego no doubt lures businessmen from all parts of the globe. It is common knowledge that some sailors and traveling businessmen patronize prostitutes. Trina Carpenter was a prostitute. (RT 3829.) Men of any race or ethnicity could have killed her.

Thus, in *People v. Portillo* (2003) 107 Cal.App.4th 834, a sailor stationed in San Diego was convicted of murdering a prostitute. The evidence showed that the sailor often talked about picking up a prostitute, raping her and then killing her. On one occasion he said that when he killed a prostitute, he would put her body in a green duffel bag. (*Id.* at p. 839.) Ms. Carpenter was found in a green duffel bag. (RT 2299, 2321.)

Hence, the perpetrators in this case could have come from virtually any population, not just from African-Americans, Caucasians, and Mexican-Americans. This observation comports not only with logic and experience (*People v. Danks* (2004) 32 Cal.4th 269, 302 ["'Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience'"], it is also consistent with the law, the recommendations of the National Research Council, and the view of the FBI. (See, e.g., *People v. Soto* (1999) 21 Cal.4th 512, 518 [calculation of genetic frequencies should be made from "population or populations to which the perpetrator of the crime might have belonged"]; *People v. Pizarro*, *supra*, 110 Cal.App.4th 530 578 ["The 'relevant' database population for calculating the profile frequency is ... the population that contains all possible perpetrators"]; NRC II at p. 112 ["If the race of the person who left the evidence-sample DNA is known, the database for the person's race should be used; if the race is not known, calculations for all racial groups to which possible suspects belong should be made"]; FBI Worldwide Study, Overview (1993) at p. 1 ["Since the ethnicity of those people who are potential perpetrators rarely, if ever, is known, statistical estimates must be based on some sort of general population database. [¶][T]he ethnic background of the suspect is not germane to selecting a reference database"].)

Accordingly, Dr. Blake's population frequency data was based on incorrect scientific procedures and should have been excluded. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 91 [appellate courts review the trial court's third-prong determinations for abuse of discretion].)

E. The Court Erred in Admitting Dr. Blake's Polymarker Evidence Regarding Trina Carpenter and JoAnn Sweets Because Dr. Blake Contravened the Recommendation of the Polymarker Kit Manufacturer Not to Type Samples Where a Sensitivity Dot Was Not Visible.

When Dr. Blake performed polymarker tests on the sperm samples in the Trina Carpenter and JoAnn Sweets cases, no sensitivity dots were visible. (RT 4797, 4874-4875, 4880, 4926 [the only sperm fraction that has an "s" dot is the Glover anal swab].) A sensitivity or "s" dot is akin to a control dot in that if it appears on a test strip, then any alleles that are present should also appear. (RT 4193, 4797.) Perkin Elmer, the manufacturer of the polymarker kit used by Dr. Blake, recommends against typing a DNA sample unless the sensitivity dot is visible. (RT 4840-4841 ["It is recommended that a DNA probe strip with no visible 's' dot not be typed for any locus'"]).

Patrick O'Donnell, a doctor of molecular biology and head of the San Diego Police Department's Forensic DNA Laboratory, testified that if the "s" dot on a polymarker test strip is not visible, then there is always the possibility that a DNA source would go undetected, so that he would not exclude someone, for example, Ike Jones, based on the fact that his allele had not been detected. (RT 4903-4905, 4908.)

Forensic scientist Marc Taylor agreed with Dr. O'Donnell that it was dangerous to assign a genotype to test results where an "s" dot was not present because a contributor may not be detectable due to the low level of

DNA in the sample. (RT 4926, 4936.) Mr. Taylor also informed the jury that it was "scientifically unreliable" to interpret the polymarker strips from a mixed sample and exclude people where the "s" dot was not present. (RT 4938.) Thus, Mr. Taylor concluded that La-Jon Van Reed, Prince Johnson, and Randy Lockwood should not be excluded as contributors to the cotton balls found with Trina Carpenter, and Ike Jones should not be excluded as a contributor to the sheet found with JoAnn Sweets. (RT 4937-4938.)

To pass muster under *Kelly's* third prong, correct scientific procedures must be followed. (*Kelly*, *supra*, 17 Cal.3d at p. 30.) The defense expressly objected under *Kelly* to Dr. Blake's polymarker testimony regarding those DNA samples where the "s" dot was not visible. (RT 4706; see also CT 6046.) Notwithstanding the objection, the court ruled that *Kelly* was inapplicable because polymarker testing was "not a new or different scientific technique." (RT 4744; see also RT 4314 ["It is the same exact technique that was used for the DQ-Alpha, but it is using different markers"].)

Nevertheless, by ignoring the manufacturer's recommendation not to type a DNA sample where the sensitivity does not appear, Dr. Blake failed to follow correct scientific procedures. And as this Court has held, *Kelly's* third prong is "case specific," and therefore required the trial court to determine whether the prosecution proved that proper scientific procedures were used by Dr. Blake in his polymarker testing. (*People v. Venegas, supra,* 18 Cal.4th at p. 78.) Hence, the trial court abused its discretion in admitting Dr. Blake's polymarker testimony and exhibits indicating that La-Jon Van Reed, Prince Johnson, and Randy Lockwood should be excluded as contributors to the cotton balls found with Trina Carpenter, and Ike Jones should be excluded as a contributor to the sheet found with JoAnn

Sweets. (*People v. Venegas, supra,* 18 Cal.4th at p. 91.)

F. The Court's Admission of Dr. Blake's Evidence Was Prejudicial Both as to Guilt and Penalty.

As demonstrated above, the trial court should not have allowed Dr. Blake to tell the jury that he detected *any* genotypes in the sperm samples for Trina Carpenter (cotton balls), JoAnn Sweets (sheet), and Sophia Glover (anal swab) by using dot-intensity analysis. Moreover, the court should have barred Dr. Blake from telling the jury that he discovered Mr. Jones's 1.2,2 DQ alpha genotype in the sperm samples for all three victims because two other possible genotypes present in the samples – the 1.2,1.2 and the 2,2 – exonerated Mr. Jones from being a contributor.

Further, the court should have excluded Dr. Blake's population frequency data because Dr. Blake did not offer data on the general population, but only submitted data on his average man. Finally, the court should have precluded Dr. Blake from providing polymarker testimony on Trina Carpenter and JoAnn Sweets given that there was no visible sensitivity dot in the sperm samples from either case.

The court's errors in failing to exclude this evidence were prejudicial in that it is reasonably probable that the Sophia Glover and JoAnn Sweets verdicts would have more favorable to Mr. Jones in the absence of the errors. (*People v. Venegas*, *supra*, 18 Cal.4th 47, 93.) Furthermore, the prosecution cannot show beyond a reasonable doubt that the death penalty would not have been imposed absent the Glover, Sweets, and Trina Carpenter DNA errors. (*People v. Clair* (1992) 2 Cal.4th 629, 678 [state-law error bearing on penalty in a capital case is reviewed under the "reasonable possibility" standard of *People v. Brown* (1988) 46 Cal.3d 432, 446-448, which in substance and effect is the same as the "reasonable

doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [the issue is "whether the ... verdict actually rendered in this trial was surely unattributable to the error"].) Hence, the Glover and Sweets verdicts and special circumstances should be reversed and the death penalty set aside.

Sophia Glover

Sophia Glover's nude body, partially wrapped in a blanket, was found about a block from the Wilsie house, where Ann Jones worked and her son helped out on occasion. (RT 2247-2249, 2287, 2309, 2607, 3936.) Ms. Glover's clothes were located in a neat pile near an apartment building next door to the Wilsie residence. (RT 2264-2265, 2268-2269, 2290-2291, 2294.) Except for the DNA evidence, this is the sum total of the evidence "connecting" Mr. Jones to Sophia Glover.

Although most of Dr. Blake's testimony should have been excluded, his testimony that the Sophia Glover anal swab clearly had sperm from more than one man (RT 4799, 4803, 4857, 4861) was admissible because Dr. Blake could have based such testimony on the presence of alleles that could have only come from multiple parties. Thus, the evidence suggests that Sophia Glover, who was not a prostitute, was sexually assaulted, if at all, by more than one man.[84] This evidence refutes the prosecutor's theory that a single perpetrator acted alone when he allegedly assaulted the

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[84]Although the prosecutor told the jury during opening statement that Sophia Glover was a prostitute (RT 2020), he failed to present any evidence of this. In fact the prosecutor even objected to a question by the defense that assumed Sophia Glover was a purported prostitute. (RT 4851.)

victims.[85]

The prosecutor relied on Dr. Blake's DNA testimony about Sophia Glover in his argument to the jury. (RT 5006-5007 ["Dr. Blake examined the anal swabs. He found sperm. He did DNA work. He found 1.2,2. There was a mixture. 1.2,2."]; 5017 ["The defendant is 1.2,2"].) Accordingly, given the lack of any other evidence that actually connected Mr. Jones to Sophia Glover, the jury undoubtedly attached great importance to the Glover DNA evidence in tying Mr. Jones to Sophia Glover. Absent such evidence, it is reasonably probable that Mr. Jones would have been acquitted of the Sophia Glover charges.

JoAnn Sweets

The admission of DNA evidence in the JoAnn Sweets case was also prejudicial. On May 9, 1986, the body of JoAnn Sweets was found in a dumpster in the alley just outside the back door of the Jones apartment. (RT 2343-2345, 2358, 2362, 2366, 3980.) An old, tattered afghan blanket covered the body, which was wrapped in a heavily soiled sheet, a mattress pad, and two large plastic trash bags. Tape was attached to the ends of the bags as if someone had tried, unsuccessfully, to tape the bags together. (RT 2303-2304, 2307, 2345-2346, 2353, 2363, 2399, 2404, 2432, 2485, 2932.)

Although the afghan might have been made by Mr. Jones's mother or sister, the sheet and mattress pad were not from the Jones apartment. (RT 2783-2785, 3931-3932.) The person who found the body described the afghan as "kind of old," "raveled," "coming apart," and not worth keeping.

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[85]The trial court found the evidence of two perpetrators "really, really interesting" because it affected "how you read all of these m.o. crimes together." The court concluded that this new evidence favored Mr. Jones. (RT 4751.)

(RT 2346, 2353.) Thus, an obvious inference is that whoever owned the afghan threw it in the garbage because it was falling apart.

Moreover, just days before the body was found in the dumpster, Ann Jones moved down the street to a new home. (RT 3068-3069, 3932-3933, 3982.) When people move, they typically toss out used or unwanted items, like old unraveling afghans, especially if they are like Ann Jones, "sort of picky," who "like[d] things sort of neat," and who "like[d] things in place." (RT 3984.) Ann Jones testified that sometimes her afghans would fall from her lap and lie on her carpet. (RT 3995.) Thus, assuming the raveled afghan came from the Jones apartment, it could have lain on the carpet, where it gathered fibers, before being put in the trash, where someone retrieved and used it to cover JoAnn Sweets.

The prosecution's theory was that JoAnn Sweets was attacked while lying on the afghan, which was on the carpet. (RT 4999.) But 29 hairs were recovered from the blanket, none of which matched Bryan Jones or JoAnn Sweets. (RT 3534.) Had this afghan been used in an attack, it surely would have had hair from both JoAnn Sweets and her attacker. Thus, it is more likely that the afghan had nothing to do with Mr. Jones and did not come from the Jones apartment.

Moreover, the discarded sheet had no connection to Mr. Jones, but did have five hairs that did *not* match Mr. Jones or JoAnn Sweets. The mattress pad, too, had no connection to Mr. Jones, but had eight hairs that did *not* match Mr. Jones or Ms. Sweets. (RT 3534-3535.) If, as the prosecutor seemed to suggest, that the mattress pad and sheet were somehow used in the attack on JoAnn Sweets (RT 4999), then it is highly unlikely that there would be no hairs that matched Mr. Jones or Ms. Sweets found on them, given the ease with which people shed hair.

And, as the prosecution acknowledged, JoAnn Sweets put up a ferocious fight to defend herself. (RT 4999.) During this struggle JoAnn Sweets must have lost many hairs. The absence of even a single hair matching JoAnn Sweets on the afghan, sheet, or mattress pad is compelling evidence that these materials were not involved in her attack.

In addition, it is likely that the afghan, sheet, and pad attracted carpet fibers from inside the dumpster, a "cesspool" of "contamination." (RT 3102-3103.) Prosecution witness, Melvyn Kong, a supervising criminalist for the San Diego Police Department crime lab, testified that because "a dumpster is a trash receptacle, it is, in essence, a cesspool of many different sources of fiber and hair contamination. So there is possibility of cross-contamination between anything which is in the dumpster and anything that's removed from the dumpster." (RT 3076, 3102-3103.)

Prosecution witness Michael Malone, an FBI Special Agent and Senior Examiner with the Hairs and Fibers Unit of the FBI lab in Washington D.C., testified that he would expect apartments in the same building to be carpeted with the same fiber. (RT 3141.)[86] The Jones apartment was located in a large apartment complex, whose tenants likely

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[86]Special Agent Malone testified that police should have tested the carpet in the other apartments in the Jones building to determine if there was another source of the fibers found with JoAnn Sweets. (RT 3141-3142, 3159-3160.) In addition, Mr. Malone testified that he was not informed by the prosecution that four packages of garbage were in the dumpster when the body was found (RT 2319, 2412, 2809); these should have been analyzed to determine whether they either contaminated or contributed to the fibers found with Ms. Sweets (RT 3143, 3159). Finally, Mr. Malone opined that the police should have examined JoAnn Sweets's residence on Bates Street for fibers and other evidence. (RT 3165, 3885.) None of these tasks was performed by law enforcement in this case.

used the dumpster in which JoAnn Sweets was found. (RT 2045, 2093.) These tenants also likely vacuumed the carpets in their apartments and deposited the vacuumed carpet fibers in the trash. Therefore, the carpet fibers found with JoAnn Sweets could have come from any of the other apartments in the Jones building.

A fingerprint from the exterior of the dumpster outside the Jones apartment matched Mr. Jones. (RT 2401-2403, 2824.) As the prosecution conceded to the jury: "There was some explanation tendered here about fingerprints and that, yeah, you would expect the defendant's prints to be on the dumpster. Okay. *Sure, we will give you that.* There might be some explanation for him, because he's using it." (RT 5094 [italics added].)

Not only would one expect to find Mr. Jones's fingerprints on the dumpster right outside his back door, one would also expect to find trash bags in the dumpster with his prints, particularly since a major move had just taken place with his mother relocating from the old apartment into a new one down the street. Thus, a fingerprint lifted from one garbage bag and a hand print from the other garbage bag not surprisingly matched Mr. Jones. (RT 2847-2851.)[87]

On the other hand, no fingerprints were detected on the tape used in the attempt to tape the ends of the bags together. (RT 2744-2745.) This suggests that whoever put Ms. Sweets's body in the garbage bags wore gloves, which explains why the *killer's* prints were not found on the garbage bags.

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[87]According to Special Agent Malone, the police should have processed the other garbage bags in the dumpster for Mr. Jones's fingerprints. (RT 3162.)

Moreover, when the body was found, other garbage was outside the dumpster, and loose trash was inside the dumpster. (RT 2303, 2327.) Thus, whoever put Ms. Sweets's body in the garbage bags likely took the trash-filled bags from the dumpster, emptied the bags in or around the dumpster, and then used them to wrap the body.

The prosecution's theory of the case, that the same person, acting alone, committed all the murders in a similar fashion, supports the conclusion that Bryan Jones did *not* use his property to wrap Ms. Sweets's body. Trina Carpenter's body was found in a green cloth duffel bag. (RT 2299, 2321.) The name "D. Belman" and the initials "D.B." appeared on the bag, indicating that D. Belman owned the duffel bag. (RT 2413.) Thus, whoever killed Trina Carpenter probably took D. Belman's discarded duffel bag from the dumpster and put her body in it. Similarly, whoever killed JoAnn Sweets probably took discarded bags of trash from the dumpster near the Jones apartment and put her body in them. If, as suggested by the prosecution's modus operandi theory, that the same person killed Trina Carpenter and JoAnn Sweets in the same way, then D. Belman did not kill Trina Carpenter, and Bryan Jones did not kill JoAnn Sweets because the killer's modus operandi was to wrap the victim in material not associated with him.

Evidence also pointed to Ike Jones rather than Bryan Jones as the killer.[88] Joyce Euwing, who lived at the Travelodge Motel located on 51st

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[88]The trial court ruled that it was "clear" that testimony regarding Ike Jones was "sufficient to raise a reasonable doubt on the JoAnn Sweets case" with respect to the defendant's guilt. (RT 266-267.) Moreover, according to the prosecution, "Joyce Euwing's testimony directly implicated Ike Jones in the JoAnn Sweets murder." (CT 6444.)

Street and El Cajon, testified that while she was walking to work at about 5:30 a.m. on May 9, 1986, she saw two men standing next to a small, dark four-door car near the dumpster in which JoAnn Sweets was found. The men were struggling to lift what looked like a big roll of carpet out of the back seat. (RT 3363, 3369-3370, 3382, 3389-3390, 3393-3394, 3397.) Ms. Euwing testified that it looked like the men were trying to dump the carpet; but because she was just walking by, she did not see the men put the carpet in the dumpster. (RT 3369, 3394.)[89] She recognized one of the men as Ike Jones. (RT 3371, 3374.)[90]

Ike Jones had been seen with JoAnn Sweets's boyfriend on Bates Street, where Ms. Sweets and her boyfriend lived. (RT 3884-3885.) Ike Jones's girlfriend corroborated that he drove a small, dark brown car. (RT 4231.)

Even if some or all of the jurors believed that Ms. Euwing misidentified Ike Jones, whether intentionally (Ms. Euwing did not give the police the name of Ike Jones until her fifth police interview (RT 4257, 4288-4289)) or because she was not wearing her glasses, the fact remains that she saw two men at the dumpster with a big roll of carpet. (RT 3364-3365, 3385-3386, 3396, 3404-3407, 3424, 3433, 3449, 4227-4229, 4249-4252, 4257-4258.)

Finally, the prosecutor relied on Dr. Blake's testimony in his closing argument to the jury. (RT 5002 ["And now we get the second repeat, the DNA on that sperm, 1.2,2, just like Trina Carpenter's cotton balls].) Thus,

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[89]This, of course, may explain where the carpet fibers on JoAnn Sweets originated.

[90]Ms. Euwing testified that the defendant, sitting at counsel's table, was not one of the men. (RT 3372.)

absent Dr. Blake's testimony, it is reasonably probable that Mr. Jones would have been acquitted for the JoAnn Sweets charges.

Trina Carpenter

On Tuesday, February 11, 1986, at about 9:45 p.m., the body of Trina Carpenter was found in a dumpster in an alley about a block and a half from the Jones apartment. (RT 2208-2209, 2240, 2242, 2244-2245, 2316, 3200, 4219.) Ms. Carpenter was a prostitute who was working most likely in the Bates Street area of San Diego on the evening of her death; she also used crack cocaine, spending between $100 and $200 a day on the drug. (RT 3829, 4280, 4284-4286.)

Her body was found headfirst in a green cloth duffel bag. (RT 2299, 2321.) The name "D. Belman" and the initials "D.B." appeared on the bag. (RT 2413.)

An older passenger car with blue oxidized paint was seen at about 10 p.m. parked in the alley where Ms. Carpenter was found. (RT 2223.) Eventually the car was gone. (RT 2236.) In 1986, Bryan Jones did not have a car, but drove a friend's faded blue 1980 Datsun 280-ZX sports car, though not often. (RT 2442-2444, 2450.) Mr. Jones was seen arguing with Trina Carpenter over money about a block from the Jones apartment some time between September 1985 and July 1986. (RT 3831, 3899-3901, 5438, 5440-5443.)

Although most of Dr. Blake's testimony should have been excluded, his testimony that the cotton balls found with Trina Carpenter clearly had sperm from more than one man (RT 2913, 3026-3027, 3868, 4876) was admissible because Dr. Blake could have based such testimony on the presence of alleles (though not genotypes) that could have only come from multiple parties. In fact, based on Dr. Blake's findings, the parties

stipulated that in "the Trina Carpenter case, La-Jon Van Reed, Prince Johnson, and Randy Lockwood cannot be eliminated as a potential source of the trace 4 allele associated with the sperm from the cotton balls found near Trina Carpenter's body." (RT 3868.) Thus, the evidence suggests that Trina Carpenter, a prostitute, was sexually assaulted, if at all, by more than one man, again disproving the prosecutor's modus operandi theory, that the person responsible for all the crimes acted alone when he allegedly assaulted the victims.

Moreover, as conceded by the prosecution: "The defense also produced forensic evidence that VanReed, Lockwood, and Johnson cannot be eliminated from the Carpenter murder. Further, the defense introduced circumstantial evidence and alleged admissions indicating Lockwood and VanReed were responsible for the Carpenter murder." (CT 6444.)

Although the jury hung on the Trina Carpenter murder charge, the court permitted each juror to use the Carpenter murder charge as an aggravating penalty factor under Penal Code section 190.3(b) [other violent criminal activity], so long as each juror found beyond a reasonable doubt that Bryan Jones committed the murder (RT 5982). Nevertheless, given the "alleged admissions indicating Lockwood and VanReed were responsible for the Carpenter murder,"as found by the prosecution, reasonable jurors would not have found the Carpenter murder charge an aggravating factor if Dr. Blake's testimony eliminating VanReed, Lockwood, and Johnson as potential sources of the sperm found on the cotton balls had *not* been excluded.

G. Conclusion

Based on the foregoing, it should be apparent that virtually all of the DNA evidence concerning the sperm samples should have been excluded, except for evidence of multiple alleles, which established multiple contributors to each sample. The DNA evidence that remains fatally undermines the prosecutor's modus operandi theory that the perpetrator of all the charged crimes was the same man acting alone.

Moreover, absent the DNA evidence that should have been excluded, it is reasonably probable that Mr. Jones would have been acquitted of the Glover and Sweets charges (*People v. Venegas*, *supra*, 18 Cal.4th at p. 93 [citing *People v. Watson* (1956) 46 Cal.2d 818, 836]), and respondent would not be able to show that the death verdict was surely unattributable to the errors. (*People v. Clair*, *supra*, 2 Cal.4th at p. 678 [citing *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448, and *Chapman v. California*, *supra*, 386 U.S. at p. 24]; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279].) Hence, reversal of the murder convictions, special circumstances, and death sentence is warranted.

11.

THE COURT ERRED IN ADMITTING IRRELEVANT, UNRELIABLE, HIGHLY INFLAMMATORY EXPERT WITNESS TESTIMONY, WHICH AMOUNTED TO NO MORE THAN IMPERMISSIBLE LEGAL CONCLUSIONS AND FORBIDDEN CHARACTER EVIDENCE, ABOUT A NON-EXISTENT SUBFIELD OF PSYCHOLOGY, "SEXUAL HOMICIDE," AND WHICH WAS BASED ON AN UNACCEPTED USE OF THE RORSCHACH TEST.

A. Proceedings Below

Before trial, Mr. Jones moved to exclude the testimony of Dr. Reid Meloy, a forensic psychologist and purported expert on "sexual homicides," based on various grounds, including the Fifth and Fourteenth Amendments, analogous provisions of the California Constitution, Evidence Code sections 21(a), 210, 350, 352, 720, 801, 1100, 1101, 1102 and "*Kelly-Frye*" (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C.Cir. 1923) 293 F. 1013). (CT 5007, 5013, 5021-5022, 5024; RT 755-759.) Mr. Jones argued that Dr. Meloy's testimony was (1) based on unreliable and invalid research; (2) irrelevant; (3) improper expert testimony because it would not assist the jury; (4) misleading and confusing (CT 5024, 5550-5551, 5557-5559); (5) prohibited under *Kelly-Frye* (CT 5552-5557); and (6) impermissible character and profile evidence (RT 756, 759).

The prosecution proffered Dr. Meloy's "testimony as circumstantial evidence to explain the motive, mental state, and methods of committing the instant cases." (CT 4857.) It expected that Dr. Meloy would "explain in psychological terms why an individual would violently assault a willing sexual partner," and that the jury would be "assisted by his testimony in deciding whether the requisite mental state has been proven." (CT 4860.)

The prosecution also expected that Dr. Meloy would "present a motive for what appears to be random killings." (CT 4862.)

Dr. Meloy testified at a pretrial hearing that he and his colleagues conducted a study where they "looked at" 18 sexual homicide perpetrators and compared them to a group of psychopaths. (RT 532.) The study, entitled "A Rorschach Investigation of Sexual Homicide" (CT 5055), defined a sexual homicide as "the intentional killing of another human being during which there is evidence of sexual activity by the perpetrator." (CT 5057.) Although Dr. Meloy's study defined sexual homicides as intentional, he acknowledged in his pretrial testimony that sexual homicides can be "accidental." (RT 489-490.)

Through the use of Rorschach tests (CT 5058), Dr. Meloy "investigate[d] the structural personality characteristics of a sample of incarcerated individuals who had committed at least one sexual homicide to better understand their internal psychological operations." (CT 5057.) Dr. Meloy's study concluded that (1) "sexual homicide perpetrators seem to contain, and then be overwhelmed, at times, by [primitive] impulse" (CT 5064); (2) obsessional thoughts "may motivate a common antecedent behavior, such as drug and alcohol use, prior to the sexual homicide, to dampen such thoughts" (CT 5066); (3) "the sexual homicide literature ... has repeatedly mentioned the obsessive-compulsive nature of sexual homicide, particularly serial sexual homicide" (*ibid.*); and (4) the "reality testing" of sexual homicide perpetrators is "seriously impaired" in that sexual homicide perpetrators have a "perceptual inability to accurately distinguish between internal and external stimuli" (CT 5067), for example, the sexual homicide perpetrator might think that the victim is the aggressor,

rather than the converse (RT 532).[91]

The prosecutor argued to the court that Dr. Meloy's testimony went "directly to the mental state that we have to prove, and we are stuck with a circumstantial evidence case. We have to prove malice; willful, deliberate, and premeditated conduct on the part of whoever did this crime. He gives us circumstantial evidence of that." (RT 589.) The prosecutor also stated: "We do have to prove intent. ... We have to prove what was in their mind, and I don't think it's clear. In fact, I think it's very unclear as to why somebody would kill someone who is a willing sexual partner. [¶] Dr. Meloy answers that for us ...." (RT 649.) Finally, the prosecutor explained: "He's being offered only to show what goes through the minds of people who do these types of crimes ...." (RT 759.)

The court ultimately excluded some of Dr. Meloy's opinions, but also ruled that he could testify on the issues of intent and motive. (RT 774, 1219.) Relying on *People v. Bledsoe* (1984) 36 Cal.3d 236, the court stated: "His testimony is simply to give the jury insight into the motive and intent that may go behind a sexual homicide, and such testimony is highly relevant where lay persons will probably find it incomprehensible why a prostitute would be murdered for sex when the sex could be obtained voluntarily." (RT 767-768.) The court expected that Dr. Meloy would "dispel what may

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[91]In the pretrial hearing, Dr. Meloy explained what he meant by difficulty distinguishing between internal and external stimuli: "To give you a specific example of that, the sexual homicide perpetrator might feel rage toward the victim, but at the moment he's feeling rage toward her, he thinks she's really angry at him. *So she becomes a threat* which may then perpetuate the killing, and that uses a mechanism we call projection, where you project from within yourself feelings outside yourself. So that there is confusion in these fellows between what they feel internally versus what's coming in from the outside." (RT 532 [italics added].)

be misperceptions by the jury that nobody would kill for sex when you have got a prostitute there." (RT 774.)

The court further stated: "Dr. Meloy's testimony would be limited to just that portion that would dispel any confusion on the jury's part concerning the intent of somebody where there is the killing of a willing prostitute for sex. So I think the people are entitled to dispel that confusion ...." (RT 1199.) Finally, the trial court stated its ruling as follows: "And it is that one narrow issue of which I'm confident that the appellate courts would allow this in and that is to deflect what would be a common misunderstanding among jurors: that they cannot understand, a layperson, I think, would have a very difficult time understanding how you can tie up a killing for sex or in the course of sex when you have got a willing prostitute." (RT 1221.)

The court based its ruling on its view that in "the psychological area, [Dr. Meloy] has got terrific data from which he has worked, which is people who have actually done these things and told him what they did and why they did it and what they were thinking about, and I cannot think of how that would be misleading data or bad data material. It has got to be very good data material. We're working with people who have nothing to lose, who have nothing better to do than talk to somebody and get it off their chest, tell them what was on their mind when they did it. The passage of time should not have anything to do with it. So you could not get a better background from working." (RT 591-592.) Thus the court allowed Dr. Meloy to opine at trial on the issue of intent and motive because it believed that Dr. Meloy had actually interviewed sexual homicide perpetrators who told him why they committed these crimes and what they were thinking about when they killed their victims.

Trial

Dr. Meloy testified at trial that he was the former chief of forensic psychiatric services for San Diego County and a board certified forensic psychologist. (RT 3250, 3253-3254.) He told the jury that he was an expert in a subfield of psychology dealing with sexual homicides. (RT 3254-3255.) He opined that a sexual homicide is "the intentional killing of another human being during which there is evidence of sexual activity by the perpetrator." (RT 3258.) He defined sexual activity as sexual arousal before, during, or after the killing, or the existence of physical evidence of sexual activity (such as semen deposits) before, during, or after the killing. (RT 3258.)

Dr. Meloy also testified that psychologically, the motivation of a sexual homicide is different than that of a common homicide. He agreed that with a sexual homicide, there is a motivation, desire, or intent that "drives" the activity. He noted: "The intent in sexual homicide, and the reason that sexual homicides exist, is that the person who does this, his rage toward women, his violence toward women, and the woman's suffering under his domination is his biggest sexual turn on." (RT 3259.) The person "is sexually aroused by the act of violence toward the victim, who is usually a woman, and he ... usually will get an erection and usually will want to reach orgasm before, during, or after the killing." (*Ibid.*) Dr. Meloy also told the jury that a sexual homicide was "goal-oriented behavior," which he defined as "behavior where there is a purpose to it and there is an end that the person wants to get to by doing particular things." (RT 3260.)

On redirect, Dr. Meloy told the jury that the 18 sexual homicide perpetrators interviewed for his study did not actually tell him what they did and why they did it and what they were thinking about: "we did not

interview them about their specific motivation for their sexual homicide. The reason we didn't is that with subjects who have engaged in this kind of behavior there may be a lot of distortion around why they did what they did coming out of their own mouths. So you have to be careful to not base your study only on what the person has said." (RT 3265.)

The prosecutor began and ended his guilt-phase argument to the jury by invoking Dr. Meloy's testimony. (RT 4971, 5026, 5102.) He initially explained to the jury that Dr. Meloy provided a definition of a sexual homicide perpetrator as "someone who intentionally kills during a sexual act, and that's what we have here." (RT 4971.) The prosecutor then argued: "Dr. Meloy tells us what sexual homicide people do, what they want, what motivates them, what causes them to act. They have that rage, that violence towards women. 'Make them hurt, dominate them, hurt them and that makes me feel better. That gives me a better orgasm. That is what I need. That is what I want. That is what I will get.' He talks about the woman suffering being their greatest turn-on, and it had to be. It had to be. And that it is goal directed behavior. 'I want to achieve something. So I am going to do it. I intend to achieve it. I will do it.' Dr. Meloy gives us the motive for these crimes." (RT 5026.) Lastly, the prosecutor insisted: "And much like Dr. Meloy told us, he had to like it. It made him feel good. It was the type of sex that he wanted, that he needed." (RT 5102.)

B. Standard of Review

On appeal, the admission of expert witness testimony is subject to an abuse of discretion standard of review. (*People v. Smith* (2003) 30 Cal.4th 581, 627.)

C. Dr. Meloy's Testimony (1) Did Not Come Within the "*Bledsoe* Exception," and (2) Could Not Be Admitted to Prove Intent or Motive, Even Assuming Each Was a Fact in Issue, as His Testimony Was Logically Irrelevant.

1. The Expert's Testimony Did Not Satisfy the *Bledsoe* Exception.

Although the court admitted Dr. Meloy's testimony purportedly based on the "*Bledsoe* exception" (*People v. Bowker* (1988) 203 Cal.App.3d 385, 392), the exception does not apply here. In *Bledsoe*, this Court held that it was impermissible for an expert to testify that a complaining witness suffered from rape trauma syndrome to prove that the witness had actually been raped. (*Id.* at p. 251.) Nevertheless, *Bledsoe* established an exception "that such testimony is admissible to rehabilitate the complaining witness when the defendant impeaches her credibility by suggesting that her conduct after the incident – e.g., a delay in reporting – is inconsistent with her testimony that she was raped." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 [citing *Bledsoe* at pp. 247-248].) *Bledsoe* reasoned that "in such a context expert testimony on rape trauma syndrome would play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." (*Bledsoe*, 36 Cal.3d at pp. 247- 248; see also *People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1302-1304 [to dispel commonly held stereotypes, expert may testify that there is no profile of a typical molester and that such persons are found in all walks of life].)

The commonly held misconception in *Bledsoe* was that any rape victim would promptly report an attack so that any delay in reporting was

evidence that a rape never happened. (*People v. Bledsoe*, *supra*, 36 Cal.3d at pp. 247-248.) A commonly held misconception in *McAlpin* was that child molesters are old men in shabby clothes who loiter in playgrounds. Since Mr. McAlpin did not meet the stereotype, the jury might believe no abuse occurred. (*People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1302-1304.) Thus, courts have held that expert testimony can be admitted to rebut popular myths, but cannot be admitted to prove a fact in issue. (*Id.* at pp. 1300-1301 [expert opinion testimony on "child sexual abuse accommodation syndrome" is admissible when offered to dispel common misconceptions the jury may hold as to how such children react to sexual abuse]; see also *People v. Erickson* (1997) 57 Cal.App.4th 1391, 1401 [evidence under *Bledsoe* is admissible only to "disabuse jurors of 'common sense' misconceptions . . . not to prove a fact in issue"].)

In *People v. Bowker*, *supra*, 203 Cal.App.3d 385, cited with approval in *People v. McAlpin*, *supra*, 53 Cal.3d at p. 1300, the appellate court stated that under the *Bledsoe* exception, testimony may be used to disabuse the jury of common misconceptions if "at a minimum," the testimony is "targeted to a specific 'myth' or 'misconception' suggested by the evidence." (*People v. Bowker*, *supra*, 203 Cal.App.3d at pp. 393-394 [citing *Bledsoe*, *supra*, 36 Cal.3d at pp. 247-248]; see also People v. Wells (2004) 118 Cal.App.4th 179, 188 ["The evidence must be tailored to address the specific myth or misconception suggested by the evidence"]; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 158 [following *Bowker*]; *People v. Bothuel* (1988) 205 Cal.App.3d 581, 587 [same].)

Typically, "it is the People's burden to identify the myth or misconception the evidence is designed to rebut. Where there is no danger of jury confusion, there is simply no need for the expert testimony."

(*People v. Bowker*, *supra*, 203 Cal.App.3d at p. 394 [citing *Bledsoe*, *supra*, 36 Cal.3d at p. 248]; see also *People v. Harlan* (1990) 222 Cal.App.3d 439, 449 [prosecutor explicitly identified misconceptions about victims' behavior, i.e., delayed disclosure and inconsistent statements, that expert's testimony was intended to rebut].)

In this case, the prosecution identified the purported myth as "why kill a willing sexual partner." (RT 588.) The court identified the "common misunderstanding among jurors: that they ... would have a very difficult time understanding how you can tie up a killing for sex or in the course of sex when you have got a willing prostitute." (RT 1221.) In other words, according to the court and prosecution, the common myth that prevailed among the public was that prostitutes are not killed for sex because prostitutes are willing to provide sex.

The *Bledsoe* exception is inapplicable here for four reasons. First, as *Bledsoe* and its progeny made plain, there must be evidence that the misconception or myth actually exists and is a common, prevailing one. Thus, for example, in *McAlpin* this Court relied on numerous studies by behavioral professionals showing a widespread public image of child molesters as old men in shabby clothes who loiter in playgrounds. (*People v. McAlpin*, *supra*, 53 Cal.3d at p. 1302.) No such similar showing was made in this case. The trial court instead relied on the prosecutor's unsubstantiated claim that jurors would not understand why someone would kill a prostitute willing to have sex. The prosecution produced no literature, cited no case law, and elicited no expert testimony that any such

misconception exists among any members of the public.[92]

Moreover, the trial court and Dr. Meloy acknowledged, respectively, that sexual homicides are "rare" and of "low frequency" (RT 590, 650; CT 5069), which suggests that, unlike rape and child abuse, there are no *common* misconceptions about sexual homicides. Thus, because there was no evidence that any popular myths existed concerning the rare crime of sexual homicide, the trial court had no basis for employing the *Bledsoe* exception, and because there was no danger of jury confusion, there was simply no need for Dr. Meloy's testimony. (*People v. Bowker*, *supra*, 203 Cal.App.3d at p. 394 [citing *Bledsoe*, *supra*, 36 Cal.3d at p. 248].)

Second, even if isolated members of the public might believe a myth that prostitutes are not killed for a sexual motivation, the jurors in this case believed no such thing. Each sitting juror was asked the following in a written questionnaire:

> 81. Evidence will be presented in this case that some of the victims were prostitutes. Do you believe that prostitutes, because of their way of life, are entitled to any greater or lesser protection as victims than other persons?

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[92]The court and prosecution's underlying premise is suspect as well. Neither the court nor the prosecution distinguished among sex acts. It is one thing to assume that all prostitutes are willing to have vaginal intercourse in exchange for compensation, it is quite another to assume that all prostitutes are willing to have anal sex, a significant distinction here relating to relevance because sodomy was alleged twice as a special circumstance and charged once as an additional substantive crime. (CT 5803.) Moreover, the assumption that jurors would not understand why someone would kill a prostitute willing to have sex was contradicted by the court's own observation that there was no evidence that a prostitute would sell anal intercourse and the court's conclusion that "the clear inference one can draw is that she doesn't do that or wouldn't do that." (RT 4750-4751.)

82. Some people believe that prostitutes cannot be raped. Do you share that attitude?

(CT 5686 [13th page].) Each seated juror answered that prostitutes are entitled to protection equal to that of other victims and that *they can be raped*. (CT 7451, 7475, 7499, 7523, 7547, 7571, 7595, 7619, 7643, 7667, 7691, 7715, 7763.) Thus, this jury understood that although prostitutes consent to sex under certain circumstances, they can still be raped like any other sexual assault victim. And like some victims of sexual assault, prostitutes may be killed to eliminate the one witness to the crime. (See, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 350 ["Evidence of motive is clearly present. Both victims were killed in connection with sexual assaults when they screamed and fought violently. The jury might reasonably infer they were killed to silence them and conceal the crime. Further, given the assaults with the baseball bat, biting the victims' breasts, and burning their pubic hair, the jury might even infer that strangulation was sexually motivated, a part of the total abuse of the victims in this case."].) Thus, the jurors in this case did not need to be disabused of a purported myth that they did not believe. (Cf. *People v. Price* (1991) 1 Cal.4th 324, 398 ["voir dire provided effective means to remove any jurors who might have been so prejudicially influenced that they could not fairly try case"].)[93]

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[93]One reason why the jurors in this case were not misled by the purported myth cited by the trial court and prosecution might be that the plight of prostitutes has received considerable attention and jurors have likely become aware of reports that prostitutes are often sexually assaulted. (See, e.g., Clifford, *School for "Johns" a Reality Check on Prostitution Education: One-day course for customers shows the seamy side of streetwalking. It also depicts the women's suffering*, L.A. Times (March 2,

Third, as *Bowker* stated, "at a minimum the evidence must be *targeted* to a specific 'myth' or 'misconception' ...." (*People v. Bowker*, *supra*, 203 Cal.App.3d at pp. 393-394, italics added [citing *Bledsoe*, *supra*, 36 Cal.3d at pp. 247-248].) Dr. Meloy's testimony, concerning the psychological intent and motive of a sexual homicide perpetrator, was primarily based on his study of 18 prisoners who had committed at least one sexual homicide. (RT 3255, 3258-3260; CT 5057.) There was no evidence that any of the victims of these homicides was a prostitute. There was also no evidence that the subjects whom Dr. Meloy studied had killed willing sexual partners. In fact, Dr. Meloy provided no evidence that he had ever studied homicides involving prostitutes or willing sexual partners. Thus, Dr. Meloy's testimony could not have been targeted to the specific popular myth, even assuming its existence, that prostitutes or willing sexual partners are not killed for sex.[94]

1997) p. B-6 [studies show that almost 70 precent of the street prostitutes in San Francisco have been raped]; Leidholdt, *Prostitution: A Violation of Women's Human Rights* (1993) 1 Cardozo Women's L.J. 133, 138 [same]; Corwin, *Life on the Street – New Wave of Prostitution With More Violence Is Overwhelming L.A. Authorities*, L.A. Times (Dec. 8, 1985) p. 1 ["Most of the women who have worked the streets for any length of time have also been assaulted and tortured"].)

[94]Dr. Meloy testified in the pretrial hearing that five books provided him "clinical and research guidance" (RT 522), including "Sexual Homicide Patterns and Motives" by Robert Ressler, Ann Burgess, and John Douglas, a 1988 study of 36 sexual homicide perpetrators (RT 524). According to the prosecutor, Dr. Meloy relied on this study in reaching his *pretrial* opinions. (RT 588.) Nevertheless, *at trial* Dr. Meloy only mentioned that he was familiar with an FBI study of 36 individuals. He did not expressly rely on the study or further identify it. (RT 3256-3257.) Assuming the FBI study and the Ressler study are the same, Dr. Meloy did not rely on it for his trial testimony most likely because the FBI study

Moreover, because the trial court permitted Dr. Meloy to testify on the issue of motive and intent in sexual homicides, his testimony went well beyond targeting or rebutting any myth. (Cf. *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1386 [expert testimony on posttraumatic syndrome affecting sexually abused children was proper where it was "fastidiously tailored to meet credibility issues defense counsel had raised"].) Instead of testifying, for example, that studies and the applicable literature (assuming both exist) show that it is not unusual for sex to be the motive where prostitutes have been killed, Dr. Meloy told the jury that every sexual homicide is intentional, goal-oriented, and purposeful (RT 3258-3260),

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related to other opinions that the trial court had excluded (RT 523, 1218-1222), and because Dr. Meloy found the study invalid to support psychological testimony (RT 3265 ["you have to be careful to not base your study only on what the person has said. The FBI study used a lot of self-report information."]; CT 5441 ["One of the shortcomings besides the uncontrolled nature of the FBI study was the fact that even though they interviewed these individuals and used extensive data gathering from prior histories, independent of self-report of the individuals, one of the other shortcomings was that they had not done any psychological testing or neuropsychological testing of any of their sample of 36"]; CT 5468 ["The weakness of the study is that it was not a controlled study. In other words, they did not compare the study to groups, to another group of individuals that had not committed sexual homicide. So even though we have got some respectable data on sexual homicide perpetrators, the data in this FBI study does not allow us to say that these individuals, given particularly their early histories, can be distinguished from other people"]; CT 5484 ["The FBI study lacked certain controls that would be accepted methodology in the scientific or psychological community"]). The lack of control groups is particularly telling because the scientific community does not know the percentage of those in the general population who are sexually aroused by violence but who do not commit sexual offenses. Also, there was no evidence that the authors of "Sexual Homicide Patterns and Motives," presumably FBI agents (RT 523), were psychiatrists or psychologists.

and, therefore, first degree murder, going well beyond rebutting a purported myth that prostitutes are not killed for sex. (Cf. *People v. McAlpin*, *supra*, 53 Cal.3d 1289, 1302 [holding that it was no abuse of discretion to admit prosecution expert testimony that it would not be unusual for a parent to refrain from reporting a child molestation until actually confronted with the fact by a law enforcement agency].)

In arguing to the court that Dr. Meloy's testimony went "directly to the mental state that we have to prove, ... malice; willful, deliberate, and premeditated conduct on the part of whoever did this crime, " (RT 589), the prosecutor proved that he well understood that Dr. Meloy's expert testimony went far beyond simply rebutting an imaginary myth. Moreover, the prosecutor again manifested this understanding when he expressly invoked Dr. Meloy's powerful testimony to begin and end his arguments to the jury. (RT 4971, 5026, 5102.) Dr. Meloy's testimony was the centerpiece of the prosecution's case-in-chief; it was not mere rebuttal evidence targeted at a specific myth. Hence, like the expert's testimony in *Bowker*, "which far exceeded the permissible limits of the *Bledsoe* exception," Dr. Meloy's testimony should have been excluded. (*People v. Bowker*, *supra*, 203 Cal.App.3d at p. 394.)

Fourth, the evidence did not "suggest" the myth found by the trial court. (*People v. Bowker*, *supra*, 203 Cal.App.3d at pp. 393-394 [citing *Bledsoe*, *supra*, 36 Cal.3d at pp. 247-248] [the popular myth or common misconception must be suggested by the evidence].) In *Bledsoe*, the Court endorsed expert testimony on rape trauma syndrome in cases where "the alleged rapist has suggested to the jury that some conduct of the victim after the incident ... is inconsistent with her claim of having been raped ... to rebut such an inference ...." (*Bledsoe*, *supra*, 36 Cal.3d at p. 247.)

Similarly, in *McAlpin*, the expert's testimony about the stereotypical child molester was admissible in the prosecution's case-in-chief because the jurors already knew that the defendant did not fit the stereotype. (*People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1303-1304.)

Here, however, there was nothing in the evidence that suggested prostitutes are not killed for a sex-related motive. Mr. Jones's defense was that someone else murdered the victims, in the case of JoAnn Sweets, Ike Jones and an accomplice, and in the case of Sophia Glover, a man who attacked her the day before she died. Moreover, there was no evidence that JoAnn Sweets and Sophia Glover were prostitutes so that any purported myth about prostitutes would not apply to them. (RT 4851.) The defense and the evidence never suggested that these deaths were not motivated by sex. Hence, the *Bledsoe* exception is inapplicable here.

2. Dr. Meloy's Testimony Was Logically Irrelevant.

Apart from failing to qualify under the *Bledsoe* exception, Dr. Meloy's testimony was inadmissible under *Bledsoe* for another reason – it was logically irrelevant to this case and could not be admitted to prove any fact in issue, such as motive or intent, even assuming either was in issue. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1160 ["A careful reading of *Bledsoe* reveals that our primary concern was the logical irrelevance of the evidence"]; *People v. Erickson*, *supra*, 57 Cal.App.4th at p. 1401 [evidence under *Bledsoe* is not admissible "to prove a fact in issue"].) Dr. Meloy's opinions about the psychological motivation and intent behind sexual homicides was chiefly based on his study, "A Rorschach Investigation of Sexual Homicide," where he "investigate[d] the structural personality characteristics of a sample of incarcerated individuals who had committed at least one sexual homicide to better understand their internal

psychological operations." (CT 5057.) Dr. Meloy's study stated that "[t]he Rorschach was selected as our investigative tool given its reliability and validity (Exner, 1990) in studying criminal populations (Gacono & Meloy, 1992)." (CT 5058.) Note that Dr. Meloy cites himself as authority for the assertion that Rorschach tests are reliable in studying criminals.

It would take a great leap of faith to believe that giving Rorschach tests to prisoners reliably reveals their motive and intent at the time they committed their crimes years before, especially since, as Dr. Meloy conceded, he never actually asked any of his 18 subjects why they committed their crimes or what they were thinking when they committed them. (RT 3265.) More significant, though, is that it cannot possibly be logically relevant that in this entire country, 18 prisoners, "a small sample of sexual homicide perpetrators," as Dr. Meloy admitted it was (RT 483), had certain motives and intents, when they committed *their* crimes, to the issues of the motives and intents of the killer or killers of Sophia Glover and JoAnn Sweets. There is simply no rational connection between the 18 test takers and the deaths of these two women.

Accordingly, the trial court erred in admitting Dr. Meloy's testimony because it did not come within the *Bledsoe* exception, and it violated *Bledsoe's* prohibition against admitting logically irrelevant evidence to prove a fact in issue.

D. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Section 720 Because His Purported Field of Expertise, the Psychology of Sexual Homicide, Does Not Exist.

Dr. Meloy is a psychologist, but no one suggested that he was an expert in all things psychological. Thus, if he had an expertise, it was in a subfield of psychology. Dr. Meloy identified that subfield of psychology as

"sexual homicide." (RT 3254-3255.) But there is no such subfield, or at the very least, the prosecution failed to show its existence. Hence, Dr. Meloy's testimony on the psychology of sexual homicide was impermissible and should have been excluded. (Evid. Code, § 720.)

Evidence Code section 720(a) provides:

> A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an *expert on the subject* to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education *must be shown* before the witness may testify as an expert.

(Italics added.) Citing section 720, Mr. Jones objected to Dr. Meloy's testimony. (CT 5013.) Thus, before Dr. Meloy was permitted to testify, the prosecution was required to show that there was a field of expertise in psychology dealing with sexual homicide. (*People v. Williams* (1989) 48 Cal.3d 1112, 1136 ["The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, *the field of expertise must be carefully distinguished and limited*" (italics added, internal quotes omitted)].) Because the prosecution failed to carry its burden, the court erred in allowing Dr. Meloy to testify on the psychology of sexual homicide.

Dr. Meloy's pretrial evidence failed to show that a subfield in *psychology* dealing with sexual homicide exists, though there may be such a subfield in law enforcement. Dr. Meloy testified that portions of five books provided him "clinical and research guidance" (RT 522) including (1) a *20-page* section on sexual homicide from "The Crime Classification Manual" by John Douglas, Ann Burgess, Allen Burgess, and Robert Ressler, all FBI

agents; (2) "Sexual Homicide Patterns and Motives" by Robert Ressler, Ann Burgess, and John Douglas, a 1988 study of 36 sexual homicide perpetrators (RT 524), which, according to Dr. Meloy, was the "definitive study on sexual homicide," but which, as noted, was authored by FBI agents, not by psychiatrists or psychologists (CT 5438); (3) a *section* on investigating sexual homicides from "Practical Homicide Investigation" by Vernon Geberth (RT 526), a homicide investigator, not a psychiatrist or psychologist; (4) a *26-page* chapter called "The Compulsive Homicides" from "Psychopathology of Homicide," a 1981 book by Revitch and Schlesinger (RT 527) (Dr. Meloy testified that psychiatrist Eugene Revitch had "taken the lead on presenting case studies which underscore the compulsive endogenous nature of sexual homicide" (RT 528)); and (5) Dr. Meloy's book, "The Psychopathic Mind," in which he wrote "about a number of issues related to psychopathy and sexual homicide" (RT 528-529).

Except for Dr. Meloy's bald assertion that a subfield in psychology dealing with sexual homicide exists (RT 3254), the prosecution identified only one other psychologist or psychiatrist – Eugene Revitch – who had even mentioned the term "sexual homicide." Thus, taking the most generous view of Dr. Meloy's pretrial testimony and the prosecution's evidence, only one psychiatrist (Revitch) and one psychologist (Meloy) believe that sexual homicide as a subfield of psychology even exists.[95] This

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[95]In his pretrial testimony, Dr. Meloy mentioned a German psychiatrist, Krafft-Ebing, who wrote in the late 19th century about an extreme form of sexual aggression, but Dr. Meloy did not claim that he

amounts to nothing more than ipse dixit.

In addition, Dr. Meloy admitted that his definition of sexual homicide is not contained anywhere in the diagnostic literature. (RT 3261.) For example, sexual homicide is not recognized by the DSM-IIIR or ICD-9 (American Psychiatric Association, 1987).[96] Dr. Meloy tried to minimize this deficiency by asserting that "sexual homicide has recently been categorized as one of four motivational types of homicide." (CT 5057.) But note that Dr. Meloy did not cite a psychiatrist or psychologist for this assertion; he merely cited four FBI agents – Douglas, Burgess, Burgess, and Ressler – as his authority. (*Ibid.*) He might well have said that sexual homicide had recently been categorized by a coroners' association, but that too would have nothing to do with the *psychology* of sexual homicide. One cannot be an expert in the subfield of psychology unless it exists, and there is no subfield of psychology dealing with sexual homicide.

Further evidence that sexual homicide is not a recognized subfield of psychology is reflected in the results of a January 15, 2004 Westlaw search ("sexual homicide") of 17 journals in psychology, which turned up exactly one reference to sexual homicide, and that was to Dr. Meloy's study ("A Rorschach Investigation of Sexual Homicide") in Butcher & Rouse, *Personality: individual differences and clinical assessment* (Jan. 1, 1996) 47 Annual Review of Psychology 1, 87 [1996 WL 14079374]. The

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relied on Krafft-Ebing in reaching his opinions on the intent and motive of sexual homicide. (RT 481.)

[96]The DSM-IIIR, a specialized diagnostic manual for psychiatrists, and the International Classification of Diseases (ICD-9) are manuals that categorize diseases. (*People v. Cegers* (1992) 7 Cal.App.4th 988, 993.)

following 16 journals, however, made no mention of sexual homicide: American Journal of Community Psychology; American Journal of Orthopsychiatry; American Journal of Psychology; Cognitive Psychology; Criminal Justice & Behavior; Developmental Psychology; Journal of Abnormal Child Psychology; Journal of Black Psychology; Journal of Child Psychology & Psychiatry & Allied Disciplines; Journal of Personality; Journal of Personality & Social Psychology; Personality & Social Psychology Bulletin; Personality Profile; Psychological Record; Psychological Science; and Social Cognition.

Finally, based on a January 6, 2004 Westlaw search ("sexual homicide") of All Federal and State Cases, Dr. Meloy appears to be the only psychologist or psychiatrist in the country to testify on the subject of sexual homicide. (See *Masters v. People* (Colo. 2002) 58 P.3d 979, 989 ["Prior to this case, Dr. Meloy had been qualified as an expert in sexual homicide five times"].) Contrary to Dr. Meloy's testimony, there is no recognized subfield in psychology dealing with sexual homicide, and thus there is no recognized expertise in this area.

The trial court questioned whether Dr. Meloy had the necessary "expertise yet in our early stages of research to go forward." (RT 591.) As shown, Dr. Meloy did not. No one does. The trial court erred in admitting Dr. Meloy's testimony under Evidence Code section 720.

E. Dr. Meloy's Testimony – Amounting to Legal Conclusions – Was Inadmissible under Evidence Code Section 801(a).

California law allows expert testimony that is related "to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801(a).) Although an expert opinion may embrace the ultimate issue decided by the jury (Evid. Code, §

805), an expert may not "testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence." (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841; see also *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972 ["the admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes"].) Hence, an expert's legal conclusions are inadmissible under Evidence Code section 801. (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1185.)

Moreover, this Court has held that "the definition of a statutory term is a matter of law on which the court should instruct the jury; it is not a subject for opinion testimony." (*People v. Torres*, *supra*, 33 Cal.App.4th at p. 46 [citing *People v. Carroll* (1889) 80 Cal. 153, 158, *People v. Rose* (1890) 85 Cal. 378, 382, and *People v. Gosset* (1892) 93 Cal. 641, 645-646].) Thus, a witness may not express an opinion as to the definition of a crime. (*Ibid.*)

Here, Dr. Meloy defined a particular kind of homicide, a sexual homicide, as "the intentional killing of another human being during which there is evidence of sexual activity by the perpetrator." (RT 3258.) But the definition of a crime is the business of the court, and not that of a witness. (See, e.g., CALJIC No. 8.00 [defining homicide]; CALJIC No. 8.10 [defining murder]; CALJIC No. 8.20 [defining first degree murder]; CALJIC No. 8.30 [defining second degree murder].)

Dr. Meloy also offered the legal conclusions that all sexual homicides are intentional, purposeful, goal-oriented, and motivated by sex. (RT 3260.) Expressing this opinion was tantamount to telling the jury that all killings involving sex are deliberate and premeditated first degree murders. (See *People v. Whitfield* (1994) 7 Cal.4th 437, 464-465 (conc. and

dis. opn. of Mosk, J.) [in an express-malice killing, "a specific intent crime, the jury would have to find the defendant carried out goal-oriented behavior, meaning that the defendant had the further precise purpose to kill when performing the lethal act "].) Thus, Dr. Meloy's expert testimony – defining crimes, which the court should do, and offering legal conclusions, which the jury should draw from the facts and law of the case – was inadmissible under Evidence Code section 801, and should have been excluded. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1099 [an expert must not usurp the function of the jury]; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 [an expert may not testify that a "specific individual had specific knowledge or possessed a specific intent"]; *Summers v. A. L. Gilbert Co., supra*, 69 Cal.App.4th at p. 1181 ["allowing an expert to voice an opinion on an issue of law usurps the authority of the court"]; *People v. Alva* (1979) 90 Cal.App.3d 418, 427 ["Psychiatric testimony which has the tendency to decide rather than to inform is inadmissible"]; *United States v. Duncan* (2d Cir. 1994) 42 F.3d 97, 101 ["Generally, the use of expert testimony is not permitted if it will 'usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it'"].)

F. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Section 801(b) Because It Was Unreliable.

Evidence Code section 801(b) limits the admissibility of expert opinions only to those "[b]ased on matter ... that is of a type that *reasonably may be relied upon* by an expert in forming an opinion upon *the subject* to which his testimony relates ...." (Italics added.) "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*People v. Boyette* (2002) 29 Cal.4th 381, 449 [citation and internal quotes

omitted].) Thus, under section 801(b), an expert's testimony "must be reliable" (*People v. Bowker*, *supra*, 203 Cal.App.3d at p. 390; Cal. Law Revision Com. com., Evid. Code § 801 [an expert's opinion must be based on "reliable matter"]); and "[a]n expert's opinion, even if uncontradicted, may be rejected if the reasons given for it are unsound" (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523; *Griffith v. Los Angeles County* (1968) 267 Cal.App.2d 837, 847 [expert opinions, though uncontradicted, are worth no more than the reasons and factual data on which they are based]).

The Federal Rules of Evidence, too, require that an expert's opinion "'rests on a reliable foundation.'" (*Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137, 141 [quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 597]; Fed. Rules Evid., rule 703.) In determining the admissibility of an expert's testimony, the United States Supreme Court has directed trial courts to consider whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; and whether the theory or technique enjoys general acceptance within a relevant expert community. (*Kumho Tire Co., Ltd. v. Carmichael*, *supra*, 526 U.S. 137, 149-150.) Thus, the high court held in *General Electric v. Joiner* (1997) 522 U.S. 136, that studies relied on in that case were an insufficient basis for the expert opinions, and therefore the testimony was inadmissible. In so holding the Court stated that "nothing in ... the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." (*Id.* at p. 146.) This Court should take the same approach in applying Evidence Code section 801(b)'s reliability mandate.

For several reasons, there was simply too great an analytical gap between Dr. Meloy's study and his opinions. First, in his study, Dr. Meloy concluded that sexual homicide perpetrators can be impulsive, compulsive, self-medicated on alcohol and drugs before committing the homicide, and seriously impaired to the point that the perpetrator actually sees the victim as a threat. (CT 5064, 5066, 5067, 5068 ["This attitude of specialness, perhaps mixed with a sense of impunity, could disinhibit sexual and aggressive impulses aroused in the presence of a victim"]; RT 532.) In his testimony, however, Dr. Meloy stated quite the opposite. Without equivocation or qualification, he testified that all sexual homicides are intentional, goal-directed, and purposeful. (RT 3258, 3260.) Thus, Dr. Meloy's so-called expert testimony was contradicted by his own study. It was also contradicted by the one mental health professional on whom Dr. Meloy relied for his opinion, psychiatrist Eugene Revitch, who, according to Dr. Meloy, had "taken the lead on presenting case studies which underscore the *compulsive* endogenous nature of sexual homicide." (RT 528 [italics added].) For this reason alone, Dr. Meloy's opinions were unreliable and should have been excluded under section 801(b).

Second, in his pretrial testimony, Dr. Meloy virtually conceded the tentative nature of his opinions. Initially, he admitted that a sexual homicide could be "accidental." (RT 489.) Later he told the court that there was no overwhelming consistency of the psychological aspects of sexual homicide among the perpetrators interviewed. (RT 583.) He also testified: "I would say reasonable consistency, and I would say that with a little bit of caution in the sense that *we want other studies that validate it.* We need more independent studies with separate groups and different locations. It would be very good if a study now came out of Europe. One

has not been done there that has been published." (*Ibid.* [italics added].) Thus, Dr. Meloy's opinion was fatally undermined by his own testimony.

Third, Dr. Meloy's theory or technique of subjecting sexual homicide perpetrators to Rorschach ink blot tests – to determine the motive and intent in committing crimes that occurred probably *years before* the actual testing – had not been tested by any other expert, had not been subjected to peer review and publication, and did not enjoy general acceptance within the relevant expert community. (*Kumho Tire Co., Ltd. v. Carmichael*, *supra*, 526 U.S. 137, 149-150; *People v. Ruiz* (1990) 222 Cal.App.3d 1241, 1245 [an expert could opine that a defendant did not fit the profile of a sex crime perpetrator, but only if it was first established that the relevant scientific community had developed such a profile]; *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134 ["Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value"].) The trial court even acknowledged that research on sexual homicides was in the "early stages." (RT 591.) In fact, as Dr. Meloy stated in his pretrial testimony, his study was not due to be published until January 1994, a month after the hearing (RT 479, 483) so that there had been no chance for testing by another expert, and no opportunity for peer review or general acceptance.[97]

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[97]Indeed, for precisely this reason, among others, on April 21, 1993, San Diego County Superior Court Judge Morgan Lester (citing *Bledsoe*, and Evidence Code sections 1101 and 352) excluded Dr. Meloy's testimony on motive in sexual homicides in another capital case, *People v. Amundson*, No. CRN 23430. (CT 5426, 5505, 5510 ["The court in this case finds that the doctor's more recent and almost current theory has not been

Fourth, the subject that Dr. Meloy's expert testimony related to was the purported myth that prostitutes are not killed for sex. As shown, however, there was no evidence that either Dr. Meloy's study, or any of the literature that he relied on in forming his opinions, involved victims who were prostitutes or willing sexual partners. Thus, Dr. Meloy's opinions were inadmissible under section 801 because they were not "[b]ased on matter ... that is of a type that *reasonably may be relied upon* by an expert in forming an opinion upon *the subject* to which his testimony relates ...." (Italics added.)

Fifth, although the trial court questioned whether, under section 801, Dr. Meloy had "enough expertise yet in our early stages of research to go forward" (RT 591), the court admitted Dr. Meloy's testimony predicated on the court's express understanding that Dr. Meloy had actually spoken with sexual homicide perpetrators, who told him why they committed their crimes and what they were thinking about when they committed them. The court believed that this provided Dr. Meloy "terrific data" on which to base his opinions. (RT 591-592.) In fact, however, Dr. Meloy did not interview any sexual homicide perpetrators "about their specific motivation for their sexual homicide." (RT 3265.)[98]

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scientifically established to be reliable"]; CT 5513.)] The court in this case had requested a copy of Judge Lester's ruling to review before ruling on Mr. Jones's motion to exclude Dr. Meloy's testimony. (CT 5425.)

[98]Apparently, the prosecutor was under the same impression as the court. The prosecutor began Dr. Meloy's redirect examination by asking the leading question, "In arriving at your findings, was part of it based upon talking to these people?" Dr. Meloy responded, "Yes. The methodology of the testing is deriving information through what they say and then recording that information very carefully." (RT 3265.) The prosecutor followed with another leading question, suggesting the answer the prosecutor appeared to

Instead Dr. Meloy and his colleagues administered Rorschach tests to 18 individuals. From the results of those tests, Dr. Meloy concluded unequivocally that *all* sexual homicides – which he broadly defined as having some evidence of sexual activity by the perpetrator – are intentional killings (RT 3258), *all* sexual homicide perpetrators are "sexually aroused by the act of violence toward the victim" (RT 3259), *every* sexual homicide perpetrator kills his victim because "the woman's suffering under his domination is his biggest sexual turn on" (*ibid.*), and *every* sexual homicide is "goal-oriented,"with "a purpose to it and ... an end that the person wants to get to by doing particular things" (RT 3260), and thus is willful, deliberate, and premeditated. That the trial court staked its ruling on a critical misunderstanding of the witness's methodology further undermines the reliability of the expert testimony.

Sixth, Dr. Meloy's extremely broad definition of sexual homicide ("the intentional killing of another human being during which there is evidence of sexual activity by the perpetrator") was both unworkable and unreliable. Under his definition, virtually any intentional felony murder – where rape, sodomy, lewd act with a child, or oral copulation was the felony (Pen. Code, § 189) – would qualify as a sexual homicide, even if the motive was to eliminate a witness and not, as the prosecutor put it, to achieve a "better orgasm" (RT 5026).

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expect, "So you interviewed the subjects that you were talking to about why they did what they did?" Dr. Meloy did not answer yes, but instead responded, "For the particular study that was just published we did not interview them about their specific motivation for their sexual homicide." (*Ibid.*)

Morever, if a husband and wife had sex and argued, and one committed a killing that constituted a voluntary manslaughter of the other, then according to Dr. Meloy, a homicide motivated by sex would have occurred, even though the perpetrator was not "sexually aroused by the act of violence toward the victim" (RT 3259), but was actually repulsed by the killing. (*People v. Lasko* (2000) 23 Cal.4th 101, 104 ["When a killer intentionally but unlawfully kills in a sudden quarrel or heat of passion, the killer lacks malice and is guilty only of voluntary manslaughter"].) Similarly, every time a male and female engage in foreplay, but the female wishes to go no further, is raped, and immediately kills her attacker, a sexual homicide would have occurred under Dr. Meloy's definition, even if the killing was in self-defense.[99]

Thus, the sexual homicide category, as defined by Dr. Meloy, is so ill-defined that his study of sexual homicides could not have provided a "reliable" foundation for his opinions that all sexual homicides are intentional, goal-oriented, purposeful, and motivated by a desire to achieve a "better orgasm." (RT 5026.) Dr. Meloy's testimony should have been

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[99]To further illustrate the folly of Dr. Meloy's definition, consider a hypothetical based on an infamous episode of *Seinfeld* involving a contest to abstain from masturbation. The episode began with George Costanza's mother walking in on George masturbating. Her response was to scream at George. Imagine if George, startled by the invader in this moment of privacy, reached for his gun and shot the intruder. Applying Dr. Meloy's definition would mean that this was a sexual homicide because it was "the intentional killing of another human being during which there is evidence of sexual activity by the perpetrator." (See CT 5058-5059 ["positive evidence that a sexual homicide had been committed [included] sexual activity in close proximity to the victim, such as masturbation"].) Dr. Meloy's definition borders on the absurd.

excluded as unreliable.[100]

G. Dr. Meloy's Testimony Was Inadmissible under Evidence Code Section 1101(a) As Forbidden Character Evidence.

Evidence Code section 1101(a) states in pertinent part: "Except as provided in this section and in Section[] 1102, ... evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Dr. Meloy's testimony was prohibited by Evidence Code section 1101(a) as impermissible character evidence offered in the form of an opinion.[101]

In *People v. McFarland* (2000) 78 Cal.App.4th 489, the defendant was charged with annoying or molesting a child, which required proof that his conduct was motivated by an unnatural or abnormal sexual interest in the victim. (*Id.* at p. 494.) Although the prosecution's expert psychiatrist

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[100]Moreover, applying Dr. Meloy's definition, virtually every time a customer kills a working prostitute, a sexual homicide would have occurred because virtually every time there would be evidence of sexual activity by the perpetrator. Dr. Meloy might just as well have said that every time a client kills a prostitute, a first degree murder with a special circumstance has taken place. Thus, every time a client kills a prostitute, the client would be death eligible. Dr. Meloy's opinion would effectively add prostitute killing as a special circumstance to Penal Code section 190.2, something that should be decided by the Legislature, not by Dr. Meloy.

[101]In a criminal action, expert opinion as to the defendant's character is admissible under section 1102 when offered by the defendant to prove he or she was unlikely to have committed the charged offense, or by the prosecution to rebut evidence offered by the defendant. Dr. Meloy's testimony, which amounted to evidence offered by the prosecution of Mr. Jones's character, did not rebut evidence offered by Mr. Jones. Hence, it was not admissible under section 1102.

did not personally interview or examine the defendant, he opined that the defendant harbored an unnatural or abnormal sexual interest in the victim. Thus, the psychiatrist provided expert testimony on the defendant's motive. The appellate court found that this was an opinion about the defendant's character, and was therefore prohibited by section 1101(a). (*Id.* at p. 493.)

Like the psychiatrist in *McFarland*, Dr. Meloy did not personally interview or examine Mr. Jones, but, as the prosecutor argued to the jury, "Dr. Meloy g[ave] us the motive for these crimes." (RT 5026.) As *McFarland* demonstrates, however, when a psychiatrist offers an opinion about the defendant's motive, the opinion constitutes character evidence that is prohibited by section 1101(a). Hence, Dr. Meloy's testimony should have been excluded.

In *People v. Walkey* (1986) 177 Cal.App.3d 268, a murder case involving the death of a child, a physician explained to the jury the various factors constituting the profile of a child abuser. The Court of Appeal noted that other courts "have disallowed evidence to show the defendant fit within the battering parent profile, reasoning character evidence in criminal cases may not be used to prove a defendant acted in conformity with such character." (*Id.* at p. 278; see also *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084 ["Profiles are a collection of conduct and characteristics commonly displayed by those who commit a certain crime"].)

Next the court observed that the "obvious purpose in introducing battering parent evidence was to show Walkey fit within that profile." (*Id.* at p. 279.) Although the physician "never expressly concluded Walkey fit the profile, his testimony clearly implicated Walkey's character." (*Ibid.*) Because the doctor's testimony tended to associate Walkey with a group of persons who are often child abusers, the jury was allowed to infer that

Walkey was a battering parent and therefore caused the child's injuries. The appellate court concluded that it was error to admit testimony used to prove that Walkey fit the diagnosis of a battering parent because it was impermissible character evidence. (*Ibid.*)

The prosecution proffered Dr. Meloy's "testimony as circumstantial evidence to explain the motive, mental state, and methods of committing the instant cases." (CT 4857.) It expected that Dr. Meloy would "explain in psychological terms why an individual would violently assault a willing sexual partner," and that the jury would be "assisted by his testimony in deciding whether the requisite mental state has been proven." (CT 4860.) The prosecution also expected that Dr. Meloy would "present a motive for what appears to be random killings." (CT 4862.) After Dr. Meloy testified, the prosecutor argued to the jury that "Dr. Meloy tells us what sexual homicide people do, what they want, what motivates them, what causes them to act. ... Dr. Meloy gives us the motive for these crimes." (RT 5026.)

Here, Dr. Meloy never said that Mr. Jones was a sexual homicide perpetrator. Nevertheless, the obvious purpose of his testimony was to show that the killings were intentional, premeditated, and deliberate first degree murders, rather than second degree, because there was evidence of sexual activity in each of the deaths. Once the jury believed that Mr. Jones was involved in the deaths of Sophia Glover and JoAnn Sweets, and Dr. Meloy's testimony showed that they were sexual homicides, then the jury was virtually required to find that the killings were first degree murders. (*People v. Bowker, supra,* 203 Cal.App.3d at p. 393 [improper "where the expert gives 'general' testimony describing the components of the syndrome in such a way as to allow the jury to apply the syndrome to the

facts of the case"].)

As stated in *People v. Castaneda* (1997) 55 Cal.App.4th 1067, "every defendant has the right to be tried based on evidence tying him to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile." (*Id.* at p. 1072.) Here, Dr. Meloy's testimony had the effect of smearing Mr. Jones with the character of 18 criminals who were not Mr. Jones. This was impermissible character evidence in the form of an opinion, and should have been excluded under Evidence Code section 1101(a).

H. Dr. Meloy's Testimony Was Subject to *Kelly* Because It Blindsided the Jury by Claiming that the Rorschach Test Could Be Used *by Itself* to Determine the Motive and Intent for Prior Conduct.

The trial court ruled that *Kelly* did not apply to Dr. Meloy's psychological testimony on motive and intent. (RT 766-767.)[102] On the contrary, this Court assumed in *Bledsoe* that *Kelly* applied to expert psychological opinion (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1161 [citing *Bledsoe*, 36 Cal.3d at p. 248]), and "broadly held" in *Stoll* that expert

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[102]Because the *Kelly-Frye* rule, named for *People v. Kelly* (1976) 17 Cal.3d 24 and *Frye v. United States* (D.C.Cir. 1923) 293 F. 1013, is now simply the *Kelly* rule (*People v. Leahy* (1994) 8 Cal.4th 587, 591), this portion of the brief will refer to *Kelly* instead of *Kelly-Frye*. In *Kelly*, this Court set forth the "general principles of admissibility" for opinion testimony based on new scientific techniques: "(1) [T]he reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]" (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30.)

opinion testimony is subject to *Kelly* if "'some special feature [of the testimony] effectively blindsides the jury.'" (*People v. Rowland* (1992) 4 Cal.4th 238, 266 [quoting *Stoll*, *supra*, 49 Cal.3d at p. 1157]; cf. *People v. McDonald* (1984) 37 Cal.3d 351, 373 [holding that *Kelly* did not pertain to a psychologist opining on the accuracy of eyewitness identification].) *Kelly* applies here because Dr. Meloy blindsided the jury by claiming that the Rorschach test could be used alone – like truth serum, hypnosis, or a polygraph – to divine what 18 prisoners were actually thinking about when they committed their crimes years before the tests. The trial court therefore erred in not subjecting Dr. Meloy's testimony to *Kelly*.

In *Stoll* this Court noted that California courts had "deferred to a qualified expert's decision to rely on 'standardized' psychological tests ... to reach an opinion on mental state at the time acts were committed." (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1154.) *Stoll* cited two cases involving psychological opinions based in part on the Rorschach test, *People v. Coleman* (1985) 38 Cal.3d 69, 78-81, and *People v. Coogler* (1969) 71 Cal.2d 153, 165, but neither case permitted the *sole* reliance on the Rorschach test. In both cases, the Minnesota Multiphasic Personality Inventory was employed in conjunction with the Rorschach. (*People v. Coleman*, *supra*, 38 Cal.3d at p. 80; *People v. Coogler*, *supra*, 71 Cal.2d at p. 165.) No California appellate case has sanctioned the use of the Rorschach test by itself to reach an opinion on an individual's mental state at the time the acts were committed.

Morever, *Coleman* and *Coogler* predate important developments regarding the Rorschach's reliability for any purpose. (See, e.g., Grove, et al., *Failure of Rorschach-Comprehensive-System- Based Testimony to Be Admissible under the Daubert–Joiner–Jumho Standard* (June 2002) 8

Psychol. Pub. Pol'y & L. 216, 228 ["The Rorschach is the subject of raging controversy and does not have a well-characterized error rate, hence failing *Frye* (*Frye v. United States*, 1923), *Daubert*, and relevance tests on these bases alone"]; Turkat, *Parental Alienation Syndrome: a Review of Critical Issues* (2002) 18 J. Amer. Academy Matrimonial Lawyers 131, 157 ["considerable disagreement exists today whether psychologists should use (the Rorschach) test"]; Wood, et al., *The Rorschach Test Is Scientifically Questionable* (Dec. 1, 2001) 18:6 Harv. Mental Health Letter [2001 WL 14822287] ["findings provide another reason for questioning the use of the Rorschach in criminal trials"]; Goode, *What's in an Inkblot? Some Say, Not Much*, N.Y. Times (Feb. 20, 2001) p. F-1, col. 1 [reporting that debate over merits of Rorschach inkblot test is likely to become more heated as result of an article in Psychological Science in the Public Interest, Journal of American Psychological Society, which argues that the inkblot test is seriously flawed and should not be used in court]; see also *Slaughter v. Parker* (W.D.Ky. 2001) 187 F.Supp.2d 755, 840 [citing expert testimony that the Rorschach Ink Blot Test should not be used in a forensic evaluation].) "[T]he burden is on the proponent of the new technique to show a scientific consensus supporting its use; if a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose [the technique] as unreliable, the court may safely conclude there is no such consensus at the present time." (*People v. Shirley* (1982) 31 Cal.3d 18, 56.) Given the significant and substantial opposition to the Rorschach test, there is no consensus that it is reliable for any use.

The prosecution also failed to present any evidence that the Rorschach test *by itself* has ever been generally accepted in the psychiatric community as a reliable tool to determine the psychological motivation and

intent of individuals for acts committed years before the tests. Even the strongest defenders of the Rorschach test agree that it should not be the sole psychological test given to a subject. (Ritzler, et. al., *Protecting the Integrity of Rorschach Expert Witnesses* (June 2002) 8 Psychol. Pub. Pol'y & L. 201, 207 ["we are in favor of excluding expert testimony that attempts to use the (Rorschach Comprehensive System) in isolation to determine the correct diagnostic label for a person"].)

Dr. Meloy's study acknowledged its limitation due to its use of Rorschach tests to unearth motivation for crimes committed years before: "Although the empirical support for our factors is *limited due to its retrospective and inferential nature*, the Rorschach variables we selected for study generally have good *temporal reliability* (Exner, 1986)." (CT 5069 [italics added].) Note that although the study asserted that the Rorschach test has "good temporal reliability" – meaning that it may be reliable in testing the *current* psychology of a subject – the study made no claim that the Rorschach test is reliable in discerning the psychological makeup of a person years before the test. Thus, Dr. Meloy admitted: "The weakness of our study is that we're looking at ... structural personality data. We did this study, and then inferring that these characteristics also existed at the time of the sexual homicides. Our work can be challenged on that basis." (CT 5470.)

In *People v. Shirley*, *supra*, 31 Cal.3d 18, this Court held that hypnotically induced testimony was subject to the requirements of *Kelly*, and had no "doubt that if testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts," *Kelly* would apply. (*Id.* at p. 53.) *Shirley* noted that the *Kelly* "requirement is not fulfilled merely by evidence that one expert personally

believes the challenged procedure is reliable; the court must be able to find that the procedure is generally accepted as reliable by the larger scientific community in which it originated." (*Id.* at p. 53.) Thus the proponent of the testimony has the burden "of demonstrating by means of qualified and disinterested experts that the new technique is generally accepted as reliable in the relevant scientific community." (*Id.* at p. 54.) To determine whether such evidence satisfies the *Kelly* standard, it is necessary to examine the published writings in scholarly treatises and journals "because the burden is on the proponent of the new technique to show a scientific consensus supporting its use." (*Id.* at p. 56.)

Shirley held that the proponent there did not satisfy *Kelly* (*id.* at p. 66), reasoning that "expert testimony as to the truthfulness of statements made by the defendant under hypnosis was inadmissible for the same reason that the results of lie detector and 'truth serum' tests are excluded, i.e., because such tests 'have not attained sufficient scientific and psychological accuracy nor general recognition as being capable of definite and certain interpretation.'" (*Shirley* at p. 34 [quoting *Jones v. State* (Okla.Crim.App. 1975) 542 P.2d 1316, 1326]; see also *People v. Aragon* (1957) 154 Cal.App.2d 646, 658 [rejecting polygraph evidence]; *People v. Jones* (1959) 52 Cal.2d 636, 653 ["The courts have consistently held that whether the test is a polygraph test, or a [truth serum] test, the results are not such as to be admissible for or against the defendant because of a lack of scientific certainty about the results"].)

Like the proponent of hypnosis in *Shirley*, truth serum in *Jones*, and the polygraph in *Aragon*, the proponent of the Rorschach test in this case failed to show that the procedure was generally accepted as reliable by the larger scientific community in which it originated. The only authority cited

by Dr. Meloy for using the Rorschach in this instance was himself. (CT 5058.) Ipse dixit does not meet the burden of showing general acceptance. "General acceptance under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community," (*People v. Leahy*, *supra*, 8 Cal.4th at p. 612), not merely the opinion of one member of that community (*People v. Shirley*, *supra*, 31 Cal.3d at p. 54 ["the *Kelly-Frye* requirement is not fulfilled merely by evidence that one expert personally believes the challenged procedure is reliable"]).[103]

Dr. Meloy also practically conceded that his study did not satisfy *Kelly's* general acceptance requirement. When the court asked whether there was "an overwhelming consistency on the psychological aspects" of sexual homicide, Dr. Meloy responded, "I would say reasonable consistency, and I would say that with a little bit of caution in the sense that *we want other studies that validate it. We need more independent studies* with separate groups and different locations. It would be very good if a study now came out of Europe. One has not been done there that has been

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[103]See *People v. Parnell* (1993) 16 Cal.App.4th 862, 869, 870 [where psychologist had viewed videotapes of defendant making statements under hypnosis to another psychotherapist, he could not testify about defendant's mental state at the time of the crime based on hypnotized statements, because there was *no showing that this use* of hypnotized statements *had gained scientific acceptance*]; *People v. Spigno* (1957) 156 Cal.App.2d 279, 288 [even if a psychiatrist is not the only expert who can testify on the defendant's intent in a sex crime, there must be "a showing of at least a semblance of scientific acceptance of the psychologist's ability to formulate a dependable conclusion under all of the circumstances of the case"].) Thus, even if *Kelly* did not apply, the prosecution was still required, under Evidence Code section 801's reliability directive, to establish that the relevant scientific community – psychiatrists and psychologists – used the Rorschach test by itself to determine the motive and intent for prior conduct. The prosecution failed to do this.

published." (RT 583 [italics added].) Dr. Meloy's study also conceded that its findings were preliminary. (CT 5069 ["We think our results, although preliminary, begin to shed light on the psychodynamic shadows that portend this low frequency but high intensity act of sexual aggression"].)

In addition, as the sole proponent of sexual homicide as a subfield of psychology and using only a Rorschach test to determine the motive and intent behind a homicide from years past, Dr. Meloy was not impartial so as to satisfy *Kelly*. (*People v. Brown* (1985) 40 Cal.3d 512, 530 [the expert "must also be 'impartial,' that is, not so personally invested in establishing the technique's acceptance that he might not be objective about disagreements within the relevant scientific community"].)[104]

Dr. Meloy admitted at trial that he did not actually interview his 18 subjects "about their specific motivation for their sexual homicide." (RT 3265.) Even so, Dr. Meloy told the jury that solely by using Rorschach tests (RT 3264), he was able to tell what the prisoners were thinking years before, and conclude that their homicides were intentional, goal-directed, and purposeful, and that each one of them was "sexually aroused by the act of violence toward the victim" (RT 3259), all from ink blots. Thus, Dr.

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[104]As Mr. Jones stated below, "Dr. Meloy is both the proponent and presenter of his own theories in this case. The research that he primarily relies on to support the use of the Rorschach test to measure a sexual homicide perpetrator's psychodynamics has not independently been found to be a reliable and valid tool within the population whose behavior and psychodynamics Dr. Meloy attempted to measure in his sexual homicide research." (CT 5557.) In fact, as noted, Dr. Meloy appears to be the only psychologist or psychiatrist in the country to testify about the psychology of sexual homicides. (See *Kelly*, *supra*, 17 Cal. 3d at 37 (it is "questionable whether the testimony of a single witness alone is ever sufficient to represent, or attest to, the views of an entire scientific community").]

Meloy effectively used the Rorschach test as a serum, guaranteed to get at the truth, just like a polygraph and hypnosis.

> A witness cut loose from time-tested rules of evidence to engage in purely personal, idiosyncratic speculation offends legal tradition quite as much as the tradition of science. Unleashing such an expert in court is not just unfair, it is inimical to the pursuit of truth. The expert whose testimony is not firmly anchored in some broader body of objective learning is just another lawyer, masquerading as a pundit.

(*People v. Johnson* (1993) 19 Cal.App.4th 778, 789 [citations and internal quotes omitted].) This Court has previously rejected truth serum, hypnosis, and the polygraph as unreliable indicators of the truth. The Court should similarly dismiss Rorschach tests *in this context*, when used in isolation to determine the true motive and intent behind homicides years old.

Accordingly, the trial court erred in ruling that *Kelly* did not apply to Dr. Meloy's testimony. Had the court properly considered the requirements of *Kelly*, it would have concluded that the prosecution did not meet its burden to show that the Rorschach test is generally accepted in the psychiatric community, let alone that its sole use as a psychological tool in a forensic setting is generally accepted. Dr. Meloy's testimony should have been excluded.

I. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Sections 210 and 350 Because It Was Irrelevant.

Dr. Meloy's testimony, limited to the issues of intent and motive (RT 774, 1219), should have been excluded as irrelevant. Under Evidence Code section 350, only relevant evidence is admissible, and under Evidence Code section 210, relevant evidence must have a tendency in reason to prove or disprove any "disputed fact" in the action. In essence Dr. Meloy testified that sexual homicide perpetrators are motivated to kill because they are

sexually aroused by the act of murder and when they do kill, they intend to do so. The defense never disputed at any time that whoever killed JoAnn Sweets and Sophia Glover did so intentionally and were motivated by sex. The defense was that Mr. Jones did not kill JoAnn Sweets and Sophia Glover, others did. Hence, Dr. Meloy's testimony did not have a tendency in reason to prove any *disputed fact* and was irrelevant. The lower court erred in admitting the testimony.

One might argue, however, that "a fact – like defendant's intent – generally becomes 'disputed' when it is raised by a plea of not guilty or a denial of an allegation. (Pen. Code, § 1019 ['The plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by [Penal Code] Section 1025.']) Such a fact remains 'disputed' until it is resolved." (*People v. Rowland* (1992) 4 Cal.4th 238, 260.) But as *Rowland* observed, this is only a general rule. It has no application here because Mr. Jones made it plain from the beginning that his intent was not an issue since others – not he – committed the murders of Sophia Glover and JoAnn Sweets.

Furthermore, even if *Mr. Jones's* intent and motive were somehow in dispute by virtue of his not guilty plea, Dr. Meloy – as an expert – was prohibited by Penal Code section 29 from offering any testimony about the *defendant's* intent and motive. Section 29 provides:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have *the required mental states*, which include, but are not limited to, *purpose*, *intent*, knowledge, or *malice aforethought,* for the crimes charged. The question as to whether the defendant had or did not have the required mental

states shall be decided by the trier of fact.

(Italics added.)

When Dr. Meloy testified that *all* sexual homicides are intentional, have the purpose of achieving a better orgasm, and are goal-oriented, he was telling jurors (who must have believed that his testimony was about Mr. Jones) that the defendant intended to kill and harbored malice aforethought. Certainly this was the interpretation of Dr. Meloy's testimony by the prosecutor, when he argued to the jury that "Dr. Meloy gives us the motive for these crimes" (RT 5026); Dr. Meloy was "here to tell us why [the crimes were] committed, which he did" (RT 5098); and "much like Dr. Meloy told us, [Bryan Jones] had to like it. It made him feel good. It was the type of sex that he wanted, that he needed." (RT 5102.)[105]

Penal Code section 29, however, forbids such testimony by an expert. (*People v. Coddington* (2000) 23 Cal.4th 529, 583 [section 29 prohibits expert from tying mental state to defendant's conduct by answering hypothetical question]; *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364 [section 29 "does not simply forbid the use of certain words, it prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted"]; *People v. Czahara* (1988) 203 Cal.App.3d 1468, 1477 ["section 29 prohibits expert psychiatric testimony as to whether the defendant did or did not have a required mental state, including malice

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[105]Before trial the prosecutor argued to the court that Dr. Meloy's testimony went "directly to the mental state that we have to prove, and we are stuck with a circumstantial evidence case. We have to prove malice; willful, deliberate, and premeditated conduct on the part of whoever did this crime. He gives us circumstantial evidence of that." (RT 589.)

aforethought"].)

Moreover, Penal code section 1019, relied on by *Rowland*, only applies to "every material allegation of the accusatory pleading." Because motive is not an element of murder, and is a "separate and disparate" mental state from intent and malice, there is no allegation in the second amended information (CT 5803) describing the reason the defendant chose to commit the murders. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503-504.) Hence, the defendant did not dispute the sexual motive of the actual killers, by pleading not guilty or otherwise.

Furthermore, Dr. Meloy's testimony had no tendency in reason to prove or disprove *any matter* related to this action. That 18 perpetrators, a small sample as Dr. Meloy admitted (RT 483), a group that included *two women* (CT 5061), "incarcerated in various prisons and forensic hospitals in California, Florida, Illinois, Massachusetts, and the District of Columbia" (CT 5058) took Rorschach ink blot tests between 1986 and 1992 (CT 5058), which purportedly revealed that each had a sexual motive and an intent to kill in committing *his or her* crime, has no bearing on the actual mental states – the motives and intents – of the killers of Sophia Glover and JoAnn Sweets. It defies reason to suggest otherwise. Dr. Meloy's testimony, based on the intents and motives of 18 test-takers with no connection to this case, was irrelevant and should have been excluded.

J. Dr. Meloy's Testimony Was Inadmissible Under Evidence Code Section 352 Because Its Prejudicial Effect, Confusion of the Issues, and Misleading of the Jury Clearly Outweighed Its Probative Value.

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court abuses its discretion under section 352 if it admits testimony and "the prejudicial effect of the evidence clearly outweighs its probative value." (*People v. Karis* (1988) 46 Cal.3d 612, 637.) Even assuming for the sake of argument that Dr. Meloy's testimony had a modicum of relevance, the trial court erred in overruling Mr. Jones's section 352 objection because the prejudicial impact of the testimony far outweighed any probative value.

"'[H]ow much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20 [quoting *People v. Delgado* (1973) 32 Cal.App.3d 242, 249].) As shown above, Dr. Meloy's testimony was relevant, material, or necessary.

On the other hand, the prejudicial effect of his testimony was substantial. "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis*, *supra*, 46 Cal.3d at p. 638 [quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377].) After hearing Dr. Meloy's testimony,

the jury must have had felt a deep loathing for – and therefore an emotional bias against – the defendant.

Dr. Meloy testified that a sexual homicide perpetrator intends to kill his victim (RT 3258), and the reason that these homicides exist is because "the woman's suffering under his domination is his biggest sexual turn on." (RT 3259). Dr. Meloy further explained that the sexual homicide perpetrator "is sexually aroused by the act of violence toward the victim, who is usually a woman, and he ... usually will get an erection and usually will want to reach orgasm before, during, or after the killing." (*Ibid.*) Dr. Meloy also informed the jury that a sexual homicide was "goal-oriented behavior," which he defined as "behavior where there is a purpose to it and there is an end that the person wants to get to by doing particular things." (RT 3260.)

In the words of the prosecutor (partly in the imagined voice of the defendant), Dr. Meloy told the jury that the defendant did not just want to have sex with women: "'[I want to] dominate them, hurt them and that makes me feel better. That gives me a better orgasm. That is what I need. That is what I want. That is what I will get.' He talks about the woman suffering being their greatest turn-on, and it had to be." (RT 5026.) The prosecutor also insisted: "And much like Dr. Meloy told us, he had to like it. It made him feel good. It was the type of sex that he wanted, that he needed." (RT 5102.)

The notion that someone commits murder and enjoys it is repulsive, to say the very least. Who is not sickened by the celluloid image of a smirking killer? But add to that the inherently inflammatory and unrebutted ingredient that the killer is so depraved that he is sexually excited by the taking of an innocent woman's life and ejaculates as a result, and one has

the very definition of prejudice under section 352.

Moreover, Dr. Meloy's testimony likely confused the issues and misled the jury. Although Dr. Meloy was limited by the court to opining on the issues of intent and motive, when Dr. Meloy testified that sexual homicide is "goal-oriented ... behavior where there is a purpose to it and there is an end that the person wants to get to by doing particular things" (RT 3260), the jury must have understood Dr. Meloy to mean that sexual homicides are premeditated, deliberate murders. This is certainly how the prosecutor interpreted Dr. Meloy's word, in arguing to the jury that Dr. Meloy "talks about ... goal directed behavior. 'I want to achieve something. So I am going to do it. I intend to achieve it. I will do it.'" (RT 5026.)

Finally, as discussed in Argument 14, the trial court instructed the jury on first degree murder by substituting "the killing was intentional" for "the killing was done with malice aforethought." (RT 5134: CT 6921.) Coupled with this instruction, Dr. Meloy's expert testimony misled the jury. By informing the jury that all sexual homicides are intentional, the jury was relieved of any obligation to find malice aforethought. Once the jury connected Mr. Jones to the deaths of Sophia Glover and JoAnn Sweets, it need only have believed Dr. Meloy's testimony to return first degree murder verdicts without ever having found malice aforethought.

Accordingly, the prejudicial effect of Dr. Meloy's testimony, its confusion of the issues, and its misleading of the jury clearly outweighed its probative value. The trial court erred in not excluding Dr. Meloy's testimony under section 352.

K. Dr. Meloy's Testimony Violated Due Process and Was Inadmissible Because There Was No Permissible Inference for the Jury to Draw from His Testimony and It Was So Inflammatory as to Deny Mr. Jones a Fair Trial.

In *Duncan v. Henry* (1995) 513 U.S. 364 (*per curiam*), the Court recognized that due process could be violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Id.* at p. 366.) Citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70, this Court stated in *People v. Falsetta* (1999) 21 Cal.4th 903 that "admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*Id.* at p. 13; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 998 ["Evidence Code section 352 must yield to a defendant's due process right to a fair trial"].) Finally, in *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, the Ninth Circuit held that "[o]nly if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'" (*Id.* at p. 920 [quoting *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1465].)

As shown, because Dr. Meloy's testimony did not satisfy the *Bledsoe* exception, was based on an expertise that does not exist, amounted to legal conclusions, was unreliable, was impermissible character evidence, violated *Kelly*, was irrelevant, and was highly prejudicial, confusing, and misleading, there were no permissible inferences for the jury to draw from the testimony, and the evidence was so inflammatory as to prevent a fair trial. Hence, the court erred in admitting the evidence as its admission denied Mr. Jones due process.

Moreover, by shifting the responsibility from the jury to Dr. Meloy to find intent, malice aforethought, deliberation, and premeditation, the trial court deprived Mr. Jones of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333), arbitrarily deprived Mr. Jones of the state-created protections of Evidence Code sections 210, 350, 352, 720, 801, and 1102, Penal Code section 29, and *People v. Kelly*, *supra*, 17 Cal.3d 24 (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and distorted the fact-finding process to such an extent that the resulting verdicts do not possess the reliability required by the Eighth Amendment (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305).

L. Under Both *Chapman* and *Watson*, the Trial Court's Error in Admitting Dr. Meloy's Testimony Was Prejudicial.

The trial court's federal due process error in admitting Dr. Meloy's testimony was not harmless because respondent cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279 [the issue is "whether the ... verdict actually rendered in this trial was surely unattributable to the error"]; *Yates v. Evatt* (1991) 500 U.S. 391, 403 ["To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question"].) Morever, even assuming for the sake of argument that this Court finds no federal constitutional error, then under state law it is reasonably probable that a more favorable result – second degree murder convictions rather than

first degree – would have been reached in the absence of Dr. Meloy's testimony. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.) Hence, reversal is required.

In short, admitting Dr. Meloy's testimony was reversible error because (a) his expert testimony possessed an aura and overwhelming power of authority that had a great influence on the jury, (b) the prosecutor succeeded in timing the testimony to have the strongest impact on the jury, (c) the prosecutor made Dr. Meloy's testimony the centerpiece of his arguments to the jury, and (d) most important, the evidence that showed the rage, modus operandi, and alcohol and drug use of the perpetrator, as well as the immediate deaths of the victims, strongly suggested that these were impulsive second degree murders, and not premeditated and deliberate first degree murders.

Dr. Meloy's testimony was commanding, as the trial court noted when describing the "overwhelming power of [Dr. Meloy's] expert testimony." (RT 593.) The prosecution represented that Dr. Meloy was "a highly educated, trained, and experienced psychologist. He possesses extensive knowledge and experience in the psychological field of sexual and serial killings." (CT 4857.)

No doubt the jury was duly impressed by Dr. Meloy's credentials. He had two master's degrees *and* a doctorate in clinical psychology; he was the chief of forensic psychiatric services for San Diego County, a board certified forensic psychologist, and a self-professed expert in a subfield of psychology dealing with sexual homicides. (RT 3250, 3253-3255.) As many appellate courts – including this one – have recognized, an expert like Dr. Meloy has an "aura" or "mantle" of authority that can profoundly affect a jury's verdict. (See, e.g., *People v. Shirley*, *supra*, 31 Cal.3d 18, 53;

Summers v. A. L. Gilbert Co., supra, 69 Cal.App.4th at p. 1185; *Elsayed Mukhtar v. California State University, Hayward* (9th Cir. 2002) 299 F.3d 1053, 1063; *United States v. Arenal* (8th Cir.1985) 768 F.2d 263, 270.) This Court has also recognized the seemingly "scientific and infallible" nature of such evidence. (See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 160; *People v. Webb* (1993) 6 Cal.4th 494, 524.)

Dr. Meloy was impressive, indeed. Of critical importance, moreover, was the fact that the prosecutor designed *both* the order of his witnesses and the progress of his closing argument to highlight Dr. Meloy's testimony, with the result that this inadmissible evidence had the expected potent effect on the jury.

A cardinal rule of trial practice is for counsel to call his or her most important witness last to have the greatest impact on the jury. This "rule of recency" is predicated on the widely accepted notion among trial lawyers that jurors "remember best what they have heard last." (14 Am. Jur. 101 (2003) Trials § 60 ["the tempo of the plaintiff's case should gradually build so that counsel can rest the case with his strongest witness"].) The experienced prosecutor in this case obviously intended to apply this rule when, near the end of his case-in-chief, he called his most important witness, Dr. Meloy. (RT 3252-3253, 3258-3260.)

The significance of Dr. Meloy's testimony was also manifested by operation of another rule of trial practice: begin closing argument with the most persuasive evidence in your favor. (See, e.g., Watts & Gowan, *Closing Arguments from a Plaintiff's Perspective* (Spring 2003) 26 American Journal of Trial Advocacy 505, 518 ["the rule of primacy is critical and should always be adhered to"].)

> It is axiomatic that closing arguments, like any other speech, must begin by immediately engaging the audience. *First impressions harden like cement.* The rule of primacy compels the speaker to capture the audience's attention immediately. Every closing has a critical first moment when the jurors, whether consciously or subconsciously, are making the pivotal decision whether to continue to listen actively or to drift off. Thus, those first words must be memorable. The introduction or "grab" should reintroduce the theme, personalize the party's view of the facts, and capture the emotional high ground.

(Caldwell et. al., *The Art and Architecture of Closing Argument* (March 2002) 76 Tulane Law Review 961, 997 [italics added, footnotes omitted].)

Here, the prosecutor gave a textbook example of the application of this rule when he began his argument to the jury by accentuating Dr. Meloy's expert testimony:

> If you remember back to I think it was the last day of the evidence, I was putting on my case in chief it's called when I put on my first segment of the case. The last witness we called, Dr. Reid Meloy, the forensic psychologist, who has spent a good deal of time reading, researching, studying, and talking to serial murderers – I am sorry, to sexual homicide people, sexual murderers.
> ...
> And he talked to you at that time about what he had seen and he gave you a definition of a sexual homicide. *His definition was someone who intentionally kills during a sexual act, and that's what we have here.*
>
> We have four intentional homicides, intentional murders during sexual acts. We almost had seven, counting Bertha Richmond. Almost had seven.
>
> We had a *serial sexual murderer*, based upon the evidence that's been provided to you, and that person is here

in court, has been with us for this month that we have been in here.

(RT 4971 [italics added.) This was the prosecution's theme – the defendant was a serial sexual murderer – and Dr. Meloy provided the convincing psychological underpinning for that conclusion.

Again employing the principle of recency, the prosecutor returned to Dr. Meloy's testimony towards the end of his opening argument to the jury:

> One man did these crimes. One man is sitting here in court, the man who did this: Bryan Jones.
>
> It's always easier if there is a motive for doing this, for explaining this conduct. Why would somebody do this? Here we have, by the most part -- not all of them perhaps, but women who would give him sex for 20 bucks, for 50 bucks. "Maybe just promise me 50 bucks. I will do it and I will try to collect later." Why do it, you know, if all you're after is sex? Clearly that's not what he wanted.
>
> Dr. Meloy tells us what sexual homicide people do, what they want, what motivates them, what causes them to act. They have that rage, that violence towards women. "Make them hurt, dominate them, hurt them and that makes me feel better. That gives me a better orgasm. *That is what I need. That is what I want. That is what I will get.*"
>
> He talks about the woman suffering being their greatest turn-on, and it had to be. It had to be. And that it is goal directed behavior. "*I want to achieve something. So I am going to do it. I intend to achieve it. I will do it.*"
>
> Dr. Meloy gives us the motive for these crimes, which may be difficult to understand.

(RT 5026 [italics added].) Thus, the prosecution produced an expert witness with sterling credentials who explained quite plainly to the jury that because the defendant wanted to achieve "a better orgasm" (the motive), he

established a goal, told himself he was going to achieve that goal, and then set out to accomplish it. In a nutshell, the prosecutor presented expert testimony that the deaths in this case were planned, and that they were the result of willful, deliberate, premeditated first degree murders.

"End strong" is yet another time-honored rule of trial practice, and it especially pertains to rebuttal closing argument.

> The familiar psychological principle of recency stands firmly ensconced as one of the bedrocks of good trial advocacy. The refrain that trial lawyers should "end strong" finds its way into almost every piece of literature about trial advocacy. The reason for this ubiquitous advice is that mountains of empirical data prove the point: people remember best the last thing they hear about a person or event and *that which goes last does have a disproportionate impact on the listener.* The one part of trial that demands an appreciation of the principle of recency more than any other is *the rebuttal closing argument*, when the party with the ultimate burden of persuasion in the case gets to talk to the jury without any opportunity for the other side to reply. *It is literally the opportunity to have the last word.* And accordingly, it is a unique advantage that must be taken seriously and exploited for its full effect.

(Caldwell et. al., *The Art and Architecture of Closing Argument*, *supra*, 76 Tulane Law Review 961, 1068-1069 [italics added; footnotes omitted].)

The prosecutor did not disappoint in his rebuttal closing argument to the jury – he took full advantage of having the last word by exploiting Dr. Meloy's testimony to underscore the prosecution's theme of serial sexual killer:

> [The defendant is] not eliminated because he is the one that has done these crimes.
>
> *And much like Dr. Meloy told us, he had to like it.* It made him feel good. It was the type of sex that he wanted,

> that he needed. Sexual predator, sexual killer, *a serial sexual killer*.
>
> You have the evidence. You will shortly get the law. You will add your own common sense and your own ideas of what is reasonable. If you do that, you will find the defendant guilty of the charged crimes. You will find the special circumstances true.

(RT 5102 [italics added].)

By calling Dr. Meloy near the *end* of his case-in-chief, invoking Dr. Meloy's testimony immediately at the *beginning* of opening argument to the jury, carefully explaining the import of Dr. Meloy's testimony near the *close* of opening argument, and then exploiting Dr. Meloy's psychological analysis at the *last possible moment* in front of the jury to drive home his theme, the prosecutor applied the proven rules of primacy and recency, and demonstrated heavy reliance on Dr. Meloy's forceful testimony. Dr. Meloy's testimony was clearly critical to the prosecution's case.

Moreover, by repeatedly making good use of Dr. Meloy's testimony, the prosecutor signaled that a major concern was obtaining first degree, rather than second degree murder convictions. That is, Dr. Meloy, with his emphasis on intent and motive, deliberation and premeditation, was expected to give the jury a reasoned, even scientific basis for rejecting the strong evidence that these homicides were second degree murders – whoever committed them – that resulted from impulsive, uncontrolled rage.

As this Court observed in *People v. Bradford* (1997) 15 Cal.4th 1229, the nature of the crime, even one that involved ligature strangulation and luring the victim to an isolated location, may show impulsive behavior and therefore lack premeditation or deliberation:

> Although defendant's initiation of the offenses by luring the victims to the same isolated location exhibits considerable premeditation and deliberation, *the nature of the murders themselves would not preclude a finding that defendant acted upon impulse.* The circumstance that the manner of killing, ligature strangulation, might be somewhat more time-consuming than other methods, for example firing a weapon, does not obviate the conclusion that *defendant might not have premeditated or deliberated before killing the victims.*

(*Id.* at p. 1345 [italics added]; see also *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 ["ligature strangulation may not always evidence a premeditated murder"]; *People v. Frank* (1985) 38 Cal.3d 711, 733 [strangulation does not necessarily show premeditation and deliberation]; cf. *People v. Farnam*, *supra*, 28 Cal.4th at p. 149 ["method of killing – strangulation with a scarf brought into the home – reflected premeditation and deliberation"].)

Thus, based solely on the nature of the deaths of JoAnn Sweets and Sophia Glover – manual strangulation accompanied by rage, as evidenced by the beatings of the victims (RT 3212-3218, 3234, 3237, 3239-3244, 4999) – the jury could have readily found that the killings were impulsive, without deliberation and premeditation, thereby warranting second degree murder verdicts. (*People v. Hawkins* (1995) 10 Cal.4th 920, 956 [suggesting that a murder committed on impulse is similar to murder committed in a rage]; *People v. Thomas* (1992) 2 Cal.4th 489, 518 ["The beatings defendant inflicted on both victims before he shot them [were] suggestive of rage"]; *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 165 ["[u]npremeditated murder resulting from spontaneous rage is normally second degree murder"].)

Dr. Meloy acknowledged that "the reason that sexual homicides exist" is the perpetrator's "rage toward women." (RT 3259.) Rage is "[v]iolent, explosive anger" (American Heritage Dict. (4th ed. 2000) p. 1444), which points to impulsive behavior, not premeditation and deliberation.

The prosecutor, too, agreed that sexual homicides involved "rage." (RT 5026.) The trial court even observed that Dr. Meloy's testimony about rage undermined a finding of premeditation and deliberation. (RT 768 [The court: "In some respects (Dr. Meloy's testimony) is somewhat helpful to the defendant because it talks about the non-volitional aspects of the behavior, the rage ... If you're talking about premeditated and intentional murder, it gives a rounded picture that may go for the defendant as well as against him."].)

Thus, the prosecutor was presented with the factual evidence and his own expert witness's testimony that supported second degree murder convictions, unless the witness had more to say on the subject. And, as shown, Dr. Meloy did. Remarkably, notwithstanding that sexual homicides involved rage and his own study concluded that sexual homicide perpetrators can be impulsive, compulsive, self-medicated on alcohol and drugs, and seriously impaired to the point that the perpetrator actually sees the victim as a threat (CT 5064, 5066, 5067, 5068), Dr. Meloy went on to testify that all sexual homicides were purposeful and goal-oriented. (RT 3260.) Or as the prosecutor characterized Dr. Meloy's testimony to the jury, "I want to achieve something. So I am going to do it. I intend to achieve it. I will do it." (RT 5026.)

In addition, evidence from the Bertha Richmond case supported a finding of impulsive behavior in the Glover and Sweets cases. As the

prosecutor argued to the jury, the Richmond case was "important" because it laid "out the rest of the cases [by giving] us some help as to what happened to ... JoAnn Sweets [and] Sophia Glover." (RT 4987.) The prosecutor also told the jury: "Bertha Richmond ... is here to give you circumstantial evidence, if you will, on identification, on motive, on m.o., on what his intent was. *What he did to her was so similar to what he did to the others*, it's meaningful." (RT 5008-5009 [italics added].) The prosecutor further argued that Bertha Richmond "was taken to the same house on Mississippi Street, in the same car, and *the same thing happened to her that happened to the rest of these women*." (RT 5023 [italics added].) Finally, the prosecutor argued to the jury that "Bertha Richmond ... matches the rest of them." (RT 5092.) Thus, evidence of impulsive behavior in the Richmond case provided evidence of similar behavior in the Glover and Sweets cases.

Bertha Richmond testified that she said "no" when the defendant asked for a kiss, and that shortly after he attacked her. (RT 2642-2643.) Thus, jurors could have believed that Sophia Glover and JoAnn Sweets were attacked only after they, too, declined to engage in conduct that they found objectionable. That is, because the jury found sodomy special circumstances in the Glover and Sweets cases (CT 7288, 7290), but did not find a rape special circumstance in connection with Sophia Glover (RT 5248), jurors might have believed that although prostitutes would consent to vaginal intercourse, they would not necessarily consent to anal sex.[106]

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[106]Although there was no evidence that Sophia Glover or JoAnn Sweets was a prostitute, the prosecutor repeatedly acted as if they were, including in his opening statement. (See, e.g., CT 762 ["Sweets was another El Cajon Boulevard prostitute"]; CT 763 ["Glover was another

Support for this view is found in the trial court's observation that there was no evidence that a prostitute would sell anal intercourse and the court's conclusion that "the clear inference one can draw is that she doesn't do that or wouldn't do that." (RT 4750-4751.) Jurors therefore could have concluded that anal sex was requested, but the women said "no," thereby triggering an unplanned, impulsive attack, as happened in the case of Bertha Richmond (RT 2643).[107]

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prostitute who worked El Cajon Boulevard"]; CT 772 ["Sweets [and] Glover were known working prostitutes"]; CT 841 ["JoAnn Sweets was the third of four prostitute murders"]; CT 4341 ["Sweets was another El Cajon Boulevard prostitute"]; CT 4342 ["Glover was another prostitute"]; RT 2020 [opening statement – Glover "worked as a prostitute"]; RT 5933 [penalty argument – Glover was "not just a prostitute"]). When this no longer served his purpose, he objected to the defense referring to Sophia Glover as a purported prostitute, and stated that there was no "evidence that Sophia Glover was a prostitute." (RT 4851.) Nevertheless, based on its notes, the court thought there was some evidence to suggest that Sophia Glover was a prostitute, though the court was mistaken. (RT 4894-4896.) The jurors might have believed as well that Sophia Glover and JoAnn Sweets were prostitutes, particularly since the prosecutor reversed his position again during argument to the juror, when he suggested that JoAnn Sweets and "perhaps" Sophia Glover were prostitutes. (RT 5001 ["Now, if these women are prostitutes, and there is a pretty good indication that most of them were, you would think – well, I will leave that one alone. Something happened to her [JoAnn Sweets] beyond the ordinary to leave these injuries. This is not just, 'you know, $25, let's make love and – at least let's have sex,' and you go on your way."]; RT 5026 ["Here we have, by the most part – not all of them perhaps, but women who would give him sex for 20 bucks, for 50 bucks." (RT 5026.)].)

[107]The prosecution was obviously well aware that it alleged sodomy special circumstances in connection with the deaths of Sophia Glover and JoAnn Sweets. (CT 5804-5805.) As shown the prosecution believed that Dr. Meloy's testimony was important to dispel the purported common myth that prostitutes are willing sex partners, regardless of the sex act requested. Thus, if the prosecution believed that Sophia Glover and JoAnn Sweets

Further evidence bolsters the conclusion that the killings were second degree murders. The prosecution's own witness, an expert pathologist, testified that a strangulation victim could die quickly – in "a matter of seconds." (RT 3209.) Initially, jurors could have concluded that the perpetrator was overcome by rage, and therefore did not weigh the considerations for and against strangulation, the kind of "careful thought" that deliberate murder requires. (*People v. Lucero*, *supra*, 44 Cal.3d 1006 at p. 1021 [citing CALJIC No. 8.20 with approval: "The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand."].) Then, based on the pathologist's testimony, jurors could have concluded that immediate death cut short the enraged perpetrator's opportunity to recover and withdraw from the strangulation.

Finally, there was evidence of alcohol and cocaine use in the death of JoAnn Sweets (RT 3218), and cocaine in the death of Sophia Glover (RT 3243). A fair inference is that whoever was with Sweets and Glover at the time of their deaths also used cocaine or alcohol. Moreover, because the prosecutor argued that the same modus operandi was used in each of the crimes (RT 5009, 5013, 5018, 5022, 5025), the jury could have believed that the defendant used drugs or alcohol with JoAnn Sweets and Sophia Glover, as Bertha Richmond and Karen Mitchell testified that he had with them (RT 2536, 2642). Even if a person is not *intoxicated* on alcohol or drugs, the use of either can impair a person's ability to think carefully and

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were willing to provide anal sex, then it is fair to conclude that whoever attacked these women also expected them to engage in anal sex, and when they refused, reacted on impulse.

weigh the pros and cons of a given course of action. (See *People v. Atkins* (2001) 25 Cal.4th 76, 91 ["'A significant effect of alcohol is to distort judgment and relax the controls on aggressive and anti-social impulses'"]; *People v. Goslar* (1999) 70 Cal.App.4th 270, 278 ["It is recognized that impairment in motor skills and judgment occur at blood alcohol concentrations as low or lower than 0.05 percent"]; see generally *People v. Anderson* (2002) 28 Cal.4th 767, 784 ["any killing, may or may not be premeditated, depending on the circumstances. If a person ... kill[s] without reflection, the jury might find no premeditation and thus convict of second degree murder].)

In sum there was compelling evidence of impulsive conduct in the deaths of Sophia Glover and JoAnn Sweets, which is why Dr. Meloy's testimony was so important to the prosecution. That is, the jury would likely have found second degree murder had the prosecutor not presented seemingly scientific and infallible testimony explaining that the rage, though apparently impulsive, was actually part of purposeful, goal-oriented behavior, and thus premeditated and deliberate. And that is just what Dr. Meloy provided. Had Dr. Meloy not offered authoritative expert testimony on sexual homicide, testimony that was unprecedented in this state, the jury likely would have returned second degree murder verdicts because (1) there was strong evidence of rage; (2) as in the case of Bertha Richmond, the victims could have unwittingly provoked an impulsive response from the perpetrator; (3) the victims could have died in a matter of seconds; and (4) drugs and alcohol could have impaired the ability to deliberate and premeditate.

Thus, Dr. Meloy's testimony was pivotal to the prosecution's case. He provided expert rebuttal, accompanied by an overwhelming aura of authority, to the sound view that these were second degree murders. In the process he relieved the prosecution of its duty to otherwise prove deliberation and premeditation (in addition to malice aforethought given the court's failure to instruct on malice [see Argument 14]).[108] Accordingly, with such solid evidence of second degree murder presented to *this* jury, respondent cannot prove that the verdict actually rendered in *this* trial was surely unattributable to Dr. Meloy's testimony. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) In fact the court's error in admitting the testimony was not harmless by any recognized measure. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The murder convictions should be reversed, the special circumstances findings should be set aside, and the death verdict should be vacated.

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[108]See *Summers v. A. L. Gilbert Co.*, *supra*, 69 Cal.App.4th at p. 1185 (admitting expert testimony was clearly prejudicial because the jury instructions on legal issue were inadequate, and the expert's testimony on the issue both filled the void left by the judge and attempted to dictate the outcome of the case).

12.

THE COURT ERRED IN EXCLUDING EVIDENCE OF MARIA RAMIREZ'S APOLOGY TO MR. JONES FOR FALSELY ACCUSING HIM.

Maria Ramirez testified that on the morning of the incident with Mr. Jones, she was living with Simon Ramirez and had a fight with a "Mexican." (RT 2087-2088, 2097.) Ms. Ramirez further testified that she returned to the Jones apartment a few days or a week after she was purportedly assaulted in August 1985. According to Ms. Ramirez, she went with some church people, but stayed in the car while the church people spoke to someone at the apartment. (RT 2082-2084.) Ms. Ramirez testified that she told the church people she thought Mr. Jones was going to hurt her again, so the "church lady" went to his apartment, and, as Ms. Ramirez told the jury, "I guess she tried to tell him that he was going to hurt me again or something like that." (RT 2082-2083.) Ms. Ramirez added that she did not know what was said at the apartment that day. (RT 2084.)

Mr. Jones's mother, Ann Jones, testified that in August 1985, two Spanish speaking people, a Mexican woman and male preacher, came to her apartment looking for Mr. Jones. (RT 3945-3946.) When Ms. Jones began to recount the substance of the conversation with the preacher, the court sustained a hearsay objection by the prosecution. (RT 3945.) The prosecution further objected that there was no foundation as to the visitors' identities. When asked if Ms. Jones found out why the visitors were there, the prosecutor asserted a hearsay objection. When Ms. Jones was asked if the woman was upset, the prosecutor objected based on relevance, "unless we know who she is." The court replied that it could not respond to the

objections right then. (RT 3946.)

At the request of the defense, the court held a hearing outside the presence of the jury. The defense insisted that the woman at the door was Maria Ramirez, while the prosecutor argued that she was not. The prosecutor also stated that Ms. Ramirez had no control over what was said at the door, since she was not there, unless the man and woman at the door "were acting on her behalf or she somehow knew or told [them] what to say." The defense offered that the man was translating for Maria Ramirez, who was apologizing for having falsely accused Mr. Jones. According to the defense, Maria Ramirez wanted to see Mr. Jones to apologize. The court noted that Maria Ramirez testified in English, which made the court think that there was an identification problem. The defense responded that medical records showed that Ms. Ramirez had language problems with English and Spanish in 1985; but by 1994, her English skills had much improved. (RT 3947-3950.)

The court acknowledged that it would be an incredible coincidence if the occasion when Ms. Ramirez went back to the Jones apartment with people from the church was not the same occasion that Ann Jones testified about. (RT 3955.) Ann Jones then testified outside the presence of the jury to lay a foundation for the defense assertion that the woman at the door was Maria Ramirez. (RT 3958.)

Ann Jones testified as follows: the preacher, translating for the woman who spoke Spanish, basically said that the woman was there to say that she was sorry. He said that she was upset, and had been beaten up by her husband. She did not know why she did this. She was just confused. Ann Jones called for her son, who was in the back, and he came to the door. Bryan Jones said that he had given the woman some food and tried to help

her out. (RT 3959.)

Ann Jones further testified that she was present on the first day of trial when Maria Ramirez testified. (RT 2040, 3960.) Ann Jones thought that the witness may have been the woman who came to her door with the preacher nine years before, but it appeared that the witness had gained weight. Ms. Jones was asked, "Did you recognize her from having been one of the people at your door other than the difference in weight?" She responded, "The only thing I can say is I thought maybe that was her [because] like when you see people sometimes but you can't quite place them. It's like I knew her, but I don't know where I knew her from; but she seemed heavy, to me." (RT 3961.) Ms. Jones responded further: "She seemed thinner to me whenever they came to the door, her and that preacher." (RT 3961.) Ms. Jones thought that the woman at the door was in her middle 30s. (RT 3963.) Maria Ramirez was 42 years old in 1985. (RT 2041.) Ms. Jones did not think that it was summer when the preacher and woman came to the door nine years before because "it seemed kind of cool." (RT 3965.) It was also late at night. (RT 3969.)

Ms. Jones continued: "I don't know how I knew she was supposed to be, because I was sitting right there. And I remember looking at her because I turned and I thought, hmm, she reminds me of somebody, but it didn't hit me until later who she was supposed to be because I said, well, she gained an awful lot of weight. Don't ask me why. I don't know why I said that." (RT 3966.)

According to Ann Jones, the woman at the door said through the interpreter that she was there to say she was sorry for what she did, that she had been confused, upset and angry because she had been beaten up by her husband. They said they were there to see the "tall man" so she could say

she was sorry. (RT 3967-3968.)

Lastly, Ms. Jones testified that when she saw Maria Ramirez walk into the courtroom, she thought that she had "gained a lot of weight. I still don't know why I said that, I just felt like I knew her. From where I don't know." (RT 3969.)

The court ruled that foundation was lacking and sustained the prosecution's objections. (RT 3969.)

The court erred. First, adequate foundation was laid for the jury to decide whether the woman at the door was Maria Ramirez. Second, even if the woman at the door was not Maria Ramirez, she and the preacher were acting as Ms. Ramirez's agents (a possibility suggested by the prosecutor), entrusted with the job of conveying Ms. Ramirez's apology to Mr. Jones. The court's error, which deprived Mr. Jones of his constitutional right to present a defense (*Crane v. Kentucky* (1986) 476 U.S. 683, 690), was not harmless beyond a reasonable doubt so that the judgment must be reversed (*Chapman v. California, supra*, 386 U.S. 18, 24.)

A. The Foundation Was Adequate for the Jury to Decide Whether the Woman at the Door Was Maria Ramirez.

If the woman at the door was Maria Ramirez, her hearsay statements would have been admissible as prior inconsistent statements (Evid. Code, § 1235), as the trial court recognized. (RT 3956.) In order for the trial court to admit the hearsay statements, Mr. Jones had the burden of producing evidence under Evidence Code section 403(a) that the woman was Maria Ramirez.

> When evidence is offered under one of the hearsay exceptions, the trial court must determine, as preliminary facts, both that the out-of-court declarant made the statement

> as represented, and that the statement meets certain standards of trustworthiness. (See legis. committee com., 29B West's Ann. Evid. Code (1966 ed.) § 403, p. 268.) The first determination – whether the declaration was made as represented – is governed by the substantial evidence rule. The trial court is to determine only whether there is evidence sufficient to sustain a finding that the statement was made. (*Ibid.*) As with other facts, the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent "without resorting to inferences or deductions." (*People v. Huston* (1943) 21 Cal.2d 690, 693; accord, *People v. Jones* (1990) 51 Cal.3d 294, 314-316; *People v. Thornton* (1974) 11 Cal.3d 738, 754.) *Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution ....*

(*People v. Cudjo* (1993) 6 Cal.4th 585, 608-609 [italics added].)

In *People v. Marshall* (1996) 13 Cal.4th 799, this Court held that "the trial court must determine whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence [citations], even if the court personally would disagree [citations]." (*Id.* at pp. 832- 833.)

> The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury." [Citations.] The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion. [Citations.] The trial court has the preliminary, but not the final, authority to determine the question of the existence of the preliminary fact. Unlike in other situations [citations], under Evidence Code section 403, "[t]he preliminary fact questions listed in subdivision (a) [of Evidence Code section 403] ... are not finally decided by the judge because they have been traditionally regarded as jury questions. The questions involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues. It is the

> jury's function to determine the effect and value of the evidence addressed to it .... *[T]he judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question.* The 'question of admissibility ... merges imperceptibly into the weight of the evidence, if admitted.'" (Legis. committee com., 29B, pt. 1 West's Ann. Evid. Code (1995 ed.) foll. § 403, p. 361.)

(*People v. Lucas* (1995) 12 Cal.4th 415, 466-467 [italics added].) Consequently, the court should have admitted Ms. Jones's testimony because the showing was not too weak for a jury to determine that the woman at the door was Maria Ramirez.

Instead, the court exceeded the scope of its duty by making its own credibility determination. The court believed Maria Ramirez, who testified that she sat in the car and did not go to the door, over Ms. Jones, because Maria Ramirez had testified in English at the trial, while Ms. Jones said that the woman at the door only spoke Spanish. (RT 3949 ["Ramirez testified in English. So that's something that makes me think maybe there is an identification problem here."].) But as this Court stated in *Cudjo*, "doubts about the credibility of the in-court witness should be left for the jury's resolution ...." (6 Cal.4th at p. 609.)

Ann Jones testified that Maria Ramirez, who was a witness on the first day of trial, may have been the woman who came to her door with the preacher. (RT 3961.) It appeared to Ann Jones that the woman had gained weight. (*Id.*) Ann Jones explained: "You know, like when you see people sometimes but you can't quite place them. It's like I knew her, but I don't know where I knew her from, but she seemed heavy, to me." Ms. Jones also stated: "She seemed thinner to me whenever they came to the door, her and that preacher." (*Id.*) Ann Jones remembered looking at the witness that

first day of trial, and thinking that she reminded her of someone, but it did not occur to Ms. Jones until later that the witness was the woman she had seen at the door nine years earlier, because she had "gained an awful lot of weight." (RT 3966.)

Ms. Jones also testified that the woman at the door was there to apologize to Bryan Jones for what she had done. The woman explained that she had been confused, upset, and angry because she had been beaten up by her husband, The woman did not know why she had done what she did, and was there to say that she was sorry. (RT 3959, 3967-3968.) Ann Jones's testimony that she recognized Ms. Ramirez was sufficient to send the issue to the jury to determine whether the woman at the door was Maria Ramirez.

Indeed, Maria Ramirez's testimony corroborated Ms. Jones. Ms. Ramirez testified that she had been in a fight with a Mexican on the day of the encounter with Mr. Jones, and that she lived with Simon Ramirez. (RT 2087-2088, 2097.) Given that Ramirez is the last name shared by both Maria Ramirez and Simon Ramirez, a fair inference is that Simon Ramirez was Maria Ramirez's husband or former husband. And given that Ramirez is a Mexican surname, Maria Ramirez was referring to a fight that she had with Simon Ramirez. The woman at the door said that she had been beaten up by her husband. Thus, there clearly was sufficient evidence from which the jury could find that the woman at the door was Maria Ramirez.

The court therefore erred in not permitting the jury to decide whether Maria Ramirez was the woman at the door. Because Mr. Jones's defense was that Maria Ramirez concocted her story of sexual assault and attempted murder, the court's refusal to allow the jury to hear the apology from Ms. Ramirez completely undermined that defense. Hence, the court committed constitutional error. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [whether

rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense].)

B. Even If the Woman at the Door Was Not Maria Ramirez, She and the Preacher Acted as Ms. Ramirez's Agents, a Possibility Suggested by the Prosecutor, So That Any Statements by the Two Would Be Imputed to Ms. Ramirez.

The prosecutor suggested that if the man and woman at the door "were acting on [Maria Ramirez's] behalf or she somehow knew or told [them] what to say" (RT 3947), then the statements made by the two would be authorized admissions. The trial court had enough evidence to reach this conclusion. Hence, the statements were admissible under Evidence Code section 1222, which provides:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Maria Ramirez testified that she went to the Jones apartment with some church people, but stayed in the car while the church people spoke to someone at the apartment. (RT 2082-2084.) This raises the inference that, like lawyers representing a client, the church people were authorized by Ms. Ramirez to speak on her behalf. (Evid. Code, § 1222(a).) As the Law Revision Committee Comment to section 1222 explains: "Under [section

1222], if a party authorized an agent to make statements on his behalf, such statements may be introduced against the party under the same conditions as if they had been made by the party himself. The authority of the declarant to make the statement need not be express; *it may be implied.*" (Italics added.) When a lawyer speaks for someone, the authority to speak is at least implied. When, as here, a preacher spoke for the woman in the car, the authority to speak was at least implied.

Moreover, "[c]onfidential relations are presumed to exist between priest and parishioner, principal and agent, counsel and client ...." (*In re Miller's Estate* (1936) 16 Cal.App.2d 141, 152; see also *Davies v. Krasna* (1975) 14 Cal.3d 502, 510 ["'A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. [I]t is particularly likely to exist where there is ... such a relation of confidence as that which arises between physician and patient or priest and penitent'"].) Thus, it is presumed that the preacher acted with Ms. Ramirez's interest in mind, and conveyed her thoughts to Ann and Bryan Jones.

And that is what the preacher did. He said that Ms. Ramirez apologized for what she had done to Mr. Jones. He explained that Ms. Ramirez had been in a confused and angry state that resulted from her having been beaten up by her husband.

Again, given that Mr. Jones's defense was that Maria Ramirez concocted her story of sexual assault and attempted murder, the court's refusal to allow the jury to hear her apology completely undermined that defense. Hence, the court committed constitutional error. (*Crane v. Kentucky*, *supra*, 476 U.S. at p. 690.)

C. The Court's Error in Excluding Evidence of Maria Ramirez's Apology to Bryan Jones Was Reversible.

Federal constitutional error is reversible unless it was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) There is no question that the erroneous exclusion of the Ramirez apology was not harmless to the Ramirez attempted murder count because respondent cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid.*) After all, the jury quite rightly could have relied on the apology to conclude that Ms. Ramirez fabricated her claim against Mr. Jones. Thus, the Ramirez verdict should be reversed.

The more difficult question is whether the JoAnn Sweets and Sophia Glover verdicts should be upheld because those verdicts were "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Because the Ramirez count was crucial to the prosecutor in obtaining the Glover and Sweets verdicts, however, these verdicts must be reversed as well.

According to the prosecutor, the Ramirez case was "important for several reasons." (RT 4987.) The prosecutor also argued to the jury:

> First question I would ask you to consider is did one person do all these crimes? Is one person responsible for that horror?
> ...
>
> Beginning with *Maria Ramirez at the top. ... Her case is important ... because it lays out the rest of the cases.* It gives us some help as to what happened to Tara Simpson, Trina Carpenter, JoAnn Sweets, Sophia Glover.
>
> Just like the two ladies at the bottom does, Bertha Richmond and Karen Mitchell. Those are our live witnesses.

Those are the people that can tell the story and can fill in the blanks that are obviously there on the murder victims. ...

Maria Ramirez, let me take you through some of the factors that establish that one man did these crimes.

(RT 4986-4988 [italics added].) Thus, the prosecutor accentuated the importance of the Maria Ramirez case by bluntly admitting there were holes in the JoAnn Sweets and Sophia Glover cases that were filled in by Maria Ramirez. This alone demonstrates that the trial court's error in excluding the Ramirez apology contributed to the Glover and Sweets verdicts.

Moreover, the prosecutor argued that Maria Ramirez established the profile of the victims that the defendant would choose:

> Look at the victim. Look at the victim profile. And I think you will see that most of these victims, if not all of them, were available, were vulnerable, and were invisible.
>
> Available meaning that they're out there on the streets where they can be found. Anybody driving up and down the streets can find them. Out there alone or maybe with a friend. Who knows. But they are available.
>
> They are vulnerable because they had needs that they couldn't meet on a regular basis. *Maria Ramirez, she needed food. She needed money. She needed showers. She needed drugs. She was vulnerable and she was alone, which caused her to obviously let down her guard at an inopportune moment.*

(RT 4988 [italics added].) The prosecutor next argued that because Mr. Jones took Ms. Ramirez back to his apartment, this was "[a]nother factor that shows we have got a series starting." (RT 4989.)

The Ramirez case was especially significant to the JoAnn Sweets murder count. Maria Ramirez testified that she was attacked inside the

Jones apartment, while the body of JoAnn Sweets was found just outside the apartment. Thus, the jury likely used the Ramirez case to contribute to its conclusion that Mr. Jones was responsible for JoAnn Sweets's death.

As permitted by the court's jury instruction – "If you should find a unique or highly distinctive method, plan, or scheme shared among other counts and the count under consideration, such that an inference of a single perpetrator for all offenses may be drawn, then *you should consider whether it may be logically concluded that if the defendant committed one or more of the other crimes, he also committed the crime under consideration*" (RT 5123 [italics added]) – the prosecutor argued that proof that Mr. Jones attempted to murder Ramirez was proof that Mr. Jones committed all of the charged crimes, including the JoAnn Sweets and Sophia Glover murders:

> At this point I ask you do we have one person doing these crimes? The evidence is overwhelming, absolutely overwhelming one person committed these crimes.
>
> Is the defendant that person? That's based upon identification and there are many ways to make identification, and we have many ways in this case. We have many means.
>
> First of all, you have eyewitness identification. We have that. *Ramirez*, Richmond, Mitchell.
>
> We have a common method of operation, common m.o.. Same thing over and over again. That tells us identification, *if we can prove one of them.*

(RT 5013 [italics added].)

Finally, and perhaps most compelling, the prosecutor insisted that the Maria Ramirez case caused the deaths of Sophia Glover and JoAnn Sweets:

> And here is the crucial – crucial point that *causes us to have those other names down the board.* After trying to kill [Maria Ramirez] and failing, after the violent sex, he let her

> go. Who is she? She's an invisible whore. Who's going to believe her. Let her go.
>
> And it comes back to burn him and *that's why we get the rest of the victims*. Just like Pavlov's dog. You learn your lessons. "I let her go. Cops come. Bad consequences. I can't do it again."

(RT 4990 [italics added].) Thus, the prosecutor argued that Sophia Glover and JoAnn Sweets met their fates because Mr. Jones learned from Maria Ramirez not to let his victims go free because, like Ms. Ramirez, they would later testify against him.

Obviously, the Maria Ramirez case was vital to the prosecution's claims that Mr. Jones was the Glover and Sweets perpetrator. Moreover, as the trial court recognized, the Karen Mitchell case was so weak (RT 472 ["Mitchell was so drunk, she's going to have such problems in proof for the people"]) that without the other cases to suggest that if Bryan Jones did it once, he probably did it again, the jury would surely have had reasonable doubt. Accordingly, the court's error in excluding the Ramirez apology was not harmless so that the judgment must be reversed in its entirety. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

13.

THE COURT ERRED IN DENYING MR. JONES'S MOTIONS TO DISMISS THE MARIA RAMIREZ COUNT ON THE GROUND THAT THE PROSECUTOR VIOLATED DUE PROCESS IN DELAYING ALMOST SEVEN YEARS TO FILE THE RAMIREZ CHARGE.

Proceedings Below

On August 15, 1985, Bryan Jones allegedly assaulted Maria Ramirez (CT 5803), and was arrested for committing forcible oral copulation. (CT 4119-4120, 4122, 4125.) According to the prosecution, charges were not pursued because Ms. Ramirez did not appear for an interview with the District Attorney's Office. (CT 4283-4284.) A police report reflects that Ms. Ramirez called the police department on August 19, 1985 to say that she was not pursuing the matter. The report noted that "[t]he case was taken to the district attorney and will be rejected due to her failure to appear." (CT 4118.)

Nevertheless, a complaint charging Mr. Jones with the attempted murder of Maria Ramirez was filed on June 9, 1992. (CT 5-6, 8.) Mr. Jones was arrested on June 24, 1992. (CT 426.)

Mr. Jones moved to dismiss the Maria Ramirez count on due process grounds because there was a prejudicial and unjustified delay between the time of the alleged crime and Mr. Jones's arrest seven years later in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as analogous provisions of the California Constitution. (CT 1216, 1229; RT 331.)

In a hearing on the motion to dismiss, the defense pointed out that the facts underlying the Ramirez attempted murder charge were known to

the prosecution by 1986, and were even mentioned in reports in connection with Mr. Jones's 1987 sentencing for the Bertha Richmond assault. (RT 331; see also CT 1220.) The trial court agreed and found "that all of the general facts – certainly ... the Ramirez case[] – were known in 1987 when they showed up in the defendant's report." (RT 335.) Nevertheless, the court concluded that the need for the results from the DNA testing justified the prosecutor's delay in filing the Ramirez charges. Specifically, the court stated to the prosecutor: "If it was the PCR that did it and brought you to the point where you felt you had it, I don't have any problem with that. That seems to me to be very good justification, because you're being on the careful side. You had all kinds of cases that were being dealt with." (RT 337.) The court stated further: "what you didn't have was the elimination of the third party suspects. You were dealing with a circumstantial case, as far as all the homicides were concerned, and you didn't have that important DNA evidence. And that to me is enough justification in itself." (*Ibid.*)

The court therefore denied the motion, finding that under the federal due process standard, there was no deliberate delay by the prosecution, and no actual prejudice to Mr. Jones. (RT 357.) Applying the California test for a due process violation, the court first found that there was no question witnesses would be lost and memories would fade given the long period of time that had lapsed. (RT 358.) Nevertheless, the court concluded, "bottom line ... I do not see any actual prejudice raised here." (RT 360.) The court further ruled that the defense could raise the motion again at the end of the trial when the court would be in a better position to analyze the evidence for lost witnesses and lost memories. (RT 361.)

At the end of the trial, Mr. Jones moved to dismiss the Maria Ramirez count on due process grounds (CT 7055, 7059-7062), but again the

court denied the motion (RT 6049-6050, 6054). Although the court found that the minister who visited the Jones apartment with Maria Ramirez could not be located, the court concluded that it "would be completely speculative as to whether that minister could have been located, even had this case proceeded within a few months of the crime itself." Moreover, the court found, "based on the totality of the circumstances, that his testimony would [not] have added much." (RT 6049.) Therefore, the court did not believe "that this failure to be able to find the minister is something that, in the long run, prejudiced the defendant's case." (RT 6049-6050.)

Law

Under federal law, the United States Supreme Court and the Ninth Circuit Court of Appeals "have established a two-prong test for determining if pre-indictment delay has risen to the level of a denial of due process. The first prong of this test is that the defendant must prove 'actual prejudice' occurred from the delay." (*United States v. Moran* (9th Cir. 1985) 759 F.2d 777, 780 [citing *United States v. Lovasco* (1977) 431 U.S. 783, 789].) "[T]he second prong of the test requires the court to weigh the length of the delay with the reasons for the delay ....." (*Ibid.*; see also *United States v. Butz* (9th Cir. 1993) 982 F.2d 1378, 1380.)[109]

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[109]In *People v. Catlin* (2001) 26 Cal.4th 81, this Court, citing *Lovasco*, stated that a federal due process claim for pre-accusation delay "also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant." (*Id.* at p. 107.) *Catlin* misreads *Lovasco*. Rather than adding tactical advantage as a requirement, *Lovasco* merely distinguished "investigative delay" from "tactical delay," a different species of due process violation altogether. (*United States v. Lovasco*, *supra*, 431 U.S. at p. 795 [citing *United States v. Marion* (1971) 404 U.S. 307, 324].) *Catlin's* incorrect view of *Lovasco* would mean that no matter how flagrant the prejudice to a defendant, and no matter how long the pre-accusation

Pre-accusation delay in prosecution may also constitute a denial of the right to a fair trial and due process under the state Constitution. (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505 [holding that "due process is the appropriate test to be applied to a delay occurring after a crime is committed but before a formal complaint is filed or the defendant is arrested"].) "A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay." (*People v. Catlin* (2001) 26 Cal.4th 81, 107.)

A. The Almost Seven-Year Delay in Filing the Ramirez Charge Prejudiced Mr. Jones Due to the Loss of Two Important Witnesses and the Memory Loss of Two More Witnesses.

Under both federal and state due process, Mr. Jones suffered prejudice from the seven-year delay in filing the Maria Ramirez charges. At trial Ms. Ramirez testified that she returned to the Jones apartment a few days or a week after she was purportedly assaulted in August 1985. Ms. Ramirez told the jury that she went with some church people, but stayed in the car while the church people spoke to someone at the apartment. (RT 2082-2084.) Maria Ramirez also testified that on the morning of the incident with Mr. Jones, she was living with Simon Ramirez and had a fight with a "Mexican." (RT 2087-2088, 2097.)

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delay, then no due process violation would have occurred unless the defendant proved an improper prosecutorial motive. That a prosecutor had bad thoughts cannot be an essential element in showing that a defendant was denied due process.

Ann Jones first testified in the jury's presence that in August 1985, two Spanish speaking people, a Mexican woman and a male preacher, came to her apartment looking for Mr. Jones. (RT 3945-3946.) Outside the jury's presence, Ms. Jones testified that the preacher, translating for the woman who spoke Spanish, said that the woman was there to say that she was sorry for what she did, and that she had been confused, upset and angry because she had been beaten up by her husband. They said they were there to see the "tall man" so she could say she was sorry. (RT 3967-3968.) Ann Jones called for her son, who was in the back, and he came to the door. Bryan Jones said that he had given the woman some food and tried to help her out. (RT 3959.)

Ann Jones further testified that she was present on the first day of trial when Maria Ramirez testified. (RT 2040, 3960.) Ms. Jones thought that Maria Ramirez might have been the woman who came to her door with the preacher nine years before, but it appeared that Ms. Ramirez had gained weight. (RT 3961.)

The court acknowledged that it would be an incredible coincidence if the occasion when Ms. Ramirez went back to the Jones apartment with people from the church was not the same occasion that Ann Jones testified about. (RT 3955.) Nevertheless, the court ruled that Ann Jones's testimony concerning the apology was inadmissible because she could not adequately identify the woman at the door as Maria Ramirez. (RT 3969.)

This Court has "observed that '[p]rejudice may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.'" (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107 [quoting *People v. Morris* (1988) 46 Cal.3d 1, 37].) Both forms of prejudice occurred with respect to the Maria Ramirez

case.

Defense investigator Keith A. Faulder interviewed Maria Ramirez on December 10, 1992. According to Mr. Faulder, when he asked about details of the incident with Mr. Jones, Ms. Ramirez had difficulty in remembering what occurred. Ms. Ramirez admitted to Mr. Faulder that she returned to the Jones apartment with her pastor, but she could not remember why. Ms. Ramirez also did not remember where the pastor's church was located or how to find the church again. (CT 4211.)

Despite attempts, the defense was unable to locate the preacher and his female colleague because of the seven-year passage of time. Although requested to provide the defense with a name of either the preacher or his colleague, Ms. Ramirez could do neither. The defense also tried to get any other information about the pair and the church from Ms. Ramirez, but she was only able to say that the church was "some kind of outreach thing." (RT 3954.)[110] Defense counsel Jose Varela informed the court that he made every effort to find the preacher. He stated: "We have tried every church thing. ... I went walking ... up and down El Cajon. I went to a Praise the Lord Fellowship on 51st; tried to contact a bunch of them. I walked to anything that looked like it was there. Nobody remembered anything about anything at that time. [¶] And when I tried looking and seeing if I could

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[110]Contrary to the trial court's conclusion that it "would be completely speculative as to whether the minister could have been located, even had this case proceeded within a few months of the crime itself" (RT 6049), it is entirely logical, given that Maria Ramirez very likely would have remembered the name of the minister, or at least the name and location of the "outreach thing" within a few months of the alleged crime so that the minister could have been located. (*Barker v. Wingo* (1972) 407 U.S. 514, 532 ["If witnesses die or disappear during a delay, the prejudice is obvious"].)

find anybody that had Spanish-speaking evangelical services that did outreach programs, ... I was running into walls everywhere. ... Nobody remembered. Nobody knows." (RT 3951.)

The preacher and his colleague were material witnesses who could have testified that Maria Ramirez returned to the Jones apartment to apologize to Bryan Jones. As the trial court suggested, this evidence would have impeached Maria Ramirez as a prior inconsistent statement. (RT 3956.) Thus, these witnesses would have supported Mr. Jones's defense that Maria Ramirez concocted these charges out of some misplaced anger at her husband for having beaten her up on the day that she was with Mr. Jones. That Ms. Ramirez chose not to pursue her claim against Mr. Jones for seven years should not redound to his detriment because it resulted in her being unable to recall the names of her preacher and his colleague, and the name or even the location of the church. The loss of these material witnesses therefore prejudiced Mr. Jones. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107.)

In addition Ann Jones's faded memory of the encounter with the preacher was attributable to the seven-year delay in charging Mr. Jones. The court declined to admit Ms. Jones's testimony regarding the incident because the court found that Ms. Jones's description of the woman at the door was inadequate to identify her as Maria Ramirez. (RT 3969.) Had Mr. Jones been promptly charged with the Maria Ramirez assault, then Ann Jones would have been much better able to identify the woman at the door. (*Barker v. Wingo* (1972) 407 U.S. 514, 532 ["There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."]; (*People v. Hill* (1984) 37

Cal.3d 491, 497 ["it is the duty of the state to bring a defendant promptly to trial"] [citing *Barker v. Wingo*, *supra*, 407 U.S. at p. 531].)

Similarly, as defense investigator Faulder discovered, Maria Ramirez's memory had faded, and she was unable to remember why she returned to the Jones apartment. (CT 4211.) Based on Ann Jones's unrebutted testimony about an apology, however, it is plain that apologizing is why Maria Ramirez went back to the apartment with the church people, and that Ms. Ramirez either appeared at the door to apologize to Mr. Jones or authorized the preacher to speak on her behalf. Ms. Ramirez's inability to remember this prevented Mr. Jones from introducing important evidence that would have impeached Ms. Ramirez's story. Mr. Jones was therefore prejudiced due to the "'loss of evidence because of fading memory attributable to the delay.'" (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107; see also *People v. Hill*, *supra*, 37 Cal.3d at p. 498 ["we can see no reason why a defendant may not seek to prove that the fading memory of a prosecution witness has also made a fair trial impossible"]; *People v. Hughes* (1974) 38 Cal.App.3d 670, 676 [225-day delay was prejudicial because eyewitness for defendant became unavailable].)

Accordingly, Mr. Jones has established prejudice under federal and state due process.

B. The Almost Seven-Year Delay and Prejudice to Mr. Jones Each Outweighs the Prosecutor's Feigned Justification for His Failure to File the Ramirez Charge.

The second prong of the federal test for a due process violation requires the court to weigh the length of the delay against the justification offered by the prosecution for the delay. (*United States v. Moran*, *supra*, 759 F.2d at p. 780.) Under the state standard, the court balances the

prejudice to Mr. Jones against the justification. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107.) Because the prosecutor failed to offer a credible or reasonable justification for his delay in filing the Ramirez charge, the prejudice and length of delay each necessarily outweighs the claimed justification so that Mr. Jones was denied federal and state due process.

> [I]n determining whether the People have shown a legitimate justification for the prolonged delay, "the particular circumstances surrounding the decision not to prosecute, the length of the delay, and the reasons for the subsequent re-evaluation and prosecution must all be considered." [Citation.]
>
> The need of law enforcement officials for additional time to conduct an investigation may constitute adequate justification, if the delay is reasonable and advances a valid police purpose. [Citations.] However, "[n]egligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial." [Citation.]
>
> Further, the delay may be unreasonable if the prosecution delayed in filing charges when all the evidence was discovered years earlier. [Citation.] In *People v. Archerd* [1970] 3 Cal.3d 615, 91 Cal.Rptr. 397, 477 P.2d 421, the California Supreme Court cited with approval an Illinois case in which a conviction was reversed because "the state had all the evidence on a murder charge it would ever have *in 1939*, but made a deliberate election to forego prosecution for [the] offense until 1953...." (*Id.*, at p. 640 [citing *People v. Hryciuk* (1967) 36 Ill.2d 500, 224 N.E.2d 250], emphasis in original.)

(*People v. Hartman* (1985) 170 Cal.App.3d 572, 581.) As *Hartman* noted, "the delay may be unreasonable if the prosecution delayed in filing charges

when all the evidence was discovered years earlier." (170 Cal.App.3d at p. 581.) That is precisely what happened here. As the trial court found, all of the general facts of the Ramirez case were known by 1987 at the latest. (RT 335.) Hence, the delay was unreasonable.

Nevertheless, the court concluded that the prosecution's need for the PCR test results was "very good justification" for the delay in filing charges. (RT 337.) Because the court failed to understand that the prosecutor did not claim that he delayed in filing the charges because he was awaiting the results of the PCR DNA tests, the trial court's ruling is not supported by substantial evidence. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911.) Moreover, as the prosecutor probably realized, simply waiting for the DNA test results would not have justified the delay because Dr. Blake began to receive the DNA samples to perform PCR testing as earlier as January 10, 1990 (RT 2929), two and half years before the prosecutor filed charges against Mr. Jones.

Contrary to the trial court's finding, the prosecutor actually claimed that he delayed filing the charges because he needed PCR testing to be generally accepted under *Kelly-Frye* before he could use it in court:

> In the instant case, after the dates of the murders *the People had to wait for the DNA PCR genetic testing technique to develop as an acceptable scientific procedure before taking it to court for acceptance as evidence. ...*
>
> While the PCR technique was discovered in 1983, there still are no published opinions regarding admissibility of PCR DNA testing results in criminal cases.

(CT 4293-4294 [Prosecution's Points and Authorities in Opposition to Motion to Dismiss for Lack of Speedy Trial] [italics added].)

Thus, according to the prosecutor, his reason for waiting seven years until June 1992 to file the Maria Ramirez case, which involved no DNA testing at all, was that he "had to wait for the DNA PCR genetic testing technique to develop as an acceptable scientific procedure before taking it to court for acceptance as evidence." (CT 4293.) But according to Dr. Blake's testimony two years before in *People v. Mack* (Super. Ct. Sacramento County, 1990, No. 86116), PCR "technology has broad usage and is well accepted in many different disciplines." (CT 2743.)[111] Moreover, according to the prosecutor's own statements in this case: "PCR-based testing, as utilized in the instant case, has been employed since 1986" (CT 4345); "general acceptance has been previously determined at numerous scientific and legal junctures" (CT 4346); "PCR-based forensic DNA testing, as employed in the instant case, has been repeatedly utilized in casework and admitted in evidence in criminal courts of the United States since 1986, including in California" (CT 4346-4347); in *Spencer v. Commonwealth* (Va. 1990) 393 S.E.2d 609, 620 "where Dr. Edward Blake performed PCR-typing, the Virginia Supreme Court noted, 'The [PCR] theory was conceived about ten years ago and has become one of the most widely-used technical procedures in molecular biology since 1985, being used in many diagnostic applications having "life or death" implications'"

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[111]See *People v. Amundson* (1995) 41 Cal.Rptr.2d 127, 132, review granted Aug. 10, 1995, and dismissed and remanded Oct. 27, 1999 ["According to the 1990 testimony of forensic serologist Dr. Edward Blake, PCR technology is reliable, it can produce accurate and reliable DNA typing when used with forensic samples and *the forensic science community has generally accepted the reliability and validity of PCR technology on evidentiary material.* (*People v. Mack* (Super.Ct. Sacramento County, 1990, No. 86116)"] [italics added].)

(CT 4347); and "PCR-based DQ-Alpha typing as utilized in the instant case has been employed and presented in evidence for approximately seven years in this country, with little scientific opposition" (CT 4352). Thus, the prosecutor's own representations to the lower court contradict his excuse for delay in filing the Ramirez case.

Moreover, the prosecution's claimed PCR justification was not credible with respect to Maria Ramirez in any event. Ms. Ramirez was allegedly assaulted on August 15, 1985, and Mr. Jones was immediately arrested and charged with committing forcible oral copulation. (CT 4119-4120, 4122, 4125, 5803.) At trial the prosecution repeatedly argued that Ms. Ramirez was also raped. (RT 4990, 4993, 5389, 5930.) The statute of limitations for oral copulation and rape is six years. (Pen. Code, §§ 261(a)(2), 288a(c)(2), 800.) Mr. Jones was not charged with the attempted murder of Maria Ramirez until June 9, 1992. (CT 5-6, 8.)

Thus, by waiting seven years to charge Mr. Jones, the prosecutor blew the six-year limitations period for oral copulation and rape. It is patently disingenuous for the prosecutor to claim that he intentionally missed the statute of limitations on two serious crimes in the Maria Ramirez case only because "the People had to wait for the DNA PCR genetic testing technique to develop as an acceptable scientific procedure before taking it to court for acceptance as evidence." (CT 4293.) If the prosecutor's assertion were genuine, then he was conceding that PCR DNA testing had not gained general scientific acceptance by the expiration of the six-year statute of limitations on August 15, 1991, while contending that PCR had gained such acceptance 10 months later when the complaint against Mr. Jones was filed. This would be an absurd justification for a decision to miss the statute of limitations in Maria Ramirez's case, which required no PCR

DNA testing at all.

The prosecutor's purported justification also makes no sense in light of the fact that Mr. Jones was charged by the same district attorney and convicted in 1987 of the Bertha Richmond offenses, which occurred on October 16, 1986, more than a year *after* the Maria Ramirez incident. (RT 2635-2640, 4220.) Had the prosecutor promptly filed the Maria Ramirez charges and obtained a conviction against Mr. Jones, then he could have attempted to admit evidence of the Ramirez incident in the same manner in which the Bertha Richmond evidence was admitted. Therefore, because the justification offered by the prosecution for his delay in filing the Ramirez case is obviously untrue, the prosecution effectively offered no explanation at all.[112]

Although the court only relied on its misunderstanding that the excuse for delay was the need for the PCR test results, the prosecutor offered the following further justification:

> Also, after the crimes [were committed] and just before the complaint was filed, the Canadian Royal Mounted Police applied a new technique through which the defendant's latent fingerprints were identified as being on the plastic bag in which JoAnn Sweets body was found.
>
> Furthermore, the ability to prove beyond a reasonable doubt that the defendant perpetrated all of the crimes charged is in no small way due to the cross admissibility of the evidence as to each count. Thus it took the solving of all of the crimes, and the evidence, not to be able to prove any one

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[112]In arguing the Maria Ramirez attempted murder charge to the jury, the prosecutor stated: "She's an invisible whore. Who's going to believe her." (RT 4990.) Perhaps this is why the prosecutor did not pursue the Ramirez case. Or perhaps it was because Ms. Ramirez had no desire to pursue the case, as she made clear in 1985. (CT 4118.)

> count individually and separately, but to prove all counts beyond a reasonable doubt before the special circumstances complaint could be filed.
>
> Another reason for the lapse in time between the commission of the crimes and the filing of the complaint was that the people felt it was necessary to eliminate all potential third party suspects before we charged the defendant in a complaint seeking the death penalty. Making sure that the defendant and no one else committed the crimes was simply the responsible, professional, and ethical thing to do.
>
> Thus the investigative delay had nothing to do with negligence or an intentional attempt to gain a tactical advantage over the defendant, to harass him, or any other improper motivation.

(CT 4293-4294.)

First, one must question whether "the responsible, professional, and ethical thing" is to blow the statute of limitations for rape and oral copulation in the Ramirez case.

Second, eliminating third party suspects is irrelevant to the Ramirez case. Ms. Ramirez identified Mr. Jones as the alleged perpetrator. There were no other suspects.

Third, Mr. Jones's fingerprints were found on the Sweets dumpster in February 1986, over six years before the complaint was filed. (RT 2024.) Inexcusably, the garbage bags were not even processed for latent prints until February 1992, four months before the complaint was filed. (RT 2826, 2859.) The prosecutor cannot rely on his own tardiness in having the bags processed for prints to support his excuse for failing to discover the prints until six years after JoAnn Sweets died. (RT 4219.)

But more important, Mr. Jones's prints on the dumpster and garbage bags have nothing to do with proving the Maria Ramirez case. No evidence from the JoAnn Sweets case or the other murder counts was admissible in the Maria Ramirez count. (See Argument 5.) Thus, the prosecution's asserted reason for delaying the Ramirez case had no *legal* basis. But even if some of the evidence related to the murder counts evidence was admissible in the Ramirez case, this could not justify a seven-year delay in charging Mr. Jones with the Ramirez claim, particularly because, as the trial court found, the prosecution had all the Ramirez facts by 1987 at the latest. Finally, the prosecutor seemed to suggest that if Mr. Jones's prints were not found in the *JoAnn Sweets* case, then he would have never have filed the *Ramirez* case. That makes no sense.

"Even a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial." (*People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at p. 914.) Here, Mr. Jones's showing of prejudice was substantial. Because of the lost witnesses (the preacher and his colleague), and the faded memories of Ann Jones and Maria Ramirez, Mr. Jones suffered severe prejudice in his ability to present evidence that Ms. Ramirez had apologized for fabricating her charges against him. Given that the delay in filing the Maria Ramirez charges was severely prejudicial and extremely long (almost seven years), and the prosecutor's justification for delay was transparently insubstantial, Mr. Jones has satisfied both the federal and state tests for a due process deprivation.

Accordingly, the trial court abused its discretion in failing to dismiss the Maria Ramirez count. As dismissal is the appropriate remedy for an unconstitutional pre-accusation delay, Mr. Jones's conviction for the

attempted murder of Ms. Ramirez must be reversed. (*United States v. Marion*, *supra*, 404 U.S. at p. 324; *People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 914.)

14.

THE COURT ERRED IN ADMITTING DIANE DONNELLY'S FINGERPRINT TESTIMONY BASED ON THE VACUUM METAL DEPOSITION CHAMBER BECAUSE SHE WAS INCOMPETENT TO TESTIFY ABOUT THE MACHINE.

When Diane Donnelly, formerly a latent print examiner with the San Diego Police Department, attempted to describe how the garbage bags in the JoAnn Sweets case were processed through a machine – the Vacuum Metal Deposition Chamber – the court sustained a foundation objection by the defense, which had argued that knowledge of the machine was outside the scope of Ms. Donnelly's expertise. (RT 2818, 2827.) The defense further insisted that proper foundation required a showing that "the person operating the machine operated it in an acceptable manner," and "only somebody operating the machine could" provide that foundation. (RT 2834.) The court responded:

> Here is what I require. [T]he objection is foundation, and it seems to me that the foundation is lacking and the thoroughness with which she is describing her knowledge of the machinery and how it works exactly and exactly how the bags were treated while they were in her custody and what was done with them. So those are the two areas I ask you to cover is all. I think that will do it. And other issues might require other witnesses.

(RT 2836.) The court then ruled that the defense would have an ongoing foundation objection to Ms. Donnelly's testimony concerning the Vacuum Metal Deposition Chamber and how the garbage bags were processed through the machine. (RT 2837.)

The court erred in failing to sustain Mr. Jones's objection and permitting Ms. Donnelly to testify about the machine and its test results.

Admission of her testimony violated Mr. Jones's confrontation rights under Penal Code section 686, subdivision 3; article I, section 15 of the California Constitution; and the Sixth and Fourteenth Amendments to the United States Constitution. The error, moreover, was not harmless, requiring reversal of the judgment in its entirety. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Proceedings Below

Diane Donnelly testified that she took the garbage bags, which had not been previously examined for latent prints, to the Royal Canadian Mounted Police Department in Ottawa, Canada so that the bags could be processed through the Vacuum Metal Deposition Chamber, a machine that is unavailable in the United States and costs $200,000. (RT 2746, 2826.) The Mounted Police took two days to process the bags. (RT 2827; see also CT 4283, 4293 [Prosecution's Points and Authorities in Opposition to Motion to Dismiss for Lack of Speedy Trial: "the Canadian Royal Mounted Police applied a new technique through which the defendant's latent fingerprints were identified as being on the plastic bag in which Joann Sweets' body was found].)

Ms. Donnelly testified that when she arrived in Ottawa, "I was not familiar with this process at all since we did not have a chamber here in San Diego or in the United States." (RT 2828.) She further stated: "Before I went to Canada I was not aware of all of the functions of the machine." She also admitted: "As far as how all the machinery works, *I really don't care*." (RT 2864 [italics added].) When asked why the machine acted in a certain way during the two-day procedure, Ms. Donnelly responded: "I had not at that point ever worked with the machine that I would have an idea as to why that had occurred." (RT 2865.)

After "absolutely" watching the two-day process (RT 2841) and reading some articles about the machine – according to Ms. Donnelly, "there is not a whole lot that's written about it" (RT 2839) – Ms. Donnelly could only provide a barely intelligible explanation to the jury as to how the machine processed the garbage bags. (RT 2839-2844.) She first told the jury two "chemicals" were involved in the process, gold and zinc. (RT 2840.) She then talked about gold having a natural affinity to zinc, fats, and lipids. She then mentioned furrows, ridges, and print residue. (RT 2841.) She finished with: "The chamber that you have to put the bag in is a round chamber and you have a rotary work holder that you suspend from the top of that chamber and only the surface area that is facing the actual evaporation dishes – that's the gold and zinc evaporation dishes – that's the only area that's going to be vacuum coated. So it took I think it was seven coatings, seven different applications of this coating to completely coat this entire bag." (RT 2841-2842.)

At the end of the process, latent prints were located on the bags (RT 2842) and photographed (RT 2843). Ms. Donnelly compared the prints to those of the defendant, and concluded that Mr. Jones made the latent prints. (RT 2849.)

Ms. Donnelly testified that the garbage bags had not been processed for prints before she submitted them to the Vacuum Metal Deposition Chamber. (RT 2826.) Moreover, Ms. Donnelly stated, had the bags been previously processed, "the vacuum metal deposition process would not have worked. It would have contaminated the entire bags if another process was used ahead of time. So I don't believe anything was done to them at all." (RT 2859.)

A. The Court Erred in Admitting the Testimony over Mr. Jones's Foundation Objection.

Wigmore has explained that before someone like Ms. Donnelly is allowed to base her testimony on a scientific instrument, e.g., an x-ray machine, or as here, the Vacuum Metal Deposition Chamber, certain foundational requirements must be met:

> What is needed, then, in order to justify testimony based on [scientific] instruments, is preliminary professional testimony: (1) to the *trustworthiness of the process* or instrument in general (when not otherwise settled by judicial notice); (2) to the correctness of the *particular instrument*, such testimony being usually available from one and the same qualified person. Any process or instrument furnishing abnormal aid to the senses may thus be employed as a source of testimonial knowledge.

(3 Wigmore (Chadbourn Rev. 1970) §795 at p. 244 [italics in original].)

California courts demand a similar foundation: "In general, the foundational requirements for establishing the reliability of test results consist of a showing that (1) the apparatus utilized was in proper working order, (2) the test used was properly administered, and (3) the operator was competent and qualified." (*Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 140; see also *People v. Williams* (2002) 28 Cal.4th 408, 412 [foundational requirements were satisfied "where (1) the testing device was in proper working order, (2) the test was properly administered, and (3) the operator was competent and qualified"]; cf. Fed. Rules Evid., rule 901(b)(9) ["The requirement of authentication ... is satisfied by evidence ... describing a process or system used to produce a result and showing that the process or system produces an accurate result"].)

As defense counsel argued, Ms. Donnelly was not competent to provide this foundation. (RT 2827.) She was exposed to the 200,000-dollar, not-to-be-found-anywhere-in-the-United-States Vacuum Metal Deposition Chamber for *two days*. Obviously, she did have the expertise to determine whether the complex machine was in proper working order. Similarly, Ms. Donnelly, whose job is to compare fingerprints, had no idea whether the test was properly administered or whether the operator was competent and qualified. Hence, there was no foundation for the test results about which she testified, and for her testimony that Mr. Jones's prints were on the garbage bags.

Furthermore, there was no foundation for Ms. Donnelly's testimony that the Deposition process did not erase prints that might be there. (RT 2840.) Because of this testimony, the jury was left with strong evidence that the garbage bags had no fingerprints of the men who were seen with a rolled carpet near the dumpster in which Ms. Sweets was discovered, or the prints of possible perpetrators who contributed sperm to the sheet found with her. Nevertheless, Ms. Donnelly had no basis for her statements because they were well beyond her expertise.

"Authentication is perhaps the purest example of a rule respecting relevance: evidence admitted as something can have no probative value unless that is what it really is." (*Ricketts v. City of Hartford* (2d Cir. 1996) 74 F.3d 1397, 1410.) Hence, the court erred in permitting Ms. Donnelly to testify based on test results of the Vacuum Metal Deposition Chamber, about which the prosecution failed to provide proper foundation and Ms. Donnelly was not competent to provide. In permitting this testimony, the court in effect admitted hearsay. That is, Ms. Donnelly's description of the deposition process was clearly offered for its truth. She might just as well

have been reading from a manual (real or imaginary) about the process. Admission of her testimony therefore violated Mr. Jones's confrontation rights under Penal Code section 686, subdivision 3; article I, section 15 of the California Constitution; and the Sixth and Fourteenth Amendments to the United States Constitution. (*Crawford v. Washington* (2004) ___ U.S.___ [124 S.Ct. 1354, 1369] [citing *California v. Green* (1970) 399 U.S. 149].)

B. Given the Prosecution's Heavy Reliance on the Discovery of the Fingerprint Evidence and the Court's Instruction That Guilt in One Case Could Prove Guilt in All Other Cases, the Court's Error Was Reversible.

As the prosecutor stated in arguing against Mr. Jones's speedy trial motion, "when we finally get his fingerprint on the bag wrapped around JoAnn Sweets, the game is over." (RT 338.) Thus, according to the prosecutor, he held off filing any of the charges in this case until he had obtained evidence that Mr. Jones's prints were on the garbage bags. He explained:

> [A]fter the crimes [were committed] and just before the complaint was filed, the Canadian Royal Mounted Police applied a new technique through which the defendant's latent fingerprints were identified as being on the plastic bag in which JoAnn Sweets body was found.
>
> Furthermore, the ability to prove beyond a reasonable doubt that the defendant perpetrated all of the crimes charged *is in no small way* due to the cross admissibility of the evidence as to each count. Thus it took the solving of all of the crimes, and the evidence, not to be able to prove any one count individually and separately, but *to prove all counts beyond a reasonable doubt* before the special circumstances complaint could be filed.

(CT 4293-4294 [italics added].)

In other words, without the fingerprints on the garbage bags, the prosecutor would not have been able to prove beyond a reasonable doubt any of the crimes charged against Mr. Jones. In fact, the prosecutor was so convinced that the fingerprint evidence was *the* pivotal piece of evidence in this case, that he intentionally delayed filing the Maria Ramirez charges and thereby blew the statute of limitations in her case for oral copulation and rape. (See Argument 12.) Beyond question, in the view of the prosecutor, all of the guilty verdicts in this case were not surely unattributable to the fingerprint evidence, and had the evidence not been admitted, it is reasonably probable that all of the results in this case would have been more favorable to Mr. Jones. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818.)

The trial court, too, believed that guilt in the JoAnn Sweets case could prove Mr. Jones's guilt in all the other cases. Thus, the court instructed the jury: "If you should find a unique or highly distinctive method, plan, or scheme shared among other counts and the count under consideration, such that an inference of a single perpetrator for all offenses may be drawn, *then you should consider whether it may be logically concluded that if the defendant committed one or more of the other crimes, he also committed the crime under consideration.*" (RT 5123 [italics added].)

Even if the court was wrong to instruct the jury in this fashion (see Argument 5), it allowed the jury to find Mr. Jones guilty of all the other charges if the jury found Mr. Jones guilty of the JoAnn Sweets counts. Because the fingerprint evidence was essential to the jury's guilty verdict in the JoAnn Sweets murder case, all of the other verdicts reasonably relied on

that murder charge, and hence are reversible under *Chapman* and *Watson*. Accordingly, the judgment must be reversed in its entirety.

15.

THE COURT ERRED IN ITS FIRST DEGREE MURDER INSTRUCTIONS BY (A) FAILING TO INSTRUCT ON MALICE AFORETHOUGHT, (B) INSTRUCTING THE JURY THAT MURDER DID NOT REQUIRE AN UNLAWFUL INTENT, AND (C) FAILING TO INSTRUCT THAT MALICE, PREMEDITATION, AND DELIBERATION MUST HAVE EXISTED JOINTLY WITH THE CONDUCT THAT CAUSED THE DEATHS OF JOANN SWEETS AND SOPHIA GLOVER.

For over 140 years, California courts have instructed juries that first degree murder requires malice aforethought, an "intention unlawfully" to kill. (*People v. Rodriguez* (1858) 10 Cal. 50, 54; *People v. Martinez* (2003) 31 Cal.4th 673, 683-684.) In this case, however, the trial court rejected over a century's worth of precedent and failed to even mention malice to the jury, while instructing that murder did not require an unlawful intent. (RT 5134; CT 6921.) In addition, the court failed to instruct that in first degree murder, a malicious, premeditated, and deliberate state of mind must co-exist with the acts causing death. (*People v. Morales* (2001) 25 Cal.4th 34, 45; *People v. Cleaves* (1991) 229 Cal.App.3d 367, 381.) In the process the court committed prejudicial error, requiring reversal of the first degree murder verdicts (*Summerlin v. Stewart* (9th Cir. 2003) 341 F.3d 1082, 1116 (en banc), revd. on other grounds *sub nom. Schriro v. Summerlin* (2004) __ U.S. __ [124 S.Ct. 2519, 72 USLW 4561, 4 Cal. Daily Op. Serv. 5558, 2004 Daily Journal D.A.R. 7569 (U.S. Jun 24, 2004) (NO. 03-526)]; *Neder v. United States* (1999) 527 U.S. 1, 15; *People v. Flood* (1998) 18 Cal.4th 470, 507), or alternatively, reduction of the verdicts from murder to voluntary manslaughter (Pen. Code, § 1260).

A. The Court's First Degree Murder Instructions Were Erroneous Because They Omitted the Elements of Malice and Concurrence, and Told the Jury that Murder Did Not Require an Unlawful Intent to Kill, the Definition of Malice.

Six times Mr. Jones requested that the court instruct on first degree murder by expressly mentioning malice to the jury, but each time the court refused to do so. (RT 4359-4360, 4370-4373, 4959.) The court was adamant in its position, despite acknowledging that this was "[s]ort of like leaping off a tall building in a single bound when you *take malice aforethought out* and *wipe out mental state*, but it feels real good once you get to the bottom." (RT 4359 [italics added].) Mr. Jones suggests that when one takes a leap off a tall building, one is committing a fatal mistake, which is what the trial court committed here.

Instead of delivering the standard CALJIC instructions on first degree murder, the court combined and modified CALJIC Nos. 8.10 (Murder – Defined) and 8.20 (Deliberate and Premeditated Murder), while eliminating CALJIC No. 8.11 ("Malice Aforethought" – Defined) (RT 4372) as follows:

> All murder which is intentional, deliberate, and premeditated is murder of the first degree. To prove such crime each of the following elements must be proved beyond a reasonable doubt: one, a human being was killed; two, the killing was unlawful; three, *the killing was intentional*; and four, the killing was deliberate and premeditated. A killing is unlawful if it is neither excusable nor justifiable. The word 'intentional' means *willful*.

(RT 5134 [italics added].)[113]

Penal Code section 187(a) states: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Section 188 provides

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[113]The court further instructed the jury:

> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand. If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill, which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill. He need not harbor ill will or hatred of the person killed.

(RT 5134-5136.) While admonishing the jury to "refer to the complete instructions in *deciding* these crimes and circumstances," the court also summarized first degree murder for the jury: "first degree murder is an unlawful killing committed with the specific intent to kill and with deliberation and premeditation." (RT 5144 [italics added].)

that malice aforethought "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."

Because express malice under section 188 requires an intent to kill *unlawfully*, this Court has rejected the argument that express malice means a defendant "need only to have intended to kill." (*In re Christian S.* (1994) 7 Cal.4th 768, 778.) In construing section 188, the Court in *Christian S.* distinguished between an intent unlawfully to kill and an act that is later found to be unlawful. The Court concluded that "the word 'unlawfully' modifies the word 'intention' so that the statute requires an intent to act unlawfully." (*Ibid.*) Thus, "an unlawful intent to kill [is] required in California to show express malice." (*People v. Martinez*, *supra*, 31 Cal.4th at pp. 683-684; *People v. Anderson* (2002) 28 Cal.4th 767, 782 ["express malice requires an intent to kill unlawfully"]; *People v. Swain* (1996) 12 Cal.4th 593, 612, fn. 2 (conc. opn. of Mosk, J.) ["intent to kill is not sufficient for malice aforethought. Penal Code 188 demonstrates this point as well. It also requires 'unlawful[ness].'"]; *People v. Saille* (1991) 54 Cal.3d 1103, 1114 ["express malice and an intent unlawfully to kill are one and the same"].)

That express malice requires more than a simple intent to kill should be obvious. As this Court has recognized, "malice [is] that most culpable of mental states." (*People v. Rios* (2000) 23 Cal.4th 450, 461.) Thus, for example, it "'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." (*Ibid.* [quoting *People v. Flannel* (1979) 25 Cal.3d 668, 675 (plur. opn. of Tobriner, J.)].) Nor does malice exist in the mind of a police officer who justifiably kills out of necessity in attempting to arrest a fleeing person charged with a felony. (Pen. Code, § 196(3).)

Malice also does not exist in the mind of a person who justifiably kills in defense of family or property. (Pen. Code, § 197.) In each of these instances, the person who kills *intends* to do so, perhaps even deliberately and with premeditation, but the person does *not* have malice, "that most culpable of mental states." Clearly, intent to kill does not alone constitute malice; the perpetrator must intend to kill *unlawfully*, exactly as section 188 provides.

As this Court has held, a criminal homicide committed with intent to kill may be either murder or manslaughter. (*People v. Rios*, *supra*, 23 Cal.4th at p. 460.) Manslaughter is defined by Penal Code section 192 as "the unlawful killing of a human being without malice." Thus, "[t]he distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." (*People v. Rios*, *supra*.) "Accordingly, a conviction of voluntary manslaughter can be sustained under instructions which require ... that the defendant killed intentionally and unlawfully. Standard California jury instructions ... have so provided for a quarter of a century. (See CALJIC No. 8.40.)" (*Id.* at p. 463.) CALJIC No. 8.40 states that to prove voluntary manslaughter, "each of the following elements must be proved: 1. A human being was killed; 2. The killing was unlawful; and 3. The killing was done with the intent to kill."

Given that voluntary manslaughter may involve an intent to kill, and that such intent to kill does not constitute malice because voluntary manslaughter lacks malice, then it follows that a murder instruction that defines malice simply as an intentional killing fails to instruct the jury on malice at all. (*Neder v. United States*, *supra*, 527 U.S. at p. 10 ["'an error in the instruction that defined the crime [is] easily characterized as ... an error of "omission"'"].) An instruction that relieves "the prosecution of the

burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood*, *supra*, 18 Cal.4th at pp. 479-480; *Neder v. United States*, *supra*, 527 U.S. at pp. 8, 12 [a jury instruction that omits an element of the offense is a Sixth Amendment violation]; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1320-1321 [where unambiguous instruction omits element, constitutional error has occurred].) Accordingly, a jury instruction that defines express malice as merely an intentional killing is erroneous as a matter of law. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217 [appellate court reviews a trial court's instruction "independently" to determine applicable legal principle].)

CALJIC No. 8.10 (Murder – Defined) states in part: "In order to prove [murder], each of the following elements must be proved: 1. A human being was killed; 2. The killing was unlawful; and 3. The killing was done with malice aforethought." CALJIC No. 8.20 (Deliberate and Premeditated Murder) provides in part: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree." And CALJIC No. 8.11 ("Malice Aforethought" – Defined) defines malice as express "when there is manifested an intention unlawfully to kill a human being."

Thus, the court substituted "the killing was intentional" (meaning "willful") for "[t]he killing was done with malice aforethought," because the trial court believed that malice, intent to kill, and a willful killing were identical states of mind (RT 2771 ["If you just simply eliminate 'malice' and understand that malice is 'intentional' ..., everything ... makes a whole lot more sense"]; 4359 ["Sort of like leaping off a tall building in a single bound when you take malice aforethought out and wipe out mental state,

but it feels real good once you get to the bottom"]; 5134 ["'intentional' means willful"]), and that the only mental state that the prosecution needed to prove was intent (CT 6673 ["mental state = intent"]).[114]

But, contrary to the trial court's view, willfulness, intent, and malice are different states of mind, and not synonymous in an instruction for first degree murder. (*People v. Valdez* (2002) 27 Cal.4th 778, 787-788 [willful does not require any intent to violate the law]; *People v. Hillhouse*, *supra*, 27 Cal.4th 469, 504 [intent and malice "'are separate and disparate mental states. The words are not synonyms.'"]; *People v. Benitez* (1992) 4 Cal.4th 91, 103 ["the mental state comprising malice is independent of that encompassed within the concepts of willfulness, deliberation, and premeditation"]; *People v. Bloyd* (1987) 43 Cal.3d 333, 352 ["malice is a separate and distinct mental state which can be established independent of the specific intent to kill"].)

In *People v. Conley* (1966) 64 Cal.2d 310, the trial court instructed the jury on the elements of murder, and as in this case, specifically mentioned intention, deliberation and premeditation, but *omitted any reference to malice*. (*Id.* at p. 320.) "Observing that the mental state of specific intent to kill was not necessarily the same as malice aforethought, the court held the instructional omission removed from the jury the issue of defendant's capacity to harbor malice." (*People v. Stanley* (1995) 10 Cal.4th 764, 796 [citing *Conley*, *supra*, 64 Cal.2d at pp. 320, 323].) Accordingly, this Court held that the trial court erred in failing to instruct

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[114]The court did not instruct the jury on implied malice in connection with first degree murder presumably "because implied malice murder normally constitutes only murder in the second degree." (*People v. Catlin* (2001) 26 Cal.4th 81, 149.)

the jury on malice aforethought. (*People v. Conley*, *supra*, 64 Cal.2d 310, 319-320.) The trial court here committed the same error.

Moreover, the court here compounded the error by defining "intentional" as "willful." "'The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. *It does not require any intent to violate [the] law*, or to injure another, or to acquire any advantage.'" (*People v. Valdez*, *supra*, 27 Cal.4th at pp. 787-788 [italics added] [quoting *People v. Garcia* (2001) 25 Cal.4th 744, 753 and citing Penal Code § 7(1)]; *People v. Atkins*, *supra*, 25 Cal.4th at p. 85 ["'Willfully implies no evil intent'"].) Thus, when the court instructed the jury that murder only required a finding that "the killing was ... willful," the court was informing the jury that murder and intent to kill did not require an intent to violate the law. But given that malice is "a deliberate *intention unlawfully* to take away the life of a fellow creature" (Pen. Code, § 188 [italics added]; *People v. Anderson*, *supra*, 28 Cal.4th at p. 782 ["express malice requires an intent to kill unlawfully"]), the instruction effectively removed malice from the jury's consideration.

In addition, because "[e]very crime requires a union of an act and a criminal mental state" (*People v. Morales* (2001) 25 Cal.4th 34, 45; *People v. Green* (1980) 27 Cal.3d 1, 53 [concurrence is "an invariable element of every crime"]; Pen. Code, § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"]), the defense requested that the court give CALJIC No. 3.31.5 (Concurrence of Act and Mental State) with respect to the required mental state for first degree murder. (RT 4359; CT 6148.) This instruction would have told the jury that "there must exist a union or joint operation of act or

conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed. In the crime of first degree murder, the necessary mental states are malice aforethought, premeditation, and deliberation." (*People v. Jones* (1991) 53 Cal.3d 1115, 1145 ["the mental states required for the commission of first degree murder were premeditation, deliberation and malice aforethought"].)[115] Thus, had the court so instructed the jury, the jury would have had the opportunity to consider the required mental states for first degree murder.

Nevertheless, the court refused to give the instruction because of its view that the only mental state involved in first degree murder was intent to kill. (RT 2772, 4359; CT 6673.) The court's view was obviously mistaken (*People v. Rathert* (2000) 24 Cal.4th 200, 205 [in instructing the jury, the critical issue is the accurate description of the state of mind required for the particular crime]) because, in addition to malice aforethought, premeditation and deliberation are mental states of first degree murder. (*People v. Jones*, *supra*, 53 Cal.3d at p. 1145.)

In short, the trial court erred in (1) failing to instruct on express malice aforethought, which requires an intent to kill unlawfully, (2) instructing the jury that first degree murder only requires a willful killing, meaning one without an intent to kill unlawfully, and (3) failing to instruct

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[115]Although the defense requested CALJIC No. 3.31.5, the court should have given the instruction on its own motion in any event. (*People v. Cleaves* (1991) 229 Cal.App.3d 367, 381; CJER, Mandatory Criminal Jury Instructions Handbook (2003 12th ed.) § 2.4 at p. 15; cf. *People v. Hayden* (1994) 22 Cal.App.4th 48, 58 [an instruction requiring the "concurrence of act and intent must be given sua sponte in a prosecution for murder"].)

that a premeditated, deliberate, and malicious (or an intent-to-kill-unlawfully) state of mind must have existed jointly with the conduct that caused the deaths of JoAnn Sweets and Sophia Glover.

B. The Court's Instructional Errors Were Prejudicial.

The trial court's instructional mistakes constituted per se reversible, federal constitutional error. In *Summerlin v. Stewart, supra*, 341 F.3d 1082, the Ninth Circuit sitting en banc held that under the Sixth and Eighth Amendments, and the Supreme Court's decision in *Ring v. Arizona* (2002) 536 U.S. 584, a death judgment is not subject to harmless error analysis, and must be automatically vacated for structural error where the death penalty decision is based on judge-made findings. (*Summerlin v. Stewart, supra*, 341 F.3d at p. 1116.) Clearly, if it is impermissible under the United States Constitution and reversible error per se to base a death judgment on judge-made findings, then the same would be true if this Court based a death judgment on a finding of harmless error in place of actual findings of malice aforethought and concurrence by the jury. (*Id.* at p. 1118 ["Application of the heightened scrutiny commanded by the Eighth Amendment in capital cases underscores the structural nature of this Sixth Amendment constitutional infirmity"].) Thus, harmless error analysis is inapplicable, and the Sweets and Glover murder verdicts must be reversed, along with the special circumstances findings and death judgment.

Assuming, however, for the sake of argument that the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18 governs here, then the trial court's failure to instruct on malice aforethought and concurrence, and its error in instructing that first degree murder only requires a willful killing, that is, one without an intent to kill unlawfully, were not harmless

because respondent cannot "prove beyond a reasonable doubt that the error[s] complained of did not contribute to the verdict obtained." (*Id.* at p. 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279 ["The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error"]; see also *Mitchell v. Esparza* (2003) 540 U.S. 12 [124 S.Ct. 7, 11, 157 L.Ed.2d 263] ["we have often held that the trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis"].)

In *People v. Flood*, *supra*, 18 Cal.4th 470, this Court found a failure to instruct on an element of the crime was harmless under *Chapman* where the error concerned "an uncontested, peripheral element of the offense, which effectively was conceded by defendant, was established by overwhelming, undisputed evidence in the record, and had nothing to do with defendant's own actions or mental state." (*Id.* at p. 507.) None of these factors applies here.

Obviously, malice and concurrence can never be peripheral elements in a capital case. Here, together they were central, and meant the difference between manslaughter (or second degree murder) convictions and multiple first degree verdicts, or the difference between life and death eligibility.

By denying guilt, Mr. Jones did not concede malice or concurrence. (*People v. Rowland*, *supra*, 4 Cal.4th at p. 260 ["a fact – like defendant's intent – generally becomes 'disputed' when it is raised by a plea of not guilty or a denial of an allegation"].)

Mr. Jones also defended the murder charges by pointing to the culpability of third parties, in the Sweets case, Ike Jones and an accomplice (RT 3363, 3369-3374, 3382, 3389-3390, 3393-3394, 3397), and in the Glover case, a man who attacked Ms. Glover the day before her death. (RT 3440-3441, 3456, 3460, 5066-5067.) Also, DNA tests showed there were two and possibly three contributors of sperm to the Sophia Glover anal swabs, suggesting that she was gang assaulted. (RT 4799-4800, 4811, 4861, 5067.) The prosecution's DNA expert, Dr. Edward Blake, conceded that there could have been multiple sperm contributors to the sheet found with JoAnn Sweets, suggesting that she, too, was attacked by more than one person. (RT 3037.)"

"[A] criminal defendant has a right to present evidence of third party culpability where such evidence is capable of raising a reasonable doubt as to his guilt of the charged crime." (*People v. Gutierrez*, *supra*, 28 Cal.4th 1083, 1136 [citing *People v. Hall*, *supra*, 41 Cal.3d 826, 833].) Here, the trial court ruled that it was "clear" that testimony regarding Ike Jones was "sufficient to raise a reasonable doubt on the JoAnn Sweets case" with respect to the defendant's guilt. (RT 266-267.) Moreover, according to the prosecution, "Joyce Euwing's testimony directly implicated Ike Jones in the JoAnn Sweets murder." (CT 6444.) The prosecution objected to none of the Glover third party culpability evidence, thereby conceding that it was capable of raising a reasonable doubt about the defendant's guilt in her death.

Although evidence of third party culpability does not directly rebut a third party's malice or the lack of concurrence, it demonstrates that Mr. Jones did not concede or leave uncontested *his* malice and the lack of concurrence.

Furthermore, evidence of concurrence or an intent to kill unlawfully was not overwhelming and undisputed. No one witnessed the killings. No one could be certain of the specific conduct or state of mind of the perpetrators. Moreover, the circumstances surrounding the deaths strongly suggest that these were impulse killings brought about by rage. Thus, had the jury been properly instructed, it could have focused on whether there was a concurrence of premeditation and the conduct causing the deaths. The evidence also shows that there could have been provocative conduct by the victims, who might have balked at providing anal sex, that led to a sudden quarrel or heat of passion, which in turn would have negated malice. (*People v. Rios*, *supra*, 23 Cal.4th at p. 460.)

Finally, the intent to kill unlawfully has everything "to do with defendant's own actions or mental state." (*People v. Flood*, *supra*, 18 Cal.4th at p. 507.) Hence, the trial court's instructional errors with respect to malice and concurrence were not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

C. The Special Circumstances Findings and Death Judgment Should Be Set Aside, While the Murder Convictions Should Either Be Reversed or Reduced to Voluntary Manslaughter, at Mr. Jones's Option.

Despite *six* requests by Mr. Jones to instruct on malice aforethought, the court, with the prosecution's encouragement (RT 4359), erroneously omitted any mention of "malice" in the jury instructions. Although the Court and the prosecution insisted that "intent to kill" would suffice, both cited as their authority, *People v. Saille* (1991) 54 Cal.3d 1103 (CT 6673, 7099), which plainly states that "express malice and an intent *unlawfully* to kill are one and the same." (*Id.* at p. 1114 [italics added].) The court compounded its error by instructing that the defendant need not have

intended to kill unlawfully ("intentional means willful") and by failing to instruct that malice, premeditation, and deliberation had to co-exist with the conduct that caused death. In essence, rather than instruct the jury on murder, the court actually instructed the jury on voluntary manslaughter, so that the verdicts reached by the jury were voluntary manslaughter at most.

Murder is "the unlawful killing of a human being ... *with malice aforethought*." (Pen. Code, § 187(a) [italics added].) "Manslaughter is the unlawful killing of a human being *without malice*." (Pen. Code, § 192 [italics added]; see *People v. Rios*, *supra*, 23 Cal.4th at p. 454 ["[b]y statute and long-standing case law, an intentional but nonmalicious criminal homicide is voluntary manslaughter"]; *People v. Conley*, *supra*, 64 Cal.2d 310, 318 ["in the absence of malice a homicide cannot be an offense higher than manslaughter"].) It follows that because the court omitted malice from its murder instruction, the court in effect instructed the jury on voluntary manslaughter, an unlawful killing without malice, and any guilt verdict the jury returned as a result of the court's instruction was voluntary manslaughter.

"The court may modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense." (Pen. Code, § 1260.) Thus, this Court may reduce the murder verdicts to lesser included voluntary manslaughter verdicts. (*People v. Heslen* (1946) 27 Cal.2d 520 [modifying first degree murder judgment to second degree after jury was erroneously instructed regarding the distinction between first and second degree murder]; *People v. Alexander* (1983) 140 Cal.App.3d 647, 666 [conviction reduced from conspiracy to commit first degree murder to

conspiracy to commit second degree murder because of instructional error].)

Moreover, the alternative remedy of reversing the murder verdicts and remanding for retrial on those charges would undermine the principles of double jeopardy, invited error, and collateral estoppel.

If a prosecutor charges a defendant with a lesser included crime, and the defendant is convicted, the prosecutor is prevented by double jeopardy from recharging the defendant with a greater crime. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 15; *Brown v. Ohio* (1977) 432 U.S. 161, 168; *People v. Fields* (1996) 13 Cal.4th 289, 305, 312.) Here, based on the jury instructions endorsed by the prosecution, the jury in essence convicted Mr. Jones of voluntary manslaughter. Hence, to further the principles of double jeopardy, the prosecution should be precluded, at Mr. Jones's option (*People v. Belcher* (1974) 11 Cal.3d 91, 96 [defendant may waive double jeopardy bar]), from refiling murder charges on remand.

In *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, a jury found the defendant guilty of murder and conspiracy to commit murder, found true a financial-gain special-circumstance allegation, and imposed a verdict of death. The judgment was reversed on appeal. On remand the defendant contended that double jeopardy prohibited the prosecution from retrying him on any offense greater than second degree murder because the jury failed to determine the degree of murder in the first trial under Penal Code section 1157.[116] This Court agreed, despite the jury's special

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[116]Section 1157 provides: "Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the

circumstance finding and death verdict. (*Id.* at p. 73.)

In reaching this conclusion, *Marks* perceived no unfairness to the prosecution, which was

> not deprived of its "one complete opportunity to convict those who have violated [the] laws." When the verdict is "deemed of the lesser degree" by operation of law, *the prosecution bears at least partial responsibility*. The consequences of an irregular verdict are well settled, and nothing precludes the prosecution from calling the deficiency to the court's attention before it discharges the panel. Since any failure to do so results from neglect rather than lack of notice and opportunity to be heard, the People's right to due process is accordingly not offended.

(*Id.* at p. 77 [citations and footnotes omitted; italics added].) Likewise, the prosecutor in this case bears at least partial responsibility for the court's failure to instruct on malice. Six times the defense requested a malice instruction, and six times the prosecution endorsed the court's view. (RT 4359-4360, 4370-4373, 4959; see also CT 7098-7099.)

Moreover, as *Marks* observed, a "prosecutor cannot '"take advantage of his own wrong"'" (*ibid.* [quoting *United States v. Ball* (1896) 163 U.S. 662, 668]), and the "double jeopardy guaranty 'serves principally as a restraint on courts and prosecutors'" (*ibid.* [quoting *Brown v. Ohio*, *supra*, 432 U.S. at p. 165].) *Marks* also noted:

> The United States Supreme Court has repeatedly counseled against subjecting a defendant to further proceedings to allow *the prosecution the opportunity to ameliorate trial deficiencies, evidentiary or procedural, that could have been otherwise timely corrected*. The purpose of double jeopardy "is subserved by refusing to permit repeated

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court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

> retrials of a defendant in order to remedy errors of law ... made by the trial court in the course of trial." At the very least, repeated trials impermissibly permit the prosecution to "gain[] an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." This process in turn encourages "the governmental overreaching that double jeopardy is supposed to prevent."

(*Id.* at pp. 77-78 [citations omitted; italics added].) Thus, modifying the judgment in this case to reflect two manslaughter convictions would serve the principles that underlie double jeopardy.

The case of *Crayton v. Superior Court* (1985) 165 Cal.App.3d 443 supports this conclusion. There, felony and misdemeanor charges were separately filed against the defendant for the same conduct. The prosecutor's case file for the misdemeanor contained a note that the misdemeanor should be dismissed because felony proceedings were pending. The prosecutor who attended a hearing where the defendant pleaded no contest to the misdemeanor failed to take the case file with her, had not seen the note, and did not object to entry of the plea. The defendant contended that the felony charge should be dismissed on double jeopardy grounds. The appellate court agreed. (*Id.* at p. 452.)

As in *Crayton* the prosecutor here made mistakes that should not redound to the detriment of the defendant. The defense repeatedly implored the court to instruct the jury on malice aforethought, which would have told the jury, contrary to the court's actual instruction, that murder required malice and an intent to violate the law. "'The underlying idea [of the double jeopardy bar] is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and

ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" (*People v. Fields*, *supra*, 13 Cal.4th at p. 298 [quoting *Green v. United States* (1957) 355 U.S. 184, 187-188].) Mr. Jones has already suffered through one trial. He should not have to endure another due to the mistakes of the prosecutor.

The principles of invited error lead to the same result. When a defense attorney makes a conscious, deliberate tactical choice to request or forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted in error. (*People v. Wader* (1993) 5 Cal.4th 610, 657, 658.) Moreover, "an appellant waives his right to attack error by expressly or implicitly agreeing or acquiescing at trial to the ruling or procedure objected to on appeal." (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.) What is sauce for the goose should be sauce for the gander.

For over 140 years, California courts have instructed juries that murder requires malice and that express malice is a "deliberate intention unlawfully" to kill. (*People v. Rodriguez*, *supra*, 10 Cal. 50, 54.) And as *Rios* noted, for a quarter of a century, standard California jury instructions have provided that "a conviction of voluntary manslaughter can be sustained under instructions which require ... that the defendant killed intentionally and unlawfully." (*People v. Rios*, *supra*, 23 Cal.4th at p. 463.)

Here, the prosecutor chose to reduce his burden to proving voluntary manslaughter instead of murder. Had he chosen to charge voluntary manslaughter, this Court would not permit him to return to the trial court to charge murder after having proven voluntary manslaughter. This Court should also not permit him to charge murder again after he lowered his

burden by having the jury instructed on voluntary manslaughter rather than on murder.

The doctrine of collateral estoppel also supports this view. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Ashe v. Swenson* (1970) 397 U.S. 436, 443.) Modifying the first degree murder convictions in this case to manslaughter would serve the purposes of collateral estoppel, which are: "(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation." (*People v. Santamaria* (1994) 8 Cal.4th 903, 914 [quoting *People v. Taylor* (1974) 12 Cal.3d 686, 695].)

The Ninth Circuit has stated: "Collateral estoppel analysis involves a three-step process: '(1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was "litigated" in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.'" (*Pettaway v. Plummer* (9th Cir.1991) 943 F.2d 1041, 1043-1044 [quoting *United States v. Hernandez* (9th Cir.1978) 572 F.2d 218, 220].)

First, the issue in this trial was whether the killings were committed with malice and any new trial on remand would be the same. Second, the existence of malice was litigated in this trial. The prosecutor charged first

degree murder and set out to prove it. Third, the issue of malice was necessarily decided in this case because the prosecutor chose to omit it from the jury instructions. It is as if the prosecutor recognized a failure of proof and informally amended his information to replace first degree murder counts with manslaughter charges. In effect the prosecutor decided the issue of malice for the jury by not presenting it to the jury. Accordingly, on retrial collateral estoppel would apply to bar the prosecutor from relitigating malice. Hence, the murder convictions should be reduced to manslaughter.

In sum, because the jury in this case was not instructed on and therefore did not find malice, but did find intent to kill, the jury effectively found that Mr. Jones was guilty of two counts of voluntary manslaughter. Moreover, because the prosecution chose to prosecute Mr. Jones on an intent to kill theory, rather than on a malice unlawful intent theory, the prosecution chose in effect to prosecute Mr. Jones for voluntary manslaughter, just as if the prosecution had charged in the information two counts of voluntary manslaughter instead of two counts of murder. Finally, because the prosecution chose in actuality to prosecute Mr. Jones for voluntary manslaughter, the prosecutor is barred by principles of double jeopardy, invited error, and collateral estoppel from recharging Mr. Jones for the greater crime of murder, absent Mr. Jones's consent.

Accordingly, the special circumstances findings and death judgment should be set aside, while the murder convictions should either be reversed or reduced to voluntary manslaughter, at Mr. Jones's option.

16.

THE COURT ERRED IN INSTRUCTING THE JURY WITH CALJIC NO. 2.03 ON CONSCIOUSNESS OF GUILT.

The court instructed the jury with CALJIC No. 2.03, which permitted the jury to infer consciousness of guilt by Mr. Jones:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning any crime for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(RT 5110; CT 6736.) The instruction was erroneously given because it was unnecessary and argumentative. Moreover, it permitted the jury to draw irrational inferences against Mr. Jones. The error deprived Mr. Jones of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstance and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Moreover, it was prejudicial. Accordingly, the judgment was be reversed in its entirety.[117]

A. The Consciousness-of-Guilt Instruction Improperly Duplicated the Circumstantial Evidence Instructions.

The instruction under CALJIC No. 2.03 was unnecessary. This court has held that specific instructions relating to the consideration of evidence

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[117]Although Mr. Jones's trial counsel did not object to the instruction, the claimed error is cognizable on appeal because it affects Mr. Jones's substantial rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

that simply reiterate a general principle on which the jury already has been instructed should not be given. (*People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on other ground, *People v. Hill* (1998) 17 Cal.4th 800.)

In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (RT 5107-5109; CT 6733-6735.) These instructions informed the jury that it may draw inferences from the circumstantial evidence, that is, that it could infer facts tending to show Mr. Jones's guilt – including his state of mind – from the circumstances of the alleged crimes.

There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection].)

B. The Consciousness-of-Guilt Instruction Was Unfairly Partisan and Argumentative.

The consciousness-of-guilt instruction were not just unnecessary, it was impermissibly argumentative. The trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th

475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

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

Judged by this standard, CALJIC No. 2.03, the consciousness-of-guilt instruction given in this case, is impermissibly argumentative. Structurally, it is almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th 408, which read as follows:

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

(*Id.* at p. 437, fn. 5.) Here the instruction told that jury that "[i]f you find" false statements, then "you may" consider that evidence for a specific purpose, showing consciousness of guilt in this case. This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and should also hold CALJIC No. 2.03 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" Nonetheless, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions ...." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment 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*, *supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instruction given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instruction not to be argumentative. Except for the party benefitted by the instruction, there is no discernable difference between the instruction this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th 705, 713; *People v.*

Bacigalupo (1991) 1 Cal.4th 103, 123 [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532, and a number of subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instruction, noting that it tells the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the allegedly protective aspect of the instruction is weak at best and often entirely illusory. The instruction does not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. It thus permits the jury to seize on one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

The argumentative consciousness-of-guilt instruction invaded the province of the jury, focusing the jury's attention on evidence favorable to

the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. It therefore violated Mr. Jones's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. The Consciousness-of-Guilt Instruction Permitted the Jury to Draw Three Irrational Permissive Inferences about Mr. Jones's Guilt.

The consciousness-of-guilt instruction suffers from an additional constitutional defect – it embodies improper permissive inferences. The instruction permits the jury to infer one fact, such as Mr. Jones's consciousness of guilt, from other facts, i.e., false statements (CALJIC No. 2.03). (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly on a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally

no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the consciousness-of-guilt instruction permitted three types of irrational inferences.

First, the prosecutor argued that after Mr. Jones was with Maria Ramirez and Karen Mitchell, he lied to law enforcement about his encounters with the women. (RT 5015-5016, 5024-5025.) He urged the jury to apply the consciousness-of-guilt instruction (CALJIC No. 2.03) and conclude that Mr. Jones's lies proved that he was guilty, but of what? (RT

5016.) The prosecutor read the instruction to the jury: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning any crime for which he is now being tried, you may consider such statement as a circumstance tending to prove consciousness of guilt." (*Ibid.*) After reading the instruction, the prosecutor did not argue explicitly that Mr. Jones's purported lies proved he was guilty of the crimes against Maria Ramirez and Karen Mitchell. Instead, he argued: "He lied, again, every chance he got." (RT 5025.) "And lies ... kick in" [the consciousness-of-guilt] instruction." (RT 5022.) Thus, the prosecutor suggested to the jury that when Mr. Jones denied committing the crimes that he was charged with in this case, he was lying because he lies every chance that he gets, which shows a consciousness of guilt for all the charged crimes. The instruction permitted this irrational inference because its language did not limit the inference of guilt to the specific crime about which Mr. Jones purportedly lied. Instead, the instruction permitted the jury to draw an inference that if Mr. Jones lied about "*any* crime for which he is now being tried," then that lie could be used "as a circumstance tending to prove consciousness of guilt" of any and all crimes.

Another irrational inference concerned Mr. Jones's mental state at the time the charged crimes allegedly were committed. The improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer, not only that Mr. Jones attempted to kill Maria Ramirez and Karen Mitchell, but that he also had done so while harboring the intents or mental states required for an attempted murder conviction. Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind

immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained,

> evidence of defendant's cleaning up and false stories ... is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)[118]

Therefore, Mr. Jones's actions after the crimes, on which the consciousness-of-guilt inferences were based, simply were not probative of whether he harbored the mental states for attempted murder at the time of the incidents with Maria Ramirez and Karen Mitchell. There was no rational connection – much less a link more likely than not – between Mr. Jones's purported lies and his consciousness of having committed the attempted murders with "express malice aforethought." (CALJIC No. 8.66 [Attempted Murder].)

This Court has previously rejected the claim that consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) Nevertheless, Mr. Jones

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[118]Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.

(LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482 [original italics, fn. omitted].)

respectfully asks this Court to reconsider and overrule these holdings, and to hold that in this case delivery of the consciousness-of-guilt instructions was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean 'consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.) The *Crandell* analysis is mistaken for three reasons. First, the instruction does not speak of "consciousness of some wrongdoing;" it speaks of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instruction to mean something it does not say. Elsewhere in the instructions, the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., RT 5108 ["a finding of guilt as to any crime;" "guilty of the crime;" "the defendant's guilt must be proved beyond a reasonable doubt;" "an inference essential to establish guilt"]; 5109 [defendant's guilt and ... innocence;" "points to his guilt;" "find the defendant guilty of the offenses charged"].) In fact, while the first sentence of CALJIC No. 2.03 mentions "consciousness of *guilt*," the very next sentence states that "such conduct is not sufficient by itself to prove *guilt*," meaning, of course, guilt of the crimes charged. Contrary to *Crandell's* view, a reasonable juror would believe that the word "guilt" has the same meaning in each sentence, and would not understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the crimes charged." Thus, it would be a violation of due process if the jury could reasonably interpret that

instruction to mean that Mr. Jones was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.)

Second, although the consciousness-of-guilt instruction does not specifically mention the defendant's mental state, it likewise does not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instruction suggests that the scope of the permitted inferences is very broad. It expressly advises the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.[119]

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[119]In a different context, this Court repeatedly has held that an instruction which refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

Third, this Court itself has drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness-of-guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.)[120] Since this Court considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

The consciousness-of-guilt instruction permitted a final irrational inference, i.e., that Mr. Jones was guilty not only of sexually assaulting Ms. Ramirez and Ms. Mitchell, but also of attempting to murder them. This Court approved an inference precisely that far-reaching in *People v. Rodriguez* (1994) 8 Cal.4th 1060, when it held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140 [original italics]; accord, *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [holding that it is rational to infer "that false statements regarding a crime show a consciousness of guilt

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[120]In *Hayes*, this Court wrote:

> There was also substantial evidence, apart from James' testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested*, the knife that killed Patel was found in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 608 [italics added].)

of all the offenses committed during a single attack"].)

To determine if the sweeping inferences permitted by the consciousness-of-guilt instruction are constitutional in this case, the Court must ask: If Mr. Jones lied about being with the purported victims because he sexually assaulted them, then is it more likely than not that because he lied, he has *also* committed attempted murder? Obviously, the answer to this question is, "No,"[121] and the inferences permitted by the consciousness-of-guilt instruction is accordingly constitutionally infirm. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167.)

Because the consciousness-of-guilt instruction permitted the jury to draw three irrational inferences of guilt against Mr. Jones, use of the instruction undermined the reasonable doubt requirement and denied him a fair trial and due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) The instruction also violated Mr. Jones's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16); and, by reducing the reliability of the jury's determination and creating the risk that the jury would make

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[121]Mr. Jones's purported lies could not conceivably indicate consciousness of guilt of attempted murder, unless one first assumes that Mr. Jones, in fact, committed such a crime. (See *United States v. Durham* (10th Cir. 1998) 139 F.3d 1325, 1332; *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149 [ruling that consciousness of guilt instructions should not be given where they, in effect, tell the jury "that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt.") Embodying such "circular" reasoning (*ibid.*) in a jury instruction that permitted a jury to arbitrarily infer guilt therefrom would – and in this case did – constitute a clear denial of due process. (U.S. Const., 14th Amend.)

erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

D. Reversal is Required.

Giving the consciousness-of-guilt instruction was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, Mr. Jones's convictions and the special circumstances finding must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The error in this case was not harmless beyond a reasonable doubt. The jury was given an unconstitutional instruction under CALJIC No. 2.03 that magnified the argumentative nature of the instruction and its impermissible inferences. The instruction was based on thin evidence – Mr. Jones's purported lies about being with the alleged victims. The effect of the consciousness-of-guilt instruction was to tell the jury that Mr. Jones's own conduct showed he was aware of his guilt for the very charges he disputed. In the context of this case, with its weak evidentiary base for every alleged crime, the instruction was not harmless beyond a reasonable doubt. Therefore, the judgment must be reversed in its entirety.

17.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED ON MOTIVE ALONE.

The trial court instructed the jury under former CALJIC No. 2.51 (5th ed.):

> Motive is not an element of the crimes 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.

(RT 5115.) This instruction improperly allowed the jury to determine guilt based on the presence of an alleged motive and shifted the burden of proof to Mr. Jones to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

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

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove

theft or robbery].)

The motive instruction was in stark contrast to another standard evidentiary instruction, CALJIC No. 2.03, which expressly admonished the jury that a wilfully false or deliberating misleading statement was "not sufficient by itself to prove guilt." (RT 5110.) Because CALJIC No. 2.51 is so obviously aberrant, it prejudiced Mr. Jones during deliberations. The instruction appeared to include an intentional omission allowing the jury to determine guilt based on motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.] [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

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

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

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

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

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

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

With respect to all four murder charges, the jury was instructed that intent to kill was an element of first degree murder. (RT 5134-5135.) With respect to Sophia Glover and Trina Carpenter, the jury was instructed that a killing during the commission or attempted commission of rape is first degree murder when the perpetrator has the specific intent to commit rape. (RT 5136.) With respect to Maria Ramirez and Karen Mitchell, the jury was instructed that intent to kill was an element of attempted murder. (RT 5125.)

By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on two crucial, contested elements of the prosecutor's case, that is, that Mr. Jones had the intent to kill and rape. 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, particularly because the prosecutor's chief witness, Dr. Reid Meloy, equated the two concepts. Dr. Meloy testified that a sexual homicide is "the

intentional killing of another human being during which there is evidence of sexual activity by the perpetrator." (RT 3250, 3258.) He also testified that psychologically, the motivation of a sexual homicide is different than that of a common homicide. Significantly, he agreed that with a sexual homicide, there is a "motivation or desire, intent that drives that activity." He noted: "The intent in sexual homicide, and the reason that sexual homicides exist, is that the person who does this, his rage toward women, his violence toward women, and the woman's suffering under his domination is his biggest sexual turn on." (RT 3259.) The person "is sexually aroused by the act of violence toward the victim, who is usually a woman, and he ... usually will get an erection and usually will want to reach orgasm before, during, or after the killing." (*Ibid.*) Dr. Meloy also told the jury that a sexual homicide was "goal-oriented behavior," which he defined as "behavior where there is a purpose to it and there is an end that the person wants to get to by doing particular things." (RT 3260.)

The prosecutor began and ended his guilt-phase argument to the jury by invoking Dr. Meloy's testimony. (RT 4971, 5026, 5102.) He initially explained to the jury that Dr. Meloy provided a definition of a sexual homicide perpetrator as "someone who intentionally kills during a sexual act, and that's what we have here." (RT 4971.) The prosecutor then argued: "Dr. Meloy tells us what sexual homicide people do, what they want, what motivates them, what causes them to act. They have that rage, that violence towards women. 'Make them hurt, dominate them, hurt them and that makes me feel better. That gives me a better orgasm. That is what I need. That is what I want. That is what I will get.' He talks about the woman suffering being their greatest turn-on, and it had to be. It had to be. And that it is goal directed behavior. 'I want to achieve something. So I

am going to do it. I intend to achieve it. I will do it.' Dr. Meloy gives us the motive for these crimes." (RT 5026.) Lastly, the prosecutor insisted: "And much like Dr. Meloy told us, he had to like it. It made him feel good. It was the type of sex that he wanted, that he needed." (RT 5102.)

Thus, according to Dr. Meloy, sexual homicide perpetrators are driven to kill by a motivation, desire, or intent. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

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

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

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, italics 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, italics 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, italics 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, italics 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 No. 2.51 motive

instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case, especially because the prosecution 's major witness, Dr. Meloy, equated intent and motive. The jury was instructed to determine if Mr. Jones had the intent to kill and rape, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

C. The Instruction Shifted the Burden of Proof to Imply That Mr. Jones Had to Prove Innocence.

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on Mr. Jones to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived Mr. Jones of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing Mr. Jones to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is Required.

Here, two crucial questions were whether Mr. Jones intended to kill and intended to rape. Dr. Meloy's testimony and the prosecutor's argument proved that intent and motive could not be separated in this case. In fact, Dr. Meloy and the prosecutor equated the two concepts to the lay jury.

Therefore, under CALJIC No. 2.51, the prosecutor was relieved of proving intent; he need only have shown motive for the jury to conclude that Mr. Jones committed murder and attempted murder. Accordingly, this Court must reverse the judgment in its entirety because the erroneous motive instruction – affecting key issues before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

18.

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 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* at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 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 Mr. Jones 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.)

A. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt (CALJIC Nos. 2.90, 2.01, 2.02, 8.83, and 8.83.1).

The jury was instructed that Mr. Jones was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (RT 5118.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(RT 5118-5119.)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions, it was reasonably likely to have led the jury to convict Mr. Jones on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given four interrelated instructions – CALJIC Nos. 2.01/8.83 and 2.02/8.83.1 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (RT 5108 [sufficiency of circumstantial evidence – special circumstances]; RT 5109 [sufficiency of circumstantial evidence to prove mental state – special circumstances].) These instructions, addressing different evidentiary issues

in almost identical terms, advised Mr. Jones's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (RT 5109-5110.) These instructions informed the jurors that if Mr. Jones *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This twice-repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating Mr. Jones's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th, & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find Mr. Jones guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, 397 U.S. at p. 364.) The instructions directed the jury to find Mr. Jones guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (RT 5109-5110.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 78 ["It would not satisfy the Sixth

Amendment to have a jury determine that the defendant is *probably* guilty" [italics added].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Mr. Jones rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 [italics added, fn. omitted].) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (RT 5109-5110.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. All the more, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable

interpretation of that evidence pointing to his innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations. As the prosecutor repeatedly acknowledged, all the murder charges were circumstantial evidence cases. (RT 5005, 5007-5008, 5013, 5025, 5087-5088, 5096.) There were no eyewitnesses. Moreover, as shown throughout this brief, the murder cases were extraordinarily weak, even with the circumstantial evidence presented. (See Argument 20.)

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced Mr. Jones by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[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, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find Mr. Jones's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated the Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51 and 2.52).

The trial court gave six other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (RT 5105); CALJIC No. 2.21.1, regarding discrepancies in testimony (RT 5112); CALJIC No. 2.21.2, regarding willfully false witnesses (RT 5113); CALJIC No. 2.22, regarding weighing conflicting testimony (RT

5113); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (RT 5114); and CALJIC No. 2.51, regarding motive (RT 5115). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated Mr. Jones's constitutional rights as enumerated in section A of this argument by misinforming the jurors that their duty was to decide whether Mr. Jones was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity 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." (RT 5106.) CALJIC No. 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (RT 5109.) 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." (RT 5115.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find Mr. Jones guilty because it

had not been proven that he was "innocent."[122]

Similarly, CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (RT 5113 [italics added].) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[123] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable

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[122]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].) The same is not true in this case.

[123]The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided 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 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.

(RT 5113.) 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." As with CALJIC Nos. 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v.*

Louisiana, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (RT 5114), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Mr. Jones's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation ...." (RT 5135 [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 Mr. Jones not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions.

Although each one of the challenged instructions violated Mr. Jones's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].)[124] While

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[124]Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of appeal have echoed the pronouncements by this Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at pp. 155-157 [challenge to former version of CALJIC No. 2.22 "would have considerable

recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally

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weight if this instruction stood alone," but the trial court properly gave CALJIC No. 2.90]; *People v. Estep*, *supra*, 42 Cal.App.4th at pp. 738-739 [citing *People v. Wilson* (1992) 3 Cal.4th 926, 943] [CALJIC No. 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC No. 2.90].)

infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [citing *People v. Westlake* (1899) 124 Cal. 452, 457] [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[125] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Mr. Jones's jury heard six separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section

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[125]A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

1096 as set out in former CALJIC No. 2.90.[126] This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

D. Reversal Is Required.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error that is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be

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[126]As this Court has noted, the statutory language – with its references to "moral evidence" and "moral certainty" – is problematic. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503.) In combination with the instructions discussed in this argument, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict Mr. Jones on proof less than beyond a reasonable doubt in violation of his right to due process. (*In re Winship*, *supra*, 397 U.S. 358.)

deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.) Accordingly, the judgment must be reversed in its entirety.

19.

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

After the trial court instructed the jury that Mr. Jones could be convicted of first degree murder if he committed a deliberate and premeditated murder (RT 5134) or killed during the attempted commission or commission of rape (RT 5133), the jury found Mr. Jones guilty of the first degree murders of Sophia Glover and JoAnn Sweets (CT 7286, 7289). The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge Mr. Jones with first degree murder and did not allege the facts necessary to establish first degree murder.[127]

Count 4 of the second amended information alleged that "[o]n or about May 9, 1986 Bryan Maurice Jones did willfully, unlawfully murder JoAnn Sweets, a human being, in violation of Penal Code section 187(a)." (CT 5804.) Count 5 of the second amended information alleged that "[o]n or about August 15, 1986 Bryan Maurice Jones did willfully, unlawfully murder Sophia Glover, a human being, in violation of Penal Code section 187(a)." (CT 5805.) Both the statutory reference ("section 187(a) of the

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[127]Mr. Jones is not contending that the information was defective. On the contrary, as explained hereafter, counts 4 and 5 of the information were entirely correct charges of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony murder in violation of Penal Code section 189.

Penal Code") and the description of the crime ("did willfully, unlawfully murder") establish that Mr. Jones was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[128]

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[129] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of

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[128]The second amended information also alleged a rape-murder special circumstance in connection with Sophia Glover. (CT 5805.) Nevertheless, this allegation 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.)

Also, 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* (1995) 10 Cal.4th 463, 519; *People v. Green* (1980) 27 Cal.3d 1, 61).

[129]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."

enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[130]

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

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

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[130]In 1985 and 1986, when the murders at issue allegedly occurred, Penal Code 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, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[131] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

Nevertheless, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*,

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

supra, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

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

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 [quoting *People v. Pride* (1992) 3 Cal.4th 195, 249]; accord, *People v. Box* (2000) 23 Cal.3d 1153, 1212.) Although that conclusion can be questioned (see following Argument), it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664(a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]) or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d at p. 472, expressly held that the first degree felony-murder rule was codified in Penal Code section 189.

Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; but see Argument 19, arguing the contrary). 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].)[132]

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

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

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

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476 [italics added, citation omitted].)[133]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first

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[133]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.]"

degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (Pen. Code, § 190(a).) Therefore, those facts should have been charged in the information. (See *United States v. Allen* (8th Cir. 2004) 357 F.3d 745, 758 [vacating death sentence because failure to allege aggravating factor in indictment was not harmless error]; *State v. Fortin* (N.J. 2004) 178 N.J. 540, 646, 843 A.2d 974, 1035 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

Permitting the jury to convict Mr. Jones of uncharged crimes violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated Mr. Jones's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated Mr. Jones's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

These violations of Mr. Jones's constitutional rights were necessarily prejudicial because, if they had not occurred, Mr. Jones could have been convicted only of second degree murder, a noncapital crime. Therefore, Mr. Jones's convictions for first degree murder, the special circumstances findings, and the death sentence must be reversed.

20.

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT WAS NOT REQUIRED TO AGREE UNANIMOUSLY ON WHETHER MR. JONES HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE.

As previously noted, the trial court instructed the jury on first degree premeditated murder (RT 5134) and on first degree felony murder predicated on rape or attempted rape (RT 5136). The trial court also instructed the jury that the jurors were not required to agree unanimously on whether Mr. Jones committed premeditated murder or felony murder. (RT 5134.)

The latter instruction was erroneous, and the error denied Mr. Jones'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., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Mr. Jones 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. Nakahara*, *supra*, 30 Cal.4th at pp. 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 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* (1983) 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.)[134]

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*, *supra*, 25 Cal.4th at p. 367) and that "the two forms of murder [premeditated murder and felony murder] 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

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[134]"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*, at pp. 476-477 [fn. omitted].)

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* (1963) 60 Cal.2d 482, 502-503 [dis. opn. of Schauer, J.] [quoted *supra,* p. 136, fn. 69]) 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.];[135] see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 [lead opn. of Scalia, J.]).[136]

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. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to say, as this Court did in *People v.*

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[135]"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 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.].)

[136]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.)

Carpenter, *supra*, 15 Cal.4th 312, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which Mr. Jones relies "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, at p. 394 [first italics added].) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges they are, then malice murder and felony murder are 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* (1980) 447 U.S. 343, 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 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). Therefore, jury unanimity is required in capital cases.

This conclusion cannot be avoided by recharacterizing 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 [italics added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900].)[137]

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to

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[137]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. Nevertheless, 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). Furthermore, 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].)

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*, *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* (2002) 536 U.S. 584, 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 Mr. Jones had committed a premeditated murder or a felony murder. Instead, the trial court erred in giving the contrary instruction that unanimity on the type of murder was not required. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to instruct was a structural error and, therefore, reversal of Mr. Jones's murder conviction is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

21.

THE EVIDENCE WAS INSUFFICIENT THAT MR. JONES COMMITTED THE FIRST DEGREE MURDERS OF SOPHIA GLOVER, JOANN SWEETS, TARA SIMPSON, AND TRINA CARPENTER, BOTH SODOMY MURDER SPECIAL CIRCUMSTANCES, AND THE ATTEMPTED MURDER OF KAREN MITCHELL.

A conviction that is not supported by sufficient evidence is a denial of due process under both the state and federal Constitutions. (U.S. Const., Amend. 14; Cal. Const., art. I, § 15; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) Similar standards are used to determine sufficiency under both state and federal law.

Under the federal Constitution, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [italics omitted].) Likewise, under the state Constitution, the test is whether a "reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

In both cases, the latter portion of the formulation is crucial. The test is not whether the evidence was sufficient to show that the defendant "might" be guilty or even whether it was sufficient to show that the defendant is "probably" guilty. A conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320.) The test is whether the evidence is sufficient to convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. (*Id.* at p. 319;

People v. Johnson, *supra*, 26 Cal.3d at p. 576.)

This principle is illustrated by this Court's decision in *People v. Hillhouse* (2002) 27 Cal.4th 469. The issue in that case was whether the victim of an alleged kidnapping for robbery was dead or alive at the time the defendant dragged him away from his truck. The evidence on that point was inconclusive, though most of it indicated the victim was probably dead. (*Id.* at p. 498.) The prosecution, however, claimed that there was substantial evidence the victim was alive because the testimony of Dr. Hall, the pathologist who performed the autopsy, left open the possibility that the victim had survived during all or part of the dragging. (*Ibid.*)

In rejecting the prosecution's contention, this Court explained why the bare possibility the victim had survived was not the equivalent of substantial evidence that he had:

> Citing Dr. Hall's testimony that she could not be certain exactly how long [the victim] lived, the Attorney General argues that "the absence of bleeding under the abrasions on [the victim's] back is not conclusive evidence that he was dead at the time of the dragging." But, as defendant notes, the question is not whether the evidence conclusively proved Schultz was dead, but whether substantial evidence supported a finding he was alive. We see no such substantial evidence.

(*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 499.)

As *Hillhouse* demonstrates, speculation, even speculation that may be entirely "consistent" with the proven facts, is not sufficient to support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500; *Evans-Smith v. Taylor* (4th Cir. 1994) 19 F.3d 899, 910.) "'[S]peculation is not evidence, less still substantial evidence.' [Citations.]" (*People v. Waidlaw* (2000) 22 Cal.4th 690, 735.) "Evidence to be 'substantial' must be 'of ponderable legal significance . . . reasonable in

nature, credible, and of solid value.' [Citations.]" (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576; accord, *People v. Raley* (1992) 2 Cal.4th 870, 891.)

While all reasonable inferences must be drawn in support of the judgment, "[a] reasonable inference ... may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Thomas* (1992) 2 Cal.4th 489, 545; see also (*People v. Kunkin* (1973) 9 Cal.3d 245, 250 ["'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.'"] [quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755].) "A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8.)

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

Here, there was no solid evidence connecting Mr. Jones to the murders of Sophia Glover, JoAnn Sweets, Tara Simpson and Trina Carpenter, there was no reasonable evidence that Mr. Jones forcibly sodomized Ms. Glover and Ms. Sweets, and there was no credible evidence that Mr. Jones attempted to murder Karen Mitchell. Hence, the convictions,

special circumstances, and death sentence must be reversed.

A. There Was No Solid Evidence Connecting Mr. Jones to SophiaGlover.

The evidence that connected Mr. Jones to the Glover killing was so weak that no reasonable juror could have found him guilty. Ms. Glover's nude body, partially covered by a blanket, was found about a block from the Wilsie house, where Ann Jones worked and her son helped out on occasion. (RT 2247-2249, 2287, 2309, 2607, 3936.) Ms. Glover's clothes were located in a neat pile near an apartment building next door to the Wilsie residence. (RT 2264-2265, 2268-2269, 2290-2291, 2294.)

Contradicting the prosecutor's theory that a lone assailant attacked Ms. Glover (RT 4988), DNA tests showed there were two and possibly three contributors of sperm to the Sophia Glover anal swabs (RT 4799-4800, 4811, 4861). The DNA tests also showed that over 15 percent of the population, including Mr. Jones, could not be eliminated as a source of the DNA. (RT 4843-4846.) No hairs matching Mr. Jones's hair were found on the body, including the pubic area, or on the green blanket. (RT 3544-3546, 3549, 3564-3566.)

This is not solid evidence connecting Mr. Jones to the murder of Sophia Glover. Moreover, that Ms. Glover had anal sex with two or three men suggests that she consented to it, or she was assaulted by more than one man, again contrary to the prosecution's theory of a single assailant. Accordingly, the Glover murder conviction, the sodomy special circumstance, and the death sentence should be set aside.

B. The Sweets Murder Conviction Was Merely the Product of Conjecture and Surmise, and Should Not Be Affirmed.

JoAnn Sweets's body was found in the dumpster outside the back door of the Jones apartment. The prosecutor conceded that one would expect to find Mr. Jones's prints on the dumpster because it was *his* dumpster. (RT 5094.) Of course, if a reasonable explanation is that Mr. Jones's prints were on the dumpster because it was his dumpster, then it follows that one would expect to find his prints on the trash, and on the bags that hold the trash. Thus, under normal circumstances, one would expect to find Mr. Jones's prints on garbage bags in his dumpster, but the likelihood of this occurring was even greater because his mother had just moved from the apartment, no doubt generating more refuse in the process. (RT 3068-3069, 3932-3933, 3982.)

Most significant, moreover, is that no prints were found on the masking tape that someone had used in an attempt to tape the ends of the garbage bags together. (RT 2303, 2744-2745.) Evidence Technician Gary Dorsett, who had processed over 400 homicides using various techniques for identifying latent fingerprints (RT 2743), testified that despite employing multiple chemical processes, he was unable to recover any fingerprints on the masking tape because "they weren't there" (RT 2745). Mr. Dorsett explained that ordinarily "when you're removing tape from a roll, a lot of times you're going to pull it off of the end, and then where you tear it, you're going to touch both of those ends when you're placing it on something. [¶] Now, when you touch that, you can actually feel it being pulled off your finger. What that is doing is pulling dead skins cells and they're sticking to

the tape." (RT 2745.) [138]

Had Mr. Jones been the person who put the body in the bags, then his prints would have been on the masking tape, just as they were on the bags themselves. But his prints were not on the tape. This suggests that whoever put Ms. Sweets's body in the garbage bags wore gloves, which explains why the *killer's* prints were not found on the garbage bags or the tape.

Moreover, when the body was found, other garbage was outside the dumpster, and loose trash was inside the dumpster. (RT 2303, 2327.) Thus, whoever put Ms. Sweets's body in the garbage bags likely took the trash-filled bags from the dumpster, emptied the bags in or around the dumpster, and then used them to wrap the body.

On May 9, 1986, the day that JoAnn Sweets's body was found, Joyce Euwing told the police that at about 6:30 a.m., she had seen two black males take some large brown carpeting material out of a blue Pinto and put it in the dumpster where JoAnn Sweets was found. (RT 4247-4252.) Ms. Euwing did not identify one of the men as Ike Jones until her fifth interview with the police. (RT 4257, 4288-4289.)[139]

The prosecutor argued that "crazy old Joyce Euwing" was "out to cause Ike Jones problems." (RT 5022, 5096.) But when Ms. Euwing was originally interviewed on the day of the incident, she described the first man

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[138]The case law reflects that fingerprints are routinely recovered from masking tape. (See, e.g., *Com. v. King* (1998) 554 Pa. 331, 346, 721 A.2d 763, 770; *Davis v. State* (1993) 314 Ark. 257, 263, 863 S.W.2d 259, 262; *People v. Valdez* (1993) 249 Ill.App.3d 1058, 1061, 621 N.E.2d 35, 37, 190 Ill.Dec.166, 168; *State v. Proctor* (1989) 94 Or.App. 720, 723, 767 P.2d 453, 455; *United States v. Thurston* (10th Cir. 1985) 771 F.2d 449, 451.)

[139]Ms. Euwing testified that Mr. Jones, whom she could see sitting at counsel's table, was not one of the men. (RT 3372.)

(whom she later identified as Ike Jones) as 20-30 years old, 6 feet to 6 feet, 1 inch tall, approximately 185 pounds, and having a muscular build. (RT 4257, 4259-4252.) Ike Jones was a 43-year-old black male, approximately 5 feet, 11 inches tall, and approximately 224 pounds. (RT 3424, 4258.) If Joyce Euwing intended to implicate Ike Jones from the start, then she would not have misdescribed him so badly by stating that the man she saw was 40 pounds lighter and 13-23 years younger than Ike Jones. Thus, although Joyce Euwing might not have seen Ike Jones at the dumpster, she saw someone, and that someone was accompanied by another man, and neither man was Bryan Jones.

Furthermore, Dr. Blake admitted that there could have been multiple contributors of sperm to the sheet found with JoAnn Sweets. (RT 3033, 3037.) The evidence therefore strongly suggests that more than one man was involved in the murder of JoAnn Sweets, contradicting the prosecutor's theory that a single male attacked JoAnn Sweets.

Although the afghan that covered Ms. Sweets's body might have been made by Mr. Jones's mother or sister, the sheet and mattress pad were not from the Jones apartment. (RT 2783-2785, 3931-3932.) The person who found the body described the afghan as "kind of old," "raveled," "coming apart," and not worth keeping. (RT 2346, 2353.) Thus, an obvious inference is that whoever owned the afghan threw it in the garbage because it was falling apart.

Moreover, as stated, just days before the body was found in the dumpster, Ann Jones moved down the street to a new home. (RT 3068-3069, 3932-3933, 3982.) When people move, they typically toss out used or unwanted items, like old unraveling afghans, especially if they are like Ann Jones, "sort of picky," who "like[d] things sort of neat," and who "like[d]

things in place." (RT 3984.) Ann Jones testified that sometimes her afghans would fall from her lap and lie on her carpet. (RT 3995.) Thus, assuming the raveled afghan came from the Jones apartment, it could have lain on the carpet, where it gathered fibers, before being put in the trash, where someone retrieved and used it to cover JoAnn Sweets.

The prosecution's theory was that JoAnn Sweets was attacked while lying on the afghan, which was on the carpet. (RT 4999.) But of the 29 hairs recovered from the blanket, none matched Bryan Jones or JoAnn Sweets. (RT 3534.) Had this afghan been used in an attack, it surely would have had hair from both JoAnn Sweets and her attacker. Thus, it is more likely that the afghan had nothing to do with Mr. Jones and did not come from the Jones apartment.

Moreover, the discarded sheet had no connection to Mr. Jones, but did have five hairs that did *not* match Mr. Jones or JoAnn Sweets. The mattress pad, too, had no connection to Mr. Jones, but had eight hairs that did *not* match Mr. Jones or Ms. Sweets. (RT 3534-3535.) If, as the prosecutor seemed to suggest, the mattress pad and sheet were somehow used in the attack on JoAnn Sweets (RT 4999), then it is highly unlikely that there would be no hairs that matched Mr. Jones or Ms. Sweets found on them, given the ease with which people shed hair.

And, as the prosecution acknowledged, JoAnn Sweets put up a ferocious fight to defend herself. (RT 4999.) During this struggle JoAnn Sweets must have lost many hairs. The absence of even a single hair matching JoAnn Sweets on the afghan, sheet, or mattress pad is compelling evidence that these materials were not involved in her attack.

In addition, it is likely that the afghan, sheet, and pad attracted carpet fibers from inside the dumpster, a "cesspool" of "contamination." (RT

3102-3103.) Prosecution witness, Melvyn Kong, a supervising criminalist for the San Diego Police Department crime lab, testified that because "a dumpster is a trash receptacle, it is, in essence, a cesspool of many different sources of fiber and hair contamination. So there is possibility of cross-contamination between anything which is in the dumpster and anything that's removed from the dumpster." (RT 3076, 3102-3103.)

Prosecution witness Michael Malone, an FBI Special Agent and Senior Examiner with the Hairs and Fibers Unit of the FBI lab in Washington D.C., testified that he would expect apartments in the same building to be carpeted with the same fiber. (RT 3141.)[140] The Jones apartment was located in a large apartment complex, whose tenants likely used the dumpster in which JoAnn Sweets was found. (RT 2045, 2093.) These tenants also likely vacuumed the carpets in their apartments and deposited the vacuumed carpet fibers in the trash. Therefore, the carpet fibers found with JoAnn Sweets could have come from any of the other apartments in the Jones building.

Although Dr. Blake testified that DNA (DQ alpha genotype 1.2,2) found on the sheet wrapped around the body matched about six percent of

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[140]Special Agent Malone testified that police should have tested the carpet in the other apartments in the Jones building to determine if there was another source of the fibers found with JoAnn Sweets. (RT 3141-3142, 3159-3160.) In addition, Mr. Malone testified that he was not informed by the prosecution that four packages of garbage were in the dumpster when the body was found (RT 2319, 2412, 2809); these should have been analyzed to determine whether they either contaminated or contributed to the fibers found with Ms. Sweets (RT 3143, 3159). Finally, Mr. Malone opined that the police should have examined JoAnn Sweets's residence on Bates Street for fibers and other evidence. (RT 3165, 3885.) None of these tasks was performed by law enforcement in this case.

the African American population (including Mr. Jones), about five percent of the Caucasian population, and about two percent of the Mexican-American population (RT 2930-2931, 2942-2944), Dr. Blake also admitted that a second man with a 1.2,1.2 DQ alpha genotype could have contributed sperm to the sheet found with JoAnn Sweets's body (RT 3037). Furthermore, Dr. Blake's earlier testimony regarding Trina Carpenter suggested that another co-contributor to the sheet sperm could have been a man with 2,2 alleles. (RT 3033.) Finally, Dr. Blake testified that in the case of Sophia Glover, where the possible sperm contributors had the same genotypes of 1.2,2, 1.2,1.2, and 2,2 as in the case of JoAnn Sweets, the portion of the population that could have contributed the sperm to the sheet was approximately 15 percent. (RT 4846.) That same calculation should apply as well to the heavily soiled sheet found with JoAnn Sweets's body.

As stated, Mr. Jones lived in a big building in an apartment complex. Given that contributors to the sperm found on the sheet could have come from 15 percent of the male population, there must have been many men meeting that profile living in the apartment complex, let alone in the surrounding neighborhood.

The prosecution's theory of the case, that the same person, acting alone, committed all the murders in a similar fashion, supports the conclusion that Bryan Jones did *not* use his property to wrap Ms. Sweets's body. Trina Carpenter's body was found in a green cloth duffel bag. (RT 2299, 2321.) The name "D. Belman" and the initials "D.B." appeared on the bag, indicating that D. Belman owned the duffel bag. (RT 2413.) Thus, whoever killed Trina Carpenter probably took D. Belman's discarded duffel bag from the dumpster and put her body in it. Similarly, whoever killed JoAnn Sweets probably took discarded bags of trash from the dumpster near

the Jones apartment and put her body in them. If, as suggested by the prosecution's theory, that the same person killed Trina Carpenter and JoAnn Sweets in the same way, then D. Belman did not kill Trina Carpenter, and Bryan Jones did not kill JoAnn Sweets because the killer's modus operandi was to wrap the victim in material not associated with him.

In light of the "whole record" of evidence relating to the JoAnn Sweets case, not just isolated bits of evidence that respondent may select (*People v. Johnson*, *supra*, 26 Cal.3d at p. 577), no "rational trier of fact could have found the essential elements of the crime [of murder] beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 [italics omitted].)

C. There Was No Substantial Evidence That Mr. Jones Committed Premeditated and Deliberate First Degree Murders of Sophia Glover and JoAnn Sweets.

An unjustified killing of a human being is presumed to be second, rather than first, degree murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) To support a finding that the murder is first degree, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. (*Ibid.*; see also *In re Winship* (1970) 397 U.S. 358; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-90 [state must prove every element that distinguishes a lesser from a greater crime].)

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

> coolly and steadily, especially according to a preconceived design.

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

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

The *Anderson* case identified three categories of evidence to be considered in assessing the presence or absence of premeditation and deliberation: (1) planning activity prior to the killing; (2) motive, usually established by a prior relationship or conduct with the victim; and (3) manner of killing. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) Typically, this Court will sustain a verdict of first degree murder on a theory of premeditation and deliberation when there is evidence of all three factors; otherwise, absent other significant factors outside the rubric of *Anderson*, there must be "at least extremely strong" evidence of planning activity, or some evidence of planning activity in conjunction with either motive evidence or an exacting manner of killing." (*Id.* at p. 27; *People v. Sanchez*, *supra*, 12 Cal.4th at p. 31.)

Using this analysis, a reviewing court must "review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117, 1124; see also *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319.) The appellate court must "judge whether the evidence of each of the essential elements constituting the higher degree of the crime is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding." (*People v. Bassett* (1968) 69 Cal.2d 122, 138.) A review of the evidence in this case compels the conclusion that there was no evidence that Mr. Jones planned or premeditated the Glover and Sweets offenses.

1. No Evidence of Planning

No evidence was introduced against Mr. Jones that could support a reasonable inference of a prior plan to kill Sophia Glover or JoAnn Sweets. On the contrary each offense had all the earmarks of an impulsive attack.

Both Ms. Glover and Ms. Sweets were severely beaten (RT 3212-3218, 3234, 3237, 3239-3244, 4999), which suggests that the killings were the result of rage, not planning. (*People v. Hawkins* (1995) 10 Cal.4th 920, 956 [suggesting that a murder committed on impulse is similar to murder committed in a rage]; *People v. Thomas*, *supra*, 2 Cal.4th at p. 518 ["The beatings defendant inflicted on both victims before he shot them [were] suggestive of rage"]; *People v. Rodriguez*, *supra*, 66 Cal.App.4th 157, 165 ["[u]npremeditated murder resulting from spontaneous rage is normally second degree murder"].) Hence, the evidence contradicted a finding of planning.

2. Insufficient Evidence of Motive

Substantial evidence of motive was lacking. Motive evidence consists of "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill." (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.)

In the present case, Mr. Jones had no "prior relationship or conduct" whatsoever with either Sophia Glover or JoAnn Sweets. Moreover, according to the prosecution,
the killings appeared to be "random." (CT 4862.) Thus, there was insubstantial evidence of motive. (Cf. *People v. Hernandez* (1988) 47 Cal.3d 315, 350 ["Evidence of motive is clearly present. Both victims were killed in connection with sexual assaults when they screamed and fought violently. The jury might reasonably infer they were killed to silence them and conceal the crime."].)

In any event, under the *Anderson* analysis, motive evidence, alone, is insufficient to support a finding of premeditation and deliberation. It must be supported by facts of planning or the nature of the killing that would "support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]." (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) Thus, even assuming that there was evidence that the killer was motivated by a desire to avoid identification, there was no evidence of prior planning or manner of killing to support a finding of premeditation and deliberation.

3. No Evidence of a Particular and Exacting Manner of Killing

The manner in which the Ms. Glover and Ms. Sweets were killed does not support a finding of premeditation and deliberation. In *Rowland*, the court found that strangulation of the victim with an electrical cord did not suggest that the defendant took "'thoughtful measures' to procure a weapon for use against the victim." (*People v. Rowland, supra*, 134 Cal.App.3d at p. 8.) The court reasoned that an electrical cord "is a normal object to be found in a bedroom and there was no evidence presented that defendant acquired the cord at any time prior to the actual killing." (*Ibid.*) In this case, the killer did not use any instrument with which to strangle the victims other than his hands. Such manual strangulation is more suggestive of a lack of premeditation and deliberation than their presence.

While strangulation might support the inference of a deliberate *intent to kill*, "[a] deliberate intent to kill ... is a means of establishing malice aforethought and is thus an element of second degree murder in the circumstances of this case. In order to support a finding of premeditation and deliberation the manner of killing must be, in the words of the *Anderson* court, 'so particular and exacting' as to show that the defendant must have intentionally killed according to a 'preconceived design.'..." (*People v. Rowland, supra*, 134 Cal.App.3d at p. 9.)

As this Court observed in *People v. Bradford, supra*, 15 Cal.4th 1229, the nature of the crime, even one that involved ligature strangulation and luring the victim to an isolated location, may show impulsive behavior and therefore lack premeditation or deliberation:

> Although defendant's initiation of the offenses by luring the victims to the same isolated location exhibits considerable premeditation and deliberation, *the nature of the murders*

> *themselves would not preclude a finding that defendant acted upon impulse.* The circumstance that the manner of killing, ligature strangulation, might be somewhat more time-consuming than other methods, for example firing a weapon, does not obviate the conclusion that *defendant might not have premeditated or deliberated before killing the victims.*

(*Id.* at p. 1345 [italics added]; see also *People v. Lucero*, *supra*, 44 Cal.3d 1006, 1020 ["ligature strangulation may not always evidence a premeditated murder"]; *People v. Frank*, *supra*, 38 Cal.3d 711, 733 [strangulation does not necessarily show premeditation and deliberation]; cf. *People v. Farnam*, *supra*, 28 Cal.4th at p. 149 ["method of killing – strangulation with a scarf brought into the home – reflected premeditation and deliberation"].)

Further evidence bolsters the conclusion that the killings were second degree murders. The prosecution's own witness, an expert pathologist, testified that a strangulation victim could die quickly – in "a matter of seconds." (RT 3209.) The presence of rage in these killings, coupled with the fact that the victims could have died quickly, leads to the conclusion that the enraged perpetrator did not have the opportunity to recover and withdraw from the strangulation.

Finally, there was evidence of alcohol and cocaine use in the death of JoAnn Sweets (RT 3218), and cocaine in the death of Sophia Glover (RT 3243). A fair inference is that whoever was with Sweets and Glover at the time of their deaths also used cocaine or alcohol. Even if a person is not *intoxicated* on alcohol or drugs, the use of either can impair a person's ability to think carefully and weigh the pros and cons of a given course of action. (See *People v. Atkins*, *supra*, 25 Cal.4th 76, 91 ["'A significant effect of alcohol is to distort judgment and relax the controls on aggressive and anti-social impulses'"]; *People v. Goslar*, *supra*, 70 Cal.App.4th 270,

278 ["It is recognized that impairment in motor skills and judgment occur at blood alcohol concentrations as low or lower than 0.05 percent"]; see generally *People v. Anderson*, *supra*, 28 Cal.4th 767, 784 ["any killing, may or may not be premeditated, depending on the circumstances. If a person ... kill[s] without reflection, the jury might find no premeditation and thus convict of second degree murder].)

In sum there was compelling evidence of impulsive conduct in the deaths of Sophia Glover and JoAnn Sweets. Moreover, there is simply no evidence that is reasonable, credible and of solid value to support a finding that the killings of Sophia Glover and JoAnn Sweets were deliberate and premeditated first degree murders.

D. The Evidence in Support of the Sodomy Special Circumstances Was Insubstantial.

The anal swab taken from Sophia Glover's body reflected multiple sperm contributors. (RT 4799, 4803, 4857, 4861) The prosecutor's theory was that Mr. Jones acted alone and that Ms. Glover was a prostitute. (RT 2020, 4988.) The existence of multiple sperm contributors means either that Mr. Jones was not involved in the attack on Ms. Glover (given the prosecutor's theory), or she consented to anal sex (given the unlikelihood that, as a prostitute, she would consent to anal sex with one contributor but not the other, and the unlikelihood that she suffered two separate sodomy attacks). Hence, there was no solid evidence that Mr. Jones sodomized Ms. Glover. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576 [substantial evidence must be of solid value].)

Although some sperm was detected on rectal swabs taken from JoAnn Sweets's body, there was not enough to subject to DNA testing. (RT 2486, 2511, 3218.) Consequently, there was no way to determine who or how

many men contributed the sperm. The prosecutor's theory was that Ms. Sweets was a prostitute. (RT 5001.) Thus, there was no way for the jury to conclude that Mr. Jones contributed the sperm or that Ms. Sweets did not consent to anal sex. The evidence was therefore insufficient to convince a rational trier of fact that Mr. Jones was guilty of sodomy beyond a reasonable doubt. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576.)

Special circumstances must be "charged and proved pursuant to the general law applying to the trial and conviction of the crime." (Pen. Code, § 190.4 ¶ 2.) Therefore, because the evidence was insufficient to sustain sodomy convictions, the corresponding sodomy murder special circumstances must be reversed. (*People v. Kelly* (1992) 1 Cal.4th 495, 530; *People v. Morris*, *supra*, 46 Cal.3d at pp. 21-23; *People v. Marshall*, *supra*, 15 Cal.4th at p. 41.)

E. The Court Erred in Failing to Acquit Mr. Jones of the Tara Simpson Charges Because the Record Contains No Solid, Reliable Evidence That Mr. Jones Had Any Connection to Ms. Simpson.

After the prosecution presented its case-in-chief, Mr. Jones moved for acquittal on the Tara Simpson murder charge under Penal Code section 1118.1. Even though at one point, the court stated that the Simpson count was "clearly the weakest" and "would not stand on its own" (RT 469), the court denied the motion. (CT 6030, 7248; RT 3343.) As stated in *People v. Smith* (1998) 64 Cal.App.4th 1458: "Section 1118.1 requires the trial court in a jury trial on ... the motion of the defense to acquit the defendant if at the close of the case of either party the evidence is insufficient to sustain conviction on appeal. When reviewing the denial of a motion to acquit for insufficient evidence made at the close of the prosecution's case, we consider only the evidence then in the record." (*Id.* at p. 1464 [citing *People*

v. Trevino (1985) 39 Cal.3d 667, 695; *People v. Belton* (1979) 23 Cal.3d 516, 526-527] [footnote omitted].)

At the close of the prosecution's case, the evidence on the Tara Simpson murder charge was insufficient to sustain a conviction on appeal. Therefore, the trial court erred in failing to acquit Mr. Jones on those charges.

On August, 29, 1985, at about 3:30 a.m., the body of Tara Simpson, a prostitute, was found in a dumpster in an alley in an area of San Diego where prostitution was rampant. (RT 2117-2118, 2132-2133, 2239, 3074-3075, 3181-3182, 3191, 3348-3353, 3778, 3810, 4219.) At about 5 a.m., the police checked for witnesses at nearby properties, including the Jones apartment; no one answered there and at other apartments where the police knocked on the door. (RT 2134-2136.)

This is the extent of the evidence connecting Mr. Jones to Tara Simpson. Clearly, the evidence was insufficient to support a murder conviction. Accordingly, this Court should direct the lower court to enter a judgment of acquittal on the Tara Simpson murder charge. (*People v. Belton*, *supra*, 23 Cal.3d at p. 527.)

F. When Discharging the Jury, the Court Erred in Failing to Enter a Judgment of Acquittal on the Trina Carpenter and Tara Simpson Charges Due to Insufficient Evidence.

Discharging the "jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented thereto or legal necessity required it." (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 712.) Here, the trial court declared a mistrial on the Trina Carpenter and Tara Simpson charges without obtaining Mr. Jones's consent. (RT 5248.) Thus, the issue is whether legal necessity required the mistrial. "[L]egal necessity

for a mistrial typically arises from an inability of the jury to agree." (*Id.* at p. 713; see also *People v. Fields* (1996) 13 Cal.4th 289, 300; Pen. Code, § 1140.)

Here, however, the jury need not have agreed on a verdict because the trial court should have ordered an acquittal as there was insufficient evidence to support any conviction against Mr. Jones with respect to Ms. Carpenter and Ms. Simpson. (Pen. Code, § 1118.1 ["In a case tried before a jury, the court ... on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal "].) Accordingly, this Court should direct the trial court to enter a judgment of acquittal on the Trina Carpenter and Tara Simpson charges, including the Carpenter rape special circumstance allegation. (*People v. Barragan* (2004) 32 Cal.4th 236, 241 ["a finding on appeal that the evidence at trial was insufficient to sustain a 'conviction' on a substantive offense 'is comparable to an acquittal'"].)

On February 11, 1986, at about 9:45 p.m., the body of Trina Carpenter, a prostitute, was found in a dumpster in an alley, about two blocks from the Jones apartment, in an area of San Diego where prostitution was rampant. (RT 2208-2209, 2240, 2242, 2244-2245, 2316, 3200, 3348-3353, 3810, 4219.) About a half hour before, a witness heard a loud thunk, looked out her bedroom window, and saw one of the dumpster lids in the same alley flipped opened. (RT 2217, 2220-2221.) She also saw an older passenger car with blue oxidized paint parked in the alley. (RT 2223-2224.) In 1986, Bryan Jones did own a car, but occasionally borrowed a faded blue 1980 Datsun 280-ZX sports car from a friend. (RT 2442-2444.)

Ms. Carpenter's body was found headfirst in a green cloth duffel bag with her legs extending outside the bag. (RT 2299, 2321.) Two cotton balls containing sperm were found in the duffel bag, one in Ms. Carpenter's hand and the other near her vagina, where drainage from the vagina could have occurred. (RT 2419, 2478.) DNA tests of the cotton balls showed the presence of a DQ-alpha type of 1.2,2, and a secondary source comprising the 3 and 4 alleles. (RT 2912-2913.) Mr. Jones's DNA tests showed a DQ-alpha type of 1.2,2, which occurs in approximately six percent of the population. (RT 2935-2936, 2942, 4844.)

This is the extent of the evidence connecting Mr. Jones to Trina Carpenter. Clearly, the evidence was insufficient to support any conviction. As shown above, the evidence was also insufficient with respect to the Tara Simpson charges. Accordingly, this Court should direct the trial court to enter a judgment of acquittal on the Trina Carpenter and Tara Simpson charges and special circumstance allegation. Moreover, given that the court permitted the jury to consider the Tara Simpson and Trina Carpenter as aggravating circumstances in determining the penalty (RT 5982), the death sentence must be set aside because it is reasonably probable that the penalty verdict would have more favorable to Mr. Jones in the absence of the Simpson and Carpenter charges. (*People v. Venegas*, *supra*, 18 Cal.4th 47, 93.) Furthermore, the prosecution cannot show beyond a reasonable doubt that the death penalty would not have been imposed absent the presence of these cases. (*People v. Clair*, *supra*, 2 Cal.4th 629, 678 [state-law error bearing on penalty in a capital case is reviewed under the "reasonable possibility" standard of *People v. Brown* (1988) 46 Cal.3d 432, 446-448, which in substance and effect is the same as the "reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24]; *Sullivan v. Louisiana*

(1993) 508 U.S. 275, 279 [the issue is "whether the ... verdict actually rendered in this trial was surely unattributable to the error"].)

G. Karen Mitchell's Inherently Unreliable Testimony Was Not Credible.

The trial court believed that the Karen Mitchell case could not survive without help from the other cases: "Mitchell was so drunk, she's going to have such problems in proof for the People ...." (RT 472.) And as the prosecutor candidly admitted about the Mitchell case and one other count, "You can't examine them one at a time because they don't make sense." (RT 336.)

What truly made no sense was that the Mitchell case was filed in the first place. Ms. Mitchell testified that she told the police who answered the call to the Wilsie house that a man had taken her there and raped her. (RT 2558.) Nevertheless, Police Officer Mark Andrew Marcos, who answered the call, testified that Ms. Mitchell did not complain of being raped on the day that she was picked up at the Wilsie home. She also showed no signs of any injuries. (RT 3651-3652.) Moreover, Officer Marcos testified that if any woman – including a prostitute – told him that she had been raped or injured, he would have taken her to get an examination and conducted a full rape investigation. (RT 2575, 3470, 3646-3647, 3649, 3652, 3656.) Nevertheless, the district attorney, obviously well aware that no police report supported Ms. Mitchell's version, and that the officer who answered the call actually disputed her version, not only charged Mr. Jones with sexual assault, he charged him with attempted murder.

As Ms. Mitchell explained to the jury, the charges filed against Mr. Jones were not the result of any complaint filed by her. Instead, the police interviewed Ms. Mitchell when she was in custody in 1989, three years after the alleged incident. (RT 2560, 2564, 2588.)[141] Ms. Mitchell admitted that she leveled her claim against Mr. Jones for the purpose of getting a reduced sentence for pending criminal charges. (RT 2588.)

Ms. Mitchell was a career criminal with four felony convictions and so many convictions for prostitution that she could not guess their number. She was in custody again at the time of trial, this time for felony grand theft. (RT 2562-2563, 2588, 2590.) Confronted with numerous instances where she had done so, she also admitted that she was willing to lie to authorities if it helped her. (RT 2590.)

Ms. Mitchell admitted the obvious, that she was testifying at trial because she was hoping to get "favorable treatment" in a pending criminal matter. (RT 2588.) As a savvy career criminal, Ms. Mitchell realized that even though the district attorney could not promise her a sentence reduction, she nonetheless hoped that her testimony would result in some form of

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[141]Ms. Mitchell was interviewed by Sgt. Harold Goudarzi of the Metropolitan Homicide Task Force in July 1989. (CT 385, 402, 411.) Sgt. Goudarzi was dismissed after allegations were made that he was involved in sexual assaults involving the drugging of street prostitutes. Former San Diego Police Chief Bob Burgreen reportedly stated that Goudarzi's dismissal "clouded the integrity of the Task Force for a period of time ... He didn't do the Department or the Task Force any good." (CT 365; see also *San Diego Police Officers Ass'n v. City of San Diego* (1994) 29 Cal.App.4th 1736, 1738 [Goudarzi accused of raping a Task Force informant]; Platte, *Detective Accused of Affair With Second Informant; Firing Urged*, L.A. Times (Feb. 22, 1991) p. B-1 [1991 WL 2318424] [police administrators recommended that Goudarzi be dismissed because of alleged sexual relationships with two Task Force informants].)

favorable treatment.

Ms. Mitchell's trial testimony further lacked credibility. Even though she brought it with her, Ms. Mitchell testified that Mr. Jones forced her to drink Jack Daniels alcohol, which made her vomit, although there was no evidence of vomit at the Wilsie house. (RT 2525, 2555.) Ms. Mitchell also admitted that she voluntarily drank the alcohol after the sex acts. (RT 2554.)

Ms. Mitchell testified that the Jack Daniels bottle – a fifth – was about half full when she arrived, and there was some liquor remaining in the bottle when she left. (RT 2569, 2586.) Yet Police Officer Daniel Hatfield testified that Ms. Mitchell told him that Mr. Jones forced her to drink almost the "entire bottle." (RT 4009.)

Ms. Mitchell testified at trial that she did not ask the police to take her to the hospital. (RT 2576.) Yet at the preliminary hearing, she testified that she did. (RT 2577.)

It is mystifying that a jury could find Ms. Mitchell credible beyond a reasonable doubt. By her own account, she was dead drunk during her encounter with Mr. Jones. When Ms. Wilsie found her, Ms. Mitchell was completely dressed, passed out on a mattress. (RT 2602, 2612, 2614-2615.) Ms. Mitchell had no memory of how she got dressed. (RT 2584.) A fully clothed prostitute remaining at the scene of the purported crime is wholly inconsistent with the allegation that she had been sexually assaulted, let alone almost killed, in the very place where she lay. Wouldn't every person, including one who had the wherewithal to dress herself and put her shoes on, flee from the site where she had just been attacked?

That the jury found Mr. Jones attempted to murder Karen Mitchell and then let her go is even more mystifying. Ms. Mitchell testified that Mr. Jones had his arm around her neck with his elbow or forearm in front of her

throat, when he lifted her, causing her to almost lose consciousness. He did not use his hand or fingers to choke her and she was still able to speak. (RT 2537-2538, 2549-2550.) Dr. Bucklin testified that it does not take very long to choke someone to death. It can be a matter of seconds to a minute or so. He also testified that manual strangulation is more harmful than an arm choke. Dr. Bucklin explained that manual strangulation is localized, and is accomplished with the fingers and multiple pressure points as opposed to the squeezing, more gross obliteration of the airway by the choke hold. Typically, a person will be unconscious long before death. (RT 3209-3210.)

Mr. Jones was a powerful 6 feet, 5 inches, 300-pound man. (RT 2093.) Assuming for the sake of argument that, as Ms. Mitchell testified, Mr. Jones arm-choked her, then he would have been aware that she had *not* lost consciousness. Her body did not go limp and she continued to struggle. If Mr. Jones had intended to kill Ms. Mitchell, then he would have either used his hands or he would have continued to choke her until she was unconscious. By Ms. Mitchell's own testimony, he did neither. Clearly there was no intent to kill, and the jury was irrational in returning an attempted murder verdict. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1549 [attempted murder requires intent to kill].)

As the court found in *People v. Nottingham*, *supra*, 172 Cal.App.3d 484: "It is ... unfortunately the case that in the repugnant crime of rape it is not uncommon for the perpetrator to apply force to the neck of the victim." (*Id.* at p. 500.) At worst, that is what occurred here. To conclude otherwise transforms most rapes into attempted murders given that most rapes involve force or violence against the victim. (§ 261(a)(2).)

Although the jury as fact-finder is entitled to determine the credibility of witnesses in arriving at a verdict, that verdict cannot be based on evidence

that is so inherently unreliable as to render it insufficient to support the conviction. As the Court of Appeals for the Eleventh Circuit explained,

> As far as it goes, this statement [that credibility issues are the province of the jury] 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. If a witness were to testify that he ran a mile in a minute, that could not be accepted, even if undisputed. If one testified, without dispute, that he walked for an hour through a heavy rain but none of it fell on him, there would be no believers.

(*United States v. Chancey* (1983) 715 F.2d 543, 546-547.)

In such a case, the issue is not whether the witness's testimony should have been excluded, but whether it is sufficient to support a conviction.

> Credibility issues are for the determination of the jury. However, defendants may not be convicted if the evidence is insufficient to persuade a rational factfinder beyond a reasonable doubt that the defendant is guilty, see, e.g., *Davis v. United States*, 160 U.S. 469, 493, 16 S. Ct. 353, 360, 40 L. Ed. 499 (1895); *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Tibbs v. Florida*, 457 U.S. 31, 102 S. Ct. 2211, 2220, 72 L. Ed. 2d 652 (1982).

(*United States v. Chancey*, *supra*, 715 F.2d at p. 546.)

In *People v. Smith* (1999) 708 N.E.2d 365, the Illinois Supreme Court reversed a conviction in a death penalty case on the grounds of insufficiency of evidence based on the unreliability of the principal prosecution witness. The court framed the issue in the following manner:

> While the credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, the jury's determination is not

> conclusive. Rather, we will reverse a conviction where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt.

(*Id.* at pp. 541-542 [citations omitted].)

In *Smith*, the prosecution's case hinged on the testimony of a single witness, one Debrah Caraway, the only witness who directly linked the defendant to the killing. As stated by the court:

> Defendant argues that Debrah's testimony was contradicted in important respects by the testimony of the State's more reliable witnesses and was in other respects sufficiently impeached so as to severely undermine its credibility. Defendant contends that the weakness of the State's chief witness, along with the lack of other direct evidence linking defendant to the crime, required a not guilty verdict as a matter of law. We agree.

(*People v. Smith*, *supra*, 708 N.E.2d at p. 542.) The testimony of the witness in *Smith* regarding her observations of the killing was contradicted by other prosecution witnesses, as was her testimony about the defendant's actions just prior to the shooting. In addition, the court found compelling the significant impeachment of the witness's testimony with a pretrial statement she made to a defense investigator. Finally, the witness had a strong motive to falsely implicate the defendant in the killing to deflect suspicion from her sister's boyfriend who was an alternative suspect. (*Id.* at pp. 553-554.)

Ms. Mitchell's testimony suffers from similar infirmities – and more. It likewise is insufficient to sustain a conviction. Further, a sentence of death based in part on the testimony of a witness as demonstrably deceptive and unreliable as Karen Mitchell does not comport with the heightened standards of reliability required by the Eighth and Fourteenth Amendments to the federal constitution. (*Woodson v. North Carolina* (1976) 428 U.S.

280, 305; see also *Beck v. Alabama* (1980) 447 U.S. 625, 638 [the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

In *People v. Mayfield* (1997) 14 Cal.4th 668, this Court rejected the defendant's claim that the trial court should have excluded the testimony of a sheriff's deputy regarding defendant's post-arrest statements. The defendant argued that the testimony was inherently improbable because it was based on the witness's claim that he remembered the defendant's statement verbatim without writing it down until some time after it was given. This Court expressed skepticism whether such a claim could be raised when it pertained to the testimony of "an ordinary witness," and noted that "generally, 'doubts about the credibility of [an] in-court witness should be left for the jury's resolution.'" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 735.)

That situation, however, was very different from the one presented here. Ms. Mitchell was no "ordinary" witness in an ordinary case, but a shrewd career criminal, motivated by a desire for a sentence reduction, who made no complaint until approached by the police three years after the alleged incident. In addition she gave false testimony at trial. Under the "rationality" requirement of *Jackson v. Virginia*, *supra*, 443 U.S. at 319, the testimony of a witness such as Karen Mitchell cannot be said to possess the degree of credibility necessary to justify a conviction.

Accordingly, Ms. Mitchell's testimony was not credible and there was no substantial evidence of sexual assault or attempted murder. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576 [substantial evidence must be reasonable in nature, credible, and of solid value].) The prosecutor was correct when he said that the Mitchell case did not make sense. (RT 336.) The Mitchell convictions should be reversed.

22.

THE COURT COMMITTED REVERSIBLE ERROR PER SE IN EXCLUDING A PROSPECTIVE JUROR BASED ONLY ON HIS QUESTIONNAIRE RESPONSES ABOUT THE DEATH PENALTY.

Without benefit of any oral questioning and over defense objection (RT 1247, 1261), the court excused prospective juror Alan McPhee for cause based only on his written answers to questions about the death penalty asked on a juror questionnaire. (RT 1261; CT 8811-8834.) The court erred in doing so, requiring reversal of the death sentence. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [a prospective juror may be challenged for cause based on his or her views regarding capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath]; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.)[142]

In *People v. Stewart* (2004) ___ Cal.4th ___ [___ Cal.Rptr.3d ___, ___ P.3d ___, 2004 WL 1574697, 4 Cal. Daily Op. Serv. 6310, 2004 Daily Journal D.A.R. 8607 (July 15, 2004) (NO. S020803)], this Court held that the trial court committed reversible error in excusing jurors for cause based only on their written answers to questions about the death penalty, that is, without conducting oral follow-up questioning to clarify their views. Although the Court did "not hold that a trial court never may properly grant a motion for excusal for cause over defense objection based solely upon a prospective juror's checked answers and written responses contained in a

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[142]The court excluded 10 other prospective jurors at the instance of the defense and by stipulation after the court declared its intention to exclude prospective jurors based solely on their questionnaires with or without the assistance of the parties. (RT 1245-1273.)

juror questionnaire," the Court acknowledged that it was "unaware of any authority upholding such a practice." (*People v. Stewart*, *supra*, 2004 WL 1574697 at p. 14.)[143] Thus, in *Stewart*, "the trial court erred in excluding these prospective jurors on the basis of their questionnaire responses alone." (*Id.* at p. 3)

Here, without any authority, and over the objection of both Mr. Jones *and* the prosecution (RT 1245-1246, 1247), the trial court excused 11 prospective jurors based solely on their written responses to questions pertaining to the death penalty (RT 1273). The trial court did so even after recognizing that it was "treading on some thin ground." (RT 1247.) The court reasoned as follows: "There is virtually nothing they could say here in court that would change my mind about them, because I would have to find that they are so confused or so perjurious in their testimony that they could not remain on the panel." (*Ibid.*) The trial court failed to appreciate that there was no authority for its position, and that prospective jurors might have merely been incomplete or ambiguous in their responses, particularly given that the court informed them that they would "return to court for follow-up questioning concerning your written answers to the questionnaires." (RT 1084.) Prospective jurors, therefore, filled out their questionnaires, expecting to return to court to elaborate on their responses if need be, and

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[143]The Court noted that there are numerous publications that exist to assist trial courts in properly conducting voir dire in capital cases, and none of those publications suggests that exclusive reliance on questionnaires is permissible or adequate in granting challenges for cause over defense objection. (*People v. Stewart*, *supra*, 2004 WL 1574697 at p. 14, fn. 14.) Moreover, those sources assume that, unless both parties stipulate to the contrary, a juror questionnaire will not eliminate the need for oral voir dire, but instead merely will shorten the time necessary to be spent on oral voir dire. (*Ibid.*)

may not have been definitive in their answers.

Prospective juror Alan.McPhee repeatedly expressed his strong opposition to the death penalty on his questionnaire, while including some equivocating language such as "I don't feel" and "I don't think." (CT 8821 [except for the penalty part, he felt that he could be an impartial juror]; 8823 ["I have a real problem with the death penalty" "Life [comes] from God. I don't feel I could be party to killing another person regardless of the justification"]; 8825 ["I don't think I could be a party to taking a life because life is a gift from God"]; 8826 [strongly oppose the death penalty – "God gives life only God should take life"]; 8827 [he would automatically vote against the death penalty regardless of the evidence – "there are no appropriate circumstances to kill;" "a life given by God is not ours to take"]; 8828 ["the death penalty is not an option"]; 8829 ["I cannot be a party to killing anyone"].)

Yet nowhere on the questionnaire was Mr. McPhee asked the critical question whether, in spite of the fact that he "firmly believe[d] that the death penalty is unjust," he was "willing to temporarily set aside [his] own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) Mr. McPhee was in the United States Navy for 10 years, and no doubt understood duty to country. (CT 8817.) He also acknowledged that jury service was a "very large responsibility." (CT 8821.) Thus, like all jurors, especially those who have strong views on the death penalty in one direction or the other, Mr. McPhee needed to be informed by the court that it was his duty to sit on a capital jury and follow the law. (*People v. Stewart*, *supra*, 2004 WL 1574697 at p. 12.)

Moreover, defense counsel should have been given the opportunity to ask Mr. McPhee to clarify his statement that "there are no appropriate

circumstances to kill," in light of the fact that Mr. McPhee spent 10 years in the armed forces. Mr. McPhee left the military in 1970. (CT 817.) His views on the death penalty had not changed since at least 1984. (CT 8829.) Did Mr. McPhee change his views between 1970 and 1984, or did he actually believe that under certain circumstances, taking a life was appropriate?

Similarly, the defense should have had the chance to question Mr. McPhee about his statement that in deciding *between* life without possibility of parole and the death penalty, he felt that it was very important to consider the defendant's background because "[i]f the defendant had committed similar crimes in the past it would show cause for stronger punishment." (CT 8828.) Stronger punishment would mean the death penalty. Under circumstances where the defendant had committed similar crimes in the past, does this mean that Mr. McPhee could vote for the death penalty?

Defense counsel might also have wanted some clarification from Mr. McPhee about his reference to the Bible as influencing his feelings about the death penalty, given that the Bible is often cited as supporting the death penalty. Finally, defense counsel could have sought elucidation on Mr. McPhee's answer that he could not follow "the penalty part" of the court's orientation and procedures for a death penalty trial. (CT 8830.) Did Mr. McPhee mean that he did not understand or "follow" (as in "I don't follow what you are saying") the court's penalty instructions, for instance when the court discussed aggravating and mitigating circumstances (RT 1077-1078 ["in weighing the aggravating and mitigating circumstances about the crime and about the defendant, each juror is free to place whatever moral or sympathetic value he or she deems appropriate to each of the factors presented at the penalty phase"]), or did he mean that he would not comply

with the law? "I do not believe a person should take a person's life.

As in *Stewart*, where a prospective juror wrote that she did "not believe a person should take a person's life," and indicated that she had a "conscientious opinion or belief about the death penalty which would prevent or make it very difficult" to "ever vote to impose the death penalty" (*People v. Stewart*, *supra*, 2004 WL 1574697 at p. 10), Mr. McPhee's questionnaire "provided a preliminary indication that the prospective juror might prove, upon further examination, to be subject to a challenge for cause. Absent clarifying follow-up examination by the court or counsel, however – during which the court would be able to further explain the role of jurors in the judicial system, examine the prospective juror's demeanor, and make an assessment of that person's ability to weigh a death penalty decision – the bare written response was not by itself ... sufficient to establish a basis for exclusion for cause." (*Id.* at p. 13.)

Accordingly, the record does not support the trial court's excusal of Mr. McPhee for cause under *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424. Furthermore, the error requires reversal of Mr. Jones's death sentence, without inquiry into prejudice. (*Davis v. Georgia*, *supra*, 429 U.S. at p. 123; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 962.)

23.

THE COURT ERRONEOUSLY PERMITTED PREJUDICIAL VICTIM IMPACT EVIDENCE AND ARGUMENT.

Over Mr. Jones's objections (RT 5207, CT 5776), the court admitted as victim impact evidence extensive testimony by Bertha Richmond concerning Mr. Jones's assault on her (RT 5511-5518). As a result the court allowed the prosecutor to argue victim impact with respect to Ms. Richmond and other victims. This testimony and argument did not qualify as victim impact under the law and should have been excluded. Ultimately, the victim impact evidence used in this case, and the prosecutor's argument exploiting that inflammatory evidence, rendered the penalty phase fundamentally unfair under the due process clause and the death verdict unreliable under the cruel and unusual punishment clause. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.) Hence, the death penalty verdict must be reversed.

A. Victim Impact Evidence and Argument that Would Not Have Been Permissible at the Time of the 1986 JoAnn Sweets and Sophia Glover Deaths Violated Ex Post Facto Principles.

JoAnn Sweets and Sophia Glover died in 1986. (RT 4219.) At the time, both state and federal law made victim impact evidence inadmissible. (*Booth v. Maryland* (1987) 482 U.S. 496 [reversible error to admit victim impact evidence in the trial of a 1983 homicide]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267 [1983 homicide case holding that victim impact evidence was inadmissible]; *People v. Love* (1960) 53 Cal.2d 843, 854-857 [evidence to show how much the victim had suffered was inadmissible].)

The law on victim impact evidence, however, changed dramatically in 1991 when the United States Supreme Court held "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." (*Payne v. Tennessee* (1991) 501 U.S. 808, 827.) California soon followed suit in *People v. Edwards* (1991) 54 Cal.3d 787, which concluded that victim impact evidence was admissible in aggravation under Penal Code section 190.3, factor (a), as one of the "circumstances of the crime of which the defendant was convicted in the present proceeding." (*Id.* at p. 835.)

Here, the prosecution's use of victim evidence and argument violated due process guarantees against ex post facto rules under the state and federal constitutions.[144] Ex post facto laws are prohibited by both the state and federal Constitutions. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) The prohibition is designed to protect individuals from "manifestly unjust and oppressive" retroactive effects. (*Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 391.) Although these provisions refer to retroactive legislative enactments, identical restrictions on retroactive judicial decisions are provided by the constitutional requirement that the defendant receive due process of law.[145] (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Rabe v. Washington* (1972) 405 U.S. 313; *Marks v. United States* (1977) 430 U. S. 188, 191; *People v. Davis* (1994) 7 Cal.4th 797, 811-813.)

The classic definition of an ex post facto law is found in Justice

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[144]In *People v. Clair* (1992) 2 Cal.4th 629, this Court held that *Payne* may be applied retroactively. (*Id.* at p. 672.) *Clair*, however, did not decide if the retroactive application of *Payne* and *Edwards* would violate the ex post facto and due process guarantees of the state and federal Constitutions. "'It is axiomatic,' of course, 'that cases are not authority for propositions not considered'" therein. (*People v. Jones* (1995) 11 Cal.4th 118, 123 [quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7].)

[145]To simplify this Court's review of the issue, Mr. Jones will refer to these due process violations as "ex post facto" prohibitions.

Chase's opinion in *Calder v. Bull, supra*, 3 U.S. (3 Dall.) 386, which enumerated four types of ex post facto laws. Under this formulation, ex post facto laws include "Every law that aggravates a crime, or makes it greater than it was, when committed." (*Id.* at p. 391.) Moreover, it applies to:

> Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws are manifestly unjust and oppressive.

(*Ibid.*; see also *Carmell v. Texas* (2000) 529 U.S. 513. 533 [reaffirming that laws changing the quantum of evidence violates ex post facto].)

This Court has interpreted the ex post facto clause in both the federal and state Constitutions in keeping with the *Calder* approach. (See, e.g., *People v. Ansell* (2001) 25 Cal.4th 868, 884.) Ex post facto prohibitions have also been summarized by various courts to apply to statutes that "aggravate the criminality of the conduct, enhance the punishment, or alter the legal rules of evidence to the accused's disadvantage." (*Taylor v. Garaffa* (N.M.Ct.Crim.App. 2002) 57 M.J. 645, 651.) The Oregon Supreme Court stated:

> The plain and obvious meaning of this prohibition is, that the Legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy.

(*State v. Cookman* (1996) 324 Or. 19, 28 [920 P.2d 1086, 1092] [quoting *Strong v. State* (Ind. 1822) 1 Blackf. 193, 196].)

In particular, the United States Supreme Court has emphasized that "[t]he fourth category [of evidentiary rules under *Calder*] ... resonates harmoniously with one of the principal interests that the Ex Post Facto

Clause was designed to serve, fundamental justice." (*Carmell v. Texas*, *supra*, 529 U. S. at p. 531.) This category includes rules that make it easier for the State to meet its threshold of proof. (*Id.* at p. 532.) The Court concluded: "There is plainly a fundamental fairness interest ... in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." (*Id.* at p. 533.)

In applying this clause to evidentiary matters, courts have looked at whether legislation has authorized a totally new class of evidence that could not have been used in previous trials. In *Stogner v. California* (2003) 539 U.S. 607 [123 S.Ct. 2446, 156 L.Ed.2d 544], the United States Supreme Court stated that a law that increased the statute of limitations violated *Calder*'s prohibition on laws that alter the rules of evidence. The Court noted that the law changed "legal rules by authorizing the courts to 'receiv[e] evidence ... which the courts of justice would not [previously have] admit[ted].'" (*Id.* at p. ___ [123 S.Ct. at p. 2452] [quoting *Calder v. Bull*, *supra*, 3 U.S. at p. 389].)

In *State v. Metz* (1999) 162 Or.App. 448 [986 P.2d 714], an Oregon court found that a change in state law to permit victim impact evidence in the penalty determination of capital cases violated the ex post facto prohibition. It noted that before the law changed, victim impact evidence was not relevant to the jury's consideration of the appropriate penalty. (*Id.* at p. 459.)

> The net effect of the [statutory change] permitting aggravating evidence, including victim impact evidence, at aggravated murder penalty phase proceedings, was to make it possible for a jury to impose a harsher sentence than previously could have been imposed based solely on evidence that was not relevant to the inquiry at all under the previous version of the statute. We conclude that such a fundamental change regarding what

> evidence may be relevant to the issue before the jury runs afoul of [Oregon's] ex post facto provision.

(*Id.* at p. 461.)

This Court has acknowledged that *Payne* and *Edwards* imposed a substantial shift in the type of aggravating evidence that may be received. (See *People v. Boyette* (2002) 29 Cal.4th 381, 444 ["Because both defendant's crime and his trial occurred after *Payne* had been decided, his case is controlled by *Payne*"].) That the ex post facto provision at issue is applied to the aggravating factors rather than a conviction does not change the unjust nature of the retroactive application. "Subtle ex post facto violations are no more permissible than overt ones." (*Collins v. Youngblood* (1990) 497 U.S. 37, 46.)

Here, the change in how factor (a) was applied greatly expanded the reach of that circumstance to increase the aggravation presented at Mr. Jones's trial. The rule permitting the introduction of victim impact evidence benefitted *only* the prosecution and was used to secure a death judgment. It allowed the prosecution to aggravate the crime in new ways. It significantly altered the burden of proof by allowing the prosecutor to present a new and uniquely emotional class of evidence.

This Court should accordingly find that the expansion of factor (a) to allow victim impact evidence and argument was subject to the prohibition on ex post facto laws. The trial court therefore erred when it admitted the victim impact evidence and permitted the corresponding argument in this case.[146]

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[146]Even if a retroactive change in the rules regarding victim impact evidence is not held to violate the federal Constitution, this Court should hold that it violates California's Constitution. (See *State v. Fugate* (Or. 2001) 26 P.3d 802, 813-814 [ex post facto clause of the Oregon Constitution applies to any change in the rules of evidence that would

B. The Court Was Wrong to Admit as Victim Impact Evidence Testimony Regarding the Bertha Richmond Offense Because It Was Not Directly Related to the Circumstances of the Capital Crimes.

In *People v. Edwards*, *supra*, 54 Cal.3d 787, this Court concluded that victim impact evidence was admissible in aggravation under Penal Code section 190.3, factor (a), as one of the "circumstances of the crime of which the defendant was convicted in the present proceeding." (*Id.* at p. 835.) Thereafter, the Court held in *People v. Mitcham* (1992) 1 Cal.4th 1027: "Evidence 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 p. 1063 [testimony admissible of surviving store employee whom defendant attempted to murder during robbery where he murdered proprietor]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1172 [victim impact evidence of husband's injuries was relevant to show the circumstances of defendant's crimes in murdering wife and attempting to murder husband during burglary].)

Thus, because victim impact evidence is admissible only as a circumstance of the crime under factor (a), victim impact evidence of a non-murder victim is admissible only if it is directly related to the capital crime. And because the testimony of Bertha Richmond was unrelated to the capital crimes of which Mr. Jones was convicted, the court erred in admitting the testimony.[147]

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benefit only the prosecution].) The rights secured under the state Constitution are not dependent on the federal charter. (Cal. Const., art. I, § 28; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351-355.)

[147]In *People v. Hope* (Ill. 1998) 702 N.E.2d 1282, the Illinois Supreme Court held "that *Payne* clearly contemplates that victim impact

C. The Court Improperly Admitted Evidence About Bertha Richmond that Exceeded Permissible Boundaries.

In *Payne v. Tennessee*, *supra*, 501 U.S. 808, 823, the United States Supreme Court approved the use of evidence that offered a "quick glimpse" into the life of the victim. Even assuming that victim impact evidence was permissible in this case, the extent and the type of evidence admitted exceeded limitations based on the circumstance of the crime (Pen. Code, § 190.3, factor (a)), or the type of evidence that was at issue in *Payne.*

In *Payne,* the victim evidence at issue was minimal. It was limited to a single question eliciting brief testimony about the effect of the crime on the victim's young son, who was in the same room when the crime was committed. The boy had been stabbed in the attack and suffered serious wounds. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 812-815.) The

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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." (*Id.* at p. 1288.) Thus, "evidence about victims of other, unrelated offenses is irrelevant and therefore inadmissible." (*Id.* at p. 1289.) As a result, the *Hope* court reversed defendant's death sentence because of the erroneous admission of victim impact evidence concerning defendant's previous murder conviction. (*Ibid.*)

The Nevada Supreme Court reached a similar conclusion in *Sherman v. State* (Nev. 1998) 965 P.2d 903, holding "that the impact of a prior murder is not relevant ... and is therefore inadmissible during the penalty phase." (*Id.* at p. 914.) 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.*; see also *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891, fn. 11 [the Tennessee Supreme Court "reiterate[d] that victim impact evidence of another homicide, even one committed by the defendant on trial, is not admissible"].)

evidence was closely tied to the circumstances of the crime – the impact on a young child who the killer knew was there at the time the crime was committed and who was also a victim in the case. The Court held that a state may permit a jury to be able to consider "the specific harm caused by the defendant" without violating the Eighth Amendment. (*Id.* at p. 825.) Nonetheless, the Court emphasized that due process protects against the admission of evidence that is so unduly prejudicial that it renders the trial fundamentally unfair. (*Ibid.*; see also *id.* at pp. 831 (conc. opn. of O'Connor, J.), 836–837 (conc. opn. of Souter, J.).)

In *Edwards,* this Court similarly reviewed very limited evidence – photographs of the victim and a short prosecutorial argument. (*People v. Edwards, supra*, 54 Cal.3d at pp. 832, 839.) *Edwards* found that victim impact evidence was relevant to factor (a) of Penal Code section 190.3, which permits consideration of the "circumstances of the offense." (*Id.* at p. 835.)

To be relevant to the circumstances of the offense, the evidence must show circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) The only victim impact evidence that meets this standard is evidence of "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935); evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes; and facts of the crime that were disclosed by the evidence properly received during the guilt phase. (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.); see also *People v. Mitcham*, *supra*, 1 Cal.4th at pp. 1062-1064; *People v. Thomas* (1992) 2 Cal.4th 489, 535-536; *People v. Hardy* (1992) 2 Cal.4th 86, 200-201.)

In *Edwards,* this Court cautioned about the need for "limits on emotional evidence and argument," and especially the requirement to "'strike a careful balance between the probative and the prejudicial ... [and exclude material] that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (*People v. Edwards, supra*, 54 Cal.3d at pp. 835–836 [quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864].)

Justice Kennard's concurring and dissenting opinion in *Fierro* noted that Justice Souter illustrated how victim impact evidence may be admitted to establish the circumstances of the crime. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 264, fn. 3 (conc. and dis. opn. of Kennard, J.).) In *Payne,* Justice Souter provided a hypothetical situation where a minister was killed by a stranger while walking from his car to his church office. The minister's wife and daughter were present in the car and witnessed the stabbing. To explain the victim's presence at the scene of the murder, the prosecutor introduced evidence that the victim was a minister, a personal characteristic. The victim's widow and daughter testified as eyewitnesses of the murder, and this testimony inevitably revealed how they were emotionally affected by the crime. (*Payne v. Tennsessee*, *supra*, 501 U.S. at p. 840 (conc. opn. of Souter, J.).)

This hypothetical was similar to the facts in *Payne* itself, where the victim's son witnessed the crime and was also a victim, so that the emotional impact was directly linked to the circumstances of the crime itself. (*Payne v. Tennsessee*, *supra*, 501 U.S. at p. 815.)

In contrast, Bertha Richmond's evidence went well beyond a "quick glimpse" of her life. (*Payne v. Tennessee, supra,* 501 U.S. at p. 823.) First, during the guilt phase, Bertha Richmond and corroborating witnesses provided 65 pages of emotionally charged testimony that three times described the details of the uncharged offense. (RT 2635-2658, 2688-2719, 3517-3528.) At one point during her testimony, Bertha Richmond broke down, necessitating a break in the proceedings. (RT 2645.) The court noted that "certainly this witness was distraught on the stand. [S]he was almost speechless at times and there were long, long pauses ...." (RT 2664.) And as the prosecutor dramatically argued to the guilt phase jury, Bertha Richmond was "terrified" when she presented her "powerful" testimony. (RT 5023, 5029.)

The corroborating witnesses testified that immediately after Ms. Richmond was attacked, she appeared to be in "great fear," was "trembling visibly," was "mumbling and crying," was "terrorized," and appeared to be "in shock." (RT 2694-2697.) One witness "had never seen anybody so scared in my life." (RT 2694.) Another witness confirmed that Ms. Richmond was "hysterical," "hyperventilating," and "crying" just after the assault. (RT 3523.)

Even assuming that victim impact evidence was admissible regarding Bertha Richmond, one would think that the foregoing evidence would suffice. But the prosecution called Ms. Richmond back during the penalty phase, where she provided more heart-rending testimony. Bertha Richmond testified that after the attack, police officers took her to the hospital, where she was tested for venereal disease and pregnancy. She did not hear that the results were negative until trial. (RT 5511-5512.)

When she told her boyfriend about the attack, he started to treat her differently and did not show any compassion. After Ms. Richmond told him that she did not feel like having sex, he told her that she deserved it. (RT 5513.)

The attack also had an impact on her relationship with her son. She started secluding herself in her room and drinking a lot; she sent her son to her sister's house so she would not be bothered by him. She used to drink occasionally before the attack. After the incident, she started drinking every day after work. She would take anything that she could find to make her numb, including cocaine and methamphetamine. (RT 5513-5514.) Sometimes she would even drink or take drugs before she went to work. It would make her numb and she would not be scared. She could do whatever she wanted to do and then just take care of her business.

At the time of the incident, Ms. Richmond worked at the naval hospital in the cafeteria. She eventually lost that job. She sought mental health help and found a therapist through the victim/witness program. She told the therapist what had happened to her, but she did not tell her about her home life. She just lied to her therapist because she was a single parent taking care of her son by herself, and she did not want anybody to know that she was weak. Most of the time she had been drinking or using a drug when she went to the therapist. (RT 5514-5515.)

After she lost her job, she was a homemaker. But she did other things to make money. She started to smoke more cocaine and to drink more. This enabled her to become a prostitute on the streets and make some money so she could buy more drugs and alcohol. (RT 5515.)

Ms. Richmond quit seeing the therapist because she was too ashamed of what she was doing. At some point after that, she made a serious effort to

turn her life around. She went to a 14-day detox and then to an outpatient program, where she went to classes and meetings six days a week. (RT 5516.)

Ms. Richmond went back to the same counselor and told her that she was sorry for lying to her and not telling her how she really felt. She quit taking drugs and drinking alcohol. She became a security guard for the shipyards. (RT 5517.) Her son, however, is not with her. He stays on the streets. (RT 5518.)

This evidence did not respect the need for "limits on emotional evidence;" nor did it "'strike a careful balance between the probative and the prejudicial ... [and exclude material] that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (*People v. Edwards, supra*, 54 Cal.3d at pp. 835–836 [citation omitted].) Because the evidence exceeded the scope of the circumstances of the crime, it violated Penal Code section 190.3, factor (a), and Mr. Jones's federal due process liberty interest in the California statutory scheme. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Hence, the evidence should have been excluded.

D. The Court Erred in Allowing the Prosecutor to Argue Improper Victim Impact.

The prosecutor exceeded the boundaries of permissible victim impact argument to the jury in commenting on victims not directly related to JoAnn Sweets and Sophia Glover (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1063), and going well beyond the scope of victim impact allowed by *Payne v. Tennessee*, *supra*, 501 U.S. at p. 823, and *People v. Edwards*, *supra*, 54 Cal.3d at p. 833, in any event.

Given the plentiful testimony during both phases of the trial concerning Bertha Richmond, the prosecutor not surprisingly focused on Ms.

Richmond. He told the jury to "look at what happened to her. How her life has been changed, almost destroyed, how much she has lost." (RT 5937.) He stated further:

> She also got choked, got raped, sodomized, and forced to orally copulate that man at knife-point.
>
> She was then hauled around town where it happened again and was gonna happen again down in southern San Diego until she was able to run for her life, and it is a good thing she did. Everybody in this courtroom knows what would have happened to her if she hadn't run.
>
> Remember her pain when she testified at the trial, the guilt phase of the trial. She could barely get through it. The pain that she demonstrated the second time when she described for you what Bryan Jones did to her life. How after he raped her, sodomized her, orally copulated her, and she was able to get away.
>
> She turned to alcohol and eventually cocaine to ease the pain. 'Something has got to help me through this.' That's what she turned to.
>
> Her boyfriend discarded her, turned on her, did not give her the support that we would hope would happen.
>
> She could not deal with her son. Single mother. Essentially lost her son, because of what this man did to her.
>
> Lost her job and turned to prostitution. There is always a reason. Always a reason. And we know why Bertha Richmond was on the streets. He put her there. He put her there.
>
> She tried to turn her life around with counseling through the therapist, but she did not have the courage, the ability, the strength to even be honest with her therapist. That's how much she hurt. That's how ashamed she was. She

couldn't even tell her therapist the whole truth.

She still carries that pain, the fear, and the shame. She's been able to turn it around. Strong woman; very strong woman.

Still doesn't have her son back. Hopefully that will come in time.

She even called her therapist and apologized for not being honest with her when she needed her help, her care.

That is what this man has done, and that woman lived.

(RT 5938-5939.) The prosecutor ended by stating that Mr. Jones took Ms. Richmond's "dignity" and "security." (RT 5943.) This sweeping victim impact argument related to a matter that was not even tried in this case. Clearly, the prosecutor's argument was not about the circumstances of the crime under Penal Code section 190.3, factor (a).

The court's order permitting victim impact evidence and argument concerning Bertha Richmond allowed the prosecutor to argue the impact of the offenses committed against other victims unrelated to JoAnn Sweets and Sophia Glover. Thus, the prosecutor suggested that "starting with Maria Ramirez, look at what he did to her. It's already been established who did it and what he meant to do, but look at the details, the destruction this man created." (RT 5929.) Regarding Karen Mitchell, the prosecutor offered that "even in spite of her hardened life, what she has seen, what she has gone through, much of it by choice, you saw the pain in her when she testified here in court. Someone who, you know, sex is her life, is her business, and she still got choked up when she was describing it for you, as hard as that woman is, as much as she has seen." (RT 5933.)

The prosecutor next argued that Tara Simpson "ends up much like a burned marshmallow. ... We had the trauma to her face, the nose, the mouth, the bloody region, the flattened nose, the trauma to several of her internal organs. She also was beaten on and then killed, and discarded like trash." (RT 5935.) Trina Carpenter was "beaten, strangled, killed, and discarded like human waste into another dumpster down the street, on fire." (RT 5936.)

Finally, the prosecutor arrived at what he called, "the crusher, which gets us deep into this man, into what type of person he is. His own sister, La Vern Allen." (RT 5940.)[148] According to the prosecutor, her "[p]hysical injuries are gone, but the emotional scar, the emotional damage, the emotional destruction carries on, and you could see that. You could feel it. You could almost reach out and grab it. She is still devastated by what her own brother did to her and still paying the price. Her mother still doesn't totally believe her. She comes out here to testify about this. She stays in a hotel, not at home with mom. She is still paying the price for what her brother did." (RT 5942.)

E. The Improper Victim Impact Evidence and the Prosecutor's Inflammatory Argument Requires Reversal.

The victim impact evidence in this case was not merely a "quick glimpse" into the lives of Sophia Glover and JoAnn Sweets. (*Payne v. Tennesssee*, *supra*, 501 U.S. at p. 822.) On the contrary the victim impact evidence and argument revolved around six victims – Bertha Richmond, Maria Ramirez, Karen Mitchell, Tara Simpson, Trina Carpenter, and LaVern Allen – evidence that was not directly related to the circumstances of the

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[148]Ms. Allen had testified during the penalty phase that her brother forced her into vaginal sex and oral copulation. (RT 5392-5397; 5403.)

capital crimes committed against Sophia Glover and JoAnn Sweets. The improper evidence and argument violated federal and state constitutional requirements for due process and the Eighth Amendment guarantees of reliability in a capital case. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 809 [unduly prejudicial victim impact evidence implicates due process protections]; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585 [reliability required for capital judgments].)

The Texas Court of Criminal Appeals has cautioned that victim impact evidence may become prejudicial unless the trial court places appropriate limits upon the amount, kind, and source of the material that is received. (*Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 336.) In *Salazar*, a memorial videotape depicted the victim's life and included substantial pictures of the victim as a child. The reviewing court found that the prejudicial effect of the videotape was enormous because the "implicit suggestion" was that the defendant murdered the young child, rather than the adult that the victim grew to be. (*Id.* at p. 337.) It stated: "A 'glimpse' into the victim's life and background is not an invitation to an instant replay." (*Id.* at p. 336.) Accordingly, it emphasized, "*victim impact and character evidence may become unfairly prejudicial through sheer volume.*" (*Id.* at p. 336 [emphasis in original].)

This Court has also recognized that highly emotional victim impact evidence may be prejudicial in the penalty phase. In *People v. Gurule* (2002) 28 Cal.4th 557, the Court characterized as "highly inflammatory" the brief portion of a guilt phase stipulation which stated that the victim's mother had hugged him goodbye on the morning of his death. (*Id.* at p. 622.) In reviewing the penalty phase, the Court noted that evidence of the victim's religious views and his hug with his mother would have been "potentially prejudicial" if it had been introduced at the penalty phase. (*Id.*

at pp. 655-656.)

The "victim impact" evidence in this case was prejudicial because it introduced substantial extraneous emotional matters that influenced the jury's verdict – from Bertha Richmond's descent into a world of prostitution, drugs and alcohol and the loss of her son and boyfriend to LaVern Allen's emotional scars and estrangement from her mother; from the destruction of Maria Ramirez to the pain of Karen Mitchell; and from Tara Simpson being "a burned marshmallow" to Trina Carpenter being "discarded like human waste."

The prosecutor used this irrelevant victim impact evidence to present a powerful penalty argument. At the same time, he gave scant attention to the circumstances of the capital crimes, devoting less than three transcript pages (RT 5930-5933) of his 36-page argument to JoAnn Sweets and Sophia Glover (RT 5919-5956).

The prosecutor used the irrelevant victim impact evidence at the precise time when the balance is at its most delicate and the stakes are highest – when jurors are poised to make the normative decision of whether the defendant lives or dies. (See Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors* (1994) 1994 Wis. L. Rev. 1345, 1396-98 [describing emotionally volatile nature of capital decisions]; Eisenberg, et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases* (2003) 88 Cornell L.Rev. 306, 317, [summarizing study indicating that 51% of a mock jury exposed to the victim impact statement voted for death, while only 20% of those not exposed voted for death].)

All of these aspects of the non-capital crimes, victim impact evidence – its volume, its substance, the inflammatory words used to deliver it –

demonstrate that the trial court failed in its duty to ensure that emotion did not take precedence over reason. The evidence and argument diverted the jury from its task of making a "reasoned moral response" (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328) to the aggravating and mitigating evidence that was legitimately before it and led to the death verdict.

This Court has emphasized that a death verdict is subject to the highest standards of review: "Any substantial error occurring during the penalty phase of the trial ... must be deemed to have been prejudicial." (*People v. Robertson* (1982) 33 Cal.3d 21, 54; see also *Stringer v. Black*, (1992) 503 U.S. 222, 232 ["reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale"].) The jury in this case was instructed to consider inflammatory, irrelevant, and prejudicial matters that led them to a hasty, ill-considered decision. Moreover, the prosecutor's relentless emphasis on irrelevant matters unrelated to Sophia Glover and JoAnn Sweets met with his desired result. Although the jury heard 19 witnesses testify during the penalty phase (CT 7298-7302), and were required to review and discuss the evidence from the six-week guilt phase (CT 7222-7284), especially due to the presence of substitute juror John Porter, the jury returned a death verdict in only four hours and forty minutes. (CT 7304-7306.) Under these circumstances, the victim impact evidence and argument were highly prejudicial so that the judgment must be reversed.

F. Allowing the Breadth of the Victim Impact Evidence in this Case Would Render California's Statute Unconstitutionally Vague.

Should this Court condone an expansive interpretation of victim impact evidence that finds that the breadth of evidence presented in this case falls within factor (a), it would render the death penalty statute unconstitutionally vague and overbroad.

When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

The United States Supreme Court has long held: "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 189, 195 (opn. of Stewart, Powell and Stevens, JJ.).) Thus, when a state wishes to establish a death penalty, it must tailor its law so that the sentencer's discretion is limited. Juries must receive adequate guidance so that sentences are, among other things, "rationally reviewable." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303.)

The United States Supreme Court upheld the constitutionality of Penal Code section 190.3 against a vagueness challenge in *Tuilaepa v.*

California (1994) 512 U.S. 967. The Court specifically approved factor (a) after concluding that the term "circumstances of the crime" had a "common sense core meaning" that jurors could easily understand and apply. Nevertheless, the Court based that determination on its own traditional definition of the term and did not consider that jurors, unfettered and undirected by any instructions from the trial court, would be permitted to consider a broad array of victim impact evidence unrelated to the victims of the capital crimes.

This Court should not permit California's statute to be used in a way calculated to remove all limits to victim impact evidence and to extend the circumstances of the crime to victims unrelated to the capital crimes. It must narrow the application of victim impact evidence under factor (a) and reverse the judgment in this case.

24.

THE COURT ERRONEOUSLY ADMITTED PREJUDICIAL EVIDENCE THAT BRYAN JONES COMMITTED INCEST WHEN HE WAS 11 YEARS OLD.

La Vern Allen testified during the penalty phase that when her brother Bryan Jones was 11 and 12 years old, he committed incest by forcing her into vaginal sex and oral copulation. (RT 5392-5397; 5403.) Under *Thompson v. Oklahoma* (1988) 487 U.S. 815, evidence of these alleged crimes was inadmissible because Mr. Jones was under the age of 16 when they occurred. (*Id.* at pp. 821-838.) Hence, the evidence should have been excluded. That it was not, requires reversal of the death sentence because of its prejudicial effect.

A. The Court Violated the Eight and Fourteenth Amendments in Admitting Evidence of Criminal Behavior by Bryan Jones When He Was a Young Child.

In *Thompson v. Oklahoma*, *supra*, 487 U.S. 815, the Court held "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." (*Id.* at p. 838.) Thus, the Court concluded that it would be cruel and unusual punishment to execute a child for an offense committed by the child under the age of 16. (*Id.* at pp. 818-819.)

In *People v. Raley* (1992) 2 Cal.4th 870, this Court distinguished the case before it from *Thompson* by stating that "[t]here, it was conduct committed when defendant was a minor that the state proposed to punish by death; here, it is conduct defendant committed as an adult that is to be punished by death. As we have explained before in rejecting a constitutional attack on the admission of evidence of juvenile misconduct, 'the penalty

verdict is attributable to [defendant's] current conduct, i.e., murder with a special circumstance finding, not his past criminal activity.'" (*Id.* at p. 909 [quoting *People v. Cox* (1991) 53 Cal.3d 618, 690].) Both *Cox* and *Raley* ignore that under California's death penalty scheme, the death penalty verdict may very well be attributable to a defendant's criminal past, not just to current conduct.

In *People v. Danks* (2004) 32 Cal.4th 269, this Court recently reiterated: "At the penalty phase, jurors are asked to make a normative determination – one which necessarily includes moral and ethical considerations – designed to reflect community values." (*Id.* at p. 311; *People v. Jones* (2003) 30 Cal.4th 1084, 1126 [the decision at the penalty phase "'is a normative judgment reflecting the juror's individual moral assessment of the defendant's culpability'"].) As the Court "explained in *People v. Brown* (1985) 40 Cal.3d 512, 220 Cal.Rptr. 637, 709 P.2d 440, the sentencing function is inherently moral and normative, not factual; the sentencer's power and discretion under both the 1978 and 1977 provisions is to decide the appropriate penalty for the *particular offense and offender* under all the relevant circumstances. [Citations.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779 [italics added].) Thus, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment [citation], requires consideration of the character and *record of the individual offender* and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [italics added].)

It follows that, contrary to the oversimplified view of *Cox* and *Raley*, the penalty verdict is not merely attributable to a defendant's current conduct, i.e., murder with a special circumstance, it is also attributable to the defendant's past, which may include criminal activity. This explains why not all capital defendants receive the death penalty even though there has been a murder with a special circumstance finding. What may separate a defendant who receives life from one who receives death is the latter's record, which, for example, may include, as in this case, the heinous offense of incest.

"Under California's scheme, ... each juror must believe the circumstances in aggravation substantially outweigh those in mitigation .... The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 33.) Given that a penalty juror freely weighs all factors relating to a defendant's blameworthiness, the juror "is free to assign whatever moral or sympathetic value he deems appropriate to each" factor in aggravation, which might include prior criminal activity of incest. (*People v. Brown*, *supra*, 40 Cal.3d at p. 541.) Thus, it is entirely possible that in light of an individual juror's moral view, the juror could assign enough weight to the crime of incest to tip the balance in favor of death.

In *Danks*, this Court confirmed that jurors may "rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen." (*People v. Danks*, *supra*, 32 Cal.4th at p. 311 [citations and internal quotes omitted].) The personal faith and deeply-held view of many find incest abhorrent and

worthy of the severest penalty.

For example, the Bible commands that death be meted out to males who commit incest. (Floyd, *"What's Going On?": Christian Ethics and the Modern American Death Penalty* (2001) 32 Tex. Tech L. Rev. 931, 948; see Leviticus 20:11-20:12 [declaring that one shall not uncover his sister's nakedness]; Deuteronomy 27:22 ["Cursed be he that lieth with his sister ..."].) Dante condemned those who committed incest to the second circle of Hell. (Alighieri, The Inferno (Ciardi Trans. 1954) Canto V [regarding Semiramis, the Assyrian queen, who legalized incest to justify her own obsession].)

If, as *Danks* instructs, jurors "may rely on their personal faith and deeply-held beliefs" when deciding whether to impose death, that belief may include death for those who commit incest, even at a young age. Yet the United States Supreme Court in *Thompson* expressly prohibits a juror from voting for death for an offense by a child under the age of 16, let alone a child as young as Bryan Jones, who was only 11 and 12 years old.

Moreover, that a person committed incest at an early age may reinforce the deeply held moral view that some people are born evil and cannot change, and those are the most deserving of death.

Although this Court has insisted that "it is conduct defendant committed as an adult that is to be punished by death" (*People v. Raley*, *supra*, 2 Cal.4th at p. 909), and that "the penalty verdict is attributable to [defendant's] current conduct, i.e., murder with a special circumstance finding, not his past criminal activity" (*People v. Cox*, *supra*, 53 Cal.3d at p. 690), the reality is that a defendant's current conduct only makes him or her eligible for death. Current conduct does that dictate a sentence of death. Nor could it under the United States Supreme Court's view of the Eighth

Amendment, which "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina*, supra, 428 U.S. at p. 304.) Hence, to rely on Bryan Jones's incest offenses, committed as a child, in returning a death verdict contravenes the Eighth and Fourteenth Amendments. (*Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 823 ["a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty"].) The court was wrong to admit Ms. Allen's testimony.

B. The Court's Admission of the Incendiary Incest Testimony Was Prejudicial.

The prosecutor called four witnesses during his penalty case-in-chief (CT 7298-7298), but chose to call La Vern Allen first (RT 5392), in order to maximize the dramatic effect of her testimony. (*Whiteplume v. State* (Wyo. 1992) 841 P.2d 1332, 1340 [taking into account certain universally recognized trial practice dynamics including the theory of primacy: the jury tends to remember that which it hears first].) And it did. In addition, just before calling Ms. Allen, the prosecutor introduced her with these compelling words from his opening statement:

> You will hear from yet another person. This person will describe for you acts of sexual assault over a two year period back when the defendant was young, in elementary or maybe even junior high years. It went on for two years. Acts of vaginal intercourse, nonconsensual. She submitted because he threatened her. You will hear from her also that she submitted to acts of oral copulation with this person, nonconsensual. She didn't want to do it. And you will hear how it went for perhaps up to two years.

> You have already heard from this woman. She's already testified. It's his sister, La Vern Allen.

(RT 5391.)

Ms. Allen then testified that for two years, when she was 10 and 11 years old, her brother Bryan, who was 11 and 12 years old at the time, repeatedly forced her into vaginal sex and oral copulation. (RT 5392-5397, 5403.)

The prosecutor exploited this disturbing revelation to full effect in his argument to the jury. As he described it, Ms. Allen's testimony was the "crusher." He stated: "And then we come to the crusher, which gets us deep into this man, into what type of person he is. His own sister, La Vern Allen. And she started it off back in elementary school days. The signs were there." (RT 5940.) The prosecutor offered more about Bryan and his sister: "you must be satisfied that he used force or violence on her or the threat of force and violence on her, and he certainly did. He had the size, 40 pounds, the age difference. Got on top of her and forced her down. She could not get away from this man, this boy at that time. Forced sex upon her ... over and over again." (RT 5940-5941.)

Later the prosecutor emphasized that, as La Vern's testimony reflected, Bryan caused his sister profound emotional damage by subjecting her to incest. The prosecutor spoke these words:

> [T]he emotional scar, the emotional damage, the emotional destruction carries on, and you could see that. You could feel it. You could almost reach out and grab it.
>
> She is still devastated by what her own brother did to her and still paying the price. Her mother still doesn't totally believe her. She comes out here to testify about this. She stays in a hotel, not at home with mom. She is still paying the

price for what her brother did.

(RT 5942.)

Thus, the prosecutor sought to draw a picture of Bryan Jones as evil from the start. According to the prosecutor, understanding that Bryan – at age 11 – forced his sister into incest "gets us deep into this man, into what type of person he is. His own sister, La Vern Allen. .... The signs were there." (RT 5940.) To the prosecutor, Bryan Jones was always evil, even at 11 years old.

The prosecutor was not alone in his view. A Pennsylvania appellate court concluded that "the common opinion of decent society" is that incest is "evil." Thus, a prosecutor was "permitted, and even expected, to breath life with all its outrage, shame, and trauma, into otherwise sterile words like "rape' and 'incest' during closing argument. To do otherwise would be to deny the full truth which those words imply, and to withhold from the jury a true image of the facts from the prosecution's perspective." (*Com. v. Slocum* (1989) 384 Pa.Super. 428, 441, 559 A.2d 50, 56.)

The point is that, as members of decent society, the silent jurors may have held the same view. And after hearing from the prosecutor, those jurors who agreed with the Bible, that those who commit incest should be executed, or even agreed with Dante, that such violators deserve eternal damnation, would have attached much weight to the prosecutor's insight into Bryan Jones and corresponding weight to Bryan's repeated acts of incest, and voted for death. Or put differently, for some jurors, the finding of incest may have been the "crusher," so much so that it enabled them to find that the aggravating circumstances substantially outweighed the mitigating circumstances and justified the death penalty. (*People v. Snow*, *supra*, 30

Cal.4th at p. 126, fn. 33.)

Accordingly, the death verdict was not "surely unattributable" to the court's admission of La Vern Allen's testimony in violation of the Eighth and Fourteenth Amendments. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) The death sentence must be vacated.

25.

THE COURT ERRED IN INSTRUCTING THE JURY TO DISREGARD THE GUILT PHASE INSTRUCTIONS DURING THE PENALTY PHASE.

Proceedings Below

At the end of the penalty phase, the court instructed the jurors to "disregard all other instructions given to you in other phases of this trial." (RT 5973.) Thus, the court omitted from the penalty phase and ordered the jury to disregard the following guilt phase instructions: CALJIC Nos. 1.23.1 (Consent – Defined in Rape, Sodomy, Unlawful Penetration and Oral Copulation), 2.01/8.83 (Sufficiency of Circumstantial Evidence – Generally), 2.02/8.83.1 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State), 2.09 (Evidence Limited as to Purpose), 2.13 (Prior Consistent or Inconsistent Statements as Evidence), 2.50 (Evidence of Other Crimes), 2.50.1 (Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence), 2.50.2 (Definition of Preponderance of the Evidence), 2.51 (Motive), 2.60 (Defendant Not Testifying – No Inference of Guilt May Be Drawn), 2.61 (Defendant May Rely on State of the Evidence), 2.71 (Admission – Defined), 2.72 (Corpus Delicti Must Be Proved Independent of Admission), 2.80 (Expert Testimony), 2.81 (Opinion Testimony of Lay Witness), 2.82 (Concerning Hypothetical Questions), 2.83 (Resolution of Conflicting Expert Testimony), 2.90 (Presumption of Innocence), 2.91 (Burden of Proving Identity Based Solely on Eyewitnesses), 2.92 (Factors to Consider in Proving Identity by Eyewitness Testimony), 3.30 (Concurrence of Act and General Criminal Intent), 3.31/8.83.1 (Concurrence of Act and Specific Intent), 3.31.5 (Mental State), 3.40 (Cause – "But For" Test), 3.41 (More than One Cause/Concurrent

Cause), 6.01 (Abandonment of Attempt – When Not a Defense), 6.02 (Abandonment of Attempt – When a Defense), 8.00 (Homicide – Defined), 8.10 (Murder – Defined), 8.11 ("Malice Aforethought" – Defined), 8.20 (First Degree Murder – Deliberate and Premeditated Murder), 8.21/10.00 (First Degree Felony-Murder/Rape), 8.30 (Unpremeditated Murder of the Second Degree), 8.31 (Second Degree Murder – Killing Resulting from Unlawful Act Dangerous to Life), 8.55 (Murder – Cause – Defined), 8.66 (Attempt to Commit Murder), 8.67 (Attempted Murder – Willful, Deliberate, and Premeditated), 8.70 (Duty of Jury as to Degree of Murder), 8.71 (Doubt Whether First or Second Degree Murder), and 8.81.17/10.00/10.20 (Special Circumstances – Murder in Commission of Rape or Sodomy).

In addition, the trial court commanded the penalty phase jury to ignore the following special instructions that were also given during the guilt phase: Third Party Suspect Evidence (CT 6764; RT 5120), and Consideration of Other Counts' Evidence (CT 6767; RT 5122). The court further instructed the penalty phase jurors that the court would provide "*all of the law* that applies to the penalty phase of this trial." (RT 5973 [italics added].)

Alternate juror John Porter was substituted for guilt phase juror James Hartman at the beginning of the penalty phase. (RT 5479-5480.) Thus, the court forbade all jurors – including replacement juror Porter – from considering or discussing the foregoing guilt phase instructions during the penalty phase.

In addition, although the court informed the jurors that they could consider in mitigation "any residual doubts about the circumstances attending the crimes as found in the guilt phase" (RT 5982), the court did not direct the jurors to set aside any previous discussion on Mr. Jones's

responsibility for the murders, attempted murders, and sodomy-murder special circumstances found by the guilt phase jury. (RT 5973-5992).

Finally, the court instructed the jurors that the Tara Simpson and Trina Carpenter first degree murder charges, on which the jury had not reached verdicts at the guilt phase, could be considered by each juror "as an aggravating circumstance in this case" if the juror was "satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal act." (RT 5982.) But again, the court did not instruct the penalty phase jurors to set aside any guilt phase discussions and conclusions concerning these charges.

Because there is a reasonable likelihood that the jury applied the court's instruction to disregard the guilt phase instructions in a way that violates the federal constitution, the court erred in giving it. (*Estelle v. McGuire*, *supra*, 502 U.S. 62, 72; *People v. Clair*, *supra*, 2 Cal.4th 629, 663 [the inquiry is "whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation" of the Constitution].) The error, moreover, was prejudicial so that the death sentence must be vacated. (*People v. Carter* (2003) 30 Cal.4th 1166, 1222 [citing *Chapman v. California*, *supra*, 386 U.S. at p. 24].)

A. There Is a Reasonable Likelihood That the Court's Command to Disregard the Guilt Phase Instructions Prevented the Jury from Considering All Relevant Mitigating Evidence Concerning (1) Lingering Doubt of Mr. Jones's Culpability for the JoAnn Sweets and Sophia Glover Murders and Sodomy Special Circumstances, and (2) the Question of Mr. Jones's Guilt for the Trina Carpenter and Tara Simpson Charges.

In *People v. Carter*, *supra*, 30 Cal.4th 1166, a capital case, the defendant argued that the trial court committed constitutional error in

instructing the jury to disregard all guilt phase instructions, while failing to instruct the penalty phase jury with several evidentiary instructions. This Court rejected the Attorney General's argument that no reasonable jury would have taken literally the instruction to disregard all guilt phase instructions, as well as the Attorney General's suggestion that the Court adopt a rule that evidentiary instructions need be given only on request in the penalty phase. (*Id.* at pp. 1219-1220.) Instead, the Court cited *Boyde v. California* (1990) 494 U.S. 370, 380, and stated that the test for error was whether the trial court's instructions, "to a reasonable likelihood, precluded the sentencing jury from considering any constitutionally relevant mitigating evidence." (*Ibid.*) The Court assumed that the defendant satisfied this test, but held that the defendant failed to show that the error was prejudicial. (*Id.* at pp. 1220, 1222.)

Carter misread *Boyde*. In *Estelle v. McGuire*, *supra*, 502 U.S. 62, the Supreme Court clarified the standard of review to be utilized in determining whether an "ambiguous" jury instruction violates the federal constitution. *Estelle* embraced the standard set forth in *Boyde v. California*, *supra*, which requires the reviewing court to inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the constitution. (*Id.* at p. 72.)[149]

In *Wade v. Calderon* (9th Cir. 1994) 29 F3d 1312, the Ninth Circuit criticized this Court's use of the "reasonable likelihood" standard in evaluating the failure to instruct on an element of the special circumstance

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[149]A reasonable likelihood is more than a mere possibility. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1225, fn. 23; see also *Weeks v. Angelone* (2000) 528 U.S. 225, 236 [there must be more than a "slight possibility" that the jury was misled].)

allegation. The Ninth Circuit held that "*Boyde* does not sanction use of the 'reasonable likelihood' standard when the disputed instruction is erroneous on its face. Where a jury instruction omits a necessary element of a special circumstance, constitutional error has occurred. [Citation omitted.] We are not free to assume that the jurors inferred the missing element from their general experience or from other instructions, for the law presumes that jurors carefully follow the instructions given to them." (*Id.* at pp. 1320-1321.)

Mr. Jones submits that the *Boyde* reasonable likelihood test is inapplicable here because there was no ambiguity. The trial court very clearly ordered the jury to ignore instructions from the guilt phase, including those that defined the crimes and special circumstances the jury was required to discuss in considering (1) any lingering doubt about Mr. Jones's culpability for the JoAnn Sweets and Sophia Glover crimes, and (2) his guilt for the Trina Carpenter and Tara Simpson charges. Given that the jurors were ordered to disregard the elements that comprise the crimes and special circumstances, there was no way for them to consider whether or how Mr. Jones committed the crimes. Thus, it was clear constitutional error for the court to command the jury to disregard those guilt phase instructions not repeated in the penalty phase. Nevertheless, because this Court employed the reasonable likelihood test in *Carter*, Mr. Jones will show that error occurred under that standard as well.

In *People v. Babbitt* (1988) 45 Cal.3d 660, the Court directed trial courts to "expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." (*Id.* at p. 718, fn. 26.) The CALJIC Committee responded with a Use Note to CALJIC No. 8.84.1 (Duty of Jury – Penalty Proceeding) and recommended that CALJIC No. 8.84.1 be

given, "followed by all appropriate instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88."

In addition, during the penalty phase, "the trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case" including, for example, CALJIC No. 2.80 on expert testimony. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1219.)

Thus, the trial court should have instructed the penalty phase jury with the instructions set forth above that were provided to the jury during the guilt phase.

Instead of giving the jury these instructions during the penalty phase, the court actually told the jury to disregard them. (RT 5973.) Because the jury is presumed to do as instructed (*People v. Carter*, *supra*, 30 Cal.4th at p. 1219), there is a reasonable likelihood that the jury failed to consider mitigating evidence; the court therefore erred in giving the instruction. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *People v. Clair*, supra, 2 Cal.4th at p. 663.)

From Mr. Jones's perspective, the major issues at trial were identity, deliberation, and consent: was Mr. Jones the Sophia Glover and JoAnn Sweets perpetrator; were the killings impulsive or deliberate; did JoAnn Sweets consent to anal sex, and did Sophia Glover consent to anal and vaginal sex? If jurors had lingering doubt about any of these issues, then Mr. Jones's eligibility for the death penalty would be seriously undermined. Moreover, because the court instructed the jurors that they could consider the Tara Simpson and Trina Carpenter charges as aggravating circumstances if they found Mr. Jones guilty of the crimes, the issues of identity and deliberation were also important to those cases, while consent was

significant to the Trina Carpenter rape special circumstance. Thus, the jurors, especially the replacement juror, Mr. Porter, who did not sit on the guilt phase juror and did not have the opportunity to discuss the guilt phase instructions with the other jurors, needed the appropriate instructions to guide them in determining whether Mr. Jones should receive life or death.

The critical instructions regarding identity that the court failed to provide and told the jurors to ignore were CALJIC Nos. 2.01 (Sufficiency of Circumstantial Evidence – Generally), 2.50 (Evidence of Other Crimes), 2.80 (Expert Testimony), and 2.90 (Presumption of Innocence). In addition the court should have given the special instructions, Third Party Suspect Evidence and Consideration of Other Counts' Evidence (assuming this Court does not find the instruction erroneous [see Argument 6), previously given at the guilt phase. (CT 6767; RT 5122.)

Had the court given the jurors, including Mr. Porter, CALJIC No. 2.01, it would have told them that "if the circumstantial evidence permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, *you must adopt* that interpretation that points to the defendant's innocence." (Italics added.) Based on his own experience, Mr. Porter was a juror who would have taken this instruction very seriously.

In 1987 Mr. Porter was falsely accused of child abuse. (CT 7752; RT 1968-1973.) He informed the court and counsel that after he had babysat his stepdaughter's child, his wife came home to hear the girl say that "Grandpa pulled my pants down." Mr. Porter was arrested for child molestation, bur later released apparently after he explained that his granddaughter "was bouncing on my back and took off and I reached for her and when I did her pants pulled down." (RT 1969-1970.) Thus, Mr. Porter should have been

more sensitive than most to the notion that one may be accused, and even look guilty, but not actually be guilty. Or put differently, the facts may suggest both a guilty and an innocent explanation.

Relying on the wisdom of CALJIC No. 2.01, Mr. Porter could have taken a careful look at the evidence that Mr. Jones's prints were found on the garbage bags in which JoAnn Sweets was wrapped, and reasonably concluded that, because there was DNA evidence of more than one contributor (RT 3037) and Joyce Euwing saw two men near the Sweets dumpster with a rolled carpet (RT 3369, 3394), the actual perpetrators used the garbage bags to wrap Ms. Sweets only after they found them in the dumpster just outside Mr. Jones's apartment. Mr. Porter might have further reasoned that because the prosecutor's theory was that the same man with the same modus operandi committed all the charged murders, and D. Belman did not wrap Trina Carpenter in the green cloth duffel bag with his initials on it, then Bryan Jones did not wrap JoAnn Sweets in his own garbage bags. (RT 2299, 2321, 2413.)

Having reached this reasonable interpretation of the evidence, Mr. Porter would have followed the command of CALJIC No. 2.01 to adopt this interpretation, and therefore would have had strong doubt about Mr. Jones's guilt in the death of JoAnn Sweets. Given that the Sophia Glover murder evidence was so weak (see Argument 20) that any thoughtful juror could have had a reasonable doubt about Mr. Jones's guilt for that crime, it is likely that Mr. Porter would have voted for life without parole because, in Mr. Porter's eyes, Mr. Jones would not have been eligible for death in the first place.

Again applying the direction of CALJIC No. 2.01, Mr. Porter might reasonably have interpreted the evidence to conclude that Sophia Glover and

JoAnn Sweets were gang assaulted so that Mr. Jones was innocent of murder. The evidence showed that there were multiple contributors to the Sophia Glover anal swab. (RT 4799-4800, 4811, 4861, 5067.) The prosecutor's theory was that Mr. Jones acted alone in committing the charged crimes. (RT 4988 [the prosecutor argued to the jury: "I am sure you can appreciate that murder, certainly first degree murder, is not a spectator sport. You don't sell tickets. You don't ask for an audience. [L]et me take you through some of the factors that establish that *one man did these crimes*."] [italics added].) Multiple sperm contributors suggests multiple assailants so that, given the prosecutor's modus operandi theory, Mr. Jones did not attack Sophia Glover.

In light of the fact that there could have also been multiple contributors to the sheet found with JoAnn Sweets (RT 3037), the same reasoning would apply. Hence, if Mr. Porter had the benefit of CALJIC No. 2.01, and had not been instructed to disregard it, he reasonably could have conducted the same analysis and concluded that Mr. Jones was not guilty of murder, or at the very least, there was lingering doubt of his culpability.

The court's command to ignore the expert testimony instruction (CALJIC No. 2.80) was misleading as well. Prosecution expert, Edward Blake, testified that he had frequency data for the 1.2,2 genotype (Mr. Jones's genotype), which was found on or near JoAnn Sweets and Sophia Glover, from three populations: African-Americans, Caucasians, and Mexican-Americans. (RT 3040-3045.) Dr. Blake declined to provide additional frequency data for other groups, such as Asians, because, according to Dr. Blake, it was "not relevant." (RT 3046). He based this expert opinion on his observation that the "the average man walking down the street is most of the time either a Caucasian or a black, which is certainly

the case in most communities, including this one." (RT 3046-3047.) Thus, Dr. Blake did *not* base his opinion on all possible perpetrators; he assumed the perpetrator came from one of the three populations mentioned, rather than any other population or mix of populations.

But Mr. Porter – who had lived in San Diego County for 12 years, watched the local television news and read the San Diego Tribune (CT 7751, 7754) – reasonably could have used his powers of observation (*People v. Danks* (2004) 32 Cal.4th 269, 302 ["'Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience'"]), and recognized that San Diego was a metropolitan community with hundreds of thousands of people who were not African Americans, Caucasians, or Mexican-Americans; a city that attracted visitors (including businessmen) from all over the world, including the Pacific Rim; and a Navy town, which drew in sailors of various ethnicities. Hence, Mr. Porter might reasonably have understood that the perpetrators in this case could have come from almost any population, not just from African Americans, Caucasians, and Mexican-Americans.

CALJIC No. 2.80, which the court told Mr. Porter to dismiss, instructs jurors in part that an expert's "opinion is only as good as the facts and reasons on which it is based. ... [¶] You are not bound by an opinion [and] may disregard any opinion if you find it to be unreasonable." A juror like Mr. Porter could reasonably conclude that Dr. Blake's opinion – that data on other ethnic groups was "not relevant" because the "the average man" in San Diego was "a Caucasian or a black" – was unreasonable. Nevertheless, by effectively telling Mr. Porter that he could not disregard Dr. Blake's opinion even if Mr. Porter personally found it based on a faulty assumption, Mr. Porter was forced to accept Dr. Blake's opinion. Moreover,

Mr. Porter would have had no choice but to be bound by Dr. Blake's opinion if the other 11 jurors had already found it reasonable, again, even if he had serious questions about the basis for Dr. Blake's opinion. But had the court instructed Mr. Porter with CALJIC No. 2.80, he would have been armed with the ammunition needed to convince other jurors that Dr. Blake's opinions were not reasonably based and should be rejected. Without Dr. Blake's opinion, Mr. Porter and the other jurors would have been left with the possibility that the perpetrators came from 100 percent of the population, rather than the smaller percentage that Dr. Blake asserted.

The court also erred in failing to give the jury CALJIC 2.50 (Evidence of Other Crimes), and the special instruction, Consideration of Other Counts' Evidence (again assuming that the instruction is not erroneous), while at the same time commanding the jury to disregard them. As consistently argued in this brief, the evidence tying Mr. Jones to Sophia Glover was extraordinarily weak, or more accurately, non-existent. Had the evidence been limited solely to evidence about that crime, no reasonable juror could have found Mr. Jones guilty. The only possible way to connect Mr. Jones to Sophia Glover would be through other crimes.

Hence, Mr. Porter and the other jurors needed the Other Crimes instructions to determine the issue of identity, rather than to be told to ignore the previous instructions that would have guided them in this endeavor. As a result, Mr. Porter probably concluded that Mr. Jones was guilty beyond lingering doubt of the Sophia Glover murder because the jury had already found him guilty of the crime beyond a reasonable doubt, and had also returned guilty verdicts on the JoAnn Sweets, Karen Mitchell, and Maria Ramirez counts. (*People v. Baskett* (1965) 237 Cal.App.2d 712, 716 ["'The natural and inevitable tendency of the tribunal – whether judge or jury – is to

give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge'"].) Thus, it is reasonably likely that Mr. Porter and the other jurors were prevented by the court's instruction from considering mitigating evidence of lingering doubt.

Lastly, during the penalty phase the court should have provided the jury with the special instruction, Third Party Suspect Evidence, rather than ordering the jury to ignore it. By commanding the jury to brush aside an instruction that Mr. Jones had presented evidence that La-Jon Van Reed, Randy Lockwood, and Ike Jones may have committed certain of the charged crimes (RT 5120-5121), the court effectively informed the jury to disregard the evidence that third parties committed the JoAnn Sweets and Trina Carpenter crimes. Thus, the court sabotaged the ability of Mr. Porter and the other jurors to consider adequately any lingering doubt about Mr. Jones's culpability for the JoAnn Sweets murder and special circumstance, as well as his guilt for the Trina Carpenter murder.

Based on his child abuse accusation experience, Mr. Porter felt that some psychologists "try to mislead you." (CT 7763; RT 1973.) Thus, with the guidance of CALJIC No. 2.80, Mr. Porter would have been open to discussing whether Dr. Meloy's opinions should have been disregarded, which, as Mr. Jones maintains in Argument 10, they certainly should have been. In rejecting Dr. Meloy's testimony that the killings were premeditated and deliberate, Mr. Porter could have better focused on the impulsive nature of the crimes in light of the beatings the victims took, and concluded that the murders were second degree, and not first degree. (*People v. Hawkins*, *supra*, 10 Cal.4th 920, 956 [suggesting that a murder committed on impulse

is similar to murder committed in a rage]; *People v. Thomas*, *supra*, 2 Cal.4th 489, 518 ["The beatings defendant inflicted on both victims before he shot them [were] suggestive of rage"]; *People v. Rodriguez*, *supra*, 66 Cal.App.4th 157, 165 ["[u]npremeditated murder resulting from spontaneous rage is normally second degree murder"].)

The court's instruction also foreclosed Mr. Porter from discussing the definition of deliberate (CALJIC No. 8.20 ["The word deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action"]) because the court told him to disregard CALJIC No. 8.20, and that he had all the law that he needed. Thus, the court effectively prevented Mr. Porter from discussing whether the killings were impulsive second degree murders. The court's instructions substantially undermined Mr. Porter's consideration of lingering doubt about the first degree murder convictions.

CALJIC No. 10.20 defines the crime of forcible sodomy, while CALJIC No. 1.23.1 defines consent for purposes of sodomy. The trial court gave both of these instructions during the guilt phase, and then ordered the jury (including Mr. Porter) to disregard them during penalty deliberations. A reasonable juror would interpret the court's command to mean that the issue of consent was unequivocally resolved against Mr. Jones, given the guilt phase jury's finding of two sodomy-murder special circumstances. As a result, there is a reasonable likelihood that the directive to disregard these instructions prevented the penalty phase jury, especially Mr. Porter who never had the opportunity to discuss the issue with the other jurors, from considering the substantial mitigating evidence that Sophia Glover and JoAnn Sweets consented to anal sex.

As the prosecutor pointed out, Ms. Glover "put up a struggle." (RT 5006.) Although for purposes of a sufficiency of the evidence claim, a "[l]ack of trauma to a victim's rectum does not preclude a finding that the victim was sodomized" where the victim's anus was dilated (*People v. Farnam* (2002) 28 Cal.4th 107,144 [citing *People v. Kraft* (2000) 23 Cal.4th 978, 1059-1060]), one would expect that if a woman is forced to have anal sex, and resists her attacker, then there should be some bruising, tears, or blood about the rectum or dilated anus. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 364 [dilated anus with a bruise and bleeding inside the rectum]; *People v. Hernandez* (1988) 47 Cal.3d 315, 345 [lacerations of the anus]; *People v. Adams* (1993) 19 Cal.App.4th 412, 429 [bleeding and abrasions in the rectum, as well as injuries to the anal sphincter]; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 790 [rectal bleeding]; *People v. Denton* (1947) 78 Cal.App.2d 540, 548 [abrasions and irritations in the anal area]; cf. *People v. Clark* (1993) 5 Cal.4th 950, 1017 [sperm inside the anus, with evidence that the victim had been on her stomach at some point during the defendant's alleged assault, did not provide "overwhelming support" for a sodomy theory].) There was no evidence of any such injury to Sophia Glover. (RT 3234-3249.)

Assuming that Sophia Glover was not gang attacked, then it appears she was not opposed to having anal sex, given that multiple men contributed sperm to her anal swab. (RT 4799-4800, 4811, 4861, 5067.) As the prosecutor conceded in his opening statement, there was a second source of sperm on her anal swab, which was due to "the nature of her work" (RT 2028), suggesting that she would engage in consensual anal sex. Like Sophia Glover, JoAnn Sweets put up a fight, but even more so. (RT 4999.) Nevertheless, she, too, had no signs of damage to her rectum or anus, again

indicating that any anal sex was consensual. (RT 3211-3219.) Significantly, although DNA consistent with Mr. Jones may have been found on the sheet in which Ms. Sweets's body was wrapped, no DNA consistent with Mr. Jones was found on the anal or rectal swabs taken from the body. (RT 2485-2487, 2510-2511.) Therefore, it would have been quite reasonable for a juror such as Mr. Porter to have lingering doubt about Mr. Jones's culpability for the JoAnn Sweets sodomy special circumstance, particularly if the jurors had been instructed with CALJIC Nos. 2.01/8.83, which would have told them that if they had a reasonable interpretation of the circumstantial evidence that pointed to Mr. Jones's innocence, then they were required to adopt that interpretation.

Furthermore, the court should not have ordered the jury to disregard the rape and consent instructions with respect to Sophia Glover and Trina Carpenter, given that the court instructed the jury on rape felony murder as an alternate theory of first degree murder for both victims. (RT 5133-5134.) Dr. Bucklin found no sign of forced vaginal sex with Trina Carpenter. (RT 3225.) Likewise, there was no sign of forced vaginal sex with Sophia Glover. (RT 3234-3249.) Mr. Porter was permitted to consider whether there was lingering doubt of rape murder with respect to Sophia Glover and whether Mr. Jones was guilty of the rape murder of Trina Carpenter, yet the court failed to provide Mr. Porter and the other jurors with the necessary law that would permit them to fairly consider these issues. In fact the court commanded the jurors to ignore the relevant law. Thus, there is a reasonable likelihood that the court's instruction prevented the jurors from weighing the evidence that neither Sophia Glover nor Trina Carpenter (a prostitute) was forced into have vaginal sex.

As this Court observed in *People v. Cain*, *supra*, 10 Cal.4th 1: "The overlap of relevant evidence between the [guilt and penalty] phases may be substantial. Substitution of a juror for the penalty phase presents the potential problem of the new juror 'joining a group which has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty.'" (*Id.* at p. 67 [quoting *People v. Fields*, *supra*, 35 Cal.3d at p. 351].) This was the challenging situation in which Mr. Porter found himself, but there was more. Not only was Mr. Porter confronted with 11 jurors who had already made up their minds about Mr. Jones's guilt for the murders of JoAnn Sweets and Sophia Glover and sodomy special circumstances after deliberating on the elements of those crimes, Mr. Porter was also told expressly by the trial court not to discuss with the other jurors those very same elements.

To remedy the problem recognized in *Fields*, the *Cain* Court endorsed an instruction, "commanding the jury in clear and certain terms to set aside any previous discussion of guilt phase evidence relevant to lingering doubt, and in general to deliberate on their penalty verdict as an integrated group, including any review they conducted of the guilt phase evidence." (*Id.* at p. 67.) No such instruction was given in this case. Instead, the court aggravated the *Fields* problem by commanding the jurors to ignore the law that informed their guilt phase deliberations.[150]

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[150]Because the jury must reach its verdict through common, shared deliberations (*People v. Collins* (1976) 17 Cal.3d 687, 693), the court's command to disregard the guilt phase instructions violated "defendant's right to unitary jury deliberations." (*People v. Cain*, *supra*, 10 Cal.4th at p. 67.) (See Argument 24.)

As *Cain* and *Fields* recognized, a juror like Mr. Porter was in a difficult position, surrounded by jurors who had already made up their minds about guilt. But on top of that, he was at a further disadvantage because the other jurors had made their decisions based on something that Mr. Porter was prohibited from even discussing – the elements of murder, sodomy, and rape. Thus, contrary to the teaching of *Cain*, "the substituted juror" in this case "play[ed] less than an equal role in assessing the evidence from the guilt phase ...." (*Id.* at p. 66.)

Furthermore, although the court had instructed the jury on the presumption of innocence during the guilt phase, the court did not do so again during the penalty phase. Thus, by instructing the jurors to disregard the guilt phase instructions, the court told the jury to ignore the presumption of innocence. No jury ever convicted Mr. Jones of the Tara Simpson and Trina Carpenter charged crimes. Yet in determining whether these crimes could be used as aggravating circumstances, Mr. Porter was told to disregard the prior instruction that Mr. Jones was presumed innocent of the crimes. This was most harmful to Mr. Jones because other jurors had already decided that Mr. Jones was guilty, and likely prevailed on Mr. Porter to accept their view given the absence of both a presumption of innocence and a *Cain* instruction "commanding the jury in clear and certain terms to set aside any previous discussion of guilt phase evidence relevant to lingering doubt, and in general to deliberate on their penalty verdict as an integrated group, including any review they conducted of the guilt phase evidence." (*People v. Cain*, *supra*, 10 Cal.4th at p. 67.)

Finally, although this Court has held that a trial court has no sua sponte duty to instruct the jury not to draw adverse inferences from a capital defendant's failure to testify (*People v. Gates* (1987) 43 Cal.3d 1168, 1208),

the trial court nonetheless should *not* have instructed Mr. Porter and the other jurors to *disregard* CALJIC Nos. 2.60 and 2.61, which were provided at the guilt phase and explained to the jurors that they should not draw any inference from the fact that Mr. Jones did not testify and that he could rely on the state of the evidence. A reasonable juror might believe that after a defendant has been found guilty of multiple murders and become eligible for the death penalty, the defendant might have little to lose and all to gain by testifying at the penalty phase, showing remorse, and essentially pleading for life. That a defendant declines to testify may erase any lingering doubt or sympathy that a juror might have. Therefore, jurors should not be instructed to *disregard* an earlier instruction that tells them no inference can be drawn from a defendant's refusal to testify. By instructing the jurors to disregard CALJIC Nos. 2.60 and 2.61 in this case, the court effectively told jurors that they could indeed draw adverse inferences from the defendant's failure to testify. And those adverse inferences could have eliminated any remaining lingering doubt in the minds of the jurors.[151]

Accordingly, the court erred because there is a reasonable likelihood that the court's command to disregard the guilt phase instructions prevented

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[151]Mr. Porter especially should not have been told to disregard the instruction not to draw an adverse inference from a defendant's silence. When asked on his questionnaire to explain his feelings about his ability to judge the conduct of an accused person based on evidence presented in the courtroom, Mr. Jones responded: "by the expression on their face or how nervous they are or won't look at the person." (RT 7762.) Obviously the defendant's expression sitting at counsel's table is not evidence. But it appears that Mr. Porter did not know this. Thus, after being told by the court to disregard the earlier instruction not to draw adverse inferences, Mr. Porter very likely would have drawn such inferences from Mr. Jones's silence during the penalty phase.

the jury from considering all relevant mitigating evidence. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Weeks v. Angelone*, *supra*, 528 U.S. at p. 232 ["the sentencer may not be precluded from considering ... any constitutionally relevant mitigating evidence"].)

B. The Court's Instruction Was Prejudicial.

The prejudice caused by the trial court's order to disregard the guilt phase instructions is manifest. As shown, there is a reasonable likelihood that the instruction to disregard the guilt phase instructions prevented the jury from adequately considering lingering doubt. Mr. Jones was eligible for the death penalty because of the multiple murder and sodomy murder special circumstances. If the jury had lingering doubt about Mr. Jones culpability for just one of the murder convictions and both sodomy special circumstances, then the jury necessarily would have had lingering doubt about Mr. Jones's *eligibility* for the death penalty and would not have given him a death sentence, regardless of the aggravating evidence.

The lack of sufficient evidence connecting Mr. Jones to Sophia Glover provided ample lingering doubt about his culpability for her murder and sodomy special circumstance, which would have removed a heavy weight from the side of the scale favoring death. Thus, it does not appear beyond a reasonable doubt that the court's instructional error did not contribute to the death verdict. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1222 [citing *Chapman v. California*, *supra*, 386 U.S. at p. 24].)

Furthermore, if the court had not directed the jury to disregard the guilt phase instructions, the jury may well have had a lingering doubt about the JoAnn Sweets verdicts that would have compelled them to vote for life without the possibility of parole. Like Sophia Glover, JoAnn Sweets may have had multiple anal sex partners, again suggesting that she consented to

anal sex or was gang assaulted by persons other than Mr. Jones. And like Sophia Glover, there was no sign that JoAnn Sweets had been subjected to forced anal sex. Thus there were compelling reasons for the jury to have lingering doubt of the sodomy special circumstance so that the final basis for Mr. Jones's death eligibility would be eliminated.

With respect to the JoAnn Sweets murder, because there was DNA evidence of more than one contributor to the sheet and Joyce Euwing saw two men near the Sweets dumpster with a rolled carpet, the perpetrators used the garbage bags to wrap Ms. Sweets after they found the bags in the dumpster. Hence, Mr. Jones was not the Sweets perpetrator.

But even if Mr. Porter and the other jurors believed beyond lingering doubt that Mr. Jones was the Sweets and Glover perpetrator, had the penalty phase jurors been properly instructed, they reasonably could have had lingering doubt of the first degree nature of the murders due to the manner in which JoAnn Sweets and Sophia Glover died – manual strangulation accompanied by rage – which indicated that each victim died as a result of impulsive behavior, without deliberation and premeditation, thereby warranting second degree murder verdicts. (*People v. Hawkins*, *supra*, 10 Cal.4th at p. 956; *People v. Thomas*, *supra*, 2 Cal.4th at p. 518; *People v. Rodriguez*, *supra*, 66 Cal.App.4th at p. 165.)

Accordingly, it does not appear beyond a reasonable doubt that the court's instructional error ordering the penalty phase jury to ignore the law governing the guilt phase did not contribute to the death verdict. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1222 [citing *Chapman v. California*, *supra*, 386 U.S. at p. 24].) The death sentence should be set aside.

26.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES MR. JONES'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

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

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

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

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be

constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (*People v. Farnam* (2002) 28 Cal.4th 107, 193.)

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

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, 104 S.Ct., at 881, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*.

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) The time has come for *Pulley v. Harris* to be reevaluated since the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (conc.

opn. of White, J.).)[152] Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[153]

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that

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[152]Mr. Jones does not challenge the narrowing effect of California's special circumstances in this automatic appeal because that factual question depends on an empirical showing that must wait for a petition for writ of habeas corpus. (Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1317-1318.)

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

Many states have judicially instituted similar review. (*State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

"there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in Penal Code section 190.3, factor (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) .)

California's authorization of the death penalty for felony-murder works synergistically with its far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in Arguments 26 through 28, which are incorporated herein. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore,

California is constitutionally compelled to provide Mr. Jones with intercase proportionality review. The absence of intercase proportionality review violates his Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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

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

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

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

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

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (Pen. Code, § 190.2) and sentencing factors (Pen. Code, § 190.3), and a court of statewide jurisdiction is well situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (*Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.) But

juries – like trial courts and counsel – are not immune from error, and they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

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

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

Carolina (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for – rather than against – requiring the State to apply its disparate review procedures to capital sentencing.

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

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

The arbitrary and unequal treatment of convicted felons, like Mr. Jones, who are condemned to death cannot be justified, as this Court ruled in *Allen*, by the fact that a death sentence reflects community standards. All criminal sentences authorized by the Legislature, whether imposed by judges

or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all other convicted felons in this state – the type of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review violates Mr. Jones's Fourteenth Amendment right to equal protection and requires reversal of his death sentence.

27.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF.

The California death penalty statute, and the instructions given in this case, assign no burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. They delineate no burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. And neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors. As shown below, these omissions in the California capital-sentencing scheme run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty.

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances" (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate

determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[154]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders Mr. Jones's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. Although this Court has rejected similar claims (see, e.g. *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774), the issue must be revisited in light of recent Supreme Court authority that creates significant doubt about the continuing vitality of California's current death penalty scheme.

With the issuance of three opinions within the past five years, *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for penalty phase instructions in California capital cases. As the Court has observed, "*in a capital sentencing proceeding*, as in a criminal trial, ""'the interests of the defendant are of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'"" [Citations.]" (*Monge v. California, supra,* 524 U.S. at p. 732 [italics added].)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and ... not factual" functions, they are not

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[154]There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code, § 190.3, factor (b)) must be proved beyond a reasonable doubt.

"susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) As the above-quoted statement from *Monge* indicates, however, the Supreme Court contemplates the application of the reasonable doubt standard in the penalty phase of a capital case. It has made this point clear in the trilogy of cases that began with *Jones v. United States*, *supra*, 526 U.S. 227.

In *Jones*, the Court held that under the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones v. United States*, *supra*, 526 U.S. at p. 243, fn. 6.) *Jones* involved a federal statute, but in *Apprendi v. New Jersey*, the Court extended to the states through the Fourteenth Amendment the holding of *Jones*, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490 [quoting *Jones v. United States*, *supra*, 526 U.S. at pp. 252-253].)

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute,

however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, where the jury determines guilt but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*: "[c]apital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on

which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[155] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

Despite the holding in *Apprendi*, this Court stated that "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." (*People v. Ochoa* (2001) 26 Cal.4th 398, 454.) The Court reasoned that "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." (*Ibid.*) After *Ring*, however, this holding is no longer tenable.

Read together, the *Jones-Apprendi-Ring* trilogy renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (*Apprendi v. New*

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[155]Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 [conc. opn. of Scalia J.].)

Jersey, *supra*, 530 U.S. at p. 494.) As the Court stated, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Ibid.*) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely on a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code, § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.)].) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494]), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 [conc. opn. of Scalia J.].) They thus trigger *Ring* and *Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

The Court in *Ring* and *Apprendi* made an effort to remove the game of semantics from sentencing determinations. "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 v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) Accordingly, whether California's weighing assessment is labeled an enhancement, eligibility determination, or balancing test, the reasoning in *Apprendi* and *Ring* require that this most critical "factual assessment" be made beyond a reasonable doubt.[156]

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[156]It cannot be disputed that the jury's decision of whether aggravating circumstances are present, whether the aggravating circumstances outweigh mitigating circumstances, and whether death is the appropriate penalty are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This Court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) The Court has also stated that the section 190.3 factors of California's death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; see *Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818 ["the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard"].)

In addition, California law requires the same result.[157] The reasonable doubt standard is routinely applied in this state in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as sentence enhancement allegations, e.g., that the defendant was armed during the commission of an offense, must be proved by the standard

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[157]The practice in other states also supports this conclusion. Twenty-six states require that any factors relied on to impose death in a penalty phase must be proved beyond a reasonable doubt, and three other states have related provisions. (Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 18-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Mont. Code Ann., §§ 46-18-302(b)(B), 46-18-305; Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).)

Moreover, in at least eight states in which the death penalty is permissible, capital juries are specifically instructed that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. (See Acker & Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes* (1995) 31 Crim. L. Bull. 19, 35-37, and fns. 71-76, and the citations therein regarding the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington.)

of beyond a reasonable doubt. (See CALJIC No. 17.15.)

The disparity of requiring a higher standard of proof for matters of less consequence while requiring no standard at all for aggravating circumstances that may result in a defendant's death violates equal protection and due process principles. (See, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 ["A state should not be permitted to treat defendants differently ... unless it has 'some rational basis, announced with reasonable precision' for doing so."].) Accordingly, both the *Jones-Apprendi-Ring* trilogy and consistent application of California precedent require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

The United States Supreme Court recently issued its opinion in *Blakely v. Washington* (2004) 542 U.S. __, 124 S.Ct. 2531, applying *Apprendi* and *Ring*. In *Blakely*, the Court held that the state trial court's sentencing of a defendant to a 90-month sentence, more than three years above the 53-month statutory maximum of the standard range for his offense, on the basis of the sentencing judge's finding that defendant acted with deliberate cruelty, violated the defendant's Sixth Amendment right to trial by jury. (*Blakely*, *supra*, 124 S.Ct. at p. 2538.)

The Court ruled that the judge could not impose the 90-month sentence based solely on the facts admitted in the guilty plea because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence, which was 53 months. (*Id.* at pp. 2537-2538.) The state had argued that there was no *Apprendi* violation because the relevant "statutory maximum" was not 53 months but the 10-year maximum for class B felonies under Washington

law. Justice Scalia, writing for the majority, stated:

> In *Ring v. Arizona*, 536 U.S. 584, 592-593, and n. 1, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi*, *supra*, at 491-497, 120 S.Ct. 2348; *Ring*, *supra*, at 603-609, 122 S.Ct. 2428. * * * ..... [T]he "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. See *Ring*, *supra*, at 602, 122 S.Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi*, *supra*, at 483, 120 S.Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi*, *supra*, at 488, 120 S.Ct. 2348 (facts admitted by the defendant). **In other words, 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**. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop*, *supra*, §§ 87, at 55, and the judge exceeds his proper authority.

(*Id.* at 2537 [bold emphasis added].)

Accordingly, the appropriate question regarding *Ring's* application to the California's capital weighing process is: What is the maximum sentence that could be imposed based on findings of all elements of first degree murder and at least one special circumstance? The maximum sentence "without any additional findings," that is, without a finding that aggravation outweighs mitigation, is life without possibility of parole. Without an

additional finding that the aggravation outweighs the mitigation, the maximum sentence that can be imposed is a life sentence; therefore, a jury must make this additional finding – and make it beyond a reasonable doubt.

B. The Sixth, Eighth, and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase.

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Mr. Jones urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not.

Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code, §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code Section 190.4(e) requires the trial judge to "review the

evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[158]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence on which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See e.g. *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421.)

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[158]Of course, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington* (1984) 466 U.S. 668, 686-87; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.)

C. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require Juror Unanimity on Aggravating Factors.

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing Mr. Jones's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 [plur. opn. of Souter, J.].)

Mr. Jones recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, Mr. Jones asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence

of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[159]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[160]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments.

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[159]The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[160]Mr. Jones acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto* (2003) 30 Cal.4th 226, 265.) Mr. Jones, however, does not believe that the Court fully addressed the arguments raised therein. Further, Mr. Jones must raise this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

"Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [conc. opn. of Kennedy, J.].) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida* (1977) 430 U.S. 349, 359 [plur. opn. of White, J.]; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[161] For example, in cases where a criminal defendant has

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[161]The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann.

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, § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

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§ 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

D. Conclusion

As set forth above, the trial court violated Mr. Jones's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

28.

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED MR. JONES'S CONSTITUTIONAL RIGHTS.

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties – death or confinement in the state prison for life without possibility of parole – shall be imposed on each defendant.
>
> After having heard all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact or condition about the defendant attending the commission of his crimes which increases his guilt or the enormity of the crimes or adds to the injurious consequences which is above and beyond the elements of the crimes themselves.
>
> A mitigating circumstance is any fact, condition or event which, as such, does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> One aggravating or one mitigating circumstance alone may be found by you to balance or outweigh any number of opposing circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(RT 5990-5991.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and were misleading and vague in crucial respects. Whether considered singly or together, the flaws in this pivotal instruction violated Mr. Jones's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instruction Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction.

Under the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on Mr. Jones 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." (RT 5991.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty ...." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* ...." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*Id.* at p. 391; see also *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here

> concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[162]

Mr. Jones acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Nevertheless, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instruction here, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions that fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

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[162]The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th & 14th Amends.), the death judgment must be reversed.

B. The Instruction Failed to Inform the Jurors That the Central Determination Is Whether the Death Penalty Is the Appropriate Punishment, Not Simply an Authorized Penalty, for Mr. Jones.

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, on weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255

F.3d 926, 962.) Nevertheless, CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" to mean "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, on weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate.

To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in

which death eligibility is established. Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (RT 5991 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate"].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence Mr. Jones to death if they found it "warrant[ed]."

The crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and must be reversed.

C. The Instruction Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole.

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[163] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. By failing to conform to the specific mandate of Penal Code section 190.3,

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[163]The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

the instruction given to Mr. Jones's jury violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281 [original italics].)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and Mr. Jones respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[164]

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[164]There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. ... There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527 [internal quotation marks omitted].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it was a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under

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defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in Mr. Jones's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, Mr. Jones can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated Mr. Jones's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. The Instruction Failed to Inform the Jurors That Mr. Jones Did Not Have to Persuade Them the Death Penalty Was Inappropriate.

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion."] That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations.]

(*Id.* at pp. 727-728.) Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instruction given in this case suffers from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, Mr. Jones's death judgment must be reversed.

29.

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER MR. JONES'S DEATH SENTENCE UNCONSTITUTIONAL.

The jury was instructed on Penal Code section 190.3 with CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (RT 5979-5981) and CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors (RT 5990-5991). These instructions, together with the application of these statutory sentencing factors, render Mr. Jones's death sentence unconstitutional.

First, the application of Penal Code section 190.3, factor (a) resulted in arbitrary and capricious imposition of the death penalty on Mr. Jones. Second, the introduction of evidence under Penal Code section 190.3, factor (b) violated Mr. Jones's federal constitutional rights to due process, equal protection, and a reliable penalty determination. Even if this evidence were permissible, the failure to instruct on the requirement of jury unanimity with regard to such evidence denied Mr. Jones's federal constitutional right to a jury trial and to a reliable penalty determination. Third, the failure to delete inapplicable sentencing factors violated Mr. Jones's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. Fourth, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty.

Fifth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating

evidence. Sixth, the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to Mr. Jones's penalty trial, his death judgment must be reversed.

A. The Instruction on Penal Code Section 190.3, Factor (a) and Application of That Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty.

Penal Code section 190.3, factor (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "the 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." (RT 5979.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

An analysis of how prosecutors actually use section 190.3, factor (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decisionmaking that the

Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

As applied in California, however, section 190.3, factor (a), not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. This can be seen upon examination of a cross-section of cases before this Court.[165]

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

- because the defendant struck many blows and inflicted multiple wounds,[166] or because the defendant killed with a

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[165]Mr. Jones respectfully requests that the Court take judicial notice of these records pursuant to Evidence Code section 452, subdivision (d).

[166]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera*, No. S004569, RT 160-161 (same).

single execution-style wound;[167]

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[168] or because the defendant killed the victim without any motive at all;[169]
- because the defendant killed the victim in cold blood,[170] or because the defendant killed the victim during a savage frenzy;[171]
- because the defendant engaged in a cover-up to conceal his crime,[172] or because the defendant did not engage in a cover-up

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[167]See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-3027 (same).

[168]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-969 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

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

[170]See, e,g., *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

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

[172]See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

and so must have been proud of it;[173]

- because the defendant made the victim endure the terror of anticipating a violent death,[174] or because the defendant killed instantly without any warning;[175]
- because the victim had children,[176] or because the victim had not yet had a chance to have children;[177]
- because the victim struggled prior to death,[178] or because the victim did not struggle;[179]
- because the defendant had a prior relationship with the victim,[180] or because the victim was a complete stranger to the

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[173]See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-3031 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[174]See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

[175]See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[176]See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[177]See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[178]See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[179]See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[180]See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

defendant.[181]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the circumstances-of-the-crime aggravating factor to embrace facts that cover the entire spectrum of facts inevitably present in every homicide:

- **The age of the victim** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[182]

- **The method of killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned,

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[181]See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[182]See, e.g., *People v. Deere*, No. S004722, RT 155-156 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-4716 (victim was "elderly").

shot, stabbed, or consumed by fire;[183]

- **The motive for the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[184]

- **The time of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[185]

- **The location of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[186]

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[183]See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an axe); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT 8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[184]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[185]See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-2604 (late at night); *People v. Lucero*, No. S012568, RT 4125-4126 (middle of the day).

[186]See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v.*

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.

In this case, the court instructed that the jury could use, as factor (a) aggravating circumstances, evidence relating not only to the murders of JoAnn Sweets and Sophia Glover, but also to the unrelated attempted murders of Maria Ramirez and Karen Mitchell. (RT 5980.) The prosecutor therefore argued that factor (a) encompassed these crimes. (RT 5921.) He first urged the jury to consider the manner in which Maria Ramirez was attacked:

> [L]ook at what he did to her. It's already been established who did it and what he meant to do, but look at the details, the destruction this man created.
>
> A woman who none of us would probably want to take home, would not want our sons, brothers, husbands, friends to fall in love with. That's the type of person he picked. A vulnerable woman who has nobody to protect her; who, theoretically, has nobody to care about her.
>
> He takes her home. She is able to look at him, the same man at least several years ago, that we have seen here in court and she trusted him.

Freeman, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

> Just as you look at him, you know, he doesn't look threatening. He certainly has the big size, but he is not a threatening demeanor. He looks like a nice guy, and he used that to get her home.
>
> Certainly he was not after sex, just straight sex. She gave him that. That went along fine. She had no quarrel with that. Okay. "You're being nice to me and give me a place to change and eat, you know. I will sleep with you here real quick."
>
> But that's not what he wanted. He wanted the violence, the violence, which is a totally different subject. Totally different issue.
>
> And he used his hands and he used the rope to choke her out and try to kill her; three times – two or three times.
>
> Think of the power he had. It was almost God-like, wasn't it. "I have got the power to kill you or let you live. Kill you. Let you live. Do what I want. Suck my dick, bitch." She finally consented.
>
> That's the type of man we are here to punish. She finally did. She finally consented. Forcible oral copulation. Forcibly raped her.
>
> In his own mother's house, where his mother lives. Where she gave him everything she had. She takes off, he rapes. He tries to kill. And then he lies to the police. Another indication of the man we are here to sentence.

(RT 5929-5930.)

Next, the prosecutor exhorted the jury three times to find that as a circumstance of the crimes against JoAnn Sweets and Sophia Glover, Mr. Jones was "lazy," and that he should receive the death penalty as a result. (RT 5930-5932; see also RT 5935 [a fourth time labeling Mr. Jones as

"lazy"].) The prosecutor argued: "The *lazy* guy. Couldn't even, you know, go to a different neighborhood. To the quickest dumpster he could find. That's the man we are here to *punish*. And we know he's *lazy*. We know he has no get-up-and-go. His mom told us that." (RT 5930 [italics added].) Wanting to execute someone in part because he is lazy is bizarre thinking at best. More likely, given that Mr. Jones is African American, it was an attempt by the prosecutor – under the guise of arguing the circumstances of the crime – to pander to any deep-seated racism that might have existed among the jurors. (*Sonpon v. Grafton School, Inc.* (D.Md. 2002) 181 F.Supp.2d 494, 503 [recognizing "lazy African" as suggestive of negative racial stereotype]; *Scott v. Western State Hosp.* (W.D.Va. 1987) 658 F.Supp. 593, 597[acknowledging "that at one time, the lazy black was a stock character in entertainment in the United States, and that this cruel and inaccurate depiction of black workers fostered stereotypes which, although moribund, persist today"]; see also Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law* (1988) 101 Harv.L.Rev. 1331, 1373 [perpetuating and encouraging stereotype of persons as lazy is classic form of racism]; Sabshin, Diesenhaus, & Wilkerson, *Dimension of Institutional Racism in Psychiatry* (1970) 127 Amer.J.Psychiat. 787, 788 ["the black American has had to face the charges of white racists that he is supposed to be innately lazy, unhealthy, unintelligent, and criminal"].)

Finally, the prosecutor urged the jury to consider the *testimony* of Karen Mitchell as a factor (a) circumstance of the crime: "[Y]ou saw the pain in her when she testified here in court. Someone who, you know, sex is her life, is her business, and she still got choked up when she was describing it for you, as hard as that woman is, as much as she has seen."

(RT 5933.)

As this case illustrates, the circumstances-of-the-crime aggravating factor licenses indiscriminate imposition of the death penalty on no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra*, 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and Mr. Jones's death sentence must be vacated.

B. The Instruction on Penal Code Section 190.3, Factor (b) and Application of That Sentencing Factor Violated Mr. Jones's Constitutional Rights to Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination.

1. Introduction

At the penalty phase, the court instructed that the jury could use seven alleged crimes as aggravating evidence under Penal Code section 190.3, factor (b). (RT 5982-5983.) The jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that Mr. Jones did in fact commit the criminal acts alleged. (RT 5982.) The jurors were not told, however, that during the weighing process, before they could rely on each alleged crime as an aggravating factor, they had to unanimously agree that, in fact, Mr. Jones committed the crime. On the contrary, the jurors were explicitly instructed that such unanimity was not required. (RT 5981.) Thus, the sentencing instructions contrasted sharply

with those received at the guilt phase, where the jurors were told they had to unanimously agree on Mr. Jones's guilt, the degree of the homicide (if any), and the special circumstance allegation. (RT 5133, 5142, 5148.)

As set forth below, the unadjudicated crimes evidence should not have been admitted. But even assuming the evidence was constitutionally permissible, the aspect of Penal Code section 190.3, factor (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

2. The Use of Unadjudicated Criminal Activity as Aggravation Renders Mr. Jones's Death Sentence Unconstitutional.

The instruction on factor (b) aggravation was upheld against an Eighth Amendment vagueness challenge in *Tuilaepa v. California*, *supra*, 512 U.S. at p. 977. Nevertheless, the instruction and evidence in this case violated the Eighth Amendment, because they permitted the jury to consider unreliable evidence of Mr. Jones's alleged unadjudicated criminal conduct.

Admitting evidence of previously unadjudicated criminal conduct as aggravation violated Mr. Jones's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment, and a reliable determination of penalty under the Eighth Amendment. (*State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in

aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated Mr. Jones's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst, supra*, 897 F.2d at p. 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated Mr. Jones's state and federal rights to due process of law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 7 and 15.)

3. The Failure to Require a Unanimous Jury Finding on the Unadjudicated Acts of Violence Denied Mr. Jones's Sixth Amendment Right to a Jury Trial and Requires Reversal of His Death Sentence.

Even assuming for the sake of argument that the evidence of the alleged crimes was constitutionally admissible at the penalty phase, the failure of the instructions under Penal Code section 190.3, factor (b) to require juror unanimity on the allegations that Mr. Jones committed prior acts of violence renders his death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v.Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that

even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[187]

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to this date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v.*

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[187]The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) It is arguable, therefore, that where the state seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that Mr. Jones committed the alleged act of violence, there is no need to reach this question here.

Taylor (2002) 26 Cal.4th 1155, 1178; *People v. Hines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent, supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona, supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 [conc. opn. of Scalia, J.] [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exist[s]"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, factor (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to tell if all 12 jurors would have agreed that Mr. Jones committed the alleged crimes. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Dellinger* (1985) 163 Cal.App.3d 284, 302 [same].)[188]

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[188]This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California, supra,* 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

4. Absent a Requirement of Jury Unanimity on the Unadjudicated Acts of Violence, the Instructions on Penal Code Section 190.3, Factor (b) Allowed Jurors to Impose the Death Penalty on Mr. Jones Based on Unreliable Factual Findings That Were Never Deliberated, Debated, or Discussed.

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (Pen. Code, § 190.3, factor (b).) Before the factfinder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (RT

5982-5983.)

Thus, as noted above, members of the jury may individually rely on this – and any other – aggravating factor each juror deems proper as long as the jurors all agree on the ultimate punishment. Because this procedure totally eliminates the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 [dis. opn. of Douglas, J.]; *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364, a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required ... even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 [dis. opn. of Douglas, J.].)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely

"to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388 [dis. opn. of Douglas, J.].)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have neither debated, deliberated nor even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at

defendant's capital sentencing hearing].)

C. The Failure to Delete Inapplicable Sentencing Factors Violated Mr. Jones's Constitutional Rights.

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case.[189] The trial court, however, did not delete those inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness, and unreliability into the capital decision-making process, in violation of Mr. Jones's rights under the Sixth, Eighth, and Fourteenth Amendments. Mr. Jones recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, Mr. Jones raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557,

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[189]Those inapplicable factors included: factor (d) ("whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"); factor (e) ("whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"); factor (f) ("whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct"); factor (g) ("whether or not the defendant acted under extreme duress or under the substantial domination of another person"); factor (h) ("whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect of the effects of intoxication"); and factor (j) ("whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"). (RT 5979-5980.)

660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) The "whether or not" formulation used in CALJIC No. 8.85 given in this case, however, suggested that the jury could consider the inapplicable factors for or against Mr. Jones. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand, and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence Mr. Jones to death because there was evidence in mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived Mr. Jones of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411,

414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of Mr. Jones's death judgment is required.

D. Failing to Instruct That Statutory Mitigating Factors Are Relevant Solely as Mitigators Precluded the Fair, Reliable, and Evenhanded Application of the Death Penalty.

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending on the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate Mr. Jones's sentence on the basis of nonexistent and/or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Failing to provide Mr. Jones's jury with guidance on this point was reversible error.

E. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation.

The inclusion in the list of potential mitigating factors read to Mr. Jones's jury of such adjectives as "extreme" (see factors (d) and (g); RT 5979-5980), and "substantial" (see factor (g); RT 5980), acted as a barrier to

the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

F. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Mr. Jones's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law.

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived Mr. Jones of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1984) 512 U.S. 967, 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* at p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not

unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170(c).) Under the Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be

articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[190] California's failure to require such findings renders its death penalty procedures unconstitutional.

G. Even If the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants like Mr. Jones Violates Equal Protection.

As noted previously, the United States Supreme Court repeatedly has

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[190]Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights ... It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) ...." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged

classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument 25, Mr. Jones explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such as the requirement of written jury findings, unanimous agreement on violent criminal acts under Penal Code section 190.3, factor (b) and on other particular aggravating factors, and the disparate treatment of capital defendants set forth in Argument 26, and this argument. The procedural protections outlined in these arguments, but denied capital defendants, are especially important in insuring the need for reliable and accurate factfinding in death sentencing trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

H. Conclusion

For all the reasons set forth above, Mr. Jones's death sentence must be reversed.

MR. JONES'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT.

A few years ago, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, Mr. Jones raises this claim

under the Eighth Amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 [dis. opn. of Brennan, J.].)

A. International Law

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

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.)[191] Consequently, this Court is bound by the ICCPR.[192] The United States Court of Appeals for the Eleventh Circuit has

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[191]The International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976. The United States ratified the treaty on April 2, 1992, and the President deposited instruments of ratification on June 8, 1992. (See Sen. Res. 49, 138 Cong. Rec., pp. 4781-4784.)

[192]The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude Mr. Jones's reliance on the treaty because, among other things, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of

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

Mr. Jones's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on Mr. Jones constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *id.* at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (*United States v. Duarte-Acero*, *supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].) Thus, Mr. Jones requests that the Court reconsider and, in the context of this case, find Mr. Jones's death sentence violates international law. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular

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the treaty (see Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[193]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 [dis. opn. of Field, J.] [quoting 1 Kent's Commentaries 1]; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was

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[193]Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (See Amnesty International's "List of Abolitionist and Retentionist Countries," *supra,* at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 [dis. opn. of Field, J.].)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming for the sake of argument that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v.*

Montgomery (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and Mr. Jones's death sentence should be set aside.

31.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[194] 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].)

Aside from the insufficiency of the evidence, which requires a per se

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[194]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* (9th Cir. 1988) 848 F.2d 1464, 1476.)

reversal, the guilt phase errors in this case include, among others, error in

admitting and instructing on the Bertha Richmond other crimes' evidence (Arguments 2-4 and 7); error in instructing on the use of other counts' evidence (Arguments 5-7); error in denying severance (Argument 8); error in admitting DNA evidence (Argument 9); error in admitting unfounded psychological testimony on "sexual homicide" (Argument 10); error in excluding Maria Ramirez's apology for falsely accusing Mr. Jones (Argument 11); error in failing to dismiss the tardy Ramirez count (Argument 12); error in admitting fingerprint testimony without proper foundation (Argument 13); error in failing to instruct on malice aforethought (Argument 14); error in instructing on consciousness of guilt (Argument 15); error in instructing on motive (Argument 16); error in diluting the requirement of proof beyond a reasonable doubt (Argument 17); and errors in instructing on first degree premeditated murder and first degree felony murder (Arguments 18 and 19). The cumulative effect of these errors so infected Mr. Jones's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and Mr. Jones's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800,

844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of Mr. Jones's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

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

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Aside from the erroneous exclusion of a prospective juror based only on his questionnaire responses about the death penalty (Argument 21), which is reversible per se, the errors committed at the penalty phase of Mr. Jones's trial include, among others, error in permitting victim impact evidence and argument (Argument 22); error in admitting evidence of incest (Argument 23); error in instructing the jury to disregard the guilt phase instructions (Argument 24); and numerous other instructional errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of Mr. Jones's convictions and death sentence.

CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

Dated: August 5, 2004.

Respectfully submitted,

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

I, Joseph E. Chabot, am the Deputy State Public Defender assigned to represent appellant, Bryan Maurice Jones, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 179,439 words in length excluding the tables and certificates.

Dated: August 5, 2004.

Joseph E. Chabot

DECLARATION OF SERVICE

Re: People v. Bryan Maurice Jones No. S042346

I, Ja Keith Turk, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and on August 5, 2004, I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

Bryan Maurice Jones
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Each envelope was then, on August 5, 2004, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true.

Executed on August 5, 2004 at San Francisco, California.

Ja Keith Turk