IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. JOHN ALEXANDER RICCARDI, Defendant-Appellant.	Crim. No. S056842

Appeal from the Superior Court of the State of California
County of Los Angeles (Case No. A086662)
The Honorable David D. Perez, Judge

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellee,

v.

JOHN ALEXANDER RICCARDI,
Defendant and Appellant.

No. S056842

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STATEMENT OF THE CASE

By amended information filed February 19, 1992, appellant was charged with two counts of murder (Pen. Code, § 187) of Connie Navarro (count one) and Sue Jory (count two). It was alleged that as to counts one and two appellant personally used a firearm within the meaning of section 12022.5.[1] It was further alleged that the murders were committed while appellant engaged in the commission of a burglary, within the meaning of section 190.2(a)(17) (1 CT 71)[2]; and there were multiple victims, within the meaning of section 190.2(a)(3). (1 CT 71; 1 RT 1; 4 RT 401). The

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

[2] The Clerk's Transcript is designated as CT. The first number indicates the volume number and the second number indicates the page number. In like manner, the Reporter's Transcript is designated as RT. A Supplemental Clerk's Transcript is designated Supp CT.

information was later amended charging multiple murder as to both counts. (15 RT 2800).

The homicides took place in 1983. Appellant was not arrested until 1992.

Jury selection began on May 23, 1994, and a jury was impaneled on June 24, 1994. (7 RT 1127.) On July 26, 1994, a jury found appellant guilty of all charges and found the special circumstances to be true. The penalty phase began on July 28, 1994. (16 RT 3130.) Jury deliberations on the penalty phase began on August 1, 1994. On August 4, 1994, a jury returned a verdict of death. (16 RT 3222.)

On October 24, 1994, the Superior Court granted defendant's motion for disclosure of personal juror information. (7 CT 1587.) The prosecutor sought a writ of mandate from the Court of Appeal. (B08927.) On January 10, 1995, the Court of Appeal granted a stay. On April 19, 1995, the Court denied the writ and vacated the stay. On July 27, 1995, this Court granted a petition for review. (7 CT 1603.) On February 15, 1996, this Court dismissed the cause and remanded to the Court of Appeal. (7 CT 1605.) The Court of Appeal sent a notice to the trial court that the order entered by the Court of Appeal was then final. Thus the trial court's order granting defendant's motion for disclosure of jurors' names and addresses without a

showing of good cause was then in effect. The trial court filed a notice to reconsider based on new law, and defense counsel filed an opposition to this notice. (7 CT 1607-1611.) At a hearing on April 23, 1996 (7 CT 1614, under seal), the prosecutor argued that the new law required a showing of good cause. The Court stated it would set the matter for hearing on a showing of good cause, or a motion for new trial, or for sentencing. (7 CT 1617.)

On September 20, 1996, the court denied a motion for new trial (4 CT 1060), and a death judgment was entered. (4 CT 1065.) Defendant timely filed a Notice of Appeal. (4 CT 1064.)

Additional procedural facts are set forth below in the argument section of the brief as necessary to understand the issues presented in this appeal.

This appeal is automatic.

STATEMENT OF FACTS

A. INTRODUCTION

On March 3, 1983, Connie Navarro and Sue Jory were shot to death at the home of Connie Navarro in West Los Angeles, California. There were no witnesses.

On March 4, 1983, Connie Navarro's ex-husband James Navarro[3] began to worry when Navarro didn't answer her phone. James Navarro finally entered the home and discovered the two bodies. He spoke with police, and suspicion centered on appellant, who had been involved in a romantic relationship with Connie Navarro for the past two years. Appellant left the state on the morning after the murders and eluded capture for eight years.

B. PROSECUTION CASE

At about 10:30 p.m. on March 3, 1983, 13-year-old Lisa Rasmusson thought she heard two gunshots fired from across the street. (9 RT 1499.) Her house was directly across the street from the condominium of Connie Navarro. She did not call the police.

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[3] For the sake of clarity, the first and last names are used here to differentiate between victim Connie Navarro, her ex-husband James a.k.a. "Mike" Navarro and their son David Navarro.

Another neighbor, Paul Arthur Bach, told the police he heard two or three muffled loud thumps around 10:30 p.m. to 11:00 p.m. He did not call the police. At 11:00 p.m., Bach took the dog out for a walk. He walked in front of Connie Navarro's condominium and noticed the blinds were open in the living room area and the lights and TV were on. (9 RT 1541.)

Haleh Farjah lived next door to Navarro. Farjah had seen Connie Navarro and her boyfriend, the appellant, walking or jogging. On March 3, 1983, Farjah heard a noise that sounded like three shots around 10:30 or 11:00 p.m. (10 RT 1651.) She looked out the window about 15 minutes after she heard the shots and saw a man rushing to a white car, which she thought was Navarro's. She did not see the man's face. She saw a white shirt or sweater, and the man opened the door, got in the car, and left. (10 RT 1652). The car was about 20 feet away from Farjah, and was parked where it usually was, in front of Navarro's condominium. The man who got in had a key, and he was a big man. (10 RT 1654.) Farjah could not identify the man as appellant. (10 RT 1656.)

On March 4, 1983, when Connie Navarro didn't answer her phone, her ex-husband James Navarro went over to the house, and using his son's key, went inside. He discovered the two bodies and called the police. (10 RT 1794.) L.A.P.D. Officer Richard Parrott was the first to respond to the

scene. Upon his arrival in a black and white he was met at the scene by the ex-husband, who was hysterical. Parrott went up and found two bodies, then backed out, sealed the apartment and notified the detectives. (10 RT 1635.)

L.A.P.D. Detective Richard DeAnda was the first detective at the crime scene. (8 RT 1302.) He saw no evidence of ransacking. The television was still there and both victims' purses were found with credit cars and $35.00 in cash. (8 RT 1328.) DeAnda searched the house for car keys and found none. Connie Navarro's body was found in a position partially in the upstairs hallway with her upper torso in the bottom of the linen closet. (8 RT 1311.) Sue Jory's body was face-down at the foot of the bed in the master bedroom, a few feet away. (8 RT 1312.)

The carpet in the master bedroom was beige; the carpet in the second bedroom was blue. (8 RT 1316.) The carpet in the hallway was burnt orange. There was a red stain on the carpet almost where the orange and blue carpet met. The red stain was determined to be blood. (8 RT 1318.)

A pillow with a blue pillowcase was booked in evidence. (8 RT 1337.)

Detective DeAnda immediately focused on appellant as the prime suspect, based on information provided by James Navarro and L.A.P.D.

Sergeant Jack Wells, who had also dated Connie Navarro. (8 RT 1328.) Appellant's apartment in Santa Monica was searched pursuant to a search warrant. (8 RT 1330.) The police found several guns, but not the murder weapon. They staked out the apartment but appellant never returned. (9 RT 1436.)

Both victims' cars were found the next day. Navarro's white Honda Civic was found parked two blocks east of the crime scene, and Jory's red Ford Fiesta was found parked two blocks west of the crime scene. No keys were found in the cars. (10 RT 1642.)

Appellant's fingerprints were found on the frame in the linen closet where Connie Navarro's body was found. Police found a fingerprint on the linen closet door jamb and a print on the master bedroom door, but they were not identifiable (9 RT 1571.)

Appellant's prints were not found in either automobile. Police found three latent prints in the house and in the automobiles that they could not match. The prints were checked against appellant and anyone ever arrested in Los Angeles County and also against the state system, which has the prints of every arrestee in the state. (9 RT 1580 .)

Dr. George Bolduc performed the autopsies on the decedents. He found two separate gunshot entry wounds in the front upper left and right

chest of Connie Navarro. Bolduc concluded that one bullet went through her lung and exited the back. A second bullet entered Navarro's right front chest and perforated the right lung and aorta. This bullet, large caliber and copper coated, was recovered just under the skin of the back. (8 RT 1236-1244.) Dr. Bolduc concluded that either wound would have been fatal and death would have been in a matter of minutes. Navarro's blood alcohol content ("B.A.C.") was .14. (8 RT 1246.)

Bolduc found one entry wound to the left jaw area of Sue Jory, with an exit wound in the back of the neck. This wound was fatal. (8 RT 1255). Jory also had a graze wound to her left hand, which was consistent with the victim bringing her hand up in a defensive movement or to grab for the gun. (8 RT 1258.) Bolduc concluded that both wounds were caused by a single bullet. Jory's B.A.C. level was .03. (8 RT 1261.)

Bolduc noted the rigor mortis, liver temperature and air temperature, and from these he concluded that the time of death could have been around 10:30 or 11:00 p.m. (8 RT 1264.) There was very little blood near the body of Connie Navarro. (8 RT 1268.) Bolduc noted that even though one of Connie Navarro's wounds was a through and through bullet, and the body was lying on its back, it is possible that there would not be a substantial

amount of blood, because the track of the bullet could have collapsed on itself. (8 RT 1266-9.)

Robert Gollhofer, an expert in gunshot residue, examined the pillow and blue pillow case found at the scene. His visual examination of the pillow case caused him to think there was possible gunshot residue on pillowcase, meaning that a gun could have been fired nearby or the pillow could have been placed over the bullet impact area. (9 RT 1349.) He sent the articles to the lab, and tests came back negative for gunshot residue. (9 RT 1346-1355.)

Connie Navarro's son David Navarro was 15 at the time of the murder. (9 RT 1356.) He had known appellant several years prior to the shooting because appellant dated his mother. Connie Navarro was divorced from David's father, James a.k.a "Mike" Navarro.[4] (9 RT 1358.) David's relationship with appellant was a trusting loving relationship. His mother told him she was trying to break off the relationship, but appellant was persistent. (9 RT 1359.) Appellant kept his own residence, but he stayed at Connie Navarro's condominium frequently. (9 RT 1359.) David's mother told him she was having problems with appellant at least a month before the

[4] This is the same James Navarro who found the bodies.

shooting. At some point appellant was not welcome in the house. (9 RT 1360.)

About a week or ten days before the shooting, David stayed home from school because he was ill. His mother was out jogging, when David heard a noise. (9 RT 1362.) He got up and went to the doorway of his mother's bedroom and saw appellant standing on the balcony removing, or replacing, the sliding glass door off the track. (9 RT 1362.) At that time appellant was not welcome in their house. David ran into his bathroom and hid behind the shower curtain. David heard someone come into the bathroom. Then he heard appellant go downstairs and he heard his mother's answering machine playing. David did not see appellant enter the bathroom, but when David left the shower, he saw a gun behind the bathroom door. (9 RT 1367.) He did not know what to do so he went to the head of the stairs and called out, "Hello Dean,[5] Mother is anyone there? I think someone is trying to break in." Appellant called up to David and told him everything was fine. David went downstairs, and appellant told him everything was fine. (9 RT 1368.) They went upstairs together, and David showed him the sliding glass door. The two of them then went downstairs to watch television. (9 RT 1369.) At one point, appellant went upstairs for 5

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[5] Appellant was known as "Dean"

minutes, and when he came back downstairs he said wanted to show David something upstairs. They went upstairs and sat on the foot of Connie Navarro's bed. Appellant told David that Connie Navarro didn't want to see him anymore and he was very upset and he was going to kill himself. (9 RT 1371.) He reached under the bed and grabbed a gun. He said he was going to kill himself and he pointed the gun at David. (9 RT 1371.) The moment David saw the gun he ran toward the stairs. Appellant caught him and brought him to the bathroom. He pulled out some handcuffs and tried to handcuff David to the toilet. (9 RT 1372.) David begged him not to, so instead he handcuffed David behind his back, left him in the bathroom and told David he was going to deal with Connie Navarro. David managed to slide his hands around his legs so he was standing with the handcuffs in front of him, but he did not leave of the bathroom, because he was afraid. (9 RT 1373.) David heard the front door open and his mother come into the house. He heard his mother and appellant talking. David stayed in the bathroom about a half hour. He heard loud voices and slapping sounds. (9 RT 1375.) Finally appellant came into the bathroom crying and took the handcuffs off, and begged David not to tell. David did not tell anyone until after his mother was killed. (9 RT 1376.)

David testified that appellant never really lived at the house, he stayed there maybe five nights a week, but did not keep clothes there. (9 RT 1377.) Sometimes he brought his laundry over and did it. They had a washer and dryer in the upstairs hallway between the two bedrooms. Above was a shelf, and sometimes appellant put his clean clothes on the shelf. The linen closet was right there also, but David never saw appellant put anything in the linen closet. (9 RT 1379.) David and his mother had temporarily moved over to his father's house about a week before the murder, because his mother felt her life was in danger. (9 RT 1379.)

Carl Rasmusson and his wife Janet lived across the street from Connie Navarro. They socialized with Navarro and appellant, and had gone on vacation together. In early 1983, Navarro came over to their house, she was upset and appeared scared. Navarro asked them to watch her house, she said appellant had broken in. (9 RT 1502-1506.)

Rasmusson confronted appellant on two occasions. Once in a restaurant on Westwood Blvd, Rasmusson talked to appellant and tried to tell him he was scaring Navarro, and asked him to leave her alone. (9 RT 1506.)

At one point Connie Navarro asked Rasmusson to come over and look at her locks. She had had her locks changed and she was having

trouble with her upstairs sliding glass door. Navarro had a little bolt installed that could be closed and locked. Rasmusson took it off and found that part of the bolt appeared to have been sawed through completely. He attempted to repair it. This was about a week or two prior to her death. (9 RT 1507.)

Janet Rasmusson also testified. She and Navarro were friends, and she also worked for Navarro at her shop on Westwood Blvd. (9 RT 1519.) Around the winter holidays of 1982, Navarro told Rasmusson she was having problems with appellant. (9 RT 1520.) In January 1983, Navarro came over to their house and told Rasmusson and her husband that appellant had been following her and wandering around her place of work. She was scared and thought he was breaking in. Connie Navarro asked them to watch the house for her. (9 RT 1521.)

George Hoefer, an advertizing executive from Connecticut, had dinner with Connie Navarro in January 1983 to discuss her career. After dinner, he gave her a friendly kiss and went back to his hotel. (10 RT 1618.) The next morning he got an angry phone call at his hotel from a man who said he was Navarro's boyfriend. The man said if he didn't stop seeing Navarro he would break Navarro's knees. Hoefer told the man he was happily married. Later, Hoefer received a second call. (10 RT 1622.) The

man said he knew Hoefer was booked on American Airlines in the morning and he had better be on the flight. The man said he knew Hoefer lived in Westport, Connecticut, and asked Hoefer how would he like a visit. Hoefer did nothing until he heard that Navarro had been murdered, then he called the police. (10 RT 1623.)

Craig Spencer knew Connie Navarro, Sue Jory and Marilyn Young from the gym where they all worked out. About two weeks before the murder, he was eating breakfast with Connie Navarro and Sue Jory at a little restaurant. He had heard about appellant, but had not met him at the time. (10 RT 1671.) Spencer was sitting next to Connie Navarro, and talking to Sue Jory, who was sitting across the table. Jory said, "Oh, no, its Dean." Appellant walked in and sat down uninvited across from Spencer, and stared at Navarro. The two women were nervous. Appellant never said a word. Spencer introduced himself and shook appellant's hand. Finally, appellant stood up and looked down at Navarro and made a hand gesture (forefinger extended, and thumb pointing down) and then walked away. (10 RT 1675).

Marilyn Young testified that she was good friends with Navarro and appellant. Navarro and appellant were sweethearts, but Navarro broke up with him in September. She got back together with him for Christmas, but

then broke up with him again. About three weeks before the murder, appellant started calling Young every night at midnight and wanted to know everything Navarro did that day. (10 RT 1689.) Navarro had her locks changed. About a week before the murder, someone told Navarro that appellant had broken into Connie's Navarro's house through the patio. The lock had been sawed through and Navarro was terrified. The Friday before the murder, Navarro stopped staying at the condominium. (10 RT 1690.)

Young testified that Navarro told her appellant had kidnaped her about a month before the murder. He used a gun to make her get in his car and took her to his house and then to a motel nearby, and made her spend the weekend with him. (10 RT 1696.)

Young testified that Navarro had discussed getting a restraining order against appellant. (10 RT 1698.) Young testified that the Friday before the murder, Navarro did not want to go home, so she stayed at Young's house. Young testified that Navarro told her a friend said appellant was in a rage, so Young and Navarro went to Laguna for the weekend. When they got back, Navarro did not want to stay at home, so she spent a few nights at her ex-husband's house. (10 RT 1700.) Young testified that Navarro told her that she went home to pick up some clothes and appellant was hiding in the closet watching her. On the day before the murder,

Young and Navarro were having lunch when appellant came into the restaurant. Navarro asked him why he disconnected her alarm, why he broke into her house, and he told her he had to get a letter she had written saying she cared about him but things weren't working out. Young testified that appellant "got all sentimental" and told Navarro that he would leave her alone. So Navarro decided to go home that night. (10 RT 1704.)

James Navarro discovered the bodies. (10 RT 1793). James had been married to Connie Navarro for 11 years until their divorce in 1975. They remained good friends after the divorce, and they shared custody of their only child, David. Connie Navarro introduced James to appellant. He thought they had a normal relationship at first. Later, in 1982, Connie Navarro told him she wanted to end the relationship. (RT 1788). Appellant harassed her. Sometimes when James Navarro was over for dinner, appellant would ride his motorcycle in front of the house and rev the engine. Sometimes when James Navarro was there, appellant would just walk right in.

Connie Navarro stayed with James Navarro for a week prior to the murder. On March 3, she decided to move back home. She had talked to appellant and he told her he would leave her alone. Connie Navarro told James Navarro she was going out to dinner with Sue Jory and Marilyn

Young, and she would call him when she got back. (10 RT 1791.) When she didn't call, he called her, but the phone just rang. The next day he kept calling. About 1:30 p.m. he decided to go over and see if she was okay. The house was closed and there was no sign of anybody. (10 RT 1792.) He left his business card in the door, and left, because he didn't have a key. Later, he picked David up from school. David had a key to his mother's house, so James Navarro took David's key and went over to Connie Navarro's condominium. (RT 1793.) John Jory's business card was now on the door too. James Navarro used the key and went in. He went upstairs and found the two bodies. Connie Navarro's body was partially in the hall linen closet, and a few feet away, her friend Sue Jory was lying on the floor. (10 RT 1794.)

James Navarro testified that Connie Navarro's face was covered with a blue pillowcase (10 RT 1795) or towel (10 RT 1795.) He removed it, to see if it was Connie. He could not remember what he did with the case or towel after he removed it, because he was so upset. (11 RT 1845.)

Navarro went back downstairs and called the police and told them there had been a murder. (10 RT 1795.) The phone rang and it was Marilyn Young. Navarro told Young appellant killed Connie Navarro and Sue Jory. James Navarro testified he knew appellant had killed them. (RT 1796.)

Connie Navarro had told James Navarro she was having trouble with appellant, she was terrified of him and was thinking about getting a restraining order. (10 RT 1796.) She asked James Navarro for the name of an attorney and he gave her the name of an attorney whom he knew from school. (10 RT 1797.)

After the murders, James Navarro cleaned out Connie Navarro's condominium. He found a stenographer's pad with a rough letter dated February 18, 1983. (10 RT 1797.) The letter was from Connie Navarro to appellant, in which she wrote about being afraid of appellant. (13 RT 2490.)

James Navarro testified that he found a tape on his answering machine at home, where Connie Navarro had made a call which was recorded. (10 RT 1799.) It was her conversation with somebody talking about restraining orders. (10 RT 1799.) James Navarro testified that on the tape, Connie Navarro was talking to a legal aid person about how she was terrified of appellant. (10 RT 1800.) The cassette from the answering machine was played to jury. (11 RT 1842.)

On cross-examination, James Navarro was asked if Connie Navarro ever got a restraining order against him. (11 RT 1825.) Navarro testified he did not remember. The defense offered as an exhibit a 1975 restraining order against James Navarro.

John Jory testified that Sue Jory was his first wife. They divorced in 1975. They had one child, Christianna, who lived with Sue. Sue and Connie Navarro had been friends ever since grade school. When Sue did not come home, Christianna called him, and he drove over to Connie Navarro's condominium. (11 RT 1877.)

Stephanie Currier Brizendine testified she had known appellant three or four years and had dated him. (11 RT 1879.) On the night of the murders, she and appellant were supposed to meet for dinner, but appellant showed up late. (11 RT 1885.) He was agitated and showed her a letter from Connie Navarro saying she was frightened and begging him to leave her alone. (11 RT 1888.) Appellant then asked her to make a phone call. He dialed the number and said, "if a boy answers, tell him Dean loves him, and if a woman answers, ask for Dave." There was no answer. Appellant said "The fucking bitch Navarro is not at home." (11 RT 1890.) Appellant walked outside the restaurant, took off his jacket and laid it in the trunk of his car. He was wearing a white sweater. Brizendine thought she saw a gun in the trunk. (11 RT 1909.)

In 1991, F.B.I. Agent Robert Lee received a tip that appellant was in Houston. F.B.I. agents arrested appellant, and Lee assisted in searching appellant's condominium. (11 RT 2020.) They recovered $467,000 worth of

stolen jewelry, and $87,000 cash. A safety deposit box in New Jersey contained $45,000 in cash and $250,000 in stolen jewelry. (11 RT 2023.) Agents recovered seven guns from appellant's condominium. (11 RT 2023.) Two of the guns were colt .38 revolvers, one was stolen. (11 RT 2053). Agents also recovered a number of pieces of identification with fictitious names, including credit cards, birth certificates, and a certificate of marriage. A number of blank birth certificates were also discovered. (11 RT 2031.)

Appellant's step-mother Rosemary Riccardi was a surprise witness. On July 11, 1994, after more than month of trial, and nearing the close of the prosecution's case, the prosecution moved for the introduction of "newly discovered" evidence that appellant's step-mother said that her husband, appellant's father, now deceased, told her back in 1983, that appellant confessed to the murders. (12 RT 2094.)

Rosemary Riccardi testified that she was married to appellant's father, Pat Riccardi, who died in August 1986. They were married 23 years. She did not see appellant often, but they were friendly. In March of 1983, appellant called late one night, and Rosemary answered the telephone. Appellant asked for his father. (12 RT 2168.) Rosemary went upstairs and put Pat on the phone, but did not listen to the conversation. After the call

was over, she went upstairs to see what it was about. Pat was sitting on the bed, tears streaming down his face. She had never seen Pat cry in 23 years. (12 RT 2170.) She asked him what was the matter, and he said, "Jackie [appellant] killed two girls. He shot them." (12 RT 2172.)

On cross-examination Rosemary Riccardi denied that she was writing a book about appellant's case. She said she had been interested in writing a life story of appellant but she found his criminal activities revolting and didn't want to write about that. (12 RT 2177.) She denied that she and appellant argued about the fact that she had 25 cats in the house, and appellant's opinion that it was unhealthy for his father. (12 RT 2181.)

Rosemary Riccardi testified that she told the F.B.I. about the confession in 1983 and in 1985 (12 RT 2189), and that she first told Detective Brown, the officer in charge of appellant's case, a few weeks ago. Prior to her calling Detective Brown, she had not been subpoenaed for trial. (12 RT 2193.)

Sammy Sabatino was a professional burglar, and at the time of appellant's trial he was serving 57 months in federal prison for interstate transportation of stolen property. Part of his deal with the government was the promise to testify against appellant in the murder trial. (11 RT 1954-1958.)

Sabatino testified that he and appellant were partners doing burglaries for many years. In early 1983, appellant came to New York and met Sabatino at a bar. Appellant told Sabatino that he was having trouble with his girlfriend and that he was going to kill himself or kill her. (11 RT 1965.) Several weeks later, appellant called Sabatino and said he killed her. (11 RT 1966.) Sabatino testified that appellant told him he broke into the condominium, Navarro and a girlfriend came home, they started arguing, he took a pillow and shot her. Then he shot the friend so there would be no witnesses. (11 RT 1966-1968.)

C. DEFENSE CASE

A firearms expert did a comparison between the expended round found in Connie Navarro's body, and a bullet from the bedroom wall door jam. (11 RT 1853.) Both bullets were .38 or .357 caliber with copper coating, with the same lands and grooves. They could have been from the same gun; there was insufficient striae for a positive match. The expert testified that this was old ammunition, not manufactured at time of murder. L.A.P.D. used this exact ammunition in 1965. None of the ammunition found in appellant's apartment was that old. None was .38 or .357 caliber. (11 RT 1867.)

A criminalist testified that he gathered some hairs that were stuck in the blood in Sue Jory's hands. Another criminalist determined that the hairs did not match appellant's. (12 RT 2233-2259.)

Mario Ragonesi, appellant's cousin, testified he grew up with appellant. He testified that appellant and his step-mother Rosemary Riccardi were not on good terms, and that she was writing a book about appellant's life, with hopes to have it made into a movie. Although Ragonesi and Rosemary Riccardi spoke frequently, she never told Ragonesi that appellant had confessed to his father. Before the trial, she had always professed his innocence. (12 RT 2271.)

Richard E. Ervin was a homicide investigator in 1983. (12 RT 2289.) The day after the murder, he went to the scene and interviewed neighbor Heleh Farjah. She told him that Connie Navarro's car was parked on the east side of the street after the gunshots were heard. She also told him that at about 11:00 p.m. on the night of the murder, she saw an unknown person driving Navarro's car. (12 RT 2289.)

F.B.I. agent Gary Steger testified that he inspected the F.B.I. files for reports of interviews with Rosemary Riccardi. (12 RT 2295.) There were twenty-seven contacts with Rosemary and the F.B.I., both in New York and Ohio. Most of the calls were from Rosemary to the F.B.I. There were no

reports that she told the F.B.I. that appellant had confessed to her husband Pat, appellant's father. (12 RT 2295.)

Appellant testified that he was a convicted burglar (12 RT 2303), but that he did not kill the women. (12 RT 2431.) He testified that he was in love with Connie Navarro. He did his laundry at her house, so the fact that his fingerprints were in the linen closet was not surprising. (12 RT 2317.) Appellant denied "stalking" Navarro. He said that since they had been going together for several years, they frequented the same restaurants. (12 RT 2341, 2347, 2367.)

Appellant admitted that he was depressed that Navarro wanted to break up with him, and he admitted the incident David described, where appellant had gone to Navarro's house with a gun, thinking of killing himself. But appellant denied handcuffing David, and testified that Navarro talked to him and calmed him down. (12 RT 2360.)

Appellant testified that it was true that he met Stephanie Brizendine and Toni Natoli for dinner at Tampico Tilly's the night Navarro was murdered. (13 RT 2382.) He was leaving for New York in the morning, and he wanted to talk to Navarro before he left, so he had Brizendine dial Navarro's number from the restaurant. (13 RT 2386.) When there was no answer, he assumed she was out, and went home. He testified that

Brizendine did not walk out with him, he would not wear a sweater and a jacket together, and he did not open the trunk of his car. (13 RT 2398.) The next morning, he flew to New York on a pre-planned trip. A few days later he called his friend Mike Hammer in Los Angeles and heard that Navarro and Jory had been murdered, and that the police were looking for him. (13 RT 2398.)

When he found out he was a suspect, he decided not to go back. (13 RT 2399.) He called his father and told him the police were looking for him in the murder of two girls. (13 RT 2401.) He testified that he and his step-mother, Rosemary Riccardi, did not get along. (13 RT 2401-2407.) After he was arrested, he called her from jail. She told him she planned to write a book about him, so he never called her again. (13 RT 2411.)

On cross-examination, appellant denied calling Sabatino, and denied that Sabatino gave him $100,000 for bail, by giving it to appellant's friend, Ms. Rolando. (13 RT 2442.) On re-direct, appellant admitted that he had directed a woman to call Sabatino and the woman, not Rolando, picked up the money at Los Angeles Airport. (13 RT 2546.)

Dr. Irving Root, a board-certified pathologist who had done 20,000 autopsies, reviewed the reports from the case. He testified that liver mortis is the "color of death." (14 RT 2569.) Normally during life the blood is

circulating. Blood consists of two parts: liquid and cells. After death, the blood is not circulated and the heavier blood cells settle to the lowest part of the body, causing discoloration. (14 RT 2569.) The reports and photographs at the scene show that the police found Connie Navarro's body resting on its back, a little more on the right side than the left side. The photographs from the scene show the bluish tinge of liver mortis on Connie Navarro's back. (14 RT 2570.) Therefore, Dr. Root was of the opinion that Connie Navarro was either killed in the closet, or moved to the closet shortly after her death (14 RT 2571.)

The reports and photographs taken at the scene showed that Sue Jory was found lying face down. (14 RT 2573.) Jory had equal amounts of livor mortis, or blood discoloration where the blood settled, on both her front and back. It was Dr. Root's opinion that Sue Jory died lying on her back, but was moved to a face down position 4-6 hours after her death. (14 RT 2574.) Root testified that after 8 to 12 hours, the blood will become fixed, and even if the body is moved, the discoloration does not drain into a newer position. (14 RT 2574.) Jory could not have moved herself, because the bullet that went through her spine should have paralyzed her. There was a lot of blood on the blue carpet, which was in the blue bedroom. Jory's body was found in the beige carpeted master bedroom. (14 RT 2594.) The blood

could not have come from Navarro, because she had no injury that would bleed out. (RT 2561-2626.) It was Dr. Root's opinion that Sue Jory was shot in the blue bedroom, and her body was later moved to the beige master bedroom. (14 RT 2597.)[6] The distance between the two bedrooms was about 15 feet (14 RT 2603.)

D. REBUTTAL

The prosecution called the acting bailiff as a rebuttal witness to testify to what appellant told him in the hallway outside the courtroom. (14 RT 2627.) On the stand, appellant had denied calling Sammy Sabatino and getting $100,000 from him to use for bail. On cross, appellant denied getting the money from Linda Rolando. On re-direct, appellant admitted that he had directed a woman to call Sabatino and the woman, not Rolando, picked up the money at Los Angeles International Airport. (13 RT 2546.) The bailiff testified that as he was taking appellant back to his cell, appellant said, "Wasn't that interesting. I bet he [Sabatino] is still pissed off about the hundred thousand dollars." (14 RT 2629.)

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[6] The blood found in the condominium was not tested at the time of the crime, but upon motion of the defense, the blood found on the blue carpet was tested during the trial. The results of that DNA testing was presented to the jury in the form of a stipulation, that the blood found on the blue carpet could have originated from Susan Jory. Connie Navarro could not be the source. (15 RT 2758).

The prosecutor also called Dr. Eugene Carpenter, the Los Angeles County Medical Examiner, to rebut the testimony of Dr. Root. Dr. Carpenter testified that rigor mortis is unreliable. Carpenter testified that there are cases where a body is turned after 24 hours and the blood shifts. There was no evidence that Jory was paralyzed. (14 RT 2714-2737.)

E. PROSECUTION'S CASE IN THE PENALTY PHASE

The prosecution presented the children of the two victims, to testify to the impact of the murder on their lives.

Christianne Jory, the daughter of Sue Jory, testified that the murder changed her whole life. She had to go live with her father, and she was in therapy for six years. Living with father was terrible because he had step-children. She locked herself in her room for four years. (16 RT 3135-3139.)

David Navarro was 27 years old at the time of the trial, but he was only 15 when his mother was murdered. His father fell apart and David had to take care of him. (16 RT 3139.) David started doing heroin. He developed a $1000-a-day heroin habit. He intentionally overdosed five times and was saved. He was in and out of rehabilitation seven times. He lost two wonderful relationships because of fear of intimacy. He had nightmares about appellant, and was afraid he would come after his father. (16 RT 3141.)

F. DEFENSE CASE IN THE PENALTY PHASE

The defense presented two witnesses who knew appellant. Liz Brooks met appellant fifteen years before the trial. (16 RT 3145.) She and her husband owned the Butterfly Bakery in Westwood, and they became friends with appellant. They saw him sometimes twice a day, when he would stop by to help her bake cookies, or help her husband with repairs. Liz also met Connie Navarro at the gift shop Navarro owned across the street. The four of them went out to dinner together. After the death, appellant dropped out of sight. Later, he called her from jail to see how she was. Brooks testified that she knew appellant was unhappy and depressed because Navarro wanted out of the relationship. (16 RT 3150.)

Brooks testified that she often saw appellant and David Navarro together. They were very close and did a lot of things together. David enjoyed being in his company. They were like father and son, and it appeared that appellant loved David and his mother. (16 RT 3152.)

On cross-examination, Brooks said she did not believe that appellant was a burglar. (16 RT 3145-3153.)

Henry Kaney testified that he was the pastor at Hope Chapel in Hermosa Beach. He met appellant at a gym about 1978 or 1979. Kaney worked out about five or six days a week, and he and appellant became

friends. Kaney was single at the time. He was married in 1981, and appellant was one of the best men at the wedding. (16 RT 3156.) Kaney met Connie Navarro, they all went out to dinner. At first the relationship seemed trouble-free. Then it appeared they were breaking up, and appellant was resistant to that. Kaney and appellant talked about it every day. (16 RT 3158.) Appellant cared for her and became despondent. He lost about 20 or 30 pounds and wasn't getting enough sleep. Appellant told Kaney he was desperate and didn't know how to deal with it. (16 RT 3159.) Kaney asked they jury for mercy for appellant. (16 RT 3161.)

ARGUMENT

JURY SELECTION ISSUES

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S FOUR *BATSON-WHEELER* MOTIONS

A. INTRODUCTION

The use of peremptory challenges to remove members of a racial, religious, or ethnic group from a jury, on the basis of a presumed group bias, violates the defendant's right under article I, section 16 of the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*People v. Turner* (1986) 42 Cal.3d 711, 715-716; *People v. Wheeler* (1978) 22 Cal.3d 258.) Such racial discrimination in the selection of jurors is also a violation of the Sixth Amendment right to an impartial jury and the right to equal protection under the Fourteenth Amendment to the U.S. Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89.)

The party claiming racially discriminatory use of peremptory challenges must raise the point in a timely fashion and make a prima facie case. To establish a prima facie case, the defendant must (1) make a record of the circumstances, (2) establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section

rule, and (3) the defendant must show that the circumstances "raise an inference" that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race. (*Batson, supra*, 476 U.S. at 96; *Wade v. Terhune* (2000) 202 F.3d 1190, 1192-1197.)

Appellant raised an inference of systematic exclusion in this case each time trial counsel objected. By the fourth *Batson* challenge, the prosecutor had used six of its twenty peremptory challenges to remove prospective black jurors. The trial judge found that the appellant had not made a prima facie case. Those findings were contrary to evidence, since the inference of systematic exclusion was compelling.

B. THE *BATSON-WHEELER* MOTIONS

During jury selection, on June 22, 1994, the trial court heard and denied four motions brought by appellant pursuant to *Batson v. Kentucky, supra*, 476 U.S. 79 and *People v. Wheeler, supra*, 22 Cal.3d 258, to declare a mistrial and dismiss the existing jury panel.

1. First Motion

After the prosecutor used peremptory challenges to dismiss the first three black jurors, the defense brought the first *Batson-Wheeler* motion, at sidebar. (6 RT 924.) Specifically, the defense objected to the dismissal of Mr. Ferguson and Ms. Hammond, jurors 4 and 5.

The proceedings relevant to this *Batson-Wheeler* motion were as follows:

> [D.A] BARSHOP: The People would thank and excuse Mr. Ferguson.
> ...
>
> MR. JONES: Your honor, may we approach?
>
> (The following proceedings were held at the bench.)
>
> MR. JONES: Your honor, I would like to make a motion under *Wheeler* and *Johnson*, et al, for a mistrial on the grounds that the prosecution is exercising their challenges in a discriminatory fashion so that we do not have a cross section of the community.
> I am aware that he has effectively solicited trivial details on the first three black jurors that he kicked off, but Mr. Ferguson and Ms. Hammond, in my mind, would be ideal prosecution jurors were they not black.
> And I think there's a prima facie basis demonstrated because those two, I believe, were No. 4 and 5, the court would be justified in asking for some explanation about why that is the situation at this time.
>
> [DA] BARSHOP: I don't understand the question of the trivial details. If the court makes a prima facie showing [sic] that has been made, I'm prepared to substantiate the position that Mr. Ferguson and Ms. Hammond, the last two jurors that Mr. Jones believes I challenged for racial basis, I challenged because I believe they were bad on death.

> THE COURT: The court didn't hear any responses [sic] and cannot disagree with the People and the responses were such that Mr. Barshop reasonably exercised peremptory challenge because of those concerns. Same concerns that I heard. So the motion will be denied.

(6 RT 923-926.)

2. Second Motion

The second *Batson-Wheeler* motion occurred a few minutes later and concerned the prosecutor's peremptory challenge of Ms. Powell, a black woman. Following defense counsel's in-court indication that he wished to approach the bench (6 RT 926), the following proceeding was held at the bench:

> THE COURT: Mr. Jones?
>
> JONES: Your Honor, we would again move under *Wheeler*, *Johnson*, et al., for mistrial based on systematic exclusion of minority people and a deprivation of a cross section of the community for this trial.
> Ms.Powell the fifth or sixth black juror to be excused, was up there after the People had accepted a half dozen times. [footnote, at 6 RT 925, the prosecutor had accepted the jury with Ms. Powell on it.] There's nothing that would lead to her being challenged.
>
> [DA] BARSHOP: Other than the fact that she was arrested.

3. Third Motion

The defense made a third motion under *Wheeler*. The following took place outside the presence of the jury.

> JONES: Your honor, I do make the motion following in the footsteps of jurors Craig, Powell, Hammond and Ferguson, Mrs. Brooks, after being accepted a half a dozen times, has now been excused.
> I think there's more than prima facie case as to the systematic exclusion of minorities, and I find nothing in her questionnaire, in her answers, or in her conduct that occurs to me would justify her excusal other than what I've indicated.
>
> THE COURT: The motion will be denied, but its obviously on the record. We'll see everybody tomorrow morning.

(6 RT 984.)

4. Fourth Motion

On June 23, 1994, the defense had exhausted their 20 peremptory challenges, and moved for additional peremptories. (7 RT 1048.) The motion was denied.

The prosecutor excused Mr. McFarlane, and the defense asked to approach. The Court told them to wait until later. The prosecutor exercised his four remaining peremptories, the jury was sworn, and the alternates were seated. (7 RT 1054.)

The defense renewed their request to be heard on the *Wheeler* motion, and the judge said yes, but went ahead with jury selection. (7 RT 1056.)

After the four alternate jurors were sworn in, the defense renewed the *Wheeler* motion (7 RT 1131.)

The proceedings relevant to this *Batson-Wheeler* motion, out of the presence of the jury, were as follows:

> JONES: Your honor, on the *Wheeler* motion, we would make a motion for mistrial based on the systematic exclusion of minorities, in particular, blacks or African Americans or colored, Negro. I've been all of those things during my lifetime.
> The following jurors Craig, Powell, Hammond, Ferguson, and Brooks. Mr. McFarlane was excused this morning. Based on the answers to his questionnaire, his answers to Mr. Schaeffer and Mr. Barshop, I see no good cause for him being excused. And I think there's a prima facie case established in the absence of any answers given by that juror that were out of the ordinary.
>
> THE COURT: That motion will be denied.
> (7 RT 1131.)
>
> [DA] BARSHOP: May I respond briefly to perfect the other side of the record? And I will be brief.
> Mr. McFarlane, if you want to discuss his answers, he said that — his answer to Mr. Schaeffer's question in regard to that he wouldn't consider flight at all, I thought, was a bad answer for the people. I certainly didn't like

his earring, as a basis for a challenge for a challenge on a gut basis.
The record should reflect, and I know that court has not made a finding that there was a prima facie showing that on this jury there are two blacks, There is a black alternate. So out of a total of exercising of challenges, it appears that there's still a cross-section of the community, and that's all I've said.
I did say earlier and I reiterate, that my earlier challenges were based almost exclusively, even through not legally challengeable for cause, on the penalty phase. The majority of minority challenges were based on my analysis of their ability to decide the death penalty, or alternatively, that they or someone close to them had some type of record.

JONES: Judge, if I may respond briefly, and at this point I understand we're just perfecting our record and I'm not trying to beat a dead horse. Number one, what is up there in the jury box at this point has nothing to do with the propriety of the challenges exercised by the people. If there was an improper challenge based on race, that in and of itself is grounds for a mistrial and is reversible on appeal absent anything else. There's no harmless error or any other standard used. (7 RT 1132.)
And more to the point, with respect to the earring, there is a white juror up there now who is wearing an earring, so I think that is a nonsequitor.
And one excuse given for the one of the other black jurors is that they had been arrested. In going over the questionnaires, there are white jurors up there with arrests. So I think we're still at the bottom line here that the answers, the earring, the background was no different than the answers provided by other jurors.

> And the fact that there are black jurors up there only means to me that there are six less than there should be because those 6 were excused. As far as I'm concerned, for no reason other than the color of their skin.
>
> [DA] BARSHOP: What about little earring versus big earring.?
>
> The court: All right.

(7 RT 1133.)

5. Final Jury Composition

The final jury had two black members, Earl Gist, and Rosa Blake. (1 Supp. CT 121; 2 Supp CT 501.)

6. Background of the Six Prospective Jurors Who Were the Subjects of the *Batson-Wheeler* Motions

a. *Mark Ferguson*

Mark Ferguson was a 36-year-old divorced black male. (1 Supp. CT 042.) He was employed by Ramp Services at LAX. He was a high school graduate and had no arrest record. In his questionnaire, Ferguson answered that he did not really like the death penalty, but "if the crime by law is death, so be it, as long as we have the right person to be placed to death." (1 Supp. CT 056.) He wrote that he thought the death penalty was used too seldom, because too many people were getting away with killing people. (1 Supp CT 056.)

During voir dire, the prosecutor asked Ferguson what he meant when he wrote he didn't really like the death penalty (6 RT 833.) Ferguson replied that he loved life. He went on to say that when he was in the military, there were a lot of things that he did not agree with, but he did his job. He carried out his orders. (6 RT 835.) The prosecutor at one point accepted the jury with Ferguson on it. (6 RT 842), but then used a peremptory to excuse him. (6 RT 923.)

b. *Denise Hammond*

Denise Hammond had no arrests. Hammond had two years of college was employed as a health service representative for Blue Shield of California. In her questionnaire, she wrote she would prefer a life sentence to a sentence of death (3 Supp. CT 861.) When questioned on the record, Hammond said she felt in some cases the death penalty is necessary, but she would prefer a sentence of life in prison. Hammond said she could impose death if the facts warranted it. (6 RT 837.)

On the record, the prosecutor stated he challenged Furguson and Hammond because they were "bad on death." (6 RT 836) (6 RT 924.)

c. *Diane Powell*

Diane Powell was employed as a parking enforcement officer at U.C.L.A. (4 Supp CT 941.) She had been arrested 25 years before at a

student demonstration at Cal. State Northridge. In 1968 or 1969, she was a member of the Black Student Union and they were protesting to have an African American study department. She was arrested along with about 300 other people, but they were then released. (6 RT 833.) Her son had been arrested for traffic violations. (4 Supp CT 953.) She felt they had been treated fairly by the courts.

After asking Powell about her arrest, the prosecutor stated:

> [DA] BARSHOP: I want to discuss an issue that shouldn't be an issue. The victims in this case are white. The defendant is white. This is not a racial case. Do you have a problem with that?
>
> POWELL: No, I do not.
>
> [DA] BARSHOP: Not at all?
>
> POWELL: Not at all.
>
> [DA] BARSHOP: Would you be fair to both sides?
>
> POWELL: Yes.

(6 RT 833.)

In the questionnaire, when asked about her general feelings regarding the death penalty, Powell wrote that if the crime was proved beyond a reasonable doubt, the crime warrants the punishment. She wrote that she personally felt the death penalty was fair. She would review all the

circumstances surrounding the incident, and she would be fair to both sides. (4 Supp CT 956.)

The prosecutor did not ask any further questions on her feelings about the death penalty before excusing her.

At sidebar, Jones made his second *Wheeler* motion, stating that Ms. Powell was fifth or sixth black juror excused. The prosecutor responded, without direction from the bench, that Powell was arrested. The court denied the motion. (6 RT 927.)

d. *Carolyn Brooks*

Carolyn Brooks was a 45-year-old black female from Detroit. She was employed as a tax examiner for IRS and married to a retired male nurse. (5 RT 721.)

As to the death penalty, Brooks wrote in the questionnaire that she did not believe the death penalty is a punishment. In the remaining questions, Mrs. Brooks answered that she would follow the directions of the court. (5 Supp CT 1441.)

In voir dire, the prosecutor asked what she meant when she wrote that death is not punishment. Mrs. Brooks answered that she didn't think that the death penalty should be imposed just because of the crime. She thought there were different situations in which a death penalty should be

imposed. When asked if she could imagine where two females are killed by a gunshot wound, a situation where she would conclude based on the evidence that the death penalty was appropriate, she answered yes. When asked if she thought life in prison was worse than death, she said, no, she didn't have a feeling one way or the other, she would have to hear everything concerning the situation. She stated she thought the death penalty was the more serious punishment. (5 RT 802.)

Mrs. Brooks stated she had a son who was arrested as a juvenile and charged with assault. (5 RT 805.) She felt the case was handled fairly, and that it would have no effect on her judgment of this case. (5 RT 721-808.)

e. *Etta Craig*

Etta Craig was a 48-year-old African American with four adult children. (5 RT 723; 1 Supp CT 082.) She was employed as a maintenance administrator for Pacific Bell. Her children were employed as a security guard, a buyer for Nordstrom, her middle son owns a tattoo parlor in Hollywood, and her 18 year old is finishing up high school. Etta Craig had been arrested for a robbery, and her son had been arrested for assault. (1 Supp CT 91.)

Craig felt that the death penalty was used too seldom, and that she could vote for the death penalty after hearing all the evidence. (1 Supp CT 96-100.)

f. *Dwight McFarlane*

Dwight McFarlane was a 30-year-old black man. (1 Supp. CT 242.) He had worked as a ramp crew chief for American Airlines for the last 10 years. He was single and had no jury experience (6 RT 981.) McFarlane attended school through the 11th grade. (1 Supp CT 245.) McFarlane had no involvement with groups that advocate increased use or abolition of the death penalty (1 Supp CT 256.)

On the questionnaire, McFarlane checked yes that he believed that the state should impose the death penalty on everyone who intentionally kills another. (1 Supp CT 257.)

When questioned in court, McFarlane answered that he did not think criminals had too many rights. He stated, "it could be me sitting in that chair and I could be an innocent person and I would have to have — I would want to make sure that people who are going to judge me are going to give me a fair opportunity." (7 RT 996.)

During voir dire, McFarlane was asked by the defense if there was evidence that the defendant fled the scene during the course of the event,

would that automatically mean the defendant is guilty and that's all he would need to hear. McFarlane replied that flight did not prove the case, and he would keep an open mind. The following took place in open court:

> SCHAFFER: Another issue that's going to come up is flight. It may be that the prosecutor will interject evidence in the case that Mr. Riccardi fled the scene during the course of the event. What I want to know is, is that the type of thing, that would again, automatically conclude that this person must be guilty and that's all I need to hear? Do you think there's allegations that he fled, that ends the inquiry right there, and I can vote now? That type of thing? How do you think that would affect you, Mr. McFarlane?
>
> [PROSPECTIVE JUROR] MCFARLANE: That doesn't prove anything. That's not telling us anything. If I'm chosen as a juror or not, I would have to see whatever's presented and still I would be open-minded. It has nothing to affect me in any kind of way.
>
> SCHAFFER: So that's an issue that you can consider. Would you base the burden solely on one issue without considering all the other evidence in the case or would you consider all the evidence?
>
> MCFARLANE: All the evidence. That's got nothing to do with it. I would just be out of my mind basically. I'm not going to look at the individual and say, well yeah he tried to flee or something like that and base it on that. No that wouldn't be right. That wouldn't be fair to him. So I would just base my judgment on the case itself. (7 RT 1006.)

[DA] BARSHOP: May we approach, please?

(The following proceedings were held at the bench)

BARSHOP: Clearly Mr. Schaeffer has misstated the law that applies to flight. I'd ask the court to read instruction 2.52 to this venire. It is a fact that is to be considered.
You've got a response from this juror that he would give it no effect at all, and it is clearly not the law. And I'd ask the court to clear up the legal problem that we have right here.

SCHAFFER: Again Mr Barshop is misstating what I said. What I told them was flight is something that he may consider. I want to know if he's going to consider only that or if he's going to consider all the evidence that he hears.

THE COURT: Well, I think it's important to tell him what the law is and re-ask your question and see if that changes that.

MR. SCHAFFER: This is the second time that flight is something that they may consider. I don't believe it's right that they have to consider that as evidence of guilt. I even corrected that of what Mr. Barshop told them in saying the instruction will be that you may instruct them that you may consider consciousness of flight.

BARSHOP: I'd ask the court to read 2.52.

THE COURT: All right.

The jury was brought in and the court read: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish

guilt, but it is a fact, which if proved, may be considered by you in light of all the other proved facts, in deciding the question of the question of his guilt. The weight to which such circumstances is entitled is a matter for the jury to determine."

SCHAFFER: As I was telling you all yesterday, that flight is an issue that may be considered as consciousness of guilt. But what the jury is about deals with the first part of what the judge read, that that in and of itself does not establish guilt, and that it may be considered.
But there's always going to be people who come in with the belief that, well, the person fled. Regardless of what the law says, as far as I'm concerned they must be guilty. That's what I'm looking for. Does anybody feel that way?
And Mr. McFarlane, let me ask you. I'm trying to understand what you were saying. Is that something you were saying you wouldn't consider that at all or you won't use flight as your sole basis for rendering your verdict?

MCFARLANE: I wouldn't use flight as the sole basis. That's what I was mentioning before.

SCHAFFER: If the judge instructs you that you may consider flight as consciousness of guilt, would you consider it just as the judge tells you that you can?

MCFARLANE: Yes, sure, I guess.

SCHAFFER: Okay. What I'm getting at, are you going to consider it solely on that or all the evidence in the case?

MCFARLANE: No. Sir. All the evidence in the case.

(7 RT 1005-1009.)

When Schaffer was questioning jurors to see if once they found guilt, they would automatically vote for death, McFarlane answered that he would be open minded based upon all the evidence (7 RT 1022).

Later, Barshop questioned McFarlane about flight. McFarlane responded that if he was instructed to consider flight as a factor, he would follow the court's instruction. (7 RT 1038).

Barshop also questioned McFarlane about one of his answers on the questionnaire. McFarlane had written "I feel a person, depending on the crime, [who] has taken a life should be put to death." (7 RT 1038; 1 Supp CT 256.) McFarlane responded that he had written that, but that now after hearing some of the instructions, he would not say automatically that if a person is found guilty he has to die. McFarlane agreed that he would listen to aggravating and mitigating evidence and follow the law. (7 RT 1039.) The prosecutor used a peremptory to excuse McFarlane. (7 RT 1054.)

C. LEGAL PRINCIPLES

The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by the federal Constitution (*Powers v. Ohio* (1991) 499 U.S. 400; *Batson v. Kentucky, supra*, 476 U.S. at 89) and

by the California Constitution (*People v. Wheeler, supra*, 22 Cal.3d 258, 276-277; *People v. Mayfield* (1997) 14 Cal.4th 668, 722-723.)

1. Federal and State Tests Differ

This Court has recently concluded that the terms strong likelihood and reasonable inference refer to the same test, and this test is consistent with *Batson*. This Court has held that under both *Wheeler* and *Batson*, to state a prima facie case, 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* (2003) 30 Cal.4th 1302.)

Appellant would disagree. *Wheeler* requires a greater evidentiary showing for a prima facie case than is required under *Batson*. *Wheeler* states: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he 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." (*People v. Wheeler, supra*, 22 Cal.3d at p. 280, italics added.) In the next paragraph of the *Wheeler* opinion the court describes the types of evidence a party may use to show his opponent is challenging persons from the venire because of their group association. The opinion then goes on to state that "[u]pon presentation of this and similar evidence ... the 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, emphasis added.) The separate references to "strong likelihood" and "reasonable inference" has created some confusion as to which of the two standards applies, as most courts that have addressed the question have concluded that a "strong likelihood" requires a stronger showing than a mere inference.

Even if, after *Box* and *Johnson*, the California courts are presumed to know the standards are the same, at the time of appellant's trial, this was not the case. In appellant's case, the trial court used the wrong standard, because, under existing California law, it was required to do so. Under the correct "inference" standard, appellant in the instant case established a prima facie case.

a. *Batson Claim not Waived*

Appellant cited only *Wheeler* in his motions for a mistrial and did not mention the federal Constitution or the *Batson* case. Appellant did not waive his federal rights. This Court held in *People v. Yeoman* (2003) 31 Cal.4th 93, that to consider defendant's claim under *Batson* is more consistent with fairness than to deny the claim as waived. (See also *Ford v. Georgia* (1991) 498 U.S. 411, 418-419 [a defendant's objection to racial discrimination in jury selection was sufficient to invoke his federal right to be free of racial discrimination in jury selection under *Batson*, even if he did not cite *Batson* or describe with particularity the exact federal provision violated]. See also *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 811, fn. 1 [challenge framed in terms of *Wheeler* construed to allege *Batson*]; overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677.)

b. *The* Batson *standard*

The *Batson* standard is clear. To establish a prima face case of discrimination under the United States Constitution, *Batson* requires that a defendant must, "raise an inference that the prosecutor used that practice [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." (*Batson v. Kentucky, supra*, 476 U.S. at p. 96, italics

added.) The difference in language between *Wheeler* ("strong likelihood") and *Batson* ("raise an inference") led to a dispute about whether *Wheeler* established a stricter test than *Batson*. In *People v. Fuller* (1982) 136 Cal.App.3d 403, 423, which was decided prior to *Batson*, the court acknowledged that the *Wheeler* opinion uses both phrases, but concluded "that a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias. . . ." (*Ibid.*) The *Fuller* court was "unwilling to believe that our high court intended to create different options for trial judges within one page of each other in so carefully crafted an opinion as the *Wheeler* opinion." (136 Cal.App.3d at p. 423, fn. 25.)

The *Fuller* view of *Wheeler* was repudiated in *People v. Bernard* (1994) 27 Cal.App.4th 458 which rejected the view "that a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias." (*People v. Fuller, supra*, 136 Cal.App.3d at p. 423.) According to the *Bernard* court, "a reduction of the prima facie standard to a 'reasonable inference' test would reduce the trial court's discretion and judgment at a time when it is uniquely situated to observe the nature and extent of voir dire as well as the attitude and awareness of the challenged prospective juror." (27 Cal.App.4th at p. 465) The conclusion of the *Bernard* court 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 of violation of the *Wheeler* rule, 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.)

In *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the Ninth Circuit observed that since the decision in *Bernard*,

> [T]he California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits. The California Supreme Court now routinely insists, despite *Batson*, that a defendant must show 'a strong likelihood' of racial bias. Its consistent practice is to cite *Batson* and *Wheeler* together as controlling law but to quote the 'strong likelihood' language from *Wheeler* rather than the 'raise an inference' language from *Batson*. *Batson* is, of course, the law of the land. California law may give greater protection to criminal defendants than is required by the federal Constitution, but it cannot give less. Yet this is precisely what the California courts now do when they follow the *Wheeler* 'strong likelihood' test in determining whether a prima facie case has been established. In our view, the *Wheeler* 'strong likelihood' test for a successful prima facie showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test."

(*Id.* at pp. 1196-1197.)

Accordingly, the Ninth Circuit concluded that "[w]here the California courts follow the 'strong likelihood' language of *Wheeler* without any indication that they are actually applying a 'reasonable inference' test consonant with *Batson*, they apply an incorrect legal standard." (*Id.* at p. 1197.)

In *Wade v. Terhune, supra,* the Court also opines,

> [T]he *Wheeler* Court itself understood 'a strong likelihood' to mean a 'reasonable inference.' While the *Wheeler* Court, on page 280 of its opinion, required a defendant to 'show a strong likelihood' that the prosecutor excluded venire members from the jury on the basis of race, the *Wheeler* Court phrased its central holding somewhat differently on the very next page: 'Upon presentation of this and similar evidence-in the absence, of course, of the jury-the court must determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone.' *Id.* at 281. It is this language regarding a 'reasonable inference' that the Supreme Court of the United States borrowed when it formulated the *Batson* test."

(*Wade v. Terhune, supra*, 202 F.3d at p. 1196.)

In *People v. Box* (2000) 23 Cal.4th 1153, which was issued six months after *Wade v. Terhune*, this Court included a short footnote agreeing with the Ninth Circuit that "in California, a 'strong likelihood' means a

'reasonable inference'" (*Id.* at p. 1188, fn. 7) and disapproving *People v. Bernard, supra*, 27 Cal.App.4th 458.

Though not cited in *Wade v. Terhune, supra*, 202 F.3d 1190, *People v. Sanders* (1990) 51 Cal.3d 471 demonstrates this Court's post-Wheeler and pre-*Box* belief that the "strong likelihood" requirement imposes a more stringent burden that the "reasonable inference" requirement. In *Sanders,* all but four Spanish surnamed members of the venire were excused for cause either by the defense or the prosecution. When the remaining four were peremptorily challenged by the prosecution, the defendant asserted a *Wheeler* objection. The trial court denied the motion, finding the defendant had failed to demonstrate a prima facie case that the prosecutor was relying on group rather than specific bias. This Court affirmed. Acknowledging that "the removal of all members of a certain group may give rise to an inference of impropriety" under *Wheeler* (*People v. Sanders, supra*, at p. 500), this Court emphasized the deference owed the trial court and primarily on that basis concluded that the "defendant failed to demonstrate a strong likelihood based on 'all the circumstances of the case' that the prosecutor's exercise of his peremptory challenges were based on group bias." (*Id.* at p. 501) After *Sanders*, most California Supreme Court opinions applying the *Wheeler* rule omit any reference to the "reasonable

inference" standard and focus only on the need to show a "strong likelihood" of group bias. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 745; *People v. Williams* (1997) 16 Cal.4th 635, 663-664; *People v. Mayfield, supra*, 14 Cal.4th 668, 723; *People v. Arias* (1996) 13 Cal.4th 92, 134-135; *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200; *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Garceau* (1993) 6 Cal.4th 140, 170-171.) Indeed, the court has even italicized "strong likelihood" to emphasize the stringency of that requirement. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154.)

In light of this, as the Ninth Circuit correctly observed, California courts confidently relied on the now disapproved language in *People v. Bernard, supra*, 27 Cal.App.4th at pp. 464-466, supporting application of the more demanding "strong likelihood" standard.

In *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, the Ninth Circuit declared that "regardless of the California Supreme Court's 'clarification' [in *Box*] of the language used in *Wheeler*, we will continue to apply *Wade's* de novo review requirement whenever state courts use the 'strong likelihood' standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Ibid.*, citing *Wade v. Terhune, supra*, 202 F.3d at p. 1192.)

Despite the ruling in *Wade v. Turhune, supra*, this Court once again concluded that *Wheeler's* terms, a "strong likelihood," and a "reasonable inference," refer to the same test, and this test is consistent with *Batson*. This Court held that under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, *were based on an impermissible group bias.* (*People v. Taylor* (2003) 30 Cal.4th 1302, 1312-1318.) And in *People v. Yeoman* (2003) 31 Cal.4th 93, this Court once again held that the two tests had an "identical standard." (*Id.* at p. 118.) Appellant would argue that a reasonable inference is not the same test as "more likely than not" which would seem to be a preponderance test.

In the case at bar, the trial court's implicit ruling under *Wheeler* was necessarily wrong if it employed the "strong likelihood" standard. Because the federal Constitution imposes a lower threshold, appellant was denied the benefit of controlling decisions. Where a trial court uses an incorrect standard to evaluate facts, a reviewing court cannot assume that the trial court viewed the facts in the light most favorable to the standard not applied. (*Rogers v. Richmond* (1961) 365 U.S. 534, 545-549; *People v. Frank* (1964) 225 Cal.App.2d 339.) Moreover, a federal court reviewing a state court criminal conviction accords no deference to trial court findings

which are based on a misapplication of federal law. (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, fn. 10.)

In sum, when the trial court in this case failed to find a prima facie case, it almost certainly misapplied the law in the standard of proof it required from appellant. The trial court is presumed to follow the controlling precedent at the time of Appellant's trial, and therefore, under *Bernard*, the trial court applied the more stringent standard in concluding that Appellant had not established a prima facie case. This alone warrants reversal of appellant's convictions. But even if the trial court applied the correct "inference of discrimination" standard, it erred in view of the facts presented, as shown below.

2. This Court Should Use Comparative Analysis

Appellant believes that the prosecutor's discriminatory motive in this case is made clear by a comparison of Diane Powell's qualifications with those of other jurors.

In *Miller-El v. Cockrell* (2003) 537 U.S. 322, the U.S. Supreme Court held that comparative juror analysis was among the evidence reviewing courts could consider. This Court agreed that when the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance,

in reviewing, deferentially, the trial court's ruling." (*People v. Johnson, supra*, 30 Cal.4th at p. 1325.) In the case at bar, the trial attorney did argue comparative analysis.

The record of jury selection in appellant's case reveal some striking similarities to the facts in *Miller-El, supra*, in which the U.S. Supreme Court used comparative analysis to reverse a death penalty case on habeas corpus.

In *Miller-El*, the prosecutor used 10 of his 14 peremptory strikes to exclude black venire members, and Miller-El had one black juror on his jury. The Court noted that "happenstance is unlikely to produce this disparity." (*Id.* at p. 1043.)

In the case of *Miller-El*, the Court noted that three of the proffered race-neutral rationales for striking African-American jurors pertained just as well to some of the white jurors who were not challenged and who did sit on the jury. The prosecutors explained that their peremptory challenges against six African-American potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors' own family history of criminality. In rebuttal to the prosecutor's explanation, the *Miller-El* petitioner identified two empaneled white jurors who expressed ambivalence about the death

penalty in a manner similar to their African-American counterparts who were subject to the prosecutorial peremptory challenges. And, as in the case at bar, four white jurors had family members with criminal histories.

The Court held that even though the prosecutor's reasons for striking of African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations. (*Id.* at p. 1043.)

The Court went on to say that "our concerns were heightened by the fact that, when presented with this evidence, the state court somehow reasoned that there was not even the inference of discrimination to support a prima facie case. The Court held that this was clear error, and "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson, supra*, at p. 98 (quoting *Norris*, 294 U.S. at 598.)

D. APPLICATION OF LEGAL PRINCIPLES TO THE FACTS OF THIS CASE

At the time the fourth *Wheeler/Batson* motion was made in this case, the prosecutor had used six of his twenty peremptory challenges to exclude black prospective jurors. This alone is sufficient to raise an inference of discriminatory motive. Federal decisions have found prima facie cases established by similar or less disproportionate excusal of minority jurors

than this. See *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 822 [exclusion of two of four members of cognizable group established prima facie case]; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1453 [three out of nine members excluded, prima facie case established]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [one of two excluded, prima facie case established]; *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1085 [trial court erred in not finding prima facie case where prosecutor used five of six peremptories to strike five of the seven African-American members of the original panel.] There is no "magic number" (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698), but the exclusion of this many of a prevalent cognizable group is hard to dismiss as coincidental. There is nothing in this record which rebuts the glaring inference that arises from the systematic removal of six black jurors from appellant's jury. In the absence of circumstances rebutting the inference, exclusion of six black jurors out of twenty peremptory challenges establishes a compelling inference.

In applying the reasonable inference test, it is important to note that both federal and California courts hold that the exclusion of even a single juror of the group against whom the challenges were exercised may establish the violation. (*Wade v. Terhune*, *supra*, 202 F.3d 1190, 1198 ["the

Constitution forbids striking even a single prospective juror for a discriminatory purpose"]; *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902 [same]; *People v. Fuentes* (1991) 54 Cal.3d 707, 715 ["the striking of a single black juror for racial reasons violates the equal protection clause"].) It is important to note that a *Batson* violation may occur notwithstanding the fact that other members of the group are still on the jury. (*Matthews v. Evatt* (4th Cir. 1997) 105 F.3d 907, 917, n. 8.)

It is also important to note that *People v. Box*, *supra*, was handed down five years after appellant's conviction in the state trial court — during the period when *Bernard* was still good law and California courts were applying an unconstitutionally relaxed standard of scrutiny. (See *Wade v. Terhune*, *supra*, 202 F.3d at 1196.) In this light, there is little question that the trial court was following *Bernard's* take on *Wheeler*, and thereby applying an unconstitutional standard of review.

In any case, appellant would argue that under any test, the record before the court at the time of the motion compelled the judge to find a prima facie case had been established. The record strongly suggests that the prosecutor did *in fact* exercise peremptory challenges on the basis of an impermissible presumption that black jurors would refuse to impose a death sentence due to group bias.

1. Analysis of the Prosecutor's Reasons

In the instant case, the trial judge avoided making a sincere effort to evaluate the peremptory challenges, but the prosecutor volunteered that some jurors had been struck because of prior arrests. (6 RT 927; 7 RT 1133.) Defense counsel raised the issue of comparative analysis in referring to the juror questionnaires and in arguing that several white jurors with arrests were not excused by the prosecutor, and that another juror had an earring like McFarlane's. (7 RT 1133.)

Of the sitting white jurors, four of the ten jurors checked "yes" when asked whether they or a close friend or family member had been arrested. Juror Marilyn Young's husband had been arrested for outstanding traffic tickets. (1 Supp CT 013.) David Forrest was arrested for DUI and his son was arrested for vandalizing personal property (2 Supp CT 553.) His view on death was that it was appropriate, but only for the most horrible crimes. (2 Supp CT 556.) Ghislaine Brassine checked that she or someone close had been arrested. She gave no details (4 Supp CT 1112.) In voir dire, she said she was an attorney, married to a physician, and the prosecutor did not even question her as who had been arrested. (6 RT 980.) Suzette Harrison's mother was arrested for driving suspiciously. (6 Supp CT 1573.)

It is clear from the record that the prosecutor used peremptory challenges to excuse black jurors with arrests, but not white jurors. Particularly notable is the case of black juror Diane Powell, who had been arrested 25 years ago for a black student protest. (4 Supp CT 941-956; 6 RT 827-833.) Contrast white juror Brassine, where the prosecutor did not even bother to ask who in her family had been arrested.

The prosecutor excused Diane Powell because she been arrested 25 years ago at a student demonstration at Cal State Northridge. In 1968 or 1969, Powell was a member of the Black Student Union, and they were protesting to have an African American Study Department. She and 300 others were arrested and released. She also had a son who was arrested for traffic violations. (4 Supp CT 941-956; 6 RT 827-833.)

In her jury questionnaire, Powell wrote that she felt the death penalty is fair. There was nothing about Powell which set her apart from the other prospective jurors except her arrest for a student demonstration protesting the lack of an African American Study Department.

After questioning Powell about her arrest in 1968, Barshop asked no questions about her feelings about the death penalty. Instead he focused on the issue of race.

> [DA] BARSHOP: I want to discuss an issue that shouldn't be an issue. The victims in this case

are white. The defendant is white. This is not a racial case. Do you have a problem with that?

POWELL: No, I do not.

[DA] BARSHOP: Not at all?

POWELL: Not at all.

[DA] BARSHOP: Would you be fair to both sides?

POWELL: Yes.

(6 RT 833.)

No similar questions were asked of any white jurors. The prosecutor excused Mrs. Powell, and later stated that he did so because of her arrest record. (6 RT 927.) This proffered reason was singularly unconvincing, in light of the type of arrest and its ancient nature, and in light of the fact, brought out by defense counsel, that many of the seated white jurors had arrest records. (7 RT 1133.) It is particularly remarkable that as to one white juror, the prosecutor did not even inquire as to the nature of the arrest.

The prosecutor's proffered reason, combined with his focus on race when he questioned Powell, at the very least established an inference that the prosecutor excused her on the basis of group bias. Since the defendant and the victims were white, the prosecutor's questions to Mrs. Powell could not be construed as anything but race baiting, when he asked her if she

would have a problem with the fact that both the defendant and the victims were white, the question: "This is not a racial case, do you have a problem with that?" was so totally irrelevant that it was clear all the prosecutor could think of when looking at Mrs. Powell was the fact that she was black. One of the factors considered by the Court in *Miller-El* was the fact that prosecutors conducting the voir dire at the *Miller-El* trial frequently questioned black and white jurors differently, in an attempt to find grounds to strike black jurors for cause. In the case at bar, the prosecutor never asked a race based question to any of the white jurors. Mrs. Powell was singled out for the prosecutor's questions on race.

Mrs. Powell worked for law enforcement and wrote in her questionnaire that she thought the death penalty was fair. (4 Supp CT 956.) The fact that the prosecutor's reason for excusing her was a 25-year-old arrest for a black student protest was clearly pretextual in the case of Mrs. Powell, in light of the prosecutor's voir dire.

The prosecutor's reasons for removing the other black jurors from the jury were similarly unconvincing. The prosecutor stated he excused Ferguson and Hammond because they were "bad on death." (6 RT 926.) Both said they preferred a life sentence, but would impose death if the facts warranted it. Ferguson wrote in his questionnaire that the death penalty was

used too seldom, because too many people were getting away with killing people. (1 Supp CT 56.)

The prosecutor's excusal of black juror Dwight McFarlane was equally suspect. The *Batson* challenge occurred in the fourth *Batson* motion where the prosecutor had used six of his twenty peremptories to excuse blacks. The prosecutor's reasons for excusing McFarlane were as follows:

> [DA] BARSHOP: May I respond briefly to perfect the other side of the record? And I will be brief.
> Mr. McFarlane, if you want to discuss his answers, he said that — his answer to Mr. Schaeffer's question in regard to that he wouldn't consider flight at all, I thought, was a bad answer for the people. I certainly didn't like his earring, as a basis for a challenge on a gut basis.

(7 RT 1132.)

On the questionnaire, McFarlane checked "yes" that he believed that the state should impose the death penalty on everyone who intentionally kills another. (1 Supp CT 257.) (During voir dire he modified that opinion.) He also said that he felt that depending on the crime, a person who has taken a life should be put to death. (1 Supp CT 256.) His answers regarding flight did not set him apart from the other jurors, especially since after hearing all the voir dire, and having the court read the flight

instruction, McFarlane stated that if he was instructed to consider flight as a factor, he would follow the court's instruction. (7 RT 1038.)

When the prosecutor cited McFarlane's earring as a reason for his "gut feeling," the defense pointed out that another sitting white sitting juror had an earring, and that had not drawn a challenge. (7 RT 1133.) None of the prosecutor's reasons rebut the inference of purposeful discrimination.

In the case of Carolyn Brooks, the record does not reflect the prosecutor's reasons, other than the reason that the minority jurors were excused "based on my [the prosecutor's] analysis of their ability to decide the death penalty" or had an arrest in the family. (7 RT 1132.) Brooks did have a son arrested for assault as a juvenile, but she felt the case was handled fairly (5 RT 721-808), and as appellant argued above, white jurors with arrests were left on the jury by the prosecutor.[7] Brooks stated in voir dire that she could imagine a case where two women were killed where she could vote for death. (5 RT 802.)

It is clear that in this case, when the prosecutor used three of his first peremptories to excuse black jurors, the trial court should have ruled that

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[7] Marilyn Young (1 Supp CT 013); David Forrest (2 Supp CT 553); Ghislaine Brassine (4 Supp CT 1112); 6 RT 980); Suzette Harrison (6 Supp CT 1573)

the defense had made a prima facie case, and demanded reasons from the prosecutor. At each *Batson* motion, the inference of discrimination grew. Instead of finding a prima facie case and asking for reasons, the trial court denied all four *Batson* challenges. When the prosecutor finally volunteered to provide some reasons, that the black jurors were "bad on death" or had arrests, and the defense argued that the prosecutor had not struck white jurors who had arrests, the court failed to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, . . ." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.) If the court had done so, it would have held that purposeful discrimination had been shown.

It is important to note the fact that *Box* was handed down five years after appellant's conviction in the state trial court — during the period when *Bernard* was still good law and California courts were applying an unconstitutionally relaxed standard of scrutiny. (See *Wade v. Terhune*, *supra*, 202 F.3d at 1196.) In this light, there is little question that the trial court's denials of the *Batson* motions demonstrate that it was following *Bernard's* interpretation of *Wheeler*, and thereby applying an unconstitutional standard of review.

2. Appellate Court Searching for Plausible Reasons Is Not Sufficient

Appellant acknowledges that in *People v. Howard*, *supra*, and most recently in *People v. Yeoman, supra*, this Court proposed that where a trial court may have wrongfully rejected a prima facie case, the reviewing court may look beyond the threshold issue and search the record for reasons justifying individual dismissals.

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

(*Yeoman, supra*, 31 Cal.4th at 118.)

Once again, appellant submits that this is not consistent with federal law. Since the inquiry into individual dismissals looks not only to the facial rationality of a plausible reason but also to whether that legitimate reason motivated the exercise of the peremptory, rather than impermissible racial bias, (*People v. Fuentes, supra*), a flawed *Wheeler* ruling cannot be

salvaged by the mere existence of a "plausible" reason for a particular juror's dismissal.

The review contemplated by *Howard*, *supra*, cannot meet the federal Constitutional requirement of a state-court finding of a nondiscriminatory motive. See *Purkett v. Elem* (1995) 514 U.S. 765, 768-769: [although any race-neutral reason for exercise of peremptory satisfies step two of the inquiry which follows a prima facie case finding, step three requires trial court to determine whether the opponent of the peremptory has carried his burden of proving purposeful discrimination. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."] *Purkett* makes clear that a race-neutral reason, standing alone, is not the end of the inquiry. To the extent that *Howard, supra*, suggests otherwise, it is contrary to federal law. A reviewing court is not equipped to make the credibility determination of whether a race-neutral reason suggested by the record was in fact the motivating cause of the peremptory challenge.

The ultimate issue raised by a *Wheeler-Batson* motion should not be whether the trial judge, or an appellate court, can sift through the record to find a possible neutral reason why a prosecutor might want to challenge a juror, but rather whether the prosecutor's actual reason for the challenge

was based on impermissible group bias. "[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, 286; *People v. Turner* (1986) 42 Cal.3d 711, 721.)

E. CONCLUSION

The fact that any one of the six challenged peremptories may not have been motivated *solely* by a presumption of group bias does not alter the analysis or the result in this case. The removal of even one member of a cognizable group for improper reasons violates the equal protection rights of the defendant. (*United States v. Vasquez-Lopez, supra*, 22 F.3d 900, 902; *People v. Fuentes, supra*, 54 Cal.3d 707, 715) Here, the prosecutor plainly had no justification other than impermissible group bias using nearly one-third of his peremptory challenges to excusing most of the black jurors from the jury.

In short, the prosecutor's questions to Ms. Powell about race and his assertion that she had an arrest as justification for the exercise of the peremptory in her case both constituted virtual admissions of an improper presumption of group bias; his plainly pretextual reasons for dismissing Mr.

McFarlane demonstrate that the prosecutor's peremptory challenges violated appellant's rights to equal protection and an impartial jury.

When a prima facie case exists and the prosecutor fails to carry the burden of demonstrating that the peremptory challenges were not motivated by an improper presumption of group bias, the defendant's state and federal constitutional rights have been violated; the error is prejudicial per se. "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (*People v. Wheeler, supra*, 22 Cal.3d at p. 283.) (*Batson v. Kentucky, supra*, 476 U.S. at p. 100.)

Appellant's convictions must therefore be reversed.

GUILT PHASE ISSUES

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE PROSECUTOR TO INTRODUCE A TAPED STATEMENT OF MARILYN YOUNG TO DETECTIVE PURCELL WHICH INCLUDED INFLAMMATORY STATEMENTS BY THE DETECTIVE STATING THAT APPELLANT WAS GUILTY, VIOLATING APPELLANT'S SIXTH AMENDMENT RIGHTS TO CONFRONT, AND HIS DUE PROCESS RIGHT TO A FAIR TRIAL

A. INTRODUCTION

The prosecutor contended that appellant had stalked Connie Navarro and killed her and her friend Sue Jory in cold blood. Appellant testified he did not, that he was not even there, and someone else must have committed the crimes.

The trial court admitted the tape recorded statements of Marilyn Young made to Detective Purcell, and Purcell's statements to Young. Admission of this tape recording violated appellant's Sixth Amendment right to confront witnesses, and his right to due process. The trial court allowed the jury to hear the entire tape, which included not only prejudicial statements of Young, but also Detective Purcell's opinions that appellant was the murderer and was dangerous, and might come to kill Young next. The tape (II Supp. CT 24-60)[8] contained 45 minutes of inflammatory

[8] Supplemental II Clerk's Transcript

hearsay of Marilyn Young and Detective Purcell, during which Young told Purcell that she wanted a 24-hour guard, and Purcell advised her she better not go home that night.

The error was prejudicial and requires reversal.

B. FACTUAL/PROCEDURAL BACKGROUND

1. Young's Direct Testimony

On direct examination, Marilyn Young testified that she and Connie Navarro were good friends, they had known each other for three years, and they talked almost every day. (10 RT 1683.) Young also knew Sue Jory, and she knew appellant as Dean Riccardi. Appellant and Connie Navarro were sweethearts. (10 RT 1685.) About September of 1982, Navarro told Young she wanted to stop seeing appellant.[9] (10 RT 1686.) Navarro and appellant got back together for the holidays because Navarro did not want him to be alone. Navarro told Young she wanted to break up with appellant but that appellant asked her to at least talk to him on the phone. He called Navarro "all the time". (10 RT 1688.)

About three weeks before the murder appellant started calling Marilyn Young every night at midnight. He wanted to know everything

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[9] In a pretrial motion, the court denied defendant's motion to suppress hearsay evidence of fear and stalking (7 RT 1148-1156.; CT 358-364; see Issues IV and V, below.)

Navarro did during the day. He wanted to know what she ate, what she did. He just wanted some contact with her. (10 RT 1689.) He never asked Young if Navarro was going out with anyone else, but he did say if she did, he wouldn't know what to do. (10 RT 1690.)

Navarro told Young that appellant was no longer welcome in her house, and she changed her locks. (10 RT 1690.) About a week before the murder someone told Navarro that appellant had broken in through the patio. So Carl Rasmussen, her neighbor, checked and found the lock had been sawed through. Navarro told Young she was terrified. Navarro said she was frightened all the time, she was really frightened appellant was going to hurt her. (10 RT 1691.) The Friday before the murder, Navarro stopped staying at her condo. Navarro told Young that appellant had called Navarro to ask what she was doing that night. When Navarro left with Young to go to dinner, appellant was there watching her get into Young's husband's car. (10 RT 1691.) Appellant was staring at them with a frightening look on his face. He followed them for one exit.

Navarro and Young worked out every day at her husband's gym in Brentwood. Appellant did not work out there, but after the breakup, he would come by and stand by the picture window. When Young and Navarro went to the gym on Main Street they would see appellant by their car when

they came out. They went to a restaurant on Washington and appellant was there. Appellant said he wanted to kill himself if Navarro didn't take him back. (19 RT 1695.)

Young testified that about a month before the murder, Navarro told her that appellant kidnaped her. Appellant wanted to see Navarro but she did not want to see him except in a public place. Navarro had checked into a motel in Brentwood and she borrowed her ex-husband's car. She took a cab to the restaurant where she had an appointment with appellant about 1:00 p.m. Young was supposed to pick her up at 2:00 p.m. Young got there about ten minutes late and they were not there anymore. Young got home and her daughter said Navarro had called and she was all right. (10 RT 1697.) Later, Navarro called and said she and appellant had gone away to Laguna for the weekend, but later she said appellant was on the other line. Later yet, Navarro told Young that when she arrived at the restaurant to meet appellant he grabbed her by the arm and said he wanted her to get into his car and go away for the weekend. She didn't want to, but he took out a gun. He took her to his apartment, then he took her to a motel in Santa Monica where they stayed for the weekend. (10 RT 1698.)

Young testified that Navarro discussed getting a restraining order against appellant. (10 RT 1698.) The Friday before the murder, Navarro did

not want to go home, so she stayed at Young's house that night. The next day one of appellant's friends told Navarro that appellant was in a rage, so Young and Navarro went to Laguna. They spent the weekend there, and appellant wasn't around. When they got back Navarro did not want to go home, so she went to her ex-husband's house and spent a few nights there. Navarro went home to pick up some clothes. Navarro told Young that appellant was in the closet watching her. (10 RT 1700.)

On the day before the murder, Wednesday, March 2, 1983, Navarro and Young worked out in the morning. Navarro was still staying at her ex-husband's house. While they were working out, Young saw appellant standing by the big picture window at the gym (10 RT 1701.) Navarro and Young went to breakfast after they worked out. Young's ex-husband, Sid, was there, and he sat down and joined them. Appellant came in and Navarro was angry and asked him why he disconnected her alarm, and asked him why he broke into her house. At first appellant denied it, but then he said he had something there he had to get. Appellant left the restaurant and returned with a letter in his hand and told her if he wanted to hurt her he could. The letter was from Navarro to him saying she cared about him but that it was not working out. (10 RT 1702.) The letter said Navarro knew that he had a really hard growing up period in his life and she wanted to kind of be his

mother and help him with his emotional life. (10 RT 1703.) Appellant got very sentimental and said he would leave her alone. Navarro had been staying at her ex-husband's house but she decided to go home that night.

On March 3, Young had plans to go to dinner with Navarro and Sue Jory, but Young's cousin Terry called her and asked her if she would have dinner with her, so Young called Navarro and Jory at Navarro's house. It was around 7:00 p.m. and Young spoke to Sue Jory. Jory said Navarro had just gone out for cigarettes. Young called back around 7:30 p.m. and spoke to Navarro. Young told them to leave her a message where they would be and she would meet them later. Young called Navarro's home repeatedly on March 3 but nobody answered. (10 RT 1704.) The next morning Young called Navarro and still got no answer. Young called Navarro's ex-husband and Sue Jory's house and learned that Sue Jory never came home. Navarro's ex-husband went over to Connie Navarro's house. Around 2:00 p.m., Marilyn Young called over there and Mike Navarro answered and said "the son of a bitch killed them both." (10 RT 1705.)

2. Young on Cross-examination

On cross-examination by the defense, Young was asked questions concerning the time line for certain events. (10 RT 1705-1708.)

Defense counsel, on three specific instances, used the taped statement to impeach Young's testimony.

a. *First Instance of Impeachment*

The defense asked Young about her testimony that someone told Navarro that appellant had broken into her house and was in the closet watching her when she came over to pick up clothes. (10 RT 1734.)

> Q: That's not what you told the police, was it? Didn't you tell the police that a friend named Donnie Clapp had told Connie . . .
>
> A: That he was — first — he told Connie that she should get out of town because he thinks Dean is — he asked her if she has a skylight.
>
> Q: Let me ask you about that. What Connie told you is that Don Clapp had read an astrology chart and in the astrology chart —
>
> A: This is a different story. There was a woman named Sue Johnson who was an astrologer. I didn't know that Donnie had anything to do with that. And she told Connie that she should get out of town because Dean was in a rage, too. And that's why we went to Laguna. And also that Donnie Clapp said that Dean was breaking into her house and that he was in a rage and that she should get out of town. (10 RT 1735.)
>
> Q: All right. Did you tell the police back in March the 5th in that tape-recorded

conversation that Connie went to Laguna because she was afraid that Dean might go crazy this weekend because a friend of hers told her that, you know, her friend is an astrologer and told her that Dean's sign's showing that he's going to erupt this weekend and she got frightened and wanted to go away. Did you tell the police that?

A: Yes. I did. That was one of the friends.

(10 RT 1734-1735.)

b. *Second Instance of Impeachment*

The second area in which defense counsel relied on the tape recorded statement was concerning Young's testimony on cross-examination that Navarro stayed at her ex-husband's house until Wednesday March 2, then after meeting with appellant and receiving assurances he would leave her alone, moved back into her home. Young testified that the next morning, Navarro told Young that she heard a loud bang on her patio and she thought it might have been appellant.

Q: That's something you didn't tell the police during any of the conversations you had, either the one they recorded, or the one where the detective took notes, correct?

A: No that's not correct. I think I did say it.

Q: You didn't see it in your statement, right?

A: I many not have said it in a statement. I was pretty shook up.

(10 RT 1747.)

c. *Third Instance of Impeachment*

The final reference by the defense to the tape recorded statement occurred when Young testified on cross-examination that appellant called her, and said in an "unbelievably breathless" voice, "Marilyn, it's Dean. I left a message for Connie and I wanted her to know that I'm going to leave her alone, but she didn't get back to me and so call me back later."

Q: You didn't mention that call to the police?

A: I did. I am sure I did.

(10 RT 1753.)

The prosecutor moved to admit the audio tape of the Marilyn Young interview with Detective Purcell on March 4, 1983. He argued that it was admissible under Evidence Code section 1236 as a prior consistent statement on claim of fabrication and the claim that it is inconsistent with her present statement. (10 RT 1764.)

The defense objected to the whole tape. The defense also argued that if the prosecution was going to use it to rebut recent fabrication, then they should only be permitted to play that portion which was directly relevant.

(10 RT 1779.) The court ruled that the tape of Marilyn Young could be played in its entirety, because the defense cross-examined on "everything" Young told the police. (10 RT 1779.) The tape was played to the jury.

During the playing of the tape, the defense objected at sidebar. The defense stated, "This tape about 30 minutes ago went far beyond the purpose envisioned by the Evidence Code. We are now at a place where the officer and the witness are theorizing what happened. It is totally hearsay, it is prejudicial, and it has nothing to do with rehabilitating this witness based on what Mr. Schaffer asked." (10 RT 1781.) The prosecutor argued that they should play whole thing because they could not stop in middle. The defense responded that the copy provided to the defense stopped 20 minutes ago. (10 RT 1782.)

The court overruled the objection, but admonished the jury that they should not consider that part of the tape in which the witness and the police officer theorize on what happened. (10 RT 1783-1784.) The entire tape was played to the jury. (10 RT 1785; transcript of tape, II Supp CT 24-60.)

C. THE TRIAL COURT'S FAILURE TO EXCLUDE THE TAPE RECORDED HEARSAY STATEMENTS WAS ERROR AND VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHTS

1. The Sixth Amendment Precludes the Admission of Hearsay Testimony Against a Criminal Defendant Which Does Not Fall under a Firmly Rooted Exception Absent Independent Indicia of Reliability

The Confrontation Clause excludes hearsay evidence against a criminal defendant which does not fall within a firmly rooted exception "absent a showing of particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66; see also *Idaho v. Wright* (1990) 497 U.S. 805, 817 [hearsay which falls under a firmly rooted exception is so reliable that adversarial testing is not required].)

The admission of unreliable hearsay testimony abrogates the defendant's Sixth Amendment rights where the defendant is unable to cross-examine the hearsay declarant. The right to cross-examine witnesses is so fundamental a right that the denial of that right, "calls into question the ultimate 'integrity of the fact-finding process.'" (448 U.S. at p. 63, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) The literal right to confront a witness "forms the core of the values furthered by the Confrontation Clause." (*California v. Green* (1970) 399 U.S. 149, 157.)

2. This Evidence Was Not Properly Admitted as a Prior Consistent Statement

Prior out-of-court statements which are admitted to prove the matter asserted are hearsay. (Evid. Code, § 1200.) However, Evidence Code section 1236 provides:

> "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with section 791.

Evidence Code section 791 provides:

> "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

Evidence of a witness's prior consistent statement is made admissible to counteract a charge of bias or improper motive sought to be

proved to attack his credibility. (*People v. Fair* (1988) 203 Cal.App.3d 1303.) However, the consistent statement must tend logically to rebut the inference raised by the impeaching fact. Or, in McCormick's more colorful language, "the rehabilitation facts must meet a particular method of impeachment with relative directness. The wall, attacked at one point, may not be fortified at another and distinct point. Credibility is a side issue and the circle of relevancy in this context may well be drawn narrowly." *McCormick on Evidence* (3d ed. 1984) § 49, p. 116.)

Here, the prosecutor moved to admit the tape recording, contending that it was admissible to rebut a claim of fabrication, and because it was consistent with her testimony at trial. (19 RT 1764.) The prosecutor also argued that the entire tape was relevant.

The defense argued that he did not use the tape to impeach the witness' credibility generally, but only to pinpoint the sequence of events. (10 RT 1767.) Counsel argued that the only part of the tape that could be relevant was that in which Young discussed specific points that the defense asked about on cross-examination. Counsel also argued that Young's testimony that appellant "called breathlessly" and said he was not going to bother Connie any more, was not on the copy of the tape provided to him. (10 RT 1765.)

The prosecutor argued that the defense had gone through each of the incidents on the tape, and it was clear from the cross-examination that the defense was contending that each was either a recent fabrication or outright lie. (10 RT 1766.)

Appellant submits that no portion of the tape was admissible under either theory. Further, the entire tape was certainly not admissible, under any theory.

3. The Prior Consistent Statement was not Admissible Under Subdivision (a) of Section 791

After her direct testimony, Marilyn Young was cross-examined by defense counsel who had (a) Young's statement to the police (2 CT 520-524), and (b) a transcript or a partial transcript of the tape recorded interview.[10] During cross-examination, defense counsel asked only general questions, establishing a time line for her testimony. The only instances where counsel impeached Young's credibility by asking her if she had told the police what she was testifying now were the three instances outlined above. The first instance, where defense counsel had combined two

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[10] The prosecution had provided defense counsel with a taped copy of Prosecutor's Exhibit 69 which had not been transcribed. It has since been stipulated by the parties that the transcript found at Supp II CT 24-60 is an accurate transcription of that taped evidence. It appears that the transcript defense counsel was using was not complete.

separate stories, was cleared up on cross-examination. There was no claim of fabrication here, once Young explained that she had related two separate stories, one where she testified that Donnie Clapp warned Connie that appellant was in a rage, and one where an astrologer had warned the same thing.

In the second instance, the defense impeached Young with the fact that his transcript of the tape did not include Connie's having heard a loud bang on the patio and thinking it might be appellant. Under cross-examination, Young thought she related this to Purcell, but was not sure.

Cross examination on this point did raise a claim of fabrication, but it was not necessary or permissible to play the entire 45-minute tape. The specific portion of the tape concerning the issue could have been played to meet the claim of fabrication. The transcript of the tape contained in the Supplemental Clerk's Transcript reveals that Young did in fact tell Purcell that Navarro told her she heard a loud bang on her patio and thought it was appellant. (II Supp CT 57.) This seems to indicate that defense counsel was ineffective in not understanding what was on the entire tape.[11] However, only that paragraph of the conversation was admissible to rebut the claim of recent fabrication.

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[11] This issue will be addressed in the Habeas Petition.

In the third instance, Young testified on direct examination that appellant called her, he said in an "unbelievably breathless" voice, "Marilyn, it's Dean. I left a message for Connie and I wanted her to know that I'm going to leave her alone, but she didn't get back to me and so call me back later." (10 RT 1753.) A thorough search of the transcript of the tape reveals that this statement is not on the tape of the interview with the police. So the tape was not admissible to rebut the defense claim of fabrication on this point.

Therefore, the only portion of the tape even arguably properly admitted was that pertaining to the second instance, when the defense attorney apparently did not have a complete and accurate transcript.

4. Even If a Limited Portion of the Tape Had Been Admissible under Section 791. The Remainder of the Taped Interview Was Inadmissible Hearsay and Was Not Rendered Admissible by Virtue of Being Recorded on Tape

An audio or video recording of an out-of-court statement has no more sanctity than the oral testimony of a witness recounting the same extrajudicial declarations. The recording doesn't make inadmissible statements admissible. For any portion to be admissible it must comply with exceptions to the hearsay rule. If a portion of a video and/or audio tape becomes admissible as either a prior consistent or inconsistent

statement, the balance of the audio or video tape does not thereby become admissible. (*People v. Sundlee* (1977) 70 Cal.App.3d 477, 484; *People v. Webb* (1956) 143 Cal.App.2d 402.)

5. Playing the Entire Tape, Including Opinions of Detective Purcell on Appellant's Guilt, Was Error

Under either federal or state law, Purcell or Young would not be able to testify to his or her opinion as to appellant's guilt or innocence. (See, e.g., *United States v. Espinosa* (9th Cir. 1987) 827 F.2d 604, 612 ("A witness . . . may not give a direct opinion on the defendant's guilt or innocence."); *People v. Torres* (1995) 33 Cal.App.4th 37 ("A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant.") Such opinions are of no assistance to the jury because the jury is as competent as the witness to determine the issue of guilt. There is great danger, however, that such opinions, especially coming from a police officer, will be accorded prejudicial deference by the jury.

The opinions of an investigating officer on the defendant's guilt are presumptively prejudicial and inadmissible, (see *United States v. Harber* (9th Cir.1995) 53 F.3d 236, 241 [reversible error where investigating officer's summary report containing the officer's personal opinions on the defendant's guilt was accidentally read and relied upon by the jury]), and

are likely to convey the impression that evidence not presented to the jury, but known to the investigating officer, supports the charges against the defendant. (Cf. *United States v. Young* (1985) 470 U.S. 1, 18-19 [allowing the jury to hear the prosecutor's personal opinion on the defendant's guilt presents danger that jury will believe other evidence supports charges]; *United States v. McKoy* (9th Cir. 1985) 771 F.2d 1207, 1211.) Further, because the officer's testimony may carry with it the imprimatur of the State, the jury may tend to give his personal opinion added weight. The testimony of law enforcement officers often carries "'an aura of special reliability and trustworthiness,'" (*United States v. Gutierrez,* (9th Cir. 1993) 995 F.2d 169, 172 [quoting *Espinosa,* 827 F.2d at 613]), and the jury is very likely to defer to the officer's judgment rather than relying on its own view of the evidence. For the same reasons, prosecutors are similarly prohbited from stating their belief or opinion regarding the guilt of the defendant. (See *United States v. Molina* (9th Cir. 1991) 934 F.2d 1440, 1444.)

The prosecutor, here, ignored the many valid and important reasons why law enforcement officers may not testify as to their personal opinion about the defendant's guilt.

It is clear under California law that before the tape recording of an interrogation is played to the jury, the tape should first be edited to remove

material that is either inadmissible or would unfairly prejudice the defense. (See *People v. Sanders* (1977) 75 Cal.App.3d 501.)

It is true that the jury here was given a cautionary instruction. The court admonished the jury that they should not consider that part of the tape where the witness and the police officer theorized about what happened. (10 RT 1783-1784.) Given the extremely inflammatory and prejudicial nature of Young's and Purcell's statements, however, this Court cannot conclude that the admonition cured the impact of the statements.

6. The Limiting Instruction did not Cure the Error.

Here, the magnitude of the impact on the jury from the repeated hearsay on the tape rendered the limiting instruction futile. In the form of hearsay, the jury heard evidence that Connie Navarro was in fear of appellant, that Marilyn Young was now in fear and requesting protection from Detective Purcell in case appellant came after her, and that Purcell cautioned Young not to go home that night. In *People v. Coleman* (1985) 38 Cal.3d 69, this Court found prejudice despite the trial court's limiting instruction where the court had admitted three letters containing hearsay testimony alluding to the victim's fear of the defendant and threats he had made. As in *Coleman*, the jury heard repeated invocations of fear by Connie

Navarro and Marilyn Young which overrode their ability to apply the limiting instruction.

D. APPELLANT'S RIGHT TO DUE PROCESS WAS VIOLATED

The risk that the jury might view the hearsay as compelling evidence of appellant's conduct and motive so affected the fairness of appellant's trial that the error violated his due process rights. A due process violation occurs when evidence admitted against a criminal defendant "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions." (*Dowling v. United States* (1990) 493 U.S. 342, 352.) Moreover, the United States Supreme Court long ago recognized the inherent prejudice of evidence of victim's fear, even where there was some colorable claim of relevance of a victim's prior statement of a threat made by the defendant. (*Shepard v. United States* (1933) 290 U.S. 96, 104-106.) Here, the opinions of the investigating officer and the hearsay testimony of Young extended far beyond Connie Navarro's state of mind to include Detective Purcell and Marilyn Young's fear that appellant might have been coming to kill Young next. The inherent unfairness of admitting such evidence with such slight probative value is a fundamental miscarriage of justice and the trial court's erroneous failure to exclude it violated federal and state due process guarantees.

E. PREJUDICE

The tape recording played to the jury consisted of 45 minutes of conversation between Young and Detective Purcell recorded on the day the bodies of Navarro and Jory were discovered. On the tape, Young told Detective Purcell that she was afraid that appellant would come looking for her now, and Detective Purcell cautioned her to stay somewhere else that night. (II Supp CT 025.) Young said appellant would go into rages if Navarro danced with someone else, he broke into Navarro's house lots of times, with guns, and said he was going to shoot himself. He forced himself on Navarro, he raped her, he kidnaped her a month ago, she moved to a motel because she was afraid he was going to hurt her. He called a man Navarro was having dinner with and threatened him. He would follow Navarro on the streets, he'd broken into her house, he could unlock anything, Navarro got a door alarm but he disconnected it.

Young told Purcell that Navarro told her appellant was seeing a therapist and he said he would kill himself if Navarro left him. Navarro's astrologer told her that appellant's sign showed he was going to erupt this weekend so she got frightened and wanted to get away. Navarro slept at Young's house on Friday. Navarro was scared to death, she didn't want to call the police because appellant would get insane. She was afraid to get a

retraining order because appellant would get crazy. The weekend before the murders, Navarro and Young went to Laguna, and then Navarro went to her ex-husband's house because she was afraid to go home. The Wednesday before the murder, appellant showed up at the restaurant by the gym, he wanted to talk to Navarro privately. Navarro didn't want to talk to him. Appellant said, "What do you think I wanted to hurt you, I'd hurt you right here, is anybody going to stop me." (II Supp CT 28.)

Young told Purcell that she was sure appellant was psychotic. (II Supp CT 28.). Young told Purcell that Navarro told her that Donnie Clapp told her that he had been calling appellant's uncle in New Jersey and telling him appellant has been breaking into Navarro's house. Young asked Purcell how she could get protection from appellant, she wanted a 24-hour guard. Purcell told Young that if appellant wanted to silence her, the best thing to do was for her to talk to the police, because then he would have no reason to kill her. Young told Purcell that Connie told her appellant pulled a gun on her and kidnaped her in an underground parking lot. (II Supp CT 49.) Young told Purcell that appellant had a lot of guns and that he had his good friend hold the guns for him to keep him from killing himself. (II Supp CT 49.)

Young told Purcell she felt she should stop talking unless he offered her protection. She said she felt like it was dangerous to be involved and appellant was out there somewhere checking on who came to the police station. (II Supp CT 50.) Purcell told Young they would give her some good ideas on how to protect herself and avoid appellant so appellant could not find her. Young asked Purcell if it would be wise for her to hire a body guard. Young said she hoped appellant would kill himself and Purcell agreed that would end a lot of misery. Purcell told Young he would not let her walk out of the station alone. (II Supp CT 51.) Young wondered aloud if appellant had seen Navarro and Jory dancing or talking with some guys and that would enrage him and trigger him. Young told Purcell that appellant should have been in the hospital he was so crazy. Young told Purcell appellant was berserk. Young told Purcell that appellant had broken into Navarro's house to get a letter she had written to him. (II Supp CT 55.) Young told Purcell that Navarro told her that the night before the murder, Navarro heard a loud bang outside her window and it scared her. She thought it was appellant.(II Supp CT 57.) On the day she died, Navarro told Young that when appellant told her he would leave her alone, she felt relieved. But after that she spoke to Donnie Clapp and he told her that appellant broke in through her skylight and was hiding in her closet, and

that appellant broke into Janet and Carl Rasmussen's looking for keys to Navarro's place. Young told Purcell she was a wreck, scared to walk to the car, afraid to stay in her house because appellant knew where she lived. (II Supp. CT 59.)

This Court must apply the *Chapman v. California* standard of review for prejudice, because the error violated appellant's federal due process and confrontation rights. ((1967) 386 U.S. 18 at pp. 24-26.) Appellant has described above the prejudice to appellant resulting from the trial court's erroneous failure to exclude this prejudicial hearsay evidence, and the prosecution's exploitation of the hearsay evidence. The errors prejudiced appellant because Navarro's and Young's statements of fear and Detective Purcell and Young's opinions of appellant's guilt were extremely prejudicial evidence in this case, with no direct forensic evidence of defendant's guilt. The prosecutor relied solely on circumstantial case.

Both the United States Supreme Court and this Court have recognized that the erroneous admission of a victim declarant's statement of fear or threat by the defendant is prejudicial where the magnitude of the error cannot be mitigated by a limiting instruction. (See *Shepard v. United States, supra,* 290 U.S. at pp. 104-106; *People v. Coleman, supra,* 38 Cal.3d at p. 83.)

Here the hearsay statements of Connie Navarro's fear of appellant, and Detective Purcell's opinions and the opinions of Marilyn Young, affected the fairness of appellant's trial and violated his federal constitutional rights to due process and right to confront witnesses. Petitioner was deprived of his right to fair trial by the cumulative impact of the erroneous admission of these inflammatory statements.

The error requires reversal.

III. LIMITS ON CROSS-EXAMINATION OF KEY PROSECUTION WITNESS JAMES NAVARRO AND THE COURT'S DENIAL OF A CONTINUANCE TO EXAMINE SURPRISE EVIDENCE VIOLATED APPELLANT'S RIGHT TO CONFRONTATION, RIGHT TO DUE PROCESS AND RIGHT TO COUNSEL

A. INTRODUCTION

The Sixth Amendment guarantees an accused the right to confront and cross-examine adverse witnesses. (*Davis v. Alaska* (1974) 415 U.S. 308.) This right is a fundamental right secured by the Sixth and Fourteenth Amendments and article I, section 14 of the California Constitution. (*Pointer v. Texas* (1964) 380 U.S. 400, 403; *People v. DeLarco* (1983) 142 Cal.App.3d 294, 305.) Writing for the majority in *Davis*, Chief Justice Warren Burger said, "[C]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis v. Alaska*, *supra*, at p. 316.)

In this case, the defense discovered that witness James Navarro had tampered with surprise tape recorded evidence (Prosecution Exhibit 71; 2 Supp. CT 61), after the tape had been admitted as evidence and played to the jury. The homicides took place in 1983, but the case did not go to trial until 1994. Navarro testified that he found the tape on his answering machine after the murders in 1983, but did not listen to it until eleven years later, when a week before he was set to testify at trial, he looked through

things he had saved in storage and found the tape. He discovered that the tape was a recording of the deceased, talking about her need to obtain a restraining order against appellant, and he brought the tape with him to trial. The defense was given no notice of this tape, the prosecutor surprised the defense with the tape during Navarro's testimony. As soon as the court released the tape to the defense, they had the tape examined, and *their* expert made a preliminary finding that the tape was not an original and had been altered. The prosecutor produced a second tape, and made a proffer that James Navarro had copied a portion of the second tape onto the first tape. The court refused to grant a continuance so the first tape or the new tape could be analyzed by experts. The trial court held that Navarro could not be cross-examined on this issue, so the jury did not know that Navarro had altered the evidence. Navarro's credibility and the integrity of the tape was shielded from attack, even though Navarro clearly lied when he testified he had taken the cassette from his answering machine in 1983, and the preliminary testing showed that the tape had been altered. This violated appellant's right to confront, right to due process and right to a fair trial.

B. PROCEDURAL/FACTUAL BACKGROUND

1. James Navarro's Testimony on Direct

James (a.k.a. Mike) Navarro was the ex-husband of the deceased Connie Navarro. On direct examination, he testified that he was married to Connie Navarro for eleven years and divorced in 1975. (10 RT 1786.) They had one child together, and they remained good friends after the divorce. Connie Navarro introduced James Navarro to appellant, John Riccardi. It seemed like Connie and appellant had a normal relationship at first, but later, there were troubles. In 1982, Connie Navarro confided in James Navarro that she wanted to end the relationship with appellant. (10 RT 1788.) Appellant harassed her. Sometimes when James Navarro was over at Connie's house for dinner, appellant would ride his motorcycle in front of the house and pause in front of the house and rev the engine. Sometimes when James Navarro would be over at Connie's house, appellant would just walk in and force them to accept that he was there. Connie and James Navarro were just friends, but Connie had other boyfriends. James Navarro never told appellant to leave Connie alone. She begged him to stay out of it. (10 RT 1789.)

Connie Navarro and their son had been staying with James Navarro for about a week before the murders. (10 RT 1790.) On March 3, 1983,

Connie decided to go back home. She had talked to appellant and he had told her he would leave her alone. James Navarro told her to at least leave their son with him. Connie told James Navarro she was going out to dinner with her friends Sue Jory and Marilyn Young, and she would call him when she got back. When Connie didn't call, he called her, but the phone just rang. (10 RT 1791.) The next day he kept calling. About 1:30 p.m. he decided to go over and see if Connie was ok. The house was closed and there was no sign of anybody. Navarro did not have a key, so he finally left his business card in the door, and left. Later, he picked his son up from school. His son had a key to Connie's house, so Navarro took his son home and went over to Connie's. John Jory's card was on the door too. James Navarro used the key and went in, and went upstairs. Connie had been murdered, her body was stuffed in the linen closet. A few feet away, her friend Sue Jory was lying on the floor, dead. Connie's face was covered with a blue pillowcase. (10 RT 1795.) Navarro was hysterical and started screaming. He went back downstairs and called the police and told them there had been a murder. The police told him to wait there. The phone rang and it was Marilyn Young. Navarro told her appellant killed them. Navarro testified he knew appellant had killed them. (10 RT 1796.) James Navarro testified that Connie had told him she was having trouble with appellant,

she was terrified of him and was thinking about getting a restraining order. Connie asked him for an attorney and he gave her the name of one who he knew from school. She went to see him. (10 RT 1796-1797.)

After the murders, Navarro cleaned out the condo. Navarro testified that he found a cassette tape on his answering machine at home, where Connie Navarro had made a call which was recorded. (10 RT 1799.) It was her conversation with somebody talking about restraining orders. (10 RT 1799.) Navarro testified that on the tape, Connie Navarro was talking to some legal aid about how she was terrified of appellant. The cassette from the answering machine was admitted into evidence and played to jury. (10 RT 1842; Casette tape 71.)

2. James Navarro on Cross Examination

On cross-examination, Navarro testified that some time before the murder, Connie told him that appellant broke into her house, and kidnaped her at gun point. (11 RT 1814.) Then Connie called him and told him she was okay, she and appellant were there together. Navarro testified that Connie wanted to break up with appellant but that appellant talked her into staying together for the holidays. Navarro testified that he believed that Connie was terrified of what appellant would do if she did not agree. (11 RT 1822.)

Navarro testified that he and Connie had been good friends since their divorce and she often came to him for advice. When asked, "Isn't it true that she got a restraining order against you for threatening violence against her?" he answered, "It is not true." (11 RT 1825.) The defense then proffered a restraining order that Connie had gotten against him during their divorce proceedings. (11 RT 1828.) The restraining order stated that Connie alleged that Navarro threatened her with bodily harm, she feared for her life, mentally and physically, unless Mr. Navarro was restrained from annoying, harassing or molesting her. (Defense Ex. 208.) Navarro testified that he did not remember any restraining order, that it might have been part of the normal divorce proceedings. (11 RT 1830.)

3. Testimony about the Answering Machine Tape

On cross-examination Navarro testified that he knew he had the tape from the answering machine, but he did not listen to the tape until the day before he gave it to the prosecutor, which was a week before his testimony. The reason he did not listen to it was because it caused him so much pain to hear her voice. (11 RT 1832.) Navarro testified he had the tape from the answering machine back in 1983, and he kept it, thinking he might want to hear her voice again sometime. Navarro didn't know what was on the tape, it was simply the tape in his answering machine (11 RT 1832-1833.)

4. James Navarro on Re-Direct

On redirect, the tape of the answering machine was introduced. (11 RT 1843; People's Ex. 71). Navarro testified that Connie told him appellant had previously kidnaped her. He also testified that when he found the bodies, Connie had a pillow case or towel covering her face. He removed it, to see if it was Connie. He could not remember what he did with the case or towel after he removed it, because he was so upset. (11 RT 1845.)

Navarro testified that he decided appellant was the killer, and offered a reward. Detective DeAnza, who was the detective in the case at the time, suggested that Navarro offer a reward and run an ad in a fitness magazine.

When asked where the tape came from, Navarro answered, "That was from my answering machine." The audio tape, exhibit 71, was played to the jury. (11 RT 1848.)

5. The Answering Machine Tape

The defense contacted the manufacturer of the newly discovered audio tape, who said that from the serial number on the tape they could tell this tape was not manufactured until 1992, so it could not have been on Mr. Navarro's answering machine in 1983, as he testified. The defense asked the court for a two day continuance. (13A RT 2552.) The defense told the judge, in an ex parte proceeding, that it appeared that it could have been a

wire tap James Navarro put on his phone to tap Connie's calls. The defense stated he had contacted a tape expert in town but he wanted the court's permission to proceed. The trial court agreed to recess to give the defense time to investigate. (13A RT 2557.)

The following Monday, the defense met in chambers with the judge, without the prosecutor. (14B RT 2670.) The defense told the judge they took the original tape in question a forensic tape analyst. (14B RT 2670.) The analyst did a preliminary inspection and determined that this tape could not have come from an answering machine due to the fact that this examination revealed it as a stereo recording and there were no stereo answering machines back in 1983. The expert found other things that caused him to believe that a microscopic analysis of the tape would be necessary, such as pause and stop signals. He discovered that the tape had been cut off and on, but to testify to that, the expert would need to do a microscopic analysis. (14B RT 2671.) During the course of the recording, a four or five minute tape, there were more conversations on the tape than were admitted in evidence regarding appellant. The expert said it was not physically possible to do a complete examination in the time he had been given. He said he needed a week, and he said the District Attorney would probably want to send the tape to the F.B.I. lab after, to rebut. He said his

preliminary findings were that the tape was manufactured, or edited. (14B RT 2673).

The defense asked the court for a continuance of one week so the expert could finish his examination. (14B RT 2674).

The court stated it needed an affidavit from the expert, that it did not want to delay the trial a week but another day or two was a possibility. (14B RT 2680.) The following day, out of presence of the jury, the prosecutor stated that he had Mr. Navarro in court with a second tape. The prosecutor told the court that the tape that was played to the jury was a copy of a portion of the original answering machine tape. (14 RT 2694.) The prosecutor argued that the tape had not been doctored, that Mr. Navarro had taken the entire answering machine tape and copied the one portion which had Connie talking about a restraining order onto a second tape, which he then brought to court. (14 RT 2694.) The prosecutor told the court he was willing to stipulate that the first tape in evidence was not manufactured until 1992. (14 RT 2695.) The prosecutor argued that this was not an issue, was not relevant, and to deal with it would be collateral impeachment. (14 RT 2695.)

The defense argued that they had a duty to investigate. The judge granted the defense request to have the newly proffered tape examined by

an expert. (14 RT 2697.) The new tape was marked as People's Exhibit 113. (14 RT 2700; 2 Supp. CT 65.)

The prosecutor warned the court that if the defense expert said the tape was doctored the prosecutor might have to call "a half a dozen" witnesses to verify the tape. (14 RT 2698.) The court suggested they wait and see what the defense expert said. (14 RT 2699.) The tape was marked People's 113, the court placed Navarro on call, and gave the tape to the defense for examination. The prosecutor agreed that he would stipulate to the fact that tape 71 was manufactured in 1992, if the court ruled the issue was relevant. (14 RT 2701.)

The prosecutor put Navarro on the stand in limine for an offer of proof. Navarro testified that he copied the relevant part the answering machine tape to the new tape. The prosecutor told the court that the answering machine tape was recorded at Christmas 1982. (14 RT 2712.)

Later, the defense moved to introduce the stipulation that tape 71 was not manufactured until 1992. The prosecutor objected.

The court said:

> Under 352 I think the point that counsel wants to make on this issue, the court finds is a minor point. Its clear from hearing his testimony that — in fact whether it's impeachment because nowhere does he indicate — the essence of his testimony is the conversation, the statement.

> The words that are on the tape are his wife's words speaking to another individual.
> I don't think there is any evidence to show that at this point in time that that's not accurate. All we have is that the particular cassette that was presented to the court as People's 71 was not, in fact the cassette on which this conversation was recorded because this particular cassette was not manufactured until 1988. The conversation took place in 1983. I just don't think that's an issue that would sway the jury one way or the other as to any a material point in this trial. The one particular statement I think, or that one particular area of evidence that was offered by Mr. Navarro as to the conversation that's on this tape is a very small part of what the court sees as the People's case in chief. Under the Evidence Code, I just don't think it has much probative value. So to the objection will be sustained then.

(14 RT 2746-2747.)

The prosecutor then offered the second tape, No. 113, as an exhibit, not into evidence, since the court had deferred ruling on whether the defense would be permitted to present evidence to attack tape 113. (14 RT 2747.)

The defense informed the court that their expert had stated he could not adequately investigate the tape in the day or two granted by the court. (14 RT 2747). The prosecutor informed the court that if the defense expert took the position that the tape had been tampered with, he would have to send the tape to the FBI lab in Quantico and it would take them two more

days to form an opinion. The prosecutor argued that it would not be cost effective, nor time effective. (14 RT 2748.)

The court ruled that the issue was not material. (14 RT 2749.) The court said:

> I don't think this jury is going to place great emphasis or look at, quote, the credibility of Mike Navarro. He didn't offer, as far as this court's concerned, any relevant testimony as to things that happened. It was neutral, quite frankly.

(14 RT 2750.)

The court held that the jury would be more interested in the testimony of other witnesses. (14 RT 2750.)

The defense offered the stipulation that if Ken Seider, manager of quality assurance for TDK Electronics Corporation were called to testify, he would testify that Exhibit 71, the TDK cassette recording, was not manufactured until January of 1992. The prosecutor stated he would have stipulated, but for the court's ruling under 352, but that he would not stipulate now. The court denied the motion to admit the stipulation. The second tape was marked as No. 113, and admitted into evidence. (14 RT 2755.) Then the prosecutor withdrew exhibit 113 but left it marked for the appellate record.(14 RT 2797; 2 Supp CT 65.)

6. Prosecutor's Closing Argument

In closing argument the prosecutor argued "when Mr. Schaffer [defense counsel] makes an attack on Mike Navarro, it is clearly unwarranted. When Connie Navarro needed a safe haven, she went to Mike Navarro. In 1983, when she moved out of her condo, she went to Mike, to her ex-husband, and stayed there. So don't trash Mike Navarro. There's no reason to." (16 RT 3083.)

In closing, the prosecutor asked, "Why is there a pillow placed over the face of Connie Navarro as found by Mike Navarro the next day at 3:15? The answer, the defendant can't stand to look at Miss Navarro, look at her face after he has killed her. You don't see that as far as Ms Jory is concerned. You only see it as far as Connie Navarro is concerned. Why is that? Why is she placed in the cabinet? This is not a crime of financial gain. It is a crime of rage. If I can't have you, nobody can have you. I will not tolerate being rejected." (15 RT 2828.)

Later, he argued, "It is obvious the killer couldn't stand what he'd done to the victim. He stuffed her in the closet and put a pillow over her face so he would not have to see her face. . . . Does that mean the person who does this killing knows Connie Navarro and has some kind of

relationship with her? The response clearly should be yes." (15 RT 2878-2879.)

C. APPLICATION OF LEGAL PRINCIPLES

1. Trial Court's Ruling Violated the Right to Confront Witnesses

A criminal defendant has a fundamental right to confront witnesses, protected by the Sixth and Fourteenth Amendments to the federal constitution and crucial to the accuracy of the truth finding process. *Chambers v. Mississippi supra*, 410 U.S. 284, 295; *Ohio v. Roberts*, *supra*, 448 U.S. 56; *Pointer v. Texas*, *supra*, 380 U.S. 400, 404. "[E]xtensive cross-examination . . . is compelled by the confrontation clause." *United States v. Alvarez-Lopez* (9th Cir. 1977) 559 F.2d 1155, 1160.

In this case, counsel for petitioner requested a continuance so his expert could determine whether James "Mike" Navarro was lying about the taped evidence. In fact, the trial court agreed the inquiry was important and ordered a short continuance to have the first tape examined. After the expert reached an opinion that cassette tape 71 had been altered, the prosecutor offered tape 113, and made an offer of proof that tape 113 was the original tape, and James Navarro had copied the portion that he thought was relevant onto tape 71. At that point, the prosecutor was willing to stipulate that tape 71 was not manufactured until 1991. When the defense asked for a continuance to have both tapes examined by their expert, the prosecutor

argued that this would take too much time and money, and that the tape was collateral impeachment, and not relevant. The prosecutor argued that any cross-examination of James Navarro on the subject of the tapes was irrelevant. The court agreed.

This was error. The denial of the right to cross-examine James Navarro and the failure to grant a continuance denied petitioner the right to present a defense, the right to effective assistance of counsel, and the right to confront witnesses.

The United States Supreme Court has forcefully and repeatedly held that the defendant's right to show bias of the prosecution's witness, or evidence from which bias can be inferred, on cross-examination is constitutionally protected by both the Fifth Amendment's Due Process Clause and the Sixth Amendment. In *Davis v. Alaska* (1974) 415 U.S. 308, a prosecution witness testified that he saw the defendant standing at a remote location where the safe from a burglary was subsequently discovered. Both at the time he saw the defendant and at the time of trial, the witness was on probation by order of a juvenile court after having been adjudicated a delinquent for burglarizing two cabins. The prosecution sought to prevent any reference to the witness's criminal record by the defense. (415 U.S. at p. 311.) The trial court granted a protective order

preventing the defendant from impeaching the witness with his probationary status. The Supreme Court found the ruling violated the confrontation clause. The court reasoned that as a result of the limitation on cross-examination, the defendant was unable to show that the witness was biased, that he identified the defendant either to shift suspicion away from himself, or because of fear that the police would otherwise revoke his probation. (415 U.S. at p. 319.)

As in *Davis*, the defense in the case at bar was unable to show that the witness James Navarro was biased, or that he was trying to shift suspicion away from himself. The preliminary testing showed that tape 71 had been altered. When the judge here would not allow cross-examination or a continuance to have the tapes tested, the defense was precluded from proving that the tape was altered, and that the person Connie Navarro feared was not appellant, but her ex-husband James Navarro, or some other man.

In *Delaware v. Van Arsdall* (1986) 475 U.S. 673, the United States Supreme Court reaffirmed that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the

reliability of the witness. (475 U.S. at p. 680.) Van Arsdall was charged with murder in a stabbing death at an all night New Year's Eve party. The evidence against him was circumstantial, all the guests were inebriated, and several altercations ensued. One witness testified he had seen the defendant in a room near the time the killing. Defense counsel sought to impeach the witness by questioning him about the dismissal of a criminal charge against him — being drunk on a highway — after he had agreed to speak with the prosecutor about the murder. The trial court prohibited the cross-examination. (475 U.S. at p. 677.)

Van Arsdall emphasized that if cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall strength of the prosecution case. (475 U.S. at p. 684.)

The Court said the question was whether a reasonable jury might have received a significantly different impression of the witness's credibility had defendant's counsel been permitted to pursue his proposed line of cross-examination. They held that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other

Confrontation Clause errors, is subject to *Chapman* harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.

In the case at bar, James Navarro was an important witness for several reasons. He was the only witness to testify that the killer placed a pillowcase over Connie Navarro's face. By the time the police arrived, the pillow was no longer there, so there was no one to corroborate Navarro's testimony on this point. The prosecutor emphasized this testimony in his closing argument, arguing that the killer knew the victim, and could not stand to see her face after he had killed her. The prosecutor used this theory to argue that appellant must have been the killer, since appellant had been in love with Connie Navarro. Because of the significant restrictions placed on appellant's defense, Navarro was shielded from attack, so his bias and credibility was unquestioned. Because of the restrictions placed on the defense, the integrity of the taped evidence was never questioned.

James Navarro's testimony was important for a second reason. He testified that tape 71 was a tape he found on his answering machine, and the tape contained the voice of Connie Navarro, asking how she could get a

restraining order against appellant, because she was in fear for her life. The tape was admitted and played to the jury.

The preliminary testing showed that tape 71 had been altered. When the judge would not allow cross-examination or a continuance to have the tapes tested, the defense was precluded from proving that the tape was altered, and that the person Connie feared was not appellant, but her ex-husband James Navarro, or some other man.

Here, the lost information was not cumulative. The defense wanted to cross-examine Navarro about the tape, which their expert said had been altered. The defense wanted to impeach Navarro's testimony that Connie was talking on the tape about her fear of appellant. Since Connie did not say on the tape who she was in fear of, and since Connie had gotten a restraining order against Navarro in the past, it could have been Navarro that she feared. Since the defense was precluded from establishing when the original tape was recorded, it is possible the recording was actually an even older one in which Connie discussed the very restraining order she obtained against James Navarro. Arguably, one purpose in altering the tape could be to remove a reference of whom Connie was afraid of. Navarro had the opportunity to remove a reference to himself.

Appellant testified he did not murder the victims. The defense did not claim to know who did murder them, but clearly, Navarro, the ex-husband, who claimed he and Connie were still best friends, would have been a suspect. Navarro, the ex-husband, was the first one at the scene of the murders, and was in the house when the police arrived. (10 RT 1794.) He had the opportunity to remove evidence. Connie had gotten a restraining order against Navarro during their divorce, citing her fear of bodily harm. (11 RT 1829.)

Because of the court's rulings, Navarro's credibility was shielded from attack, as was the integrity of the taped evidence. As a result, Navarro was allowed to present himself to the jury as the grieving husband, certain appellant was the murderer. As a result of the restrictions placed on the defense, Navarro's testimony that Connie was talking about appellant on the tape and Navarro's testimony that he found and removed a pillow that was covering Connie Navarro's face was made to appear much more believable.

It was undisputed that Navarro tampered with the first tape. Since the court denied the defense request for a continuance, neither tape could be examined before the trial was over. And since the court ruled that Navarro could not be cross-examined on this matter, the defense was thwarted from this important line of questioning. By precluding the defense from

adequately examining Navarro as to these matters, and by refusing to grant a continuance to permit examination of the tapes, the court shielded Navarro's credibility and the integrity of the taped evidence from attack. From the record presented, the jury was told that Connie Navarro was trying to get a restraining order against appellant because she feared for her safety. The tape recording was presented as a "voice from the grave." In reality, there was no proof who Connie was trying to get a restraining order against. The only other evidence concerning a restraining order was that Connie had sought one against Navarro himself. The conversation on the tape may have been about that restraining order or someone else. The tape, which was indisputedly altered, does not reveal against whom Connie was trying to get a restraining order. Navarro testified it was appellant, and the defense was prohibited from impeaching this testimony.

During closing arguments, the defense tried to cast doubt on some of Navarro's testimony, noting that Marilyn Young testified she talked to James Navarro at 2:00 p.m. and he told her he found the bodies, yet James Navarro testified he didn't get over there until 3:00 p.m. (15 RT 3034.) During his closing the prosecutor argued, "I suggest to you that when Mr. Schaffer makes an attack on Mike Navarro, it is clearly unwarranted. When Connie Navarro needed a safe haven, she went to him. By 1983 when

Connie Navarro moved out of her condominium, she went to Mike, her ex-husband, and she stayed there with David, her son. So don't trash Mike Navarro. There's no reason to." (16 RT 3083.)

In closing, the prosecutor argued that "Another possibility is that we know Connie Navarro did not die immediately. And to show how mean-spirited the defendant is, he takes the body, he's going to hide it in the linen closet, and he takes a pillow. Sticks it over her face and snuffs out her last breath of life." (16 RT 3100.)

The evidence against appellant was entirely circumstantial. Appellant's fingerprints were found in the house, but he had lived there with Connie Navarro for two years. (9 RT 1359, 1401.) No murder weapon was found (9 RT 1430, 1452.) The only eye-witness saw a man leaving the condo, but did not identify appellant, although she had met him and knew what he looked like. (10 RT 1654.) Many witnesses testified that Connie Navarro wanted to break up with appellant, and that she and appellant broke up and got back together many times. There was evidence from appellant's former partner in crime Sammy Sabatino and appellant's step-mother that appellant confessed to the crime, (12 RT 2172; 11 RT 1966) but Sabatino was impeached with the fact that he was getting a sentence reduction for his testimony (11 RT 1954-1958), and the step-mother's testimony was called

into question because she testified that she had reported the confession to the FBI, but the FBI had no record of her having done so, despite many contacts between her and the F.B.I. (12 RT 2295.)

Connie's voice on the tape recording stating she was in fear, portrayed as referring to fear of appellant, was a uniquely compelling piece of evidence. It was the voice of the victim herself and, as far as the jury knew, not burdened with credibility issues. There were, in fact, serious credibility issues concerning the tape, but the jury never heard them, because the trial court refused to permit the defense to investigate or present them.

James Navarro told the jury that Connie tried to get a restraining order against appellant and that Navarro referred her to a lawyer. Yet that lawyer did not testify, so the only evidence that Connie wanted to get a restraining order against appellant was the testimony of James Navarro, coupled with the tape, that the jury was never told had been altered.

The trial court erred when it ruled that cross-examination of James Navarro was not material to the case. Navarro lied about the tape, and the tape was heard by the jury. This was certainly material. The court erred in its factual findings. The court assumed that the tape was recorded in 1983 (14 RT 2746-2747) but there was no proof of that. The court assumed that

Connie Navarro was talking about her fear of appellant, when there was absolutely no proof of whom she was speaking.

The prosecution threatened the court that the issue would take too many witnesses and would disrupt the trial schedule. But the reason for the disruption was a discovery violation: the prosecutor's failure to produce this taped evidence with the normal discovery. According to the testimony of James Navarro, he brought the tape to the prosecutor a week before his testimony. But the prosecutor did not reveal it to the defense, until the moment of James Navarro's testimony. Under these circumstances, the people should not be allowed to argue about undue consumption of time. "A . . . defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.'" (*Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

It is true that this Court has affirmed convictions where the trial court restricted defense cross-examination of a prosecution witness where the proffered line of cross-examination was not relevant to any disputed fact of consequence to the question of defendant's guilt of the charged crimes, or to the witness's veracity. See *People v. Frye* (1998) 18 Cal.4th 894; *People v. Cooper* (1991) 53 Cal 3d 771; *People v. Belmontes* (1988) 45

Cal.3d 744.) These cases differ from the case at bar, however, because here, a reasonable jury would have received a significantly different impression of Navarro's credibility and the taped evidence had the defense been permitted to pursue its proposed line of cross-examination, and had the defense been armed with expert testing of the taped exhibits. The constitutionally improper denial of appellant's opportunity to impeach Navarro was error, and the Court cannot say that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Even under *Watson*, reversal is required, because it is reasonably probable a result more favorable to appellant would have been reached had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818.)

2. The Trial Court's Denial of the Request for a Continuance Constituted an Abuse of Discretion and Violated Defendant's Rights of Confrontation, Due Process of Law, the Right to Present a Defense, and the Effective Assistance of Counsel under the Federal Constitution

The court erred in denying appellant a continuance to have the first and second surprise tape examined by his expert. Both tapes were produced at trial, without any notice, even though James Navarro testified he found the tape at home and gave it to the District Attorney about two weeks earlier. (11 RT 1799, 1831.) The first tape was played to the jury, and James Navarro testified that the voice on the tape was Connie Navarro's

and the conversation consisted of Connie asking someone how to get a restraining order against appellant because she was in fear. When the tape was examined, defense experts made a preliminary finding that the tape had been altered, and that the tape cassette had not been manufactured until many years after the murder. The defense asked for a continuance to have the first tape examined by the expert, the expert said that his preliminary examination indicated that (1) it was impossible for this cassette to have been on Navarro's tape machine in 1983, as Navarro had testified, since it was not manufactured until 1991; (2) there were starts and stops on the tape that indicated editing; and (3) the expert would need a week to do a complete examination. The prosecutor responded that if the defense expert concluded the second tape was doctored he might have to call a half a dozen witnesses to verify the tape. (14 RT 2698.) The judge put off ruling on the motion, suggesting they wait and see what the defense expert said about the first tape. (14 RT 2699.) The second surprise tape was presented in limine on July 19, 1994. (14 RT 2694; Ex 113.) When the defense expert said he would need a week to analyze both tapes, and the prosecutor threatened that he would have to call six witnesses to verify the tape, the court denied the motion.

The court held that the issue of Connie Navarro words on the tape recording was a minor part of the prosecution's case, and impeaching James Navarro about the tape would have little probative value.

(14 RT2746-2747.)

Penal Code section 1050 allows a court to continue a matter upon a showing of good cause. The discretion the court has may not be exercised in a manner that deprives a defendant of his right to a reasonable opportunity to present a defense. (*People v. Maddox* (1967) 67 Cal.2d 647, 652; *People v. Locklar* (1978) 84 Cal.App.3d 224, 230.) Denial of a proper request for a continuance to prepare a defense constitutes an abuse of discretion and a denial of due process. (*People v. Cruz* (1978) 83 Cal.App.3d 308.)

The defense sought to establish that the tape recording had been altered to make it appear that Connie said she was in fear of appellant. The trial court's refusal to permit a continuance completely eviscerated this defense.

This Court has said "While the determination of whether in any given case a continuance should be granted 'normally rests in the discretion of the trial court,' (*People v. Buckowski* (1951) 37 Cal.2d 629, 631), that discretion may not be exercised in such a manner as to deprive the

defendant of a reasonable opportunity to prepare his defense. 'That counsel for a defendant has a right to reasonable opportunity to prepare for a trial is as fundamental as is the right to counsel.' (*People v. Sarazzawski* (1945) 27 Cal.2d 7, 17.)

Refusal to grant a reasonable request for a continuance can, in fact, rise to the level of a Sixth Amendment violation. That is what happened here. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." The Supreme Court has held that this right to compulsory process includes "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Washington v. Texas* (1967) 388 U.S. 14, 19.) According to the Court, "[t]his right is a fundamental element of due process of law." (*Ibid.*)

a. *Continuances where Prosecutor Produces New Evidence at Trial*

The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors

and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. (*People v. Samayoa* (1997) 15 Cal.4th 795; *People v. Zapien* (1993) 4 Cal.4th 929, 972.) In this case, James Navarro was a key witness for the prosecution. He was the only witness who testified that the killer had covered the victim's face with a pillowcase (10 RT 1795), a point the prosecutor capitalized upon in his closing argument. (15 RT 2828, 2878-9.) James Navarro testified that he and Connie Navarro had been close friends since their divorce, and that Connie told him about her fear of appellant. (11 RT 1822.) Navarro testified that Exhibit 71 was a cassette tape that he found on his answering machine in 1983, after the murders, and that he saved it. Navarro testified that on the tape, Connie was heard talking to someone about getting a restraining order because she was in fear of appellant. (10 RT 1799.) The tape was played to the jury. (11 RT 1842.) No transcript was provided to the jury.

When the defense discovered the tape had been tampered with, and was not even manufactured until 1992, they wanted to have the tape examined, and they wanted to cross-examine James Navarro on the subject. (14B RT 2670-2680.) Since Connie Navarro did not name on the tape who she was hoping to get the restraining order against; only James Navarro himself established that "fact." The trial court's refusal to grant a brief

continuance to permit expert examination of the tape, coupled with the court's refusal to permit the defense to cross-examine James Navarro on this point resulted in the jury being misled by altered evidence. Because this evidence was sprung on the defense in the middle of trial, appellant's state and federal constitutional rights to prepare, to due process, to present a defense, and to counsel, were violated.

b. *Burden on Witnesses, Jurors and Court*

In this case, the first surprise tape was produced during the prosecutor's case in chief. (10 RT 1799.) The court delayed its ruling on the whether Navarro could be cross-examined on that tape, and on whether the court would grant a continuance to have the tapes examined. If the court had ruled immediately on this issue, the tapes could have been examined and Navarro could have been recalled for cross-examination. There would have been only a slight delay of the trial, and even that delay was caused by the late production by the ~~prosecutor~~, not by the defense.

c. *No Opportunity to Prepare*

While the determination of whether a continuance should be granted rests within the sound discretion of the trial court, that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare. (*People v. Hawkins* (1995) 10 Cal.4th 920, 945;

People v. Maddox (1967) 67 Cal.2d 647, 652; *People v. Fontana* (1982) 139 Cal.App.3d 326, 333.)

A case where new evidence arose during the trial is *People v. Barnett* (1998) 17 Cal.4th 1044. In *Barnett*, the defendant testified he had stolen some containers of methamphetamine oil from one Cantwell and hidden the containers in Butte Creek Canyon. The claimed theft of the methamphetamine oil was central to the credibility of both defendant and Cantwell. Defendant testified that he had drawn a map for a defense investigator Eastman. The prosecutor called Eastman as a witness and Eastman testified that he had been unable to locate any containers. Several days later, and after both sides had rested, defense investigators followed a new map from defendant, and found several bottles containing liquid buried at the location. This court held that the defendant was not entitled to a one-week continuance to retest substances found by police after both sides had rested; the trial court did grant a brief continuance to allow a criminalist from Department of Justice to conduct testing on newly discovered evidence, but once the criminalist confirmed that no methamphetamine oil had been found, the court properly determined that a continuance was unnecessary.

Barnett differs from the present case. In *Barnett*, the new evidence was defense evidence that could have been located earlier, while in the case at bar, the evidence was surprise taped evidence presented by the prosecution. In both cases, once the evidence was located the court granted a brief continuance for testing the new evidence. However, the critical difference is that in *Barnett*, the preliminary testing was negative. In the case at bar, the preliminary testing showed that the taped evidence had been altered. Once the expert found that the taped exhibit 71 could not have been a tape found on Navarro's answering machine, as he testified, the court should have granted a continuance for further testing on tape 71 and on tape 113. The failure to do so violated appellant's rights to due process, a fair trial, the right to counsel and the right to cross-examine.

d. *Materiality*

Navarro was permitted to bring forth the first tape as if it was legitimate unaltered evidence. His act of lying about the first tape obviously calls into question his credibility about the second tape, but the jury never was permitted to hear about that lie. The trial court's actions concealed from the jury Navarro's lie about the first tape.

Not permitting a continuance for scientific testing was unfair. All the delay here was the fault of the prosecution, not the defense. Even if defense

testing would have caused delay, such delay must be tolerated to meet apparent fraud on the court by Navarro. To allow a witness to come in with a last minute tape recording and allow the witness's delay to prevent defense testing of the evidence is to encourage fraud in the courts of this state.

Navarro altered the tape and then, when caught, came up with an excuse for the alteration. The defense was never permitted to challenge or explore that less-than-credible excuse. Navarro may well have altered the tape to remove all references to himself, so as to convert the evidence against Navarro into evidence against appellant.

In *Miller v. Pate* (1967) 386 U.S. 1, the prosecutor and the trial court blocked efforts by the defense to conduct forensic testing on a pair of shorts. There, the prosecutor knowingly introduced critical evidence that blood matching the child victim's blood type was found on a pair of shorts inferentially belonging to the defendant. The prosecutor also argued in his final comments to the jury that the defendant had discarded the pair of shorts that was stained with the victim's blood. (386 U.S. at p. 6.) Later testing showed that the stains on the shorts were paint. The conviction was reversed.

In this case, James Navarro claimed to be very close to Connie Navarro and because of their close friendship he was privy to her thoughts and fears. He testified she told him about her fears of appellant based on domestic violence, threats, kidnaping and rape. (11 RT 1816.) Navarro also testified she sought a restraining order against appellant. And further, because of her fear of appellant, she moved out of her home and into the home of James Navarro shortly before the murder. James Navarro testified that he posted a reward for appellant's capture, and that suddenly, eleven years after the murders, he came to court with a never before produced or discussed tape recording supporting theories of the prosecution.

In his closing argument, the prosecutor argued that the murderer was appellant because the cloth over Connie Navarro's face proved that her killer knew her and was ashamed of what he had done. (15 RT 2879-2879.)

The court's ruling that Navarro could not be cross-examined and the tapes could not be examined violated appellant's state and federal rights to due process and a fair trial.

D. PREJUDICE

Because federal constitutional rights to due process, to confront witnesses, and to present a defense are affected when a trial court limits cross-examination and refuses to allow testing of evidence, reversal is

required unless the error is harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Here, because the state's case was entirely circumstantial, the erroneous ruling took on critical importance. By refusing to allow the taped evidence to be tested by the defense, and by refusing to allow Navarro to be cross-examined on the evidence, the trial court violated appellant's rights to due process, confrontation, and the right to present evidence. Even under the standard in *Watson*, reversal is required, because it is reasonably probable a result more favorable to appellant would have been reached had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818.)

Therefore the judgment must be reversed.

IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING THE VICTIM'S HEARSAY STATEMENTS EXPRESSING FEAR OF APPELLANT DURING TESTIMONY OF WITNESSES, WHICH VIOLATED APPELLANT'S SIXTH AMENDMENT CONFRONTATION RIGHTS.

A. INTRODUCTION

The trial court admitted multiple hearsay statements made by the deceased Connie Navarro, from which the prosecutor argued that the victim was living in fear of appellant. Defense counsel objected on hearsay and relevancy grounds, and on the grounds that the evidence was more prejudicial than probative.

The prosecutor responded that the hearsay statements were relevant to Connie Navarro's state of mind and conduct immediately preceding the killing, in that they would show that she would not have consented to appellant entering her home. The prosecutor also argued that the statements were not hearsay, as they were not admitted for the truth. The prosecutor's arguments were specious, because Connie Navarro's state of mind or conduct on these issues was not in dispute at trial, and there is no doubt that the statements were admitted for their truth. Because Navarro's conduct and state of mind were not in dispute, the trial court erred in admitting the hearsay under the exception contained in Evidence Code section 1250. (*People v. Noguero* (1992) 4 Cal. 4th 599, 621.) Furthermore, because the

hearsay did not fall under a firmly rooted exception and carried no independent indicia of trustworthiness, the trial court's error violated appellant's confrontation rights, under the federal constitution. (*Idaho v. Wright, supra*, 497 U.S. at p. 817.)

B. SUMMARY OF THE PROCEEDINGS BELOW

1. Pretrial Motions

The prosecutor contended that appellant killed Connie Navarro and Sue Jory; appellant contended that he was not present at the time of the murder, and someone else must have committed the crime. The prosecutor moved to introduce hearsay evidence that Connie Navarro was in fear of appellant.

The defense objected on hearsay grounds, and also argued that testimony regarding the victim's fear of appellant was irrelevant and prejudicial. (7 RT 1148; 2 CT 358-364.) The prosecutor argued that Evidence Code section 1250 should apply, which made admissible the declarant's statement of her then existing state of mind. The prosecutor argued that because of Connie Navarro's fear of appellant, she would not agree to a consensual entry into her apartment. (2 CT 530-531.) Secondly, the prosecutor argued that these statements were not hearsay at all, because

they were not introduced to prove the truth of the matter asserted. (2 CT 532.)

The defense contended that there was no contested issue of whether appellant was welcome in the apartment. Appellant's defense was that he was not there, and the women were murdered by someone else. Appellant argued that the victim's state of mind was not in issue and that her fear of appellant was irrelevant. (2 CT 534; 7 RT 1154.). The prosecutor contended that evidence of Connie Navarro's fear was offered to show that she was afraid of appellant, that she moved around, she went to Laguna, she stayed with her ex-husband, she talked to someone about getting a restraining order, and she wrote a letter to appellant telling him she was afraid of him.

The trial court allowed the proposed instances of testimony above to show the victim's state of mind, to show that she was afraid of appellant, and acted in conformity with that state of mind. The court held that the evidence was more probative than prejudicial. (7 RT 1156.)

2. Trial testimony of Marilyn Young

Marilyn Young testified as follows: She was good friends with Connie Navarro and appellant. Connie Navarro and appellant were sweethearts, but Navarro broke up with him in September. She got back together with him for Christmas, but then broke up again.

Young testified that Navarro told Young she had her locks changed. About a week before the murder, someone told Navarro that appellant had broken in through the patio. The lock had been sawed through and Navarro told Young she was terrified. The Friday before the murder, Navarro stopped staying at the condominium. (10 RT 1683-1691.)

Young testified that Navarro told her appellant kidnaped Navarro about a month before the murder. He used a gun to make her get in the car and took her to his house and then to a motel, and made her spend the weekend with him. (10 RT 1996.)

Young testified that Navarro discussed getting a restraining order against appellant. (10 RT 1698.) Young testified that Navarro told her that the Friday before the murder, Navarro did not want to go home, so she stayed at Young's house. Young testified that Navarro told her a friend said appellant was in a rage, so Young and Navarro went to Laguna for the weekend. When they got back, Navarro did not want to stay at home, so she spent a few nights at her ex-husband's house. Young testified that Navarro told her that she went home to pick up some clothes and appellant was hiding in the closet watching her. (10 RT 1700.) On the day before the murder, Young and Navarro were having lunch when appellant came in the restaurant. Navarro asked him why he disconnected her alarm, why he

broke into her house, and he told her he had to get a letter she had written saying she cared about him but things weren't working out. Young testified that appellant got "all sentimental" and told Navarro that he would leave her alone. So Navarro decided to go home that night. (10 RT 1764.)

3. Trial testimony of James aka "Mike" Navarro

Connie Navarro's ex-husband James Navarro testified that Connie had told him she was having trouble with appellant, she was terrified of him and was thinking about getting a restraining order. She asked him for an attorney and he gave her the name of an attorney whom he knew from school. James Navarro testified that as soon as he saw the bodies, he knew appellant had killed them. Navarro testified that Connie told him appellant kidnaped her at gunpoint.(10 RT 1797, 11 RT 1849.)

C. THE TRIAL COURT'S FAILURE TO EXCLUDE HEARSAY STATEMENTS OF CONNIE NAVARRO'S FEAR WAS ERROR AND VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHTS

1. The Sixth Amendment Precludes the Admission of Hearsay Testimony Against a Criminal Defendant Which Does Not Fall under a Firmly Rooted Exception Absent Independent Indicia of Reliability.

The Confrontation Clause excludes hearsay evidence against a criminal defendant which does not fall within a firmly rooted exception "absent a showing of particularized guarantees of trustworthiness." (*Ohio v.*

Roberts, *supra*, 448 U.S. at p. 66; see also *Idaho v. Wright*, *supra*, 497 U.S. at p. 817 [hearsay which falls under a firmly rooted exception is so reliable that adversarial testing is not required].)

The admission of unreliable hearsay testimony violates the defendant's Sixth Amendment rights where the defendant is unable to cross-examine the hearsay declarant. The right to cross-examine witnesses is so fundamental a right that the denial of that right, "calls into question the ultimate 'integrity of the fact-finding process.'" (*Id.*, 448 U.S. at p. 63, quoting *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 295.) The literal right to confront a witness "forms the core of the values furthered by the Confrontation Clause." (*California v. Green*, *supra*, 399 U.S. 149, 157.)

2. The Case Law Overwhelmingly Confirms That the Hearsay Statements of Connie Navarro Did Not Fall under the Exception Contained in Evidence Code Section 1250.

The trial court's repeated admission of hearsay statements of Connie Navarro expressing her fear of appellant was clear error under Evidence Code section 1250. Under section 1250, hearsay testimony is only admissible to prove the declarant's state of mind or conduct where his or her mental state or conduct is actually in dispute at the trial: "'a victim's out-of-court statements of fear of an accused are admissible under section 1250 only when the victim's conduct in conformity with that fear is in

dispute. Absent such dispute, the statements are irrelevant.'" (*People v. Noguero*, *supra*, 4 Cal.4th at p. 621, quoting *People v. Ruiz* (1988) 44 Cal.3d 589, 608.)

Here, no conduct of Connie Navarro "in conformity with her fear" of appellant was in dispute. The defense did not contest the fact that Navarro would not have consented to let appellant into her home on the night of the murder. James Navarro testified that when he discovered the bodies, the front door was locked, and not damaged. (10 RT 1793.) Officer DeAnza testified there was no sign of forced entry (9 RT 1486.) Whether or not Navarro would let appellant in was not an issue.

The prosecutor's second purported reason for introducing the hearsay evidence of fear was to explain why Connie Navarro changed the locks on her residence, moved temporarily to reside with her ex-husband, went to Laguna Beach, talked to someone about a restraining order, and wrote a letter to appellant about her fear. The problem with the prosecutor's argument is that none of these actions were controverted, or in any way in issue.

Therefore, Connie Navarro's statements of fear of appellant were relevant only for the impermissible purpose of implying that appellant had engaged in some course of threatening and frightening conduct sufficient to

give rise to Connie Navarro's fears: "'A victim's prior statements of fear are not admissible to prove the defendant's conduct or motive (state of mind). If the rule were otherwise, such statements of prior fear or friction could be routinely admitted to show that the defendant had a motive to injure or kill.'" (*People v. Noguero*, *supra*, 4 Cal.4th at p. 622, quoting *People v. Ruiz*, *supra*, 44 Cal.3d at p. 609.)

The case law firmly establishes that the test for whether an issue is in dispute when the prosecutor seeks to introduce prior statements of the victim's fears looks to what facts are *actually* contested at the trial. The prosecution cannot concoct a pseudo-issue of fact regarding the declarant's conduct immediately before her death in order to gain admissibility. (See *People v. Armendariz* (1984) 37 Cal.3d 573, 587 [hearsay statements by victim expressing fear are inadmissible where the defendant does not claim that the act of homicide was immediately preceded by any conduct by the victim].

In *People v. Armendariz*, *supra*, the defendant testified that he and the murder victim had a good relationship. In order to impeach his testimony, the prosecutor called the victim's son as a witness. He testified, over objection, that his father had telephoned him 17 months before the killing to say he was frightened because the defendant had demanded

money and threatened to assault him if he did not comply. At the victim's request, the witness went to his father's house and spent the night there to protect him. The trial court ruled that the testimony was admissible for the limited non-hearsay purpose of explaining why the son went to the victim's house. This Court held that the trial court erred because the non-hearsay purpose "had no bearing whatsoever on any issue in the trial." (*Id.* at p. 585.)

In *People v. Arcega* (1982) 32 Cal.3d 504, 526-529, the prosecutor elicited evidence from the murder victim's mother that the murder victim had expressed fear that the defendant was going to hit her and beat her up. On appeal, the People argued that the evidence explained the victim's conduct, i.e. that the victim was apprehensive about the defendant and the defendant attacked the victim by surprise as part of a well thought out course of conduct. This Court held that the victim's conduct prior to the killing was not at issue, contrasting the case to one in which the defendant claimed that the victim had engaged in certain conduct which led to an accidental or justifiable homicide, such as *People v. Lew* (1968) 68 Cal.2d 774, 778-780. There, state of mind evidence of the declarant's fear of the defendant was held to be relevant to disprove the defendant's claim that the declarant was sitting on his lap and examining his gun when it accidentally

discharged. But since the victim's conduct in *Arcega* was not in issue, this Court held that the victim's statements were irrelevant.

In *People v. Ireland* (1969) 70 Cal.2d 522, 528-532, a family friend testified that on the morning that the murder victim (defendant's wife) was killed, the victim called her and said that she knew the defendant was going to kill her. The People contended that the statement was admissible to show the victim's state of mind and also to prove or explain acts and conduct of the victim. This Court held that the evidence was inadmissible, since the victim's state of mind was not in issue, nor were any relevant acts of conduct of the victim.

People v. Ruiz, supra, confirms that the prosecution may not offer hearsay statements of fear by the victim, ostensibly to prove an aspect of the victim's conduct that is not questioned by the defense. *Ruiz* found error where the prosecution claimed that the two victim's statements of fear explained why the defendant had to "catch them off guard" and kill them while they were sleeping. (44 Cal.3d at p. 527.)

In *Ruiz*, this court stressed that a victim's prior statements of fear are not admissible to prove the defendant's conduct or motive (state of mind). If the rule were otherwise, such statements of prior fear or friction could be routinely admitted to show that the defendant had a motive to injure or kill.

These cases forcefully reject the use of this form of hearsay. The danger is that the jury will use evidence of the victim's mental processes to prove the defendant's state of mind, and to prove that the defendant acted in conformity with that state of mind. Prophetic expressions of fears are especially prejudicial because they misleadingly suggest that the victim had accurate knowledge of the defendant's intention to harm the victim, and that the defendant subsequently acted consistently with this state of mind.

The recent case of *People v. Cox* (2003) 30 Cal.4th 916 is distinguishable. In *Cox*, the prosecutor's theory was that defendant drove the victim to the murder scene in his vehicle. The circumstances surrounding the victim's entry into defendant's car — whether she would enter the car voluntarily or whether defendant may have overcome any resistance by force — were at issue. This Court held that evidence that the victim had acted as though she feared defendant was admissible to show that she would not have voluntarily entered defendant's car and thus he may have forced her into his vehicle the night she disappeared. (30 Cal.4th at 958.)

Another witness testified that Cox had confessed his guilt in the murder to her. She did not tell the police right away, and the defense used that failure to claim that she had recently fabricated defendant's confession.

The prosecutor's theory was that such evidence of fear would explain why the witness waited so long to come forward, and would rebut the defense claim of recent fabrication. This Court held that defendant's claim that the witness fabricated defendant's confession squarely put the witness's state of mind in issue. Because her fear of defendant tended logically to provide a legitimate reason for her withholding this confession, the statements were admissible. (30 Cal.4th at 958.)

In the case at bar, the prosecutor first purported to offer the statements that Connie Navarro was in fear to explain why she would not voluntarily admit appellant into her condominium. (2 CT 530-531.) But appellant's entry into the condominium was never in issue. James Navarro testified that on day he found the bodies, the front door of the house had not been broken into. (10 RT 1793.) Appellant testified he was not there at all. The defense raised no issue with respect to Connie Navarro's mental state prior to her death, and did not claim accident, self-defense, provocation or suicide. The prosecutor's theory was that appellant had somehow broken in through the upstairs balcony or skylight. Whether Connie Navarro would let appellant in or not, was not an issue.

Secondly, the prosecutor purported to offer the statements that Connie Navarro was in fear to explain why she changed the locks on her

residence; moved temporarily to reside with her ex-husband; she went to Laguna Beach; she talked to an agency about a restraining order; and wrote a letter to appellant about her fear. None of these issues were contested. It was clear from all the witnesses that appellant and Connie Navarro had been lovers for two years, and that appellant had spent much time at her condominium, although maintaining a separate apartment. It was clear from all the evidence that Connie Navarro and appellant broke up and got back together, and that appellant was still in love with her and wanted to stay together. The fact that she changed the locks, talked to a someone about a restraining order, or went to Laguna Beach or her ex-husband's house were not contested, and did nothing to explain any of the contested issues, and were therefore not legally relevant.

Third, the prosecutor argued that the evidence was not admitted for the truth, and was therefore not hearsay. It appears that the judge adopted that part of the argument in his ruling. (CT 532; 7 RT 1155.) Appellant would submit that the prosecutor clearly intended to admit the evidence for the truth, that Connie Navarro was afraid of appellant, and therefore appellant must be the killer.

The inadmissibility of such evidence was reiterated in *People v. Noguero, supra*, which held that the trial court erroneously admitted under

Evidence Code section 1250 testimony that the victim expressed fear and hatred of the defendant and alluded to defendant' threats. This Court held that the testimony was inadmissible because, "neither the victim's state of mind nor her conduct was relevant to any part of the People's case; nor did the defense raise any issue concerning her state of mind or behavior at or before the night she was murdered. The entire thrust of the defense went to the identity of the killer and defendant's alibi. (*Id.* at p. 622.) Here, the defense counsel was correct in pointing out that the evidence of fear was irrelevant and that the prosecutor's only theory of relevance was clearly rebutted by the facts in the case. Thus the trial court erred in admitting the victim's repeated extrajudicial expressions of fear."

The danger here is that the jury would use evidence of the victim's mental processes to prove appellant's state of mind, and to prove that the appellant acted in conformity with that state of mind. Prophetic expressions of fears are especially prejudicial because they misleadingly suggest that the victim had accurate knowledge of the defendant's intention to harm the victim, and that the defendant subsequently acted consistently with this state of mind. (*Armendariz*, *supra*, 37 Cal.3d at p. 589.)

3. The Victim's Expressions of Fear of Appellant Were Untrustworthy, and Their Admission Violated Appellant's Confrontation Rights.

No particularized showing guaranteeing the trustworthiness of Marilyn Young's testimony of Connie Navarro's expressions of fears was made at trial. Rather, Young's statements were inherently unreliable because her suspicions were wide-ranging and based upon multiple hearsay, including an astrologer's predictions.

The statements of James Navarro were equally untrustworthy. He was the ex-husband of the deceased, who either believed appellant was guilty and therefore had a motive to lie to convict the person he felt was responsible, or Navarro was the killer, and therefore he had a motive to put the blame elsewhere. James Navarro did, in fact, lie to the jury, about the tape recording he testified he found on his answering machine (See Issue III, infra.)

Because they were unreliable, the introduction of Connie Navarro's hearsay statements of fear violated appellant's confrontation rights under the federal constitution. (*Idaho v. Wright*, *supra*, 497 U.S. at p. 817; *California v. Green*, *supra*, 399 U.S. at p. 157.)

D. THE SIXTH AMENDMENT VIOLATION PREJUDICED APPELLANT AND THIS COURT MUST REVERSE THE CONVICTION

The trial court's error violated appellant's Sixth Amendment rights, requiring review under *Chapman v. California*, *supra*, 386 U.S. at pp. 24-26. The State cannot prove beyond a reasonable doubt that the error was harmless because the jury almost certainly inferred from Connie Navarro's repeated expressions of fear of appellant before the killing that he had the intention to kill or harm her. As in *People v. Ireland, supra*, where the court found prejudice from the admission of one of the victim's statements that she feared her husband:

> The statement in question not only reflected the victim's state of mind at the time of the utterance; it also constituted an opinion on her part as to the conduct which defendant would undertake at a future time. On the basis of this hearsay opinion the jury might reasonably have inferred that the victim concluded that defendant had then formed the intention to kill her. The next logical inference, to wit, is that her assessment of the defendant's then intention was accurate and defendant had in fact formed an intention to kill before the homicide.

(70 Cal.2d at p. 532.)

Here, where the prosecution advanced theories of premeditated murder or murder during the course of a burglary, the victim's statements of fear went to show appellant's purportedly pre-existing intentions to harm

her. Since the jury heard repeated hearsay statements of Connie Navarro's fear, in the absence of any actual evidence that appellant had a preconceived plan to harm or kill her, the error was highly prejudicial.

This error is not harmless. Where evidence of fear is admitted in error but "is cumulative of other properly admitted evidence to the same effect," such error is not prejudicial. (*People v. Green* (1980) 27 Cal.3d 1, 27.) In this case, however, the hearsay evidence of Connie Navarro's fear was not cumulative to other properly admitted evidence.

Even under *People v. Watson* (1956) 46 Cal.2d 818, 836, the trial court's errors were prejudicial. Since the case at bar was based on circumstantial evidence, the repeated hearsay statements that Connie Navarro was in fear of appellant were highly prejudicial. It is reasonably probable that the result would have been more favorable to appellant, but for the error.

V. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING TESTIMONY OF CONNIE NAVARRO'S FEAR OF APPELLANT BECAUSE THE RISK OF UNDUE PREJUDICE FAR OUTWEIGHED ANY PROBATIVE VALUE, WHICH VIOLATED APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS.

A. INTRODUCTION AND SUMMARY OF PROCEEDINGS BELOW

Appellant contends, in Argument IV above, that the trial court violated appellant's Sixth Amendment right to confrontation by admitting hearsay testimony regarding Connie Navarro's fear of appellant. Assuming arguendo that the trial court did not err on those grounds, the prejudicial effect of the hearsay statements so outweighs any possible probative value that the trial court erred under Evidence Code section 352, and violated appellant's state and federal constitutional rights to due process.

The risk that the jury might view the hearsay as evidence of appellant's conduct and motive so affected the fairness of appellant's trial that the error violated his due process rights. A due process violation occurs when evidence admitted against a criminal defendant, "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions." (*Dowling v. United States*, *supra*, 493 U.S. at p. 352.) Evidence of statements of fear by the victim in a homicide case has been condemned as inherently unreliable and highly prejudicial to the defendant

(See *People v. Noguero*, *supra*, 4 Cal.4th 599, 621; *People v. Ruiz*, *supra*, 44 Cal.3d at p. 608.) Moreover, the United States Supreme Court long ago recognized the inherent prejudice of hearsay like this, even where there was some colorable claim of relevance of a victim's prior statement of a threat made by the defendant. (*Shepard v. United States*, *supra*, 290 U.S. at pp. 104-106.) The inherent unfairness of admitting such evidence where there is slight probative value is a fundamental miscarriage of justice and the trial court's erroneous failure to exclude it violated due process.

Appellant has summarized the relevant proceedings at trial at argument IV, part B, above, and incorporates them herein by reference. The trial court made rote findings that the evidence was more probative than prejudicial. (7 RT 1156.) The trial court's explicit finding was that the testimony was admissible to show the victim's state of mind, to show that she was afraid of appellant, and acted in conformity with that state of mind. (7 RT 1155.) The trial court did not explicitly consider the prejudicial effects of the hearsay testimony of fear.

B. THE TRIAL COURT ERRED IN ADMITTING CONNIE NAVARRO'S HIGHLY INFLAMMATORY STATEMENTS OF FEAR, VIOLATING APPELLANT'S DUE PROCESS RIGHTS

The California Supreme Court has repeatedly warned that hearsay testimony of the victim's fear of the defendant and or prior threats carry a high risk of undue prejudice to the defendant, and that the risk must be carefully scrutinized before the evidence can be admitted. (*People v. Thompson* (1988) 45 Cal.3d 86, 103; see also *Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045; *People v. Coleman*, *supra*, 38 Cal.3d at pp. 92-93; *People v. Armendariz*, *supra*, 37 Cal.3d at pp. 588-589; *People v. Green*, *supra*, 27 Cal.3d at p. 26.) Because Connie Navarro's hearsay statements of fear were highly prejudicial and unreliable, and the probative value of the evidence was marginal at best, the trial court was bound to exclude the evidence.

Assuming arguendo that, despite the fact her conduct and state of mind were not in dispute, the testimony had some relevance, the testimony was cumulative to other admissible evidence on point. Another witness, Carl Rasmussen, testified that he helped Navarro change her locks (9 RT 1507.) David Navarro testified that his mother wanted to break up with appellant, but appellant was persistent. (9 RT 1359.) Connie Navarro's hearsay statements of fear were not necessary to the prosecutor's proofs.

Here the prejudicial effect of the hearsay evidence was overwhelming and should have been obvious to the court:

> Testimony that a defendant threatened his victim prior to committing the crime charged is a particularly sensitive form of evidence of the victim's state of mind. In the case at bar it created substantial danger that despite the limiting instruction, the jury, consciously or otherwise, might consider [the victim's] statement as evidence not only of her mental state but also of that of defendant, i.e. of the fact that he actually threatened to kill her... And inferentially harbored an intent to do so; and the relevance to the crime charged should have been obvious."

(*People v. Green*, *supra*, 27 Cal.3d at p. 26.)

The inference from Connie Navarro's statements that she was afraid of appellant was precisely that identified in *Green*. The trial court erred in admitting the testimony since the probative value of the evidence for a permissible inference was slight, if in fact there was any proper evidentiary value, and the likelihood of undue prejudice was great.

C. THE TRIAL COURT'S ERRONEOUS FAILURE TO EXCLUDE HEARSAY STATEMENTS OF CONNIE NAVARRO'S FEAR OF APPELLANT WAS PREJUDICIAL AND VIOLATED DUE PROCESS.

This Court must apply the *Chapman v. California* standard of review for prejudice, because the error violated appellant's federal due process rights. (386 U.S. at pp. 24-26.) Appellant has described in Argument IV,

part E, above, the prejudice to appellant due to the trial court's erroneous failure to exclude hearsay evidence of the victim's fear, and the prosecution's exploitation of the hearsay evidence. The errors prejudiced appellant because the hearsay evidence concerning Navarro's fear was compelling evidence in this circumstantial case.

In the case, the court gave no limiting instruction. Both the United States Supreme Court and this Court have recognized that the erroneous admission of a victim declarant's statement of fear or threat by the defendant is prejudicial where the magnitude of the error cannot be mitigated by a limiting instruction. (See *Shepard v. United States*, *supra*, 290 U.S. at pp. 104-106; *People v. Coleman*, *supra*, 38 Cal.3d at p. 83.)

In this case, the hearsay statements of Connie Navarro's fear of appellant affected the fairness of his trial and violated his state and federal rights to due process.

VI. INTRODUCTION OF HEARSAY STATEMENT THAT APPELLANT CONFESSED TO NOW DECEASED FATHER VIOLATED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION AND HIS RIGHT TO DUE PROCESS

A. INTRODUCTION

The trial court admitted multiple hearsay statements that appellant's step-mother heard his father say that appellant confessed to killing the two women. Defense counsel objected on hearsay grounds, on the right to confront, and on due process grounds.

The prosecutor argued that the statements were admissions by appellant, and spontaneous statements by his father. This was error, because the statements were not admissions, did not qualify as spontaneous statements, and failed to meet the requirements of the confrontation clause that they have some independent indicia of reliability.

Admission of the statements violated appellant's state and federal rights to confront and to due process.

The hearsay statements, viewed in context of the totality of the surrounding circumstances, were not sufficiently reliable to meet any hearsay exception or obviate the need for confrontation and cross-examination.

B. FACTUAL PROCEEDINGS

On July 11, 1994, after more than month of trial, and nearing the close of the prosecution's case, the prosecution moved for the introduction of "newly discovered" evidence that appellant's step-mother said that her husband, appellant's father, now deceased, told her back in 1983 that appellant confessed to the murders. (12 RT 2094; 3 CT 660-667.) The prosecutor contended that the testimony by appellant's step-mother was admissible as an admission under Evidence Code section 1220, and as a spontaneous statement under Evidence Code section 1240. (3 CT 661.) The defense objected, and a evidentiary hearing was held.

1. The Testimony at the 402 Hearing

Out of the presence of the jury, Rosemary Riccardi testified that she was married to appellant's father, Pat Riccardi. Appellant would frequently telephone his father, she would usually answer the phone. In March of 1983, the telephone rang, very late at night (12 RT 2096.) She answered the phone downstairs. It was appellant. He said, "Go get my pop." Pat Riccardi was upstairs in bed. Mrs. Riccardi ran upstairs and woke up Pat. Mrs. Riccardi went back downstairs and hung up the phone, she never listened in on their conversations. About 15 minutes later she went upstairs. Appellant's father was sitting on the edge of the bed with tears streaming

down his face. Pat Riccardi said, "Jackie[12] killed two girls." Mrs. Riccardi thought there was a car accident so she asked what happened. Pat Riccardi replied, "He shot them." (12 RT 2099.)

On cross-examination, Mrs. Riccardi testified that a few minutes elapsed between the phone call and Pat Riccardi's statement. (12 RT 2101). Mrs. Riccardi testified that she is a writer, and that she would like to write a book about appellant's life and that she has discussed the book with appellant. (12 RT 2102.) She was quite evasive about her plans to write the book. At first, she denied having talked to appellant's cousin Marty Ragonesi about writing a book. (12 RT 2102.) Then when asked "So you're telling us that you didn't discuss with Marty the fact that you're going to write a book when this case is over, yes or no?" she responded, "I brought up the desire that I would like to have a book written." Then she testified that she talked to appellant when he was in jail in Houston, and appellant wanted her to write a book about him. (12 RT 2103.)

Mrs. Riccardi denied that she and appellant didn't get along. She denied that appellant had said she was jeopardizing his father's health because she had 30 or 40 cats in the house and it was making his father sick (12 RT 2105.) She admitted that she had 20 to 30 cats in the house, but she

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[12] Appellant's nickname was Jackie.

denied that this had an ill effect on Pat Riccardi's health or that she had ever had a discussion with appellant about it. (12 RT 2106.)

Mrs. Riccardi admitted telling Detective Brown recently that the disagreement with her husband over whether appellant should turn himself in to authorities drove a wedge between she and her husband and ended up ruining the marriage. (12 RT 2108.)

Mrs. Riccardi testified that eleven years ago, she had told two F.B.I. agents from Yonkers that Pat told her appellant had confessed to the murders. (12 RT 2109.) Mrs. Riccardi testified that she also told F.B.I. agents in Ohio on July 24, 1985, that Pat had told her appellant confessed to the murders. (12 RT 2110.) Mrs. Riccardi testified that the reason she recently contacted Detective Brown was that she wanted appellant to admit what he did. (12 RT 2114.) She testified that she was longing for the trial to be over with so there would be a sentence or he would be free. She testified that she was not anxious for him to go to prison, because he has some wonderful qualities. Mrs. Riccardi denied telling appellant that she would pray for him because she knew he was innocent. (12 RT 2114.)

The prosecutor offered to stipulate that he had no report from any F.B.I. agent that Mrs. Riccardi had made any statement to them regarding appellant's confession to her husband. (12 RT 2117.)

The defense argued that the hearsay statement was so unreliable as to violate due process as well as the right to confrontation. The trial court held that the statements of Mrs. Riccardi met the elements of trustworthiness and reliability, and that the statements were admissible under the "spontaneous" exception to the hearsay rule. (12 RT 2131.)

2. Rosemary Riccardi's Testimony at Trial

Rosemary Riccardi, testified at trial that in March of 1983, appellant called very late at night. (12 RT 2167) She was downstairs and she answered the phone. Her husband Pat Riccardi was upstairs in bed. He was 72 years old at the time. Appellant said, "Go get Pop." Appellant sounded "terrible," so she raced upstairs to get Pat Riccardi. Pat Riccardi picked up the phone in the bedroom, and Mrs. Riccardi went back downstairs and hung up the extension there. She could not hear the conversation. When she realized the call was over, she ran upstairs to hear what the call was about. The light as on and Pat. Riccardi was sitting on the edge of the bed. Tears were streaming down his face. She had not seen Pat Riccardi cry in 23 years (12 RT 2170.) She asked him what was the matter. He said, "Jackie [appellant] killed two girls." Mrs. Riccardi thought maybe there was a car accident. Pat Riccardi said "He shot them." Mrs. Riccardi asked why it

happened, and Pat Riccardi said the girlfriend was trying to break up with him. (12 RT 2172.)

3. Testimony of F.B.I. Agent

F.B.I. Agent Gary Steger testified as a defense witness that he inspected the F.B.I. files relating to appellant's case. He reviewed all of the reports and could find no mention of Rosemary Riccardi telling the agents that appellant had confessed to her husband Pat. (12 RT 2295.) Steger counted 27 contacts of Rosemary Riccardi with members of F.B.I., either in New York or Ohio, between 1985 to 1986. (12 RT 2296). Most of the calls were from Rosemary Riccardi to the F.B.I. (12 RT 2299.)

C. DOUBLE HEARSAY

The hearsay rule generally rejects out-of-court statements offered for their truth because, without the test of cross-examination, they are not deemed sufficiently reliable for admission. (1 Witkin, *California Evidence* (3d ed. 1986) The Hearsay Rule, § 558, p. 534; 5 *Wigmore, Evidence* (Chadbourn ed. 1974). Exceptions exist for certain classes of statements that possess "adequate indicia of trustworthiness," under circumstances where there exists some arguable necessity for their introduction (e.g., 5 *Wigmore, supra*, Exceptions to the Hearsay Rule, § 1422, at pp. 253-254;

see also *People v. Tewksbury* (1976) 15 Cal.3d 953, 966.) The exceptions offered in this case should not apply.

In this case, there are two levels of hearsay: (1) the purported statement of appellant to his father over the phone; and (2) the purported statement from the father to the step-mother. Hearsay evidence can be admitted if it falls within one of the exceptions to the hearsay rule. However, multiple hearsay is admissible for its truth only if each hearsay layer separately meets the requirements of a hearsay exception. (*People v. Arias* (1996) 13 Cal.4th 92, 149; Evid. Code, § 1201.)

1. The Purported Statements of Appellant to His Father Were Not Admissions, and Should Have Been Excluded as Inadmissible Opinion Evidence

The prosecutor offered the statement of appellant to his father under Evidence Code section 1220, an admission of a party.

Mrs. Riccardi testified at the 402 hearing that Mr. Riccardi said, "Jackie [appellant] killed the two girls" and "Jackie went to his girlfriend's apartment, shot her and the girl that was with her." (12 RT 2122.) The defense argued that if she had testified that the father said, "Jackie told me he killed the two girls," that would be an admission. (12 RT 2127.)

Mrs. Riccardi did not testify that Mr. Riccardi said "Jackie said he killed the two girls." Therefore there is nothing in this record as to what

appellant may have said. It is possible that appellant told his father that he feared the police believed he killed the two girls. It is possible that appellant told his father that he feared he was going to be charged with killing the two girls. Assuming, for the sake of this argument, that Mrs. Riccardi is telling the truth about her husband's statements, we can only conclude that after talking to appellant, Pat Riccardi reached the opinion that appellant had killed the two women. Since Mr. Riccardi was not available to be cross-examined, the double hearsay should not have been admitted.

The statement admitted was improper opinion evidence. Such evidence would have been excludable on that ground had it come from appellant's father during in-court testimony, since a lay witness's opinion is not generally admissible unless it is rationally based on the witness's perception and helpful to a clear understanding of his or her testimony. (Evid. Code, § 800.) Thus, a lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 40; see 2 Jefferson, *Cal. Evidence Benchbook* (2d ed. 1982) Expert and Lay Opinion Testimony, § 29.1, p. 976.) Where the witness can adequately describe his observations, his opinion or conclusion is inadmissible because

it is not helpful to a clear understanding of his testimony. (*People v. Miron* (1989) 210 Cal.App.3d 580.)

If Pat Riccardi had not died prior to the trial, he could have testified to exactly what appellant said, if — and this is a crucially important "if" — it qualified as an admission. This highlights the danger of hearsay. Since Pat Riccardi was not available to be cross-examined, there is no way to determine what, exactly, appellant said to him, so there is no way to determine if this was an admission.

In the instant case, appellant's father's opinion that appellant had killed two girls, would have been excludable if he had been alive to testify at the time of the trial. It was no more admissible if, as the prosecutor alleged, it was expressed in a spontaneous way.

2. Hearsay Statements by Pat Riccardi Did Not Qualify as Spontaneous Statements

Under Evidence Code section 1240: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

To render statements admissible under the spontaneous declaration exception it is required that (1) there must be some occurrence startling

enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstances of the occurrence preceding it. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

The "crucial element" in determining reliability under section 1240 is the "mental state" of the speaker. (*People v. Farmer* (1989) 47 Cal.3d 888, 903.) The court observed that the length of time between the event and the statement may be an important factor in assessing the declarant's mental state. (*Ibid.*) And "[t]he fact that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation. . . ." (*Ibid.*)

In the case at bar, the factors discussed by this Court in *Farmer* do not support the trial court's finding that the statements made by Pat Riccardi were properly admitted as excited utterances or spontaneous statements. Not only had minutes elapsed between the phone call and Pat Riccardi's statement. (12 RT 2101), but more importantly the statements made by Pat Riccardi were made in response to questioning by Rosemary Riccardi. (12 RT 2099.) Both of these factors demonstrate circumstances which deprived

those statements of the spontaneity required to be admissible under Evidence Code section 1240.

Even if this Court determines that the statement was spontaneous, excited utterances may be excluded on the basis that they are inadmissible opinions. (See *Gatlin v. Union Oil Co. of Calif.* (1916) 31 Cal.App. 597, 608; *People v. Miron*, *supra*, 210 Cal.App.3d 580, 582 [spontaneous declarant's opinion as to intruder's motive was properly excluded].. At most, the statements here were opinions of Pat Riccardi in response to questioning by Mrs. Riccardi, and in any case, violated the right to confront, because the statements were unreliable.

D. RIGHT TO CONFRONT

"The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides, 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' (*Idaho v. Wright*, *supra*, 497 U.S. at pp. 813-814.) While the hearsay rule and the confrontation clause protect similar values, the United States Supreme Court has consistently refused to "equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." (*Id.* at p. 814.)

In *Ohio v. Roberts* (1980) 448 U.S. 56, 66, the Supreme Court set forth a general framework with which to determine whether admission of a hearsay statement meets the requirements of the confrontation clause. "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." (*Ibid.*, fn. omitted.)

The particularized guarantees of trustworthiness must be based on the circumstances that surround making the statement and must render the declarant particularly worthy of belief. (*Idaho v. Wright*, *supra*, 497 U.S. at p. 819.) Hearsay can only be admitted over a confrontation clause objection where cross-examination would be of marginal utility. (*Id.* at p. 820.) "Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." (*Id.* at p. 821.) The Supreme Court also teaches us that "hearsay evidence used

to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." (*Id.* at p. 822.)

Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66; *People v. Gallego* (1990) 52 Cal.3d 115, 176.) However, the inference in the case at bar was rebutted by the evidence of unreliability.

The conventional definition of "inference" is stated in Evidence Code section 600(b): It 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." However, the inference in this case was rebutted by the evidence adduced at the 402 hearing. The judge erred when he held that Rosemary Riccardi's hearsay testimony met the elements of trustworthiness and reliability. (12 RT 2131.)

While they are not coextensive, the hearsay rule and the confrontation clause of the Sixth Amendment serve nearly identical purposes. (*People v. Valdez* (1947) 82 Cal.App.2d 744, 749.) Both are concerned with reliability of evidence. To avoid violation of a defendant's confrontation rights in the admission of hearsay evidence, the prosecution must show that the out-of-court statement bears adequate "indicia of

reliability." (*Idaho v. Wright*, *supra*, 497 U.S. at p. 815; *Ohio v. Roberts* *supra*, 448 U.S. 56, 66.)

In the case at bar, appellant would argue that the statement did not fall within a firmly rooted exception, but if it did, any inferred reliability was rebutted by the testimony at the 402 hearing, and thus, should have been excluded as unreliable.

a. *Evidence of Recent Fabrication*

The record in the instant case shows that although Mrs. Riccardi testified that she had reported the purported statement to the F.B.I. on several occasions, it was clear that this was not true. The prosecutor agreed to stipulate that the F.B.I. had no reports corroborating her testimony. There is no doubt that if Mrs. Riccardi had told the agents that appellant confessed, the agents would have noted it in a report. Yet, F.B.I. Agent Steger testified there were 27 contacts of Rosemary Riccardi with members of F.B.I., either in New York or Ohio, between 1985 to 1986, that most of the calls were from Rosemary Riccardi to the F.B.I., and that none of them mentioned the so-called confession (12 RT 2296-2299.) Recent fabrication may be inferred when it is shown that a witness did not speak about an important matter at the time when it would have been natural for her to do so. (*People v. Manson* (1976) 61 Cal App.2d 102.) From the above

evidence, it should have been clear to the trial court that Rosemary Riccardi's testimony that she had told the F.B.I. agents about the purported confession was incredible.

b. *Evidence of Bias*

The trial judge also had evidence of Mrs. Riccardi's bias at the time he made his ruling that her testimony was credible. Mrs. Riccardi gave conflicting statements about whether she was writing a book about appellant's life and case, and whether that could be a motive to fabricate the purported confession. She testified that she would like to write a book about appellant's life, but that she didn't know enough about the case to write the book. She denied having talked to appellant's cousin Marty Ragonesi about writing a book. (12 RT 2102.) Then she admitted she had talked to him. Next she testified that she talked to appellant when he was in jail in Houston, and appellant wanted her to write a book about him. (12 RT 2103.)

Mrs. Riccardi denied that she and appellant didn't get along. She denied that appellant thought she was jeopardizing his father's health because she had 30 or 40 cats in the house and it was making his father sick (12 RT 2105.) She admitted that she had 20 to 30 cats in the house, but she

denied that this had an ill effect on Mr. Riccardi's health or that she had ever had a discussion with appellant about it. (12 RT 2106.)

Mrs. Riccardi admitted telling Detective Brown that the disagreement with her husband over whether appellant should turn himself in to authorities drove a wedge between her and her husband, and ended up ruining the marriage. (12 RT 2108.)

Mrs. Riccardi's testimony was far from reliable. There was no doubt she lied when she testified that she had reported appellant's confession to the F.B.I.. Her conflicting stories about whether she was planning on writing a book about appellant's life was not credible. Her story that she and appellant never argued about the ill effects her 20 cats had on appellant's father were not credible.

In examining whether Mrs. Riccardi's statements had particularized indicia of reliability, the judge had the following factors to consider: Lapse of time the before Mrs. Riccardi came forward with the statement; the two versions she provided; absence of F.B.I. documentation; unavailability of Pat Riccardi; the witness's strange behavior, and her bias. It was clear from the testimony presented at the 402 hearing that Mrs. Riccardi's testimony was completely unreliable. Therefore, her testimony of what Pat Riccardi

purportedly told her was far from trustworthy, and should have been excluded on Sixth Amendment grounds.

In the instant case, the facts reveal no particularized guarantees of trustworthiness nor adequate indicia of reliability. Consequently, appellant's federal rights under the confrontation clause were violated.

Appellant was denied his constitutional right to confront when evidence of a purported out-of-court statement was admitted against him without any evidence that testimony was particularly worthy of belief. This evidence also violated his federal right to due process and a fair trial under the Fourteenth Amendment.

E. PREJUDICE

Because the error in the introduction of the statements violated appellant's Sixth Amendment right of confrontation and Fourteenth Amendment right to due process, the standard of prejudice is that applicable to federal constitutional error rather than any lesser standard applicable to mere evidentiary error. (*Pointer v. Texas* (1965) 380 U.S. 400, 407-408; *People v. Powell* (1967) 67 Cal.2d 32, 56-57.) Appellant's conviction must be reversed unless this court is able to conclude that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 25.) Even under the standard in *Watson*, reversal is required, because it

is reasonably probable a result more favorable to appellant would have been reached had the error not occurred. *People v. Watson* (1956) 46 Cal.2d 818.)

This Court cannot find the admission of this evidence was harmless. The errors prejudiced appellant because Mrs. Riccardi's statements were compelling evidence in this circumstantial case. What could be more prejudicial that a son confessing to his father? If the jury believed the testimony of Rosemary Riccardi, they had no choice but to convict.

The conviction must be reversed.

VII. THE CONVICTION MUST BE REVERSED BECAUSE APPELLANT WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY DUE TO PUBLICITY FROM THE O.J. SIMPSON TRIAL AND HIS RIGHT TO DUE PROCESS, WHERE THE JURY RECEIVED INFORMATION ABOUT DOMESTIC VIOLENCE FROM SOURCES OTHER THAN IN THE COURTROOM

A. INTRODUCTION

Just as appellant's trial was set to begin, O.J. Simpson was arrested for the double murder of Nicole Simpson and her companion. Radio, television, and newspapers were filled daily with fact and unconfirmed rumor, experts offered opinions on all aspects of the case. Appellant moved for a continuance to let the hysteria subside. The defense submitted hundreds of news articles and affidavits from many experienced attorneys stating that appellant could not get a fair trial during this media frenzy. (5 RT 560, 5 RT 563, 5 RT 566, 5 RT 730; 6 RT 729-732, 6 RT 989; 7 RT 1133; 10 RT 1666, 10 RT 1804; 12 RT 2219-2222.)[13]

The facts of appellant's case and the O.J. Simpson case were strikingly similar. In both cases, the defendant was accused of killing his attractive young blond former lover and her companion. In both cases, no murder weapon was found. In both cases, after the double murder, the

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[13] These news articles were marked as Defense Special Exhibits S-A through S-NN-1, and are presently stored with the exhibits from the trial.

defendant immediately fled Los Angeles, a manhunt ensued, and the defendant was thereafter captured. There was much television coverage. In both cases the defendant threatened suicide. (9 RT 1371.) In both cases, the romantic relationship was a stormy one with the suspect allegedly threatening the victim, after which she sought help from the authorities. In both cases, the break-up was followed by repeated attempts and efforts to reconcile.

Because of these similarities and the hysterical media attention to domestic violence cases during this time period, it was impossible for appellant to get a fair trial.

B. THE RECORD BELOW

On May 23-30, 1994, the jury panel in appellant's case was sworn and examined as to hardship. (4 RT 435-545.) Nichole Simpson and Ron Goldman were murdered on June 12, 1994, and O.J. Simpson was taken in for questioning on June 13. Two counts of murder were filed against Simpson on June 17, 1994 (3 CT 565.) On that same day, Simpson was scheduled to turn himself in at police headquarters. Instead he slipped out and led the police on a massive manhunt, with the famous televised Bronco chase. (3 CT 576.) On June 19, 1994, headlines announced "Simpson Under Suicide Watch" (3 CT 578.) On July 8, Simpson's preliminary hearing

ended. (*Chronology of the O.J. Simpson Trials*, University of Missouri-Kansas City School of Law <http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonchron.htm> (as of November 29, 2003).)

Appellant filed his Motion for Continuance due to Pretrial Publicity on June 20, 1994. (3 CT 551-560.) The defense argued that both the O.J. Simpson case and the present case were out of West L.A., both involve stalking, both were double homicides, in both an attractive young blond woman and her companion were killed, both had no eye witnesses, no confession, no weapon, both involve flight, a manhunt, capture, TV coverage, alleged threats to kill, and attempted suicide. The defense requested a continuance, arguing that a change of venue would not help because there was no venue that was not affected by the O.J. Simpson case, and the defense needed time until the "lynch mob mentality" calmed down. (3 CT 551-560.)

The defense augmented the motion with affidavits from defense attorneys Louise Gulartie, Fritzie Galliani, Joel Isaacson, Ray Clark, Michael Nasatir, Victor Sherman, David Eldon, and Stanley Greenberg. (5 CT 595-610.) The defense also included news articles from the Los Angeles Times and Santa Monica Outlook. (5 CT 561-594.) The defense argued that District Attorney Gil Garcetti had been on the news saying

women are usually killed by someone they love. Garcetti was on the David Brinkley Show saying the defense is always looking for one juror to hang. The Simpson flight was featured on all the networks, and all the newspapers covered it. One hundred percent of the panel read these papers. (5 RT 567.)

As noted, the defense submitted the declarations of local defense attorneys in support of the motion. The attorneys pointed out that the O.J. Simpson case was broadcast across the entire United States, it was the number-one topic of interest in American households, it had caused TV viewer ratings to escalate dramatically because the public was interested in the details of the murder, Mr. Simpson's involvement, his flight, suicide threats, the manhunt, and his subsequent capture. (3 CT 595.) Because of the publicity there were no jurors that had not been impacted by the events involving Mr. Simpson. The danger to appellant was that the emotional evaluations which members of the public have already come to, as a result of the Simpson matter, would be carried over unconsciously and used in their evaluation of the evidence against appellant. Thus the jurors' evidentiary evaluation of appellant's case would be based not on the merits of the case but on facts that have only to do with Simpson matters, and publicity-broadcast events, and the jurors' individual emotional reactions to those broadcast facts. It was not possible to find jurors who have not been

exposed to O.J. Simpson material. However, it was possible to diffuse and minimize the emotional impact and spillover. This could be achieved by the lapse of time. (Louise B. Gulartie) (3 CT 597.)

The media hype had caused everyone to become an "expert" on "stalking" cases and the obvious guilt that flows from flight. The District Attorney had proclaimed that Mr. Simpson was guilty with the single problem being the ability to find a jury who could overcome the celebrity status of Mr. Simpson. Appellant had the same problem, without the celebrity status. (Joel Isaacson) (3 CT 601.)

During voir dire, the panel was questioned about their views on domestic violence in general. Several of them had been victims of abuse or stalking. (5 RT 705-711.) Two of the jurors who heard this case had some personal experience with domestic violence, but said they could be fair. (5 RT 707.)

The panel was not questioned at all about publicity or the O.J. Simpson trial.

The defense renewed and augmented the motion for continuance on this basis throughout the trial, and each time the motion was denied. (6 RT 729-32; 6 RT 989; 7 RT 1133; 10 RT 1804; 12 RT 2219-2222.)

The defense argued that all the attorneys in the O.J. Simpson case were holding press conferences. They argued that lawyers, prosecutors, law professors, psychiatrists, psychologists were all giving their opinions on wife abuse, spouse abuse, domestic violence, and none of them were subject to cross-examination on behalf of appellant (6 RT 988.) The Santa Monica Outlook had an article about probable guilt percentages for O.J. Simpson. Another Santa Monica Outlook had a front page story of O.J. Simpson, and an article about domestic violence. The jurors had been told not to read the media, but the coverage was overwhelming, and could not be ignored. (6 RT 989.) The defense argued that two judges in the building had stopped cases. Judge Altman said nobody in a domestic violence case could get a fair trial in this atmosphere. (10 RT 1804.)

C. APPLICATION OF THE LAW

The Sixth Amendment guarantees the right to be tried before a fair and impartial jury. (*Sheppard v. Maxwell* (1966) 384 U.S. 333.) When faced with a colorable claim that a trial court's denial of a change of venue motion may have denied the defendant a fair trial, the reviewing court must independently examine the record to determine "Whether, in light of the failure to change venue, it is reasonably likely that the defendant in fact received a fair trial." (*People v. Williams* (1989) 48 Cal.3d 1112,

1125-1126.) First, the court must consider, "the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim." (*Id.*, at p. 1125.) Second, review of the voir dire of the jurors actually selected may demonstrate that pretrial publicity had no prejudicial effect, or conversely may corroborate the allegations of potential prejudice. Based on these factors and guidelines, the court must decide if it is reasonably likely defendant did not have a fair trial. (*People v. Gallego* (1990) 52 Cal.3d 115.)

The offense in both the O.J. Simpson case and the present case was a double homicide. The extent of the publicity in the O. J. Simpson case was overpowering. The jury in the present case was not questioned about whether they had heard anything about the O.J. Simpson case, but it is clear that nobody in Los Angeles or anywhere in the United States could have avoided hearing about the case daily.

The public's imagination was gripped by the excitement of the O.J. Simpson publicity, and the experts and non-expert opinions on domestic violence. This media attention incited a significant amount of hostility toward any defendant charged with domestic violence or the murder of a spouse or loved one.

The O.J. trial did not take place until 1995, and the O.J. Simpson verdict was read on October 3, 1995. (*Chronology of the O.J. Simpson Trials*, University of Missouri-Kansas City School of Law <http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonchron.htm> (as of November 29, 2003).). However, during the entire period of appellant's trial, the O.J. Simpson media frenzy continued.

The fact that the O.J. Simpson case resulted in an acquittal does not change the argument. O.J. Simpson was a celebrity, and there were other factors that led to an acquittal. In the instant case, Mr. Riccardi, who was not a celebrity, had a jury that was prejudiced by the overwhelming O.J. Simpson publicity and media frenzy.

D. PREJUDICE

The media frenzy during the O.J. Simpson trial resulted in the dissemination of prejudicial opinions and information about domestic abuse and murder. A review of the record shows there is a reasonable likelihood that defendant did not receive a fair trial. This violated his federal rights to an impartial jury and to due process of law. (U.S. Const. Amend VI, XIV.) The conviction must be reversed. (*People v Gallego,* supra, 52 Cal.3d 115.)

VIII. THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

As detailed above, appellant's guilt phase trial was tainted by the following errors: (1) the trial court's failure to grant *Batson* motions; (2) the trial court's permitting the prosecution to introduce taped evidence of a witness and a detective stating their belief in appellant's guilt; (3) the trial court's limiting cross-examination of James Navarro; (4) the court's permitting the admission of hearsay statements; (5) the court's erroneous admission of evidence of victim's fear of appellant; (6) the trial court's erroneous admission of a hearsay statement made to appellant' now deceased father; and (7) the trial court's failure to grant a continuance due to O.J. Simpson pre-trial publicity.

As explained in the preceding arguments, virtually all of appellant's assignments of error involve violations of the federal Constitution, and therefore — assuming that this Court does not conclude that they are subject to per se reversal — call for review under the *Chapman*[14] standard. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691; *Delaware v. Van Arsdall supra*, 475 U.S. at p. 684.)

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[14] *Chapman v. California* (1967) 386 U.S. 18, 24.

In a case where multiple errors have permeated a defendant's trial, the reviewing court must look to their *cumulative* impact. (*People v. Stritzinger* (1983) 34 Cal.3d 505, 520-521; *People v. Hudson* (1982) 126 Cal.App.3d 733, 741; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622, cert. den. (1993) 507 U.S. 951.) Furthermore, when federal constitutional error is combined with other errors at trial, the appellate court must review their cumulative effect under the *Chapman* standard. The reviewing court is to consider the course of the defendant's trial as it would have been in the absence of all errors and then determine whether the combined errors which did occur were "harmless beyond a reasonable doubt." (*People v. Stritzinger*, *supra*, 34 Cal.3d at pp. 520-521.) In the face of the record of errors below, respondent cannot meet this heavy burden. Furthermore, with respect to the charges which resulted in death sentences, these cumulative errors deprived appellant of his right under the Eighth and Fourteenth Amendments to be sentenced in accordance with procedures which are reliable, rather than arbitrary and capricious. (*Johnson v. Mississippi* (1988) 486 U.S. 486, 584; *Beck v. Alabama* (1980) 446 U.S. 625, 638.)

Accordingly, appellant's convictions must be reversed.

SPECIAL CIRCUMSTANCE ISSUES

IX. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE BURGLARY SPECIAL CIRCUMSTANCE BECAUSE THE BURGLARY WAS INCIDENTAL TO COMMISSION THE MURDER

A. INTRODUCTION

There was insufficient evidence to support the burglary special circumstance because the burglary alleged was merely incidental to the murder.

B. PROCEEDINGS BELOW

Appellant was charged with two counts of murder and the special circumstances of multiple victims and murder committed while engaged in the commission of a burglary.

The prosecution informed the court that it intended to argue the burglary theory for the special circumstance but not for the theory of the case. (14A RT 2684.)

The jury found true the allegation that appellant had committed a homicide while engaged in the commission of a burglary. The verdict forms give no indication of their reasoning. (3 CT 763.)

C. BURGLARY MERELY INCIDENTAL TO MURDER

In reviewing the sufficiency of the evidence on appeal, this Court must review the whole record in the light most favorable to the prosecution

to determine whether it discloses substantial evidence such that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) A conviction based on insufficient evidence violates appellant's right to due process under the Fourteenth Amendment of the U.S. Constitution. (*Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337.)

A murder is not committed during a felony for purposes of the special circumstance unless it is committed to carry out or advance the commission of the felony. In other words, as applied here, the jury could not find true the burglary special circumstance if the burglary was "merely incidental to the commission of the murder." (*People v. Green* (1980) 27 Cal.3d 1, 61; *People v. Thompson* (1980) 27 Cal.3d 303; *People v. Garrison* (1989) 47 Cal.3d 746, 791.)

If the felony is committed only for the purpose of committing the murder, the murder is not committed during the commission of the felony, for purposes of applying the special circumstance. (*Ario v. Superior Court* (1981) 124 Cal.App.3d 285, 287-290 [where kidnapping was for purpose of murder, murder was not committed while defendant was engaged in kidnapping].)

In the case at bar, the prosecutor argued that the defendant broke into the condominium with the intent to kill or assault one of the victims. (15 RT 2808.) There was no evidence of a robbery or intent to rob. In fact, both victims' purses were found in the house with money and credit cards still in them, (8 RT 1325-1332), and the prosecutor argued that there was no evidence of theft or robbery. (15 RT 2808.) The record here establishes that the burglary was incidental to the killings.

As in the instant case, the record in *Green* established that the defendant's primary goal was not to steal but to kill (27 Cal.3d at p. 62), and in *Thompson* there was a serious question whether the perpetrator had any intent to steal at all. (27 Cal.3d at p. 323.)

It is true that the court instructed the jury, pursuant to *Green*, that "the special circumstance referred to in these instructions is not established if the "theft or other felony, to wit, assault with intent to commit great bodily injury" was merely incidental to the commission of murder." (16 RT 3105; 3CT 736.)[15]

But the evidence was insufficient to establish the *Green* requirement. The record, as set out above, contains substantial evidence showing that if

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[15] This instruction was erroneous; see issue IX.

appellant committed the murders, any burglary was merely incidental to the murders.

D. THE SPECIAL CIRCUMSTANCE AND THE DEATH JUDGMENT MUST BE REVERSED

In this case, the jury found both counts of first degree murder, and both special circumstances true: multiple murder and murder in the commission of a burglary. The guilt verdict and the second special circumstance must be reversed, for the reasons stated above. The penalty verdict must also be reversed, because it cannot be determined if the second special circumstance was considered in the verdict.

In the case at bar, the jury before fixing the penalty was instructed in accord with former Penal Code section 190.3, which states, "In determining the penalty the trier of fact shall take into account the existence of any special circumstance found to be true." Since the special circumstance was flawed, the death verdict must be reversed.

The crucial function of special circumstances under California law is to delimit eligibility for capital punishment — i.e., to furnish the "'meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'" (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147

quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.)

Given the closeness of the penalty determination, it is both cannot be said beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) that the failure to correctly instruct did not contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Accordingly, reversal is required, under any standard of prejudice.

X. THE SPECIAL CIRCUMSTANCE AND DEATH SENTENCE MUST BE REVERSED DUE TO INSTRUCTION ON A NON-EXISTENT SPECIAL CIRCUMSTANCE OF MURDER IN THE COMMISSION OF A THEFT

A. INTRODUCTION

Appellant was charged with two counts of murder (Pen. Code, § 187) of Connie Navarro (count one) and Sue Jory (count two). It was alleged that the murders were committed while appellant engaged in the commission of a burglary, within the meaning of section 190.2(a)(17) (1 CT 71); and there were multiple victims, within the meaning of section 190.2(a)(3). (1 CT 71; 15 RT 2800).

The prosecution informed the court that it intended to argue the burglary theory for the special circumstance but not for the theory of the case. The court gave erroneous instructions. The court instructed on the special circumstance of murder in the commission of a "theft," which is not a special circumstance at all. (16 RT 3105; 3CT 736.) The erroneous instructions violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments.

B. PROCEEDINGS BELOW

After the closing argument in the guilt phase by the prosecutor, the judge instructed the jury, in relevant part:

> To find the special circumstance referred to in these instructions as murder in the commission of a theft or other felony, to wit, an assault with intent to commit great bodily injury or with a deadly weapon, a handgun, is true, it must be proved:
>
> One, the murder was committed while the defendant was engaged in the commission of a theft or other felony, to wit, assault with intent to commit great bodily injury or with a deadly weapon, a handgun.
>
> Two, the murder was committed in order to carry out or advance the commission of the crime of theft or other felony, to wit, assault with intent to commit great bodily injury or with a deadly weapon, a handgun, or to facilitate an escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the theft or other felony, to wit, assault with intent to commit great bodily injury or with a deadly weapon, a handgun, was merely incidental to the commission of the murder.

(16 RT 3105)(3CT 736.)

Theft is not one of the enumerated felonies for a finding of special circumstance. (See Pen. Code, § 190.2, subd. (a)(17).)

C. THE ERRONEOUS INSTRUCTIONS DEPRIVED APPELLANT OF A FAIR TRIAL

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

Supreme Court has also elected to adopt the reasonable likelihood test for review of state law instructional issues. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

In this case, the instruction was not ambiguous, but plainly wrong on its face. The jury was instructed on the non-existent special circumstance of murder in the commission of a theft. The jury was not instructed on the elements of theft. The jury was instructed on murder in the commission of a burglary. The jury was not told how to reconcile these instructions.

The instruction on the non-existent special circumstance allowed the jury to find a special circumstance true without a finding beyond a reasonable doubt of all the elements of the crime of burglary. For a true finding on the special circumstance of burglary, the jury was instructed that they must find that the defendant entered a building; and at the time of the entry, that person had the specific intent to steal and take away someone else's property, and intended to deprive the owner permanently of that property, or at the time of the entry, that person had the specific intent to commit a theft or other felony, to wit, assault with intent to commit great bodily injury or with a deadly weapon, a handgun. (3 CT 739; 16 RT 3106-3107.)

The jury was not instructed on the elements of theft.

It is reasonable likely that the jury found that the burglary was merely incidental to the commission of the murder. (See issue VII.) If they rejected the burglary special circumstance on that theory, it is reasonably likely that they considered the special circumstance of murder in the commission of a theft, to which they had been instructed.

D. THE SPECIAL CIRCUMSTANCE AND THE DEATH JUDGMENT MUST BE REVERSED

The instructional errors discussed above violated appellant's right, under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, to have the jury resolve, beyond a reasonable doubt, all of the elements of the crimes with which he was charged. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) In this case, the jury found both counts of first degree murder, and both special circumstances true: multiple murder and murder in the commission of a burglary. The second special circumstance must be reversed, for the reasons stated above. The penalty verdict must also be reversed, because it cannot be determined if the non-existent theft special circumstance was considered in the verdict.

In the case at bar, the jury, before fixing the penalty, was instructed in accord with Penal Code section 190.3, which states that "In determining the penalty the trier of fact shall take into account the existence of any

special circumstance found to be true." Since the special circumstance was flawed, the death verdict must be reversed.

Where the error is a constitutional error, a reversal is required unless this Court can say that the error did not contribute to the verdict beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. 18, 21.) Both state and federal due process demand that when the government is attempting to take an individual's life, a higher standard of scrutiny of errors be employed, and therefore, the *Chapman* standard is mandated for errors which effect the penalty.

If the error is deemed a state law violation, it must be reviewed under the reasonable-possibility test of *People v. Brown* (1988) 46 Cal.3d 432. In that case, this Court reaffirmed the reasonable-possibility test as the appropriate test for assessing the effect of state-law error in the penalty phase of a capital trial.

Given the closeness of the penalty determination, it is reasonably possible that the failure to correctly instruct contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

The Eighth Amendment imposes "a high requirement of reliability" on the capital sentencing process. (*Mills v. Maryland* (1988) 486 U.S. 367.)

The Eighth Amendment also requires that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) The failure to heed basic state procedures when imposing the death penalty, in turn, violated federal due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Accordingly, reversal is required, under any standard of prejudice.

XI. THE DEATH PENALTY MUST BE SET ASIDE BECAUSE THE COURT ERRONEOUSLY ALLOWED TWO ALLEGATIONS OF MULTIPLE MURDER SPECIAL CIRCUMSTANCES TO BE CONSIDERED AS AGGRAVATING FACTORS

A. INTRODUCTION

Appellant was charged with two counts of murder (Pen. Code, § 187, subd. (a)). It was further alleged that the murders were committed while appellant engaged in the commission of a burglary, within the meaning of section 190.2(a)(17); and there were multiple victims, within the meaning of section 190.2(a)(3). (CT 71.) Prior to closing arguments the court granted the prosecutor's request, over objection, to amend the information alleging multiple murders as to both victims. (15 RT 2800.) Defendant was found guilty of two counts of first degree murder (Pen. Code, § 187, subd. (a)), and the jury found true two multiple-murder special circumstance allegations (Pen. Code, § 190.2, subd. (a)(3)), as well as a burglary special circumstance. (3 CT 763-764.) The true findings in the two multiple murder special circumstances were considered as aggravating factors by the jury in the penalty phase. This was error.

B. TWO ALLEGATIONS OF MULTIPLE MURDER IS PROHIBITED

The rule of *People v. Harris* (1984) 36 Cal. 3d 36, 67, prohibits more than one multiple murder special circumstance in a single proceeding. The court said this practice "inflates the risk that the jury will arbitrarily impose the death penalty." The appropriate manner of charging in this situation is to allege one multiple murder special circumstance, separate from the individual murder counts. The restriction of the multiple murder special circumstance only applies to death penalty cases. (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1562.)

The *Harris* rule, prohibiting more than one multiple murder special circumstance in a single proceeding, has been consistently followed. But a failure to apply the rule has been held not to be prejudicial, because the jury is aware of the actual number of murders alleged. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 787; *People v. Odle* (1988) 45 Cal.3d 386, 409 [two special circumstances charged and found; one vacated]; *People v. Daniels* (1991) 52 Cal.3d 815, 876 [only one special circumstance should be charged when there are multiple murders, but superfluous findings are generally not prejudicial]; *People v. Diaz* (1992) 3 Cal.4th 495, 565 [defendant was improperly charged with 12 multiple murder special

circumstances, all of which were found true; 11 were set aside].) Appellant would argue that these cases were wrongly decided.

C. PREJUDICIAL EFFECT OF EXCESSIVE SPECIAL CIRCUMSTANCES

The death penalty must be set aside because the jury was erroneously allowed to consider three special circumstances as aggravating factors when, as we have noted, only two special circumstances were properly to be considered as aggravating factors.

Where the error is a constitutional error, a reversal is required unless this Court can say that the error did not contribute to the verdict beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. 18, 21.)

If the error is deemed a state law violation, it must be reviewed under the reasonable-possibility test of *People v. Brown*, *supra*, 46 Cal.3d 432. In that case, this Court reaffirmed the reasonable-possibility test as the appropriate test for assessing the effect of state-law error in the penalty phase of a capital trial.

Any "substantial error" at the penalty phase of a capital case requires reversal of a judgment of death. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 (plur. opn.) & 63 (Broussard, J., conc.).) Whether an error concerning the evidence used by a jury in its sentencing decision is "substantial," requires "a careful consideration whether there is any reasonable possibility

that [the] error affected the verdict." (33 Cal.3d at p. 63 (Broussard, J., conc.); *People v. Davenport* (1985) 41 Cal.3d 247, 280 (plur. opn.) & 295 (Broussard, J., conc.); *People v. Phillips* (1985) 41 Cal.3d 29, 83 (plur. opn.), 84 (Kaus, J., conc.) & 85-89 (Bird, C. J., conc. & dis.).) Furthermore, as Justice Broussard observed, "[w]e cannot . . . avoid that analysis on the grounds that no one knows what seemingly insignificant factor might have tipped the scales in the mind of a single juror." (*People v. Robertson*, *supra*, 33 Cal.3d at p. 63.)

Given the "special need for reliability" in the sentencing phase of a capital trial (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584), the Fifth and Eighth Amendments likewise require reliability with regard to the critical findings in a capital case. Appellant submits that the court's failure to instruct correctly violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishments, and his right to equal protection under the Fourteenth Amendment.

The jury was instructed to consider all of the evidence, and to be guided by the statutory factors, among which were "the circumstances of the crime in which the defendant was convicted in the present proceeding

and the existence of any special circumstances found to be true." (Pen. Code § 190.3(a); 16 RT 3210.) These instructions, which permitted the jury to consider the excessive multiple murder special circumstance, placed extra emphasis on the fact that there were two murders. While this error did not permit consideration of any evidence that was not otherwise admissible and relevant to the penalty decision, it cannot be determined whether it tipped the scales in the mind of a single juror.

These facts were emphasized by the prosecutor during his penalty phase argument, in which he told the jury that "the major factor that you can consider is the circumstances of the crime . . . and the existence of any special circumstance found to be true." (16 RT 3184.)

In view of the facts above, a court cannot be confident the jury understood the scope of its sentencing role, and that it did not consider the extra special circumstance in its determination of whether death was appropriate in this case. The People's penalty evidence depended on victim impact evidence and the special circumstances. Under either standard, this error affected the penalty verdict.

The sentence of death must be reversed.

PENALTY PHASE ISSUES

XII. THE PROSECUTOR COMMITTED MISCONDUCT DURING THE PENALTY PHASE BY ASKING QUESTIONS OF WITNESSES WHICH CALLED FOR INADMISSIBLE PREJUDICIAL RESPONSES

A. THE DISTRICT ATTORNEY COMMITTED MISCONDUCT IN QUESTIONING DEFENSE WITNESS REVEREND HENRY KANEY

People v. Pitts (1990) 223 Cal. App.3d 606, described a prosecutor's duty to refrain from improper tactics and insure that a fair trial takes place:

> 'Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.]'" (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) A prosecutor has a duty to prosecute vigorously. "But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321, 55 S.Ct. 629].) Misconduct need not be intentional in order to constitute reversible error. (*People v. Bolton* (1979) 23 Cal.3d 208, 214 .)

(*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 691.)

The prosecutor in this case engaged in misconduct by way of asking improper questions of a defense witness. This served to deny appellant a fair jury trial and violated his rights to due process of law and a reliable

penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) This misconduct took two forms: (1) Improperly acting as his own unsworn witness while cross-examining Reverend Henry Kaney regarding whether Kaney told the prosecutor on the phone that he thought appellant was guilty; and (2) Asking Reverend Kaney whether he thought appellant was merciful when he killed the victims. These instances of misconduct are discussed in turn below.

During the prosecutor's cross-examination of defense witness Reverend Henry Kaney there occurred the following exchange:

> [D.A. BARSHOP]: Mr. Kaney, I have talked to you on the telephone?
> [KANEY]: Yes.
> [D.A. BARSHOP] And, in fact, I asked you, I think, do you believe that John Riccardi killed Connie Navarro and Sue Jory. I asked you that question on the telephone.
> [KANEY] : Yes.
> [D.A. BARSHOP]: And you said that —
> [DEFENSE COUNSEL JONES]: Objection, Your Honor. It's irrelevant.
> [THE COURT]: Objection sustained.
> [D.A. BARSHOP]: Well, doesn't that have an effect on your ability to decide whether or not what the appropriate punishment is—
> [KANEY]: No.
> [D.A. BARSHOP]: — what your mental set it as to whether or not he did the crime?

> [KANEY]: No.
> [D.A. BARSHOP]: Doesn't make a difference to you?
> [KANEY]: It always makes a difference, yet that is not in my hands right now. In my hands right now is to share with the court that I love this man and that if it was up to me, I would be merciful. But I don't believe its up to me.
> [DA BARSHOP]: Do you believe he was merciful when he killed Sue Jory and Connie Navarro?
> [DEFENSE COUNSEL JONES]: Your honor, I object. Its argumentative, its inappropriate, and misconduct.
> [THE COURT]: Objection overruled on the latter grounds but sustained on other grounds.

(16 RT 3162.)

1. Improperly Acting as His Own Unsworn Witness in Questions to Reverend Kaney Regarding Kaney's Telephone Conversation with the Prosecutor about Whether Kaney Thought Appellant Killed the Victims

"It is always misconduct for a prosecutor to bring before a jury facts from his own experience." (*People v. Whitehead* (1957) 148 Cal.App.2d 701, 706.) Here, it was totally improper for the prosecutor to ask Reverend Kaney whether he told the prosecutor on the telephone that he believed appellant killed the victims. This amounts to unsworn testimony by the prosecutor and violates the advocate-witness rule which generally prevents an attorney from testifying in a case where he is counsel to a party. (*United States v. Prantil* (9th Cir. 1985) 756 F.2d 759, 882 n.3.) Defense counsel's

objection was proper and should have been sustained. And, after the court sustained the first objection, the prosecutor persisted in further questioning on the same subject.

Secondly, Kaney's opinion of whether appellant was guilty was irrelevant. Kaney was a defense witness at the penalty phase. He testified that he was an old friend of appellant, that appellant was despondent over Connie breaking up with him, that appellant cared for her, and didn't know how to deal with the break-up. He testified that appellant was like a brother to him, and he asked the jury to show him mercy. (16 RT 3160.) His opinion, in the penalty phase, of whether he thought appellant was guilty, had no relevance to the issue of whether appellant should be sentenced to life or death. The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct. The rule is well established that the prosecuting attorney may not interrogate witnesses solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given. (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 734; see also *People v. Bell* (1989) 49 Cal.3d 502, 532.)

Improper cross-examination is not cured even if the witness gives a negative answer.

> By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question . . . It is quite reasonable to assume that, in spite of [the] negative responses in the instant case, the jurors were led to believe that, in fact, the insinuations were true.

(*Pitts*, *supra*, 223 Cal.App.3d at p. 734.)

In short, a trial court should ensure that counsel was not "asking a groundless question to waft an unwarranted innuendo into the jury box." (*Michelson v. United Prosecutors* (1948) 335 U.S. 469, 481).

Here, the defense objection had been sustained, yet the prosecutor continued to question Kaney about his opinion of appellant's guilt. It is misconduct for a prosecutor to continue to engage in a forbidden line of questioning after the trial court has indicated that this line will not be permitted. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 252; *People v. Rich* (1988) 45 Cal.3d 1036, 1088.)

2. Misconduct by Way of Asking Reverend Kaney Whether Appellant Was Merciful when he Killed the Victims

During the prosecutor's examination of Reverend Henry Kaney there was the following exchange:

> [DA BARSHOP]: Do you believe he was merciful when he killed Sue Jory and Connie Navarro?

> [DEFENSE COUNSEL JONES]: Your honor, I object. Its argumentative, its inappropriate, and misconduct.
> [THE COURT]: Objection overruled on the latter grounds but sustained on other grounds.

(16 RT 3162.)

Defense counsel moved for a mistrial. The defense argued that the question to Reverend Kaney was inappropriate, and could not have been anything other than intentional and in bad faith. The motion was denied. (16 RT 3173.) The defense raised the issue again in the motion for new trial. This motion was denied as well. (17 RT 3292; 4 CT 1060.)

B. THE PROSECUTOR'S PURPOSE WAS TO INFLAME THE PASSIONS OF THE JURY

It was clearly improper for the prosecutor to place before the jury this sort of question, which could only be intended to inflame the jury against the defendant. "The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct." (*People v. Bell*, *supra*, 49 Cal.3d at p. 532; *People v. Fusaro* (1971) 18 Cal.App.3d 877, 886.)

It was highly unfair for the prosecutor to effectively undercut and discredit Reverand Henry Kaney's testimony by placing before the jury the question of whether Kaney thought appellant showed mercy when he

murdered he victims. It was highly prejudicial for the prosecutor to inflame the jury against appellant in this dramatic appeal to raw emotions.

C. THE PROSECUTOR'S MISCONDUCT WAS PREJUDICIAL

The cumulative impact of this misconduct was to deny appellant a fair jury trial and violate his rights to due process of law and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United State Constitution. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *People v. Bell*, *supra*, 49 Cal.3d at p. 534.) Where, as in the present case, prosecutorial misconduct serves to effectively deprive a defendant of constitutional safeguards, review is required under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, and reversal is mandated unless the state can prove beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Bolton*, *supra*, 23 Cal.3d at pp. 214-215, fn. 4; *People v. Barajas* (1983) 145 Cal.App.3d 804, 810-811.)

The implication that even appellant's close friend did not believe appellant, but was hiding it from the jury, was extremely prejudicial. The argument that appellant did not deserve mercy because he had not shown mercy was designed to appeal to the jury's passion or bias in order to

prejudice appellant. What murderer in a death penalty case showed "mercy"?

The prejudicial consequences of the above-cited misconduct tainted appellant's penalty trial in several respects. At the penalty phase, the prosecutor presented the children of the victims, who testified at length to how the deaths of their mothers had impacted their lives. (16 RT 3135-3144.) The prosecutor focused on this testimony in his closing argument (16 RT 3189.) The defense presented two witnesses, old friends of the defendant, who testified that the defendant should be given mercy. In weighing the various factors under section 190.3, the jury likely decided that if appellant's friends did not think he was innocent, but were hiding that fact from the jury, that alone was reason enough to discount their testimony, and impose death.

It is clear that the decision of whether to vote for death or life was a close one here. After a full day of deliberations in the penalty phase, the jury sent out a note, asking if it took a unanimous vote to vote for life:

> Your Honor: The instructions state quite explicitly that all 12 jurors must agree in order to render a verdict. The question is, does this apply only for the death sentence, and if so does any one or more dissenting vote automatically set a sentence of life imprisonment without

> chance of parole, or does the life imprisonment sentence have the vote of the 12 jurors also?

(CT 774; RT 3217; see Issue XIV.) This Court cannot say that the error was harmless beyond a reasonable doubt. This Court should reverse appellant's conviction.

XIII. PENALTY PHASE VICTIM IMPACT EVIDENCE VIOLATED APPELLANT'S STATE AND FEDERAL RIGHTS

A. INTRODUCTION

During the penalty phase, the prosecutor introduced extensive victim impact evidence from the children of the two victims. The testimony was extremely emotional and unquestionably devastating to appellant's ability to obtain a fair penalty determination. Introduction of the victim impact evidence in this case effectively precluded any meaningful consideration by the jury of the appropriate penalty, and violated appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

As discussed more fully below, the introduction of victim impact evidence violated appellant's right to due process and a fair penalty determination. First, the capital crime prosecuted in this case occurred in 1983, prior to the 1991 change in the law that permitted the introduction of some kinds of victim impact evidence. Second, even if some victim impact evidence was admissible, the excessive amount and unduly prejudicial nature of the evidence which the trial court did admit rendered the trial fundamentally unfair. Third, this evidence, found by a jury to be true, but not beyond a reasonable doubt, violated appellant's right to due process and to a jury determination under *Ring v. Arizona* (2002) 536 U.S. 584. Because

this evidence was critical in securing a death sentence against appellant, reversal is required.

B. THE TESTIMONY AND ARGUMENT AT THE PENALTY PHASE

Eleven years had elapsed between the homicides in 1983 and the trial in 1994. The two children of the victims testified at the penalty phase.

Christianne Jory, who was 25 years old at the time of the trial, was 13 years old when her mother, Susan Jory, was murdered. She testified that on the date the bodies were discovered, she was at home waiting for her mom. (16 RT 3137.) Her life was never the same after the murders, she didn't have a mom anymore. The person most like a brother to her was David Navarro, and after the murders he didn't have a mom either. Christianne's family and the Navarro family used to do things together. She called Connie Navarro her aunt. After the murders, Christianne had to go live with her father. (16 RT 3137.) Living with her father was terrible, he had step-children. He had a new wife who didn't expect to have children living in the house. She did not get along with the step-mother, and locked herself in her room for four years. She was in therapy for six years. (16 RT 3138-9.) When she was 13 she wrote a letter to appellant asking how he could have been so selfish to ruin everyone's life. (16 RT 3138).

David Navarro, who was 27 years old at the time of the trial, was 15 when his mother Connie Navarro was killed. He testified that the murder destroyed his whole life. He was not emotionally able to handle it. His father fell apart, and David had to take care of him. (16 RT 3140.) David started to take drugs. He felt like he had to take care of his father but there was no one there to take care of him. (16 RT 3141.) Before the murders, his mom had been there for him, and his father had too, but now his father was so emotionally upset he was no longer capable of taking care of David. David started using drugs and developed a thousand-dollar a day heroin habit. He was suicidal. He intentionally overdosed five times but was saved by people around him. (16 RT 3141.)

David was in and out of therapy, and in rehabilitation hospitals seven times. He lost out on two wonderful relationships because of his inability to commit, and his fear of intimacy. He was always afraid the one he loved would leave him. (16 RT 3141.)

David always blamed himself for his mother's death. He felt that if he had told his mother that appellant had handcuffed him, maybe she would have been warned and the murder might never have happened.[16] David testified he had nightmares about appellant, and he had been afraid of

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[16] (9 RT 1376.)

appellant ever since the murders. He had always thought that appellant would come after him or his father. He had always been afraid of his father dying, and he was prepared that anyone close to him could just be snatched away in the blink of an eye. David was a complete pessimist, who lived his life thinking that the worst possible thing that is conceivable can happen at any moment. He has prepared his life for the worst possible things. (16 RT 3142.)

After ending his cross-examination of David Navarro, the prosecutor re-called him to testify that he now attends Alcoholics Anonymous and has been clean for over two and a half years. (16 RT 3140-3145.)

In his closing argument, the prosecutor argued that the jury should consider the long term effects on the families. He argued:

> And Christy told you that she hid in another room for four years because her life was changed completely because she wasn't with her mom, that she was with a dad she didn't know and stepmother that she didn't want. That didn't want her.
>
> And David, you heard his testimony regarding his own guilt and his own fear. And David's guilt is certainly something that each of us understands. His guilt, which is certainly not true, but in the mind of a 15-year-old boy, and something that will never get out of his mind, is that if I only told my mother that Dean had handcuffed me in the bathroom, maybe she would have realized how serious this really was.

And that he feels guilty and it has affected his life, and it has affected his life for 11 years.

I want you to notice something else. David wanted to get back up on the stand to say that he's been clean and sober for two and a half years, which I think is just wonderful. And this is a great kid. And in thinking about that, I want you to relate it to the fact that the defendant was caught in January 1991, which is over three years ago. So maybe there is a relationship to that.

And ultimately, I'm not one for psychological terms, but there has to be a closure in relation to a case as it applies to an individual. And here, for Christy and David, and members of Connie and Sue's family, maybe there is a closure by the conviction of this defendant. And maybe even some peace as to both of these young adults. And maybe they can go forward with their lives now. I hope so . . .

Ultimately, you have to consider sympathy in relation to the defendant. And whether he's entitled to mercy, you heard Mr. Carney — Kaney, excuse me, talk about mercy in relation to the defendant regardless of whether he had committed the crime, regardless of whether he had shown mercy or sympathy to the two victims . . .

And the rhetorical — or the return comment I have is that we know the defendant on March the 3rd showed no sympathy, no mercy, for either of these two victims, that he coldbloodedly killed both of them.

Clearly we know that Sue Jory's hand was raised in horror as she was shot, and there's a defensive wound. So she's looking directly at the defendant, and the defendant doesn't care at all, because he kills the witness. And the defendant was the judge, the jury and the executioner.

> What you should consider is that Connie Navarro never got to see her son grow up to be a young man. That Sue Jory never got to see her daughter grow up to womanhood.

(16 RT 3186-3188.)

C. EX POST FACTO APPLICATION

The crimes charged in this case occurred in 1983 and the penalty phase of the trial took place in 1994. At the time of the homicide and for eight years thereafter, 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, [appeal involving a 1983 homicide, held that evidence of the impact of the crime on the victim's family was inadmissible]; *People v. Love* (1960) 53 Cal.2d 843, 854-857, [evidence whose only purpose was to show the jury how much the victim had suffered was inadmissible]; (*People v. Levitt* (1984) 156 Cal.App.3d 500, [non-capital case held that the purpose of sentencing is to punish defendants in accordance with their level of culpability. "In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in a civil action,

but it has no relationship to the proper purposes of sentencing in a criminal case.])

By the time appellant's case went to trial in 1994, the law on the admissibility of victim impact evidence had changed. In 1987, the U.S. Supreme Court had ruled that it was reversible error to admit victim impact evidence in the trial of a 1983 homicide because that introduction of victim impact evidence at the sentencing phase of state capital murder trial violated the Eighth Amendment; the information was irrelevant to a capital sentencing decision, and its admission created a constitutionally unacceptable risk that jury might impose the death penalty in arbitrary and capricious manner. (*Booth v. Maryland*, *supra*, 482 U.S. 496.)

But in 1991, the U.S. Supreme Court overruled *Booth* and held that certain types of "victim impact" evidence may be admissible in capital trials. (*Payne v. Tennessee* (1991) 501 U.S. 808.) However, the *Payne* opinion did not mandate the introduction of such evidence, nor did it suggest that such evidence should be admitted in all capital cases. It only found no Eighth Amendment bar to victim impact evidence in general. As Justice O'Connor stated in her concurrence: "We do not hold today that victim impact evidence must be admitted, or even that it should be admitted." (501 U.S. at p. 831.)

Closely following *Payne*, this Court held in *People v. Edwards* (1991) 54 Cal.3d 787, that factor 190.3(a), the circumstances of the capital murder for which defendant had been convicted in the current prosecution, generally authorizes the presentation of victim impact evidence. (54 Cal.3d at pp. 835-836.)

Under the state of the law existing at the time the charged capital case in this case was committed in March 1983, victim impact evidence was inadmissible on both federal constitutional and state evidentiary law grounds. Had the trial taken place prior to 1991, the prosecution would have been precluded from introducing victim impact evidence against appellant. However, as a result of the 1991 *Payne* and *Edwards* decisions, the trial court permitted the prosecution to introduce extensive victim impact testimony. This modification of substantive law regarding admission of victim impact evidence violated appellant's right to due process because it constituted a retroactive modification of the pre-existing statutory and constitutional law on the subject. Permitting the prosecution to circumvent previously settled law through the retroactive application of *Edwards* in order to deprive appellant of his interest in continued life offended principles of fundamental justice. (See *Carmell v. Texas* (2000) 529 U.S.

513 [addressing the defendant's interest in mere personal liberty, not to a defendant's vastly greater interest in life itself].)

Ex post facto laws are prohibited by both the state and federal Constitutions. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Although these provisions refer to retroactive legislative enactments, similar restrictions on retroactive judicial decisions are provided by the constitutional requirement that the defendant receive due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15; *Rabe v. Washington* (1972) 405 U.S. 313; *Bouie v. City of Columbia* (1964) 378 U.S. 347; *People v. Davis* (1994) 7 Cal.4th 797, 811-813.)

The U.S. Supreme Court's recent decision in *Stogner v. California* (2003) 123 S.Ct. 2446, provides support to the above analysis. In *Stogner*, the Court held that the ex post facto clause bars application of a newly enacted law that revived time barred cases. The Court examined the history of the ex post facto clause and reaffirmed that the four types of ex post facto laws found in Justice Chase's opinion in *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 390 [1 L.Ed. 648] still apply:

> 1st Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.

2d Every law that aggravates a crime, or makes it greater than it was, when committed.

3d Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

4th 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 offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive."

(*Calder*, *supra*, at pp. 390-391, 1 L.Ed. 648.)

The discussion of ex poste facto laws in *Calder* has been cited time and again, including in the U.S. Supreme Court's decision in *Carmell v. Texas*, *supra*, 529 U.S. 513. There, the Court reaffirmed that the prohibition against ex post facto laws includes the fourth category of laws cited by Justice Chase: those which alter the legal rules of evidence [retroactive application of amended statute which reduced required corroboration of victim effectively reduced the amount of evidence required for a finding of guilt and violated ex post facto prohitition]. (See also *In re Melvin* (2000) 81 Cal.App.4th 742, 758 [by allowing commitment to the Youth Authority on less and different evidence than previously required, amended version of the Welfare and Institutions Code section 777, subdivision (a) fell into the fourth category of impermissible ex post facto laws].)

Courts have found rules to be ex poste facto violations if a rule increases the punishment for a crime retroactively. The increase in punishment need not be direct. The increase is improper if it results in a change in the sentencing formula that works to the disadvantage of the accused. (*Miller v. Florida* (1987) 482 U.S. 423, 432-433 [application of state sentencing guidelines to defendant, whose crimes occurred before their effective date, violated the ex poste facto clause]; *Weaver v. Graham* (1981) 450 U.S. 24, 34-36 [statute reducing good time credits, as applied to a prisoner whose crime was committed before its effective date, the statute reducing the amount of good time credit violated the ex post facto clause].)

The critical question here is whether the retroactive application of this court's decision in *Edwards*, which for the first time permitted the introduction of victim impact evidence in a California capital case penalty phase, violated the ex poste facto prohibition and appellant's constitutional right to due process when it was used to admit devastating victim impact evidence here. It did.

In generally sanctioning the admission of victim impact evidence in California courts, *Edwards* did not simply alter a minor rule of evidence, or change a rule that could potentially benefit the defense as well as the prosecution. Rather, it opened the floodgates for the introduction of a whole

new class of emotionally charged evidence that renders substantially easier the prosecution's ability to obtain a death sentence. The victim impact testimony admitted in this case was used to devastating effect to convince the jury to impose the death penalty.

In the closing argument in appellant's penalty phase, the prosecutor quoted the testimony of the two children at length, and argued that they needed closure to bring them peace. (16 RT 3187.) The only other factor cited by the prosecution in its closing argument was the defendant's prior felony conviction. (16 RT 3184.) Consequently, the introduction of victim impact evidence was devastating and violated appellant's constitutional right to due process under the Fourteenth Amendment.

D. EVEN UNDER *PAYNE V. TENNESSEE* THE VICTIM IMPACT EVIDENCE IN THIS CASE VIOLATED APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS

Even if this Court concludes that application of *Payne* and *Edwards* does not violate ex poste facto rules, appellant's death sentence must be vacated because the victim impact evidence here was inadmissible even under those cases.

In *Payne v. Tennessee* (1991) 501 U.S. 808, the defendant, who lived in an apartment building with his girlfriend, made sexual advances to the 28-year-old woman next door. When the woman screamed at him to leave,

the defendant stabbed her 84 times, and also stabbed her two-year-old daughter and three-year-old son. The daughter died, but the son, Nicholas, miraculously survived, but not until undergoing seven hours of surgery and blood transfusions. (*Id.* at p. 812.) The defendant denied culpability at trial, and at the penalty phase presented testimony of his mother, father, and girlfriend, who testified that Payne was a good loving man, and testimony of a clinical psychologist, who testified Payne had a very low I.Q. (*Id.* at p. 814.) The prosecutor presented the testimony of the victim's mother, who testified that Nicholas regularly cried for his mom, he didn't understand why she could not come home. And he cried for his sister, saying he missed her and was worried about her. (*Id.* at p. 815.)

In his closing argument, the prosecutor argued that there was nothing the jury could do for the dead victims. But there was something they could do for little Nicholas. (501 U.S. at p. 815.) He argued that they should think about the brother who mourned for his little sister every single day and wanted to know where his best playmate was. He argued that the impact of the murders on Nicholas went to why the murders were especially cruel, heinous and atrocious, "the burden that child will carry forever." (501 U.S. at p. 816.)

The state Supreme Court held that the evidence was irrelevant but harmless. The U.S. Supreme Court overruled *Booth*, and held that the Eighth Amendment erects no per se bar prohibiting a capital sentencing jury from considering victim impact evidence.

While the Supreme Court in *Payne* held that *Booth* was wrongly decided, the Court expressly recognized that, in appropriate cases, focusing the jury's attention on victim impact may nonetheless violate the U.S. Constitution:

> We do not hold today that victim impact evidence must be admitted or even that it should be admitted. We hold merely that if a state decides to permit consideration of this evidence the Eighth Amendment erects on per se bar. If in a particular case a witness' testimony or a prosecutor's remark so infects the sentencing proceeding so as to render it fundamentally unfair, the defendant may seek appropriate relief under the due process clause of the Fourteenth Amendment.

(*Payne v. Tennessee*, *supra*, 111 S.Ct. at p. 2612, (O'Connor, J., concurring).)

Appellant submits that the prosecutor's focus on victim impact evidence in this case was so substantial as to render the sentencing proceeding fundamentally unfair, in violation of the due process clause of the Fourteenth Amendment. It is critical to note that this is not a case

involving brief or passing reference to victim impact. (Cf. *People v. Ghent* (1987) 43 Cal.3d 739, 771-772 [finding harmless error because prosecutor's remarks were "brief and mild."].) On the contrary, the prosecutor's entire presentation and argument in the penalty phase in this case was based upon victim impact evidence.

A decision to impose the death penalty must be based on reason, not emotion. (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) Here, the prosecutor's impassioned focus on the impact of the victims' death on their two children was designed to inflame the jury's emotions and produce a judgment predicated on revenge and emotion rather than reason. Under the particular facts of this case, the prosecutor's victim impact evidence and closing argument in the penalty phase so infected the sentencing proceeding as to render it fundamentally unfair, compelling reversal under the due process clause of the Fourteenth Amendment.

Appellant acknowledges that this Court has rejected a similar issue in previous cases. (*People v. Marks* (2003) 31 Cal.4th 197; *People v. Boyette* (2002) 29 Cal.4th 381; *People v. Zapien* (1993) 4 Cal.4th 929; *People v. Fiero* (1991) 1 Cal.4th 173.) Appellant reasserts his challenge, both because those cases were wrongly decided, and because the extreme

facts in the case at bar render the sentencing proceeding fundamentally unfair.

E. A DEATH VERDICT BASED ON VICTIM IMPACT EVIDENCE WITHOUT PROOF BEYOND A REASONABLE DOUBT VIOLATES *RING V. ARIZONA*

In the instant case, the aggravating factors were found to be true by a jury, but not unanimously or by proof beyond a reasonable doubt. The aggravating factors argued in this case were the circumstances of the crime, the defendant's age, and the victim impact evidence. (Pen. Code, § 190.3) [beyond a reasonable doubt is required only as to factor B, and unanimity is required only as to the final normative decision of whether to impose death after the factual determinations have been made.]

In *Ring v. Arizona* (2002) 536 U.S. 584, the Court held that under the sentencing scheme in Arizona,[17] appellant's maximum sentence after the guilt phase was life without parole, and not until the sentencer found aggravating factors was his sentence maximum increased to death. The U.S. Supreme Court said:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi*

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[17] This Court found Arizona's sentencing scheme to be the "functional equivalent" to California's on this point. (*People v. Ochoa* (2001) 26 Cal.4th 398.

> majority's ruling that, because Arizona law specifies death or life imprisonment as the only sentencing options for the first-degree murder of which Ring was convicted, he was sentenced within the range of punishment authorized by the jury verdict. This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one of effect, not form. 530 U.S., at 494, 120 S.Ct. 2348. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the guilty verdict. *Ibid.* The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, *id.*, at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting), for it explicitly cross- references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting. See *id.*, at 541, 120 S.Ct. 2348. Arizona's argument based on the Walton distinction between an offense's elements and sentencing factors is rendered untenable by *Apprendi*'s repeated instruction that the characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question "who decides," judge or jury. See, e.g., 530 U.S., at 492, 120 S.Ct. 2348.

(*Ring* at p. 587.)

Since the victim impact evidence was used to increase appellant's sentence, a unanimous finding of true beyond a reasonable doubt was required. (*Ring v. Arizona, supra.*) (See Issue XV.)

F. PREJUDICE

In this case the extensive victim impact evidence was unnecessary to the understanding of the crime, and conveyed to the jury that appellant deserved a death sentence because of the psychological pain of the children of the victims. The prosecutor's impassioned focus on the impact of the victims' deaths upon their children was designed to inflame the emotions and produce a judgment predicated on revenge and emotion rather than reason. In his closing argument, the prosecutor argued:

> And Christy told you that she hid in another room for four years because her life was changed completely because she wasn't with her mom, that she was with a dad she didn't know and stepmother that she didn't want. That didn't want her.
>
> And David, you heard his testimony regarding his own guilt and his own fear. And David's guilt is certainly something that each of us understands. His guilt, which is certainly not true, but in the mind of a 15-year-old boy, and something that will never get out of his mind, is that if I only told my mother that Dean had handcuffed me in the bathroom, maybe she would have realized how serious this really was. And that he feels guilty and it has affected his life, and it has affected his life for 11 years . . .
>
> And ultimately, I'm not one for psychological terms, but there has to be a closure in relation to a case as it applies to an individual. And here, for Christy and David, and members of Connie and Sue's family, maybe there is a closure by the conviction of this defendant. And maybe even some peace as to

> both of these young adults. And maybe they can go forward with their lives now. I hope so. . . .

(16 RT 3186-3188.)

The prosecutor's use of victim impact evidence so infected the sentencing proceeding as to render it fundamentally unfair, compelling reversal under the due process clause of the Fourteenth Amendment. Because this issue is of constitutional dimensions, the error must be evaluated under the strict "harmless beyond a reasonable doubt" standard adopted in *Chapman v. California*, *supra*, 286 U.S. 18.)

If the error is deemed a state law violation, it must be reviewed under the reasonable-possibility test of *People v. Brown*, *supra*, 46 Cal.3d 432. In that case, this Court reaffirmed the reasonable-possibility test as the appropriate test for assessing the effect of state-law error in the penalty phase of a capital trial:

> [W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.

(*Brown*, *supra*, 46 Cal.3d at p. 448, see also *People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 [quoting *Brown*, and stating: "we must ascertain how a

hypothetical 'reasonable juror' would have, or at least could have, been affected"].)

The reasonable-possibility test applied to penalty-phase state-law error in a capital case is more exacting than the usual reasonable-probability test of *People v. Watson*, *supra*, 46 Cal.2d at p. 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*Brown, supra*, 46 Cal.3d at p. 447.) The reason for the more exacting standard is that "a capital jury must retain and exercise vast discretion different from that possessed by any guilt phase jury." (*Ibid.*) The Court stated further: A capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role is not merely to find facts, but also — and most important — to render an individualized, normative determination about the penalty appropriate for the particular defendant — i.e., whether he should live or die. When the "result" under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure reliability in the determination that death is the appropriate punishment in a specific case.

Here, to allow the jury to rely on victim impact evidence as a reason for either imposing death or not choosing life imprisonment was thus to permit the death verdict to rest on an unreliable ground. For this reason, also, the prosecutor's argument violated the Eighth and Fourteenth Amendments. (Cf. *Johnson v. Mississippi* (1988) 486 U.S. 486, 584-587 [in state with weighting scheme, jury's consideration of one invalid aggravating favor requires reversal of death sentence].)

The sentence of death must be reversed.

XIV. JUDGE ERRED WHEN HE FAILED TO ANSWER JUROR NOTE REGARDING PENALTY

A. FACTUAL/ PROCEDURAL BACKGROUND

In closing argument the defense argued, "every single one of you must vote death in order to take away Riccardi's life. On the other hand, one vote will avoid the death penalty. . . . Every vote is a deciding vote. John Riccardi will not die without your individual vote." (16 RT 3194.)

The jury began its deliberations in the penalty phase at 11:00 a.m. on August 1, 1994. (3 CT 773.) On August 2, at 9:25 a.m., the jurors sent the following note:

> Your Honor: The instructions state quite explicitly that all 12 jurors must agree in order to render a verdict. The question is, does this apply only for the death sentence, and if so does any one or more dissenting votes automatically set a sentence of life imprisonment without chance of parole, or does the life imprisonment sentence have [sic] the vote of the 12 jurors also? (8.88 — second to the last paragraph — last page.)

(3 CT 774; 16 RT 3217)

The paragraph to which they referred stated:

> In order to made a determination as to the penalty, all twelve jurors must agree.

(3 CT 786; 16 RT 3207.)

The judge suggested answering that unanimity does not only apply to the death sentence, that one dissent doesn't set death, and life in prison needs 12 votes. The defense objected. They argued that was misleading, that if one person votes no, the People have the option of retrying the penalty phase (16 RT 3218.)

The defense suggested that the jury should be told that a life verdict can come from 12 votes, or from one vote, which hangs, and the District Attorney declines to proceed to retrial. In the alternative, the defense asked to reopen argument. The court denied that request. (16 RT 3220.)

On August 2, 1994, at 11:30 a.m., the court responded by sending the note back to the jury with handwritten "no, no and yes" on juror question. (3 CT 774.)

> "Your Honor: The instructions state quite explicitly that all 12 jurors must agree in order to render a verdict. The question is, does this apply only for the death sentence **NO D.P.**, and if so does any one or more dissenting vote automatically set a sentence of life imprisonment without chance of parole **NO D.P.**, or does the life imprisonment sentence have the vote of the 12 jurors also? **YES D.P.**

(8.88—second to the last paragraph—last page.)"

(3 CT 774; 16 RT 3217.)[18]

Deliberations continued that day and all day the following day of August 3, 1994. (3 CT 776.) It was not until 10:15 a.m. on August 4, 1994, that the jury returned a verdict of death. (4 CT 845, 849.)

The defense once again argued that this was unfair in the motion for new trial. (4 CT 1034).

B. TRIAL JUDGE HAS A DUTY TO RESPOND

1. Trial Judge Has an Obligation to Direct the Jury

The Supreme Court has made it abundantly clear, in a series of cases going back to 1976, that for a jury determination of death to stand against Eighth Amendment scrutiny, the jury's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [quoting *Gregg v. Georgia*, (1976) 428 U.S. 153, 189 (opinion of Stewart, Powell and Stevens, JJ.)].) This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death

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[18] Bold answers and initials indicate judge David Perez's answers and initials.

penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance" and that "make rationally reviewable the process for imposing a sentence of death." As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in [*Furman v. Georgia*, (1972) 408 U.S. 238] could occur."

The Court reiterated this message in *Walton v. Arizona* (1990) 497 U.S. 639, 653, saying, "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."

Gregg's requirement that a jury be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" surely does not end the moment the judge instructs the jury, but continues until a verdict is reached and returned. As they work towards a verdict, the jurors must stay in the channel charted for them by state law. To this end, the jury may need ongoing guidance.

2. The Trial Court's Response Must Be Accurate

In this case, the jury was faced with a difficult penalty decision, given that the prosecutor presented little aggravating evidence, other than victim impact evidence. The defense presented little mitigating evidence.

After deliberating for a day, the jury sought instructions from the court as to what would happen if one or more jurors voted for life, and whether the decision for life in prison would require a unanimous decision. The trial court responded by writing yes and no on their question, but not clearing up the questions. Since the defense had argued that one vote would avoid the death penalty, the question from the jury was not surprising. The judge's answer was erroneous, because it was inaccurate, because it failed to answer the question, and because it tended to cast doubt on defense counsel's credibility.

This is one of the perennially plaguing questions which penalty phase jurors want answered. Given that the jurors are directed to make a moral and equitable choice, it necessarily makes an enormous difference whether an apparent non-choice, i.e. a hung jury, could result in a de facto windfall for the defendant and an unintended threat to society of release. Jurors have long been known to speculate whether a hung jury might require a retrial of the guilt phase as well, or otherwise result in the release

of a defendant back into society. If the juror's most thoroughly shared sentencing goal is to ensure that the defendant is not released back into society, then a failure to answer a jury's direct question on the consequences of a hung jury has all too much tendency to influence pro-LWOP jurors to switch over to death verdicts to avoid any possibility that a hung jury could result in release.

Here, the jury obviously entertained such a question, posed it to the court, and was given an evasive and incorrect answer. The judge answered "no" to the question: "does any one or more dissenting vote automatically set a sentence of life imprisonment without chance of parole." The judge answered "yes" to the question "does the life imprisonment sentence have [sic] the vote of the 12 jurors?".

These answers misled the jury into thinking that a hung jury could in the guilt phase being tried again, and the defendant possibly going free. In truth, even if the jury hung on the penalty phase, the guilt phase verdict would stand. The district attorney would have the option to retry the penalty phase only. Given the findings of guilt and the special circumstances, the only penalties to which appellant could be sentenced in subsequent proceedings (in the event of a hung jury) were death or LWOP. The jury was not told that.

McDowell v. Calderon (9th Cir. 1997) 130 F.3d 833 (en banc) reconfirmed the trial court's obligation to answer clearly and directly jury questions posed during deliberations. *McDowell* issued habeas corpus relief because the trial court declined to answer a jury question whether certain evidence could be considered as penalty phase mitigation. The Ninth Circuit held that a direct response was required, even though the previously given instructions were correct. (130 F.3d at 842.) *McDowell* reconfirmed that the Eighth Amendment prohibition against cruel and unusual punishment requires that a sentencing jury be fully informed about the matters that the jury views as critical to its sentencing determination.

McLain v. Calderon (9th Cir. 1998) 134 F.3d 1383 also issued habeas corpus relief following *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, because the trial court instructed the jury with a misleading description regarding the possibility that an LWOP sentence could be commuted or otherwise reduced by gubernatorial action in the future. The bottom line in *McLain* was that under *California v. Ramos* (1983) 463 U.S. 992, the jury must be given accurate information as to the likelihood that the defendant will be released from incarceration if sentenced to LWOP.

Weeks v. Angelone (2000) 528 U.S. 225 is distinguishable. In that case, a habeas action, the jury's question was whether, if they believed

Weeks guilty of at least one of the aggravating factors, it was their duty to issue the death penalty, or whether they must decide to issue the death penalty or a life sentence. The judge responded by referring them to the paragraph in their instructions, which correctly set out the law. In denying relief the Court emphasized that the defense had specifically explained to the jury that it could find both aggravating factors proven and still not sentence Weeks to death. (*Id.* at p. 236.)

It is the court's responsibility to respond to jury communications manifesting concern, confusion, or questions. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-614.) The proper execution of the duty to answer the jury's questions is a matter of ensuring due process of law as guaranteed by the Fourteenth Amendment. (*McDowell*, *supra*, 130 F.3d at 839.)

This Court has previously rejected similar claims in *People v. Belmontes*, *supra*, 45 Cal.3d at pp. 813-815; *People v. Morris* (1991) 53 Cal.3d 152, 227; *People v. Thomas* (1992) 2 Cal.4th 489. These cases should be reexamined in light of the developing Ninth Circuit jurisprudence cited above.

C. THE RESULTING PREJUDICE

Under *Boyde v. California*, it is reasonably probable that jurors were misled by the error. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) Because this issue is of constitutional dimensions, the error must be evaluated under the strict "harmless beyond a reasonable doubt" standard adopted in *Chapman v. California*, *supra*, 286 U.S. 18.)

Even if the error did not rise to rise to the level of a federal constitutional violation, a state law error must be assessed under the "reasonable probability" test found in *People v. Brown*, *supra*, 46 Cal.3d 432.

In *Brown*, this Court reaffirmed the reasonable-possibility test as the appropriate test for assessing the effect of state-law error in the penalty phase of a capital trial:

> [W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.

(*Brown,* 46 Cal.3d at p. 448, see also *People v. Ashmus*, *supra*, 54 Cal.3d at pp. 983-984 [quoting *Brown*, and stating: "we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"].)

The reasonable-possibility test applied to penalty-phase state-law error in a capital case is more exacting than the usual reasonable-probability test of *People v. Watson*, *supra*, 46 Cal.2d at p. 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*Brown*, *supra*, 46 Cal.3d at p. 447.) The reason for the more exacting standard is that "a capital jury must retain and exercise vast discretion different from that possessed by any guilt phase jury." (*Ibid.*) The Court stated further:

> A capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role is not merely to find facts, but also — and most important — to render an individualized, normative determination about the penalty appropriate for the particular defendant — i.e., whether he should live or die. When the "result" under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure "reliability in the determination that death is the appropriate punishment in a specific case."

(*Brown* at p. 448, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Ashmus*, *supra*, 54 Cal.3d at p. 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard).

Here, under either the standard in *Chapman* or *Brown*, the error was not harmless. By failing to properly respond to the jury note, the trial court impermissibly diminished the reliability of their determination that death was the appropriate punishment, because the judge improperly denied the jurors important information that was relevant to their decision, in violation of the Eighth Amendment. (*Beck v. Alabama*, *supra*, 447 U.S. 625.)

There are substantial reasons why the trial court's inadequate response must be viewed as neither harmless-beyond-a-reasonable-doubt under the federal standard nor harmless under the reasonable-possibility standard of *Brown*. First, the jury's question touched on an area which is frequently troubling to capital jurors. Jurors understand that the death sentence, if carried out, will preclude the defendant from committing more crimes. The jurors, on the other hand, are uncertain or confused as to whether an LWOP sentence necessarily means imprisonment until death. And the jurors do not know what will happen if they hang. It is precisely the recognition that jurors need to have explicit and accurate information about the likelihood of release in light of alternative sentences that guided the United States Supreme Court decision in *California v. Ramos*, *supra*.

Secondly, here the penalty determination was clearly a close one, and any confusion of the jury must be viewed as substantial and grave.

Following the jury's question about the number of jurors required to vote for life in prison, the jury continued deliberating for another day. It is likely that the jury's final tilt toward death was not based on the weighing of the evidence, but rather upon the jury's concern based upon confusion about the law, about preventing appellant's future release.

Finally, the evidence in aggravation was limited to the circumstances of the crime and appellant's prior felony conviction of burglary. In light of the fact that the prosecutor's theory of the case was that appellant loved the victim and killed her in fit of rage when she wanted to break up with him, this case was a very strong candidate for a life verdict under any circumstances.

There was such a simple response to the question that there is no conceivable reason why the trial court failed to give it. Penal Code section 190.4(b) is straightforward:

> "If the trier of fact is the jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue of what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole."

A straightforward reading of the statute would have removed any jury speculation that their failure to render a penalty verdict might render vulnerable their guilty verdict or otherwise open the possibility of appellant's future release under some circumstances. By failing to properly respond to the note, the trial court denied appellant's federal constitutional right to due process, fundamental fairness, and a reliable determination in the penalty verdict.

For these reasons, appellant's death sentence must be reversed.

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

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the

victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing

courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage

> of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 26 special circumstances[19] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad

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[19] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now 32.

in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See Voter's Pamphlet, (1978), Arguments in Favor of Prop. 7, p. 34 [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to

encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1324-1326.)[20] It is quite clear that these theoretically possible noncapital first

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[20] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of

degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was

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the lethal assault of his intent to kill — a distinctly improbable form of premeditated murder. (*Ibid.*)

convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death

sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[21] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence,[22] or had a "hatred of religion,"[23] or threatened witnesses after his arrest,[24] or disposed of the victim's body in a manner that precluded its recovery.[25]

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[21] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (7th ed. 2003).

[22] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[23] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S. Ct. 3040 (1992).

[24] *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[25] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.* 496 U.S. 931 (1990).

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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 been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[26] or because the defendant killed with a single execution-style wound.[27]

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[26] 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).

[27] 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).

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[28] or because the defendant killed the victim without any motive at all.[29]

c. Because the defendant killed the victim in cold blood[30] or because the defendant killed the victim during a savage frenzy.[31]

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[28] 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).

[29] 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).

[30] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

[31] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

d. Because the defendant engaged in a cover-up to conceal his crime[32] or because the defendant did not engage in a cover-up and so must have been proud of it.[33]

e. Because the defendant made the victim endure the terror of anticipating a violent death[34] or because the defendant killed instantly without any warning.[35]

f. Because the victim had children[36] or because the victim had not yet had a chance to have children.[37]

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[32] 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).

[33] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed 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).

[34] 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.

[35] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[36] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[37] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

g. Because the victim struggled prior to death[38] or because the victim did not struggle.[39]

h. Because the defendant had a prior relationship with the victim[40] or because the victim was a complete stranger to the defendant.[41]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

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[38] 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).

[39] See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[40] 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).

[41] See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

a. 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.[42]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[43]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance

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[42] 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, 711 P.2d 423, 444 (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").

[43] 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 ax); *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).

because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[44]

d. 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.[45]

e. 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.[46]

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[44] 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).

[45] 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).

[46] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts — or facts that are inevitable variations of every homicide — into aggravating factors which the jury is urged to weigh on death's side of the scale.[47]

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

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[47] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all.

Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make — whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a

reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [hereinafter *Apprendi*] and *Ring v. Arizona* (2002) 536 U.S. 584; 122 S.Ct. 2428 [hereinafter *Ring*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (530 U.S. at p. 478.)

In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a

unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

a. *In the Wake of* Ring, *Any Aggravating Factor Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[48] Only

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[48] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); 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); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance — and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors.[49] According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an

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[49] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility; its role "is not merely to find facts, but also — and most important — to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[50] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[51]

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[50] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[51] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code, § 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[52] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life

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[52] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

> imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 122 S.Ct. at 2431.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 122 S.Ct. at p. 2440.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (Pen. Code, § 190.2). Death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating

circumstances. (Pen. Code, § 190.3; CALJIC 8.88 (7th ed. 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (Pen. Code, § 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[53] while California's statute provides that the trier of fact may impose death only if the

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[53] Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

aggravating circumstances substantially outweigh the mitigating circumstances.[54]

There is no meaningful difference between the processes followed under each scheme. "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*, 122 S.Ct. at pp. 2439-2440.) The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's

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[54] Penal Code section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." In *People v. Brown* (1985) 40 Cal.3d 512, 541, 545, fn.19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).)

previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence — in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death — no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. The finding of an aggravating factor is an essential step before the weighing process begins.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a

defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty — death or life without the possibility of parole — is appropriate." (*Prieto*, 30 Cal.4th at p. 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present — otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring*, *supra*, 122 S.Ct. at pp. 2439-2440.)

Finally, this Court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to

choose life or death as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.

(*Ring*, *supra*, 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death

penalty is unique in its severity and its finality"].)[55] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined,

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[55] In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly found the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. *The Requirements of Jury Agreement and Unanimity*

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor — including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[56] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra.*)

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[56] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at p. 732;[57] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

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[57] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code §§ 1158 & 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 122 S.Ct. at p. 2443).[58] See section D, *post*.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[59] To apply the requirement to findings carrying a maximum punishment of one year in the county jail — but not to factual findings that often 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

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[58] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[59] The first sentence of article 1, section 16 of the California Constitution provides: "Trial 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 *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal

enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(*Richardson*, *supra*, 526 U.S. at p. 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide

disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439

U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt.

b. *Imposition of Life or Death*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."

(*Stantosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," (*Speiser*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Stantosky*, *supra*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'"

(455 U.S. at p. 756.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Stantosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Stantosky*, *supra*, 455 U.S. at p. 763.)

Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

The final *Stantosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Stantosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing

proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever

considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% — even 20%, or 10%, or 1% — is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co., supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant.

Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* — in which this Court did not consider the applicability of section 520 — is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana*, *supra*.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors — and the juries on which they sit — respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable — "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) — the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) — that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[60] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and

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[60] See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at p. 696.

Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

6. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously

agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It 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." (*Id.*, 11 Cal.3d at p. 267.)[61] The same analysis

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[61] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

applies 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].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, *supra*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at p. 383, fn. 15.) The fact that

the decision to impose death 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 that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[62]

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[62] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); 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(e) (1987); 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. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); 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); 42 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. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence — including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review — a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there

could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate — even cases from outside the United States. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2248, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v.*

Georgia (1972) 408 U.S. 238] . . ." (*Gregg v. Georgia, supra*, 428 U.S. at p. 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[63]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case

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[63] 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, 03, 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. § 39-13-206(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).

Also see *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. 1981) 417 N.E.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]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 — a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* — and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case

proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant.

The United States Supreme Court's recent decisions in *Ring v. Arizona*, *supra,* and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting

as a collective entity. The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

10. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" — factors (d), (e), (f), (g), (h), and (j) — were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,*

428 U.S. at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State — as represented by the trial court — had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not"

answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia*, *supra*, 428 U.S. at p. 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.)

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*,

supra, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the

classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[64] as in *Snow*,[65] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons

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[64] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at p. 275.)

[65] "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." (*Snow*, 30 Cal.4th at p. 126, fn. 32.)

sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code §§ 1158 & 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural

protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen*, *supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

(1) The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, 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.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.) Juries, like trial courts and counsel, are not immune from error. 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.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria

that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Pen. Code, § 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claim was that the 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 p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "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*, *supra*, 428 U.S. at p. 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos*, *supra*, 463 U.S. at pp. 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[66] The qualitative

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[66] The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions

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.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*People v. Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects 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 as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of

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made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at p. 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra.*)[67] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra.*)

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[67] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra.*) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull*

(1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [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 have now abolished the death penalty. (Amnesty International, *The Death Penalty: Abolitionist and Retentionist Countries* <http://web.amnesty.org/pages/deathpenalty-countries-eng> [as of Oct 13, 2003].)[68]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "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

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[68] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, *supra*, 122 S.Ct. at 2249-2250.) It 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 antithetical to our own. In the course of determining that

the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 122 S.Ct. at 2249, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* 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. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 122 S.Ct. at p. 2249.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311] Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty

for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[69] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[69] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad — mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

XVI. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED DURING APPELLANT'S PENALTY PHASE REQUIRES REVERSAL OF HIS DEATH SENTENCE

As detailed above, appellant's penalty phase trial was tainted by the following errors: (1) prosecutorial misconduct by way of improperly acting as his own sworn witness; (2) prosecutorial misconduct in asking a defense witness whether he thought appellant was merciful when he killed the victims; (3) inflamatory victim impact evidence; and (4) the trial court's failure to properly answer the jury note about penalty. In addition to the above-listed errors committed in the course of the penalty phase, there were also errors committed during the guilt phase[70] which were likely to prejudice the jury's determination of appellant's penalty: (1) the trial court's failure to ensure the right to an impartial jury drawn from a representative cross-section of the community; (2) the admission of taped statements of a witness and a detective stating their belief in appellant's guilt; (3) the admission of hearsay statements of victim's fear of appellant; (4) hearsay statement of now deceased father; (5) and the trial court's refusal to grant a continuance due to media frenzy from the O.J. Simpson trial.

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[70] The fact that this Court may have already found the errors harmless with respect to the guilt verdicts does not affect the present argument. An error may be harmless as to guilt and prejudicial as to penalty. (See, e.g., *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error not prejudicial as to guilt but prejudicial as to penalty].)

In capital cases, the problem of cumulative prejudice is most severe. "[B]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing," there is "a unique opportunity for . . . prejudice to operate" therein. (*Turner v. Murray*, *supra*, 476 U.S. at p. 35.) Consistent with the fairness and reliability principles that must govern review in death penalty cases (see *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584), it cannot be assumed that the improper information placed before the jury in the guilt phase played no role in the penalty verdict.

Appellant incorporates by reference his argument as to why his case was close as to the jury's penalty verdict. (See Argument XIV, above.) As explained in the preceding arguments, virtually all of appellant's assignments of error involve violations of the federal constitution and, therefore (assuming that this Court does not conclude that they are subject to per se reversal), call for review under the *Chapman* standard.[71] (*Crane v. Kentucky*, *supra*, 476 U.S. 683 at pp. 690-691; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.)

In a case where multiple errors have permeated a defendant's trial, the reviewing court must look to their *cumulative* impact. (*Taylor v.*

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[71] *Chapman v. California*, *supra*, 386 U.S. at p. 24.

Kentucky (1978) 436 U.S. 478, 487-488 & fn. 15; *People v. Stritzinger*, *supra*, 34 Cal.3d at pp. 520-521; *People v. Hudson*, *supra*, 126 Cal.App.3d at p. 741.) Furthermore, when federal constitutional error is combined with other errors at trial, the appellate court must review their cumulative effect under the *Chapman* standard. The reviewing court is to consider the would-be course of the defendant's trial in the absence of all errors and determine whether the combined errors were "harmless beyond a reasonable doubt." (*People v. Stritzinger*, *supra*, 34 Cal.3d at pp. 520-521.) In the face of the record of errors and misconduct affecting the penalty determination herein, respondent cannot meet this burden.

The errors which occurred during the guilt and penalty phases violated state and federal constitutional safeguards in numerous ways. If this Court does not agree that any of the errors requires reversal when considered in isolation, then it is incumbent on the Court to assess their cumulative impact. (See, e.g., *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 487-488 & fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459.) The consolidated impact in this case would have been overwhelming.

The errors committed in connection with the determination of the penalty verdict must cause this Court to question the reliability of appellant's death sentence in light of the heightened scrutiny which the

Eighth Amendment places upon capital proceedings. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.).) It cannot be said that these errors were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Yates v. Evatt* (1991) 500 U.S. 391, 402-404.) It certainly cannot be found that such errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

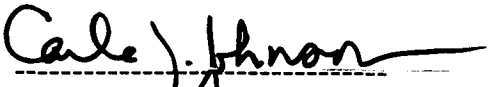
Accordingly, the judgment of death must be reversed.

CONCLUSION

For each and all of the foregoing reasons the judgment and conviction and sentence of death must be reversed.

Dated: December 1, 2003

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

I am a resident of the County of Los Angeles, I am over the age of 18 years and not a party of the within entitled action. My business address is: Attorney Carla J. Johnson, P.O. Box 30478, Long Beach, CA 90853.

On December 3, 2003, I served APPELLANT'S OPENING BRIEF by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at: Long Beach, California, addressed as follows:

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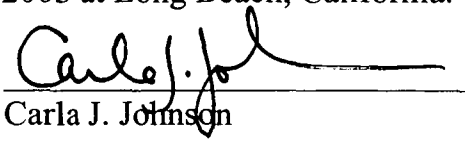
I declare under penalty of perjury that the foregoing is true and correct. Executed on December 3, 2003 at Long Beach, California.



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