IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ROBERT BOYD RHOADES,

Defendant and Appellant./

No. S082101

Sacramento County
Superior Court #
98F00230

On Appeal From Judgment Of The Superior Court Of California

Sacramento County

Honorable Loyd H. Mulkey, Jr., Trial Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This automatic appeal from a final judgment of conviction and imposition of a sentence of death is authorized by Penal Code section 1239, subdivision (b).[1]

STATEMENT OF THE CASE

On March 31, 1998, the Sutter County District Attorney filed a fourth-amended information (the first information was filed on October 22, 1996 (1-CT 46)) charging appellant, Robert Boyd Rhoades, with one count (count 1) of murder in violation of Penal Code section 187(a), and alleged the special circumstances that appellant was engaged in the commission of the crimes of kidnapping, sodomy, and a lewd act on a child within the meaning of section 190.2(a)(17), and alleged the special circumstance that the murder was intentional and involved the infliction of torture within the meaning of section

1. All further statutory references are to the Penal Code unless otherwise indicated. For easier reading, appellant generally will not use the word "subdivision" or the abbreviation "subd." in statutory citations that include a reference to a subdivision.

190.2(a)(18); one count (count 2) of kidnapping in violation of section 207(a); one count (count 3) of kidnapping for the purpose of committing a lewd act on a child under the age of 14 in violation of section 207(b); one count (count 4) of torture in violation of section 206; one count (count 5) of sodomy in violation of section 286(c); one count (count 6) of lewd and lascivious act upon a child under 14 in violation of section 288(a); one count (count 7) of lewd and lascivious act upon a child under 14 by force in violation of section 288(b)(1); one count (count 8) of oral copulation with a child under 14 by force in violation of section 288a(c); one count (count 9) of possession of methamphetamine in violation of Health and Safety Code section 11377(a); and one misdemeanor count (count 10) of possession of a hypodermic needle in violation of Business and Professions Code section 4140; and alleged, with respect to the nine felony counts, that appellant had suffered three serious and violent felony strike priors, including forcible oral copulation, kidnapping and child molestation, within the meaning of sections 667(a), 667.5(a) and 667(e)(2)(A) and 1170.12(c)(2)(A); one serious felony strike prior, second-degree robbery, within the meaning of sections 667(a) and 667(e)(2)(A) and 1170.12(c)(2)(A); and two prison priors within the meaning of section 667.5(b). (7-CT 2033-2042.)

On December 16, 1996, the court denied the public defender's request to be relieved due to a conflict of interest and appellant waived any conflict. (1-CT 137.)

On August 26, 1997, the court granted appellant's motion for a change of venue. (2-CT 503.)

On November 20, 1997, the court denied appellant's motion to suppress and motion to quash the search warrant. (3-CT 865.)

On January 6, 1998, over appellant's objection, the court transferred appellant's case to the Sacramento superior court. (3-CT 899.)

On March 14, 1998, appellant's trial began with in limine motions. (8-CT 2249.) On March 20, 1998, jury selection began. (8-CT 2260.) On May 12, 1998, the prosecution began to present evidence. (8-CT 2290.) On June 1, 1998, the defense began to present its case. (8-CT 2350.)

On June 10, 1998, the case was submitted to the jury. (9-CT .) On June 17, 1998, after more than 20 hours of deliberations over four days, and after a requested readback of the testimony of Sherrie Luster, who testified she saw Michael with two men by the river that afternoon, and DNA expert, Ms. Duda-Shea, the jury could not reach a unanimous decision on counts 2 and 3 (kidnapping), count 8 (forcible oral copulation), nor the kidnapping special circumstance, but found appellant guilty of the other counts and special circumstances. (9-CT 2474-2475, 2526-2546.)

On June 17, 1998, the court granted the prosecutor's motion to dismiss the kidnapping and forcible oral copulation counts on which the jury could not unanimously agree, as well as the kidnapping special circumstance. (9-CT 2546.)

On June 17, 1998, the court found appellant had suffered all the alleged priors. (9-CT 2546.)

On July 6, 1998, the prosecution presented its penalty phase evidence. (9-CT 2595-2596.) On July 6 and 7, 1998, the defense presented its penalty phase evidence. (9-CT 2595-2598.) On July 7 and 8, 1998, the court instructed the jury and the parties presented argument. (9-CT 2598-2599, 2681.)

On July 9, 1998, the court declared a mistrial when the jury, after two days of deliberations, could not agree on a verdict. (9-CT 2679-2687.)

On August 12, 1998, the court granted appellant's *Marsden* motion and relieved the public defender and appointed private counsel. (9-CT 2776.)

On October 19, 1998, the court denied appellant's motion for new trial. (12-CT 3527.) On November 23, 1998, the court denied appellant's *Marsden* motion to relieve appointed private counsel. (12-CT 3577.)

On December 1, 1998, jury selection began for the retrial of the penalty phase. (13-CT 3626.) On January 11, 1999, the court denied appellant's *Wheeler/Batson* [*People v. Wheeler* (1979) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79] motions and swore in the jury. (13-CT 3703-3705.)

On February 16, 1999, the prosecution began to present its penalty phase evidence. (14-CT 4115-4122, 4196-4205.) On February 17, 1999, the court denied appellant's motion for mistrial. (14-CT 4118, 31-RT 9559.) On February 25, 1999, the defense began to present its penalty phase evidence. (15-CT 4205-4211, 4217-4218, 4238-4240, 4257-4263.) On March 10, 1999, the prosecution presented its rebuttal evidence. (15-CT 4263.) On March 16 and 17, 1999, the parties presented argument. (15-CT 4307-4310.) On March 18, 1999, the court instructed and the jury began deliberations. (15-CT 4432.)

On March 19, 1999, after about five hours of deliberation over two days, and after a requested readback of the testimony of Ray Clark, who testified he saw someone in a truck pick up the victim that afternoon, and DNA expert, Ms. Duda-Shea, the jury returned a verdict of death. (15-CT 4431-4433, 4437-4440; 41-RT 12541-42, 12553.)

On July 9, 1999, the court denied appellant's *Marsden* motion, his motion for new trial, and the application for modification of the verdict under Penal Code section 190.4(e). (15-CT 4499-4500.)

On September 10, 1999, the court pronounced judgment, sentencing appellant to death for special-circumstances murder, plus three concurrent terms of 25 years to life for torture, a lewd and lascivious act upon a child under 14, and a forcible lewd and lascivious act upon a child under 14; and a concurrent term of

75 years to life for forcible sodomy on a child under 14 years old; and a consecutive 25 years to life for possession of methamphetamine, and two five-year terms for two serious felony priors and one year for a prison prior for a total of 11 years, and stayed all the life sentences pending execution of the death penalty, and imposed a $10,000 restitution fine. (1-CT 14-15, 16-CT 4654-4659.)

On September 10, 1999, the clerk gave notice of appellant's automatic appeal from the death sentence. (16-CT 4664.)

INTRODUCTION TO FACTUAL SUMMARY

Eight-year-old Michael Lyons never arrived home from school on May 16, 1996. The next day he was found in the river bottoms with his throat cut. Autopsy results showed he had been sodomized and possibly tortured. Appellant was found several hundred yards away trying to extricate his truck from the mud. Michael's blood was found under some dirt on appellant's knife, and Michael's footprints were found inside appellant's truck. The state's case emphasized that appellant was a bad man – a drug abusing, sexual predator -- likely to have kidnapped, sodomized, and murdered Michael. Evidence of appellant's convictions for kidnapping and forcible oral copulation of a woman in her twenties and a no contest plea to child molestation of his four-year-old granddaughter were introduced to prove appellant committed the crimes against Michael.

Appellant's defense was that he went home after his truck got stuck in the river bottoms to get a come-along, and Michael must have been murdered in his truck when he was gone for several hours. Appellant also presented such a compelling alibi defense -- he was playing cards at the time of Michael's presumed kidnapping -- that the kidnapping charge was dismissed (as well as the oral copulation charge) after the jury could not reach a unanimous verdict.

STATEMENT OF THE FACTS

The People's Case

A. Michael's Whereabouts

On Thursday, May 16, 1996, eight-year-old Michael Lyons attended third grade at Bridge Street School. Michael lived in apartment 31 at 390 McRae, with his mother, Sandra Friend, her husband (his stepfather) Billy Friend (a painter), and his sisters, four-year old Alithya, and three-month old, Mettea. (12-RT 3688-3689, 3707.)

That day Mrs. Friend took Michael and Alithya to the Bridge Street School by car and when she returned at noon to pick up Alithya, she saw Michael in the playground. (12-RT 3690, 3831.)

Katherine Menghini was Michael's third-grade teacher at Bridge Street School and probably his best friend, as she had been his teacher for two years. (12-RT 3831-33.) On May 16th, class got out at 2:40 p.m. and at 2:50 p.m., she told Michael he needed to go home because it was raining hard. (12-RT 3832, 3834.)

Susan Cuquet was a school counselor at Bridge Street, and on that cold, windy, rainy day of May 16th, she had gate duty, which entailed waiting until all the students had left. (12-RT 3858-3859.) At 3:05 p.m., she told Michael, who liked to play in the rain: "Michael, you're getting soaking wet. You better hurry home; you're [sic] mom's going to get worried." Michael said, okay, and jumped in a puddle and took off home. (12-RT 3857, 3860, 3864.) She waited for him to go through the gate, and then walked into the school. (12-RT 3860, 3864.)

In May 1996, Henry Battles lived at the Bridge Way apartments, #45, and was a neighbor of the Friends and knew Michael. (12-RT 3869-3870.) On his way home from work on May 16th, sometime after 3:00 p.m., he saw Michael walking alone with a stick in his hand about to cross C Street at Wilbur. (12-RT

3872-3874.) Mr. Battles told the police it was "around" 3:00 p.m., but testified that it was probably after 3:00 p.m. (12-RT 3875-3878.)

On May 16th, Ray Clark was visiting his nephew or cousin, Charlie Wilbur, in the Bridge View Apartments, Apt. #48, on 370 McRae Way in Yuba City and went on the balcony for a cigarette. (12-RT 3881-3884, 3891.) Mr. Clark saw a "shiny gold," brand-new (at least a 1995) Toyota 4-wheel drive pickup with brand new shiny rims on the wheels of the truck and tinted windows and a camper driving fast down Boyd Street.[2] (12-RT 3884-3885, (13-RT 3911, 3914, 3917; Exhibit 126.) Mr. Clark told Officer Green he saw the boy at 2:40 or 2:45 p.m.[3] (13-RT 3909.) Mr. Clark's wife was picking him up about 3:00 p.m. after school, but had not arrived. (13-RT 3907.)

It was raining, but the sun was out "real bright," shining through a cloud. (12-RT 3885.) Mr. Clark saw a blond-haired little boy with dark, either green or black, pants, though he had told the police the pants were green. (12-RT 3888-3889, 13-RT 3913, 3915.) The little boy ran up to the truck, and it seemed to him like the driver might have been someone he knew, like his father or someone coming to get him after school, because it was raining. Then the little boy backed up and started pointing, as if giving directions. (12-RT 3890, 13-RT 3916.) The boy went back up to the truck, and when the truck pulled off, the boy was not there. As the truck was moving, the passenger door swung open and then slammed shut. (12-RT 3890.)

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2. Appellant owned a white 1989 four-by-four Toyota pickup with matching camper shell, heavy-duty suspension, and heavy-duty rear bumpers. It had a tow package on it, with a gray interior. (RT 5315-5316, 11222.) It did not have shiny "mag rims." (RT 11182.)

3. Mr. Clark called the police at 6:00 a.m. on May 17th and told Officer Jeff Webster that what he saw was possibly between 3:00 and 4:00 p.m. (RT 3921.) Mr. Wilbur did not describe the incident to the police until two years afterwards. (RT 3927.)

Charlie Wilbur came outside around 3:30 or 4:00 p.m. as the truck was leaving, and Mr. Clark said, "Didn't you see that? That was kind of curious, I mean, kind of weird." (12-RT 3890-3891.) Mr. Clark said, "That little boy was standing there and now he wasn't standing there." (12-RT 3891.)

As soon as Mr. Wilbur looked, a truck was speeding down C Street going eastbound towards the courthouse.[4] Mr. Wilbur did not see a boy, but described the truck as "creamy white, possibly a white truck, looked dirty." (12-RT 3891, 13-RT 3925-3926, 3931-3932.) It looked like a Toyota pickup with a camper shell, if not a Forerunner. The camper was the same white color as the truck. (13-RT 3925-3926.)

After Mr. Clark learned someone had been arrested, he saw appellant's truck on the TV, which looked like the truck he had seen "to a certain extent." (12-RT 3894-3895.) The model and the shape of truck looked the same, but not the color, so he could not be sure. (13-RT 3904-3905.)

Mr. Friend, who had worked that day painting with his stepfather, Jarrett Willis, picked up Sandy and arrived home about 5:00 p.m.[5] (12-RT 3708, 3715, 3724.) Michael was missing and Mrs. Friend called Linda Sue Willis, his "grandmother" (Mr. Friend's mother) and then called the police about 6:00 p.m. (12-RT 3691-3692, 3747.) Ms. Willis lived three doors from Bridge Street School and Michael often came over after school, but not on May 16th, when she did not arrive home until 4:15 p.m. (12-RT 3748.)

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4. Unless the truck had made a U-turn, this was not the same truck that Mr. Clark saw on Boyd Street.

5. The baby sitter, Mary Urquhart, who had smoked marijuana through the day, had told investigators the Friends came home around 7:30 p.m., but later she said she did not remember when they came home. (12-RT 3731, 3732, 3745.)

The police told Mrs. Friend to look more. (12-RT 3693.) Mr. Friend went to look for Michael in the river bottoms that night and the mile between school and home. (12-RT 3709, 3712.) Mr. Friend took Michael to the river bottoms two or three times a month to fish. (12-RT 3710, 3713.) Michael was not allowed to go to the river bottoms alone and had never done so as far as Mr. Friend knew, and none of Mr. Friend's fishing equipment was missing. (12-RT 3711.) Mr. Friend did not believe Michael was a loner. (12-RT 3713.)

Mrs. Friend called the police again at 8:00 p.m. and the police and others began to search the neighborhood and the river bottoms. (12-RT 3693-3694, 13-RT 3959-3964.) She told police that Michael had on green pants. (12-RT 3698.) Later, Mrs. Friend found Michael's only pair of green pants in the hamper, but not his black pants. (12-RT 3700, 14-RT4382.) The next day, she saw Michael's black pants at the river bottoms. (12-RT 3700.)

Captain Scott Berry of the Yuba City Police Department called off the search about 11:00 p.m. (13-RT 3965-3966.) The next morning, May 17th, the search resumed. (13-RT 3967.)

About 11:00 a.m. David Derolf, while searching the muddy and wet river bank, saw Michael's leg while the rest of him was under brush. (13-RT 3967, 4033-4035, 4044.) Michael was completely nude from the waist down and had a green sweatshirt pulled up over his head and covering his head, which was face down in the mud. (13-RT 4038, 4045, 4206-4207; CT 2309.) Michael's body was located two and one half miles south of the Tenth Street Bridge along the Feather River on a peninsula in a brushy area with trees and low grass about 2.4 miles from his home. (13-RT 4038, 4497, 4466-4467; 8-CT 2309.) The police parked about 30 yards from the body, which was as close as they could get, because two-wheel drives would get stuck in the mud. (14-RT 4226, 4469.)

FBI Agent Steve Grube took photos of footprints by the edge of the river bank between 15 and 90 feet from Michael's body and made plaster of paris casts of the three best footprints in the area. (14-RT 4219, 4239-4242, 4245.) The footprint tracks seemed to head south and into the river. (14-RT 4244.)

A blood-soaked blanket was found about ten feet from Michael's body, towards the river. (14-RT 4210, 4217, 4541; Exhibit 46.) FBI Agent Todd Drost found a silver-colored bracelet under Michael's body. (14-RT 4213; Exhibit 103.)

On May 20th, Sergeant Michael Johnson went with FBI agent Jeff Rinek to Stockton to talk with appellant's wife, Lynette Rhoades. (14-RT 4246.) Lynette said that based on the photos of the blanket found at the scene, the blanket appeared to be the one appellant kept in back of his pickup. (14-RT 4251-4254.)

Lynette said that she had seen the bracelet found under Michael in appellant's truck under the driver's seat the Tuesday before when she was cleaning the vehicle, after which she left it on the dashboard. (14-RT 4252-4253; Exhibit 103.) Camille Ottinger and her boyfriend James Hickman visited appellant's home several times in April around Easter and stayed there for a few days when appellant's wife, with whom appellant was having marital difficulties, was not there. (15-RT 4641-4643, 4653-4654.) The bracelet was Camille's and the last time she remembered seeing it was at appellant's home when she put it in her bag. (15-RT 4642, 4648; Exhibit 103.) When Camille returned home to the river bottoms, she never saw it again until shown by the police. (15-RT 4643, 4648.)

On May 17th, Janet Lemmons lived in a trailer in the Feather River bottoms close to the river and a lagoon at Mosquito Beach with her husband, Bobbie. (14-RT 4362, 4365.) That day, she went to look for shoe laces with her husband and saw a pair of shoes near the frontage road which she picked up

and started to take the shoe strings off. (14-RT 4363, 4368, 4370.) Michael's mother, Mrs. Friend, approached and asked for the shoe because it looked like her son's shoe, which Ms. Lemmons gave her. (14-RT 4364, 4376-4377.) Mrs. Friend found her son's other shoe down the embankment. (14-RT 4379.) Bobbie Lemmons and Mrs. Friend walked further and found Michael's black pants. (14-RT 4369, 4380-4381.) The pants and shoes were both found on the driver's side of the embankment, if a car were heading south. (14-RT 4394.) Mrs. Friend gave the shoes and pants to the police. (14-RT 4382, 4384, 4393.)

B. Michael's Autopsy

On May 17, 1996, Dr. James Dibdin conducted an autopsy of Michael. (14-RT 4258.) The autopsy revealed that Michael had suffered two deadly ragged-edged deep cuts on the left side of his neck, extending from approximately just below his ear across the front of his neck to just past his uncut airway. The cuts went through all the muscle and some of the veins on the left side of his neck, and the carotid artery and into the bone on his spine. (14-RT 4261-4265.) There was a right side neck wound a half inch deep, which ordinarily would not have been fatal. (14-RT 4267.)

There was a deadly stab wound to the left side of chest made by single-edge knife. (14-RT 4268, 4275.) Appellant's knife, which was sharp on one side and narrow, could have caused the wound with reasonable medical certainty. (14-RT 4270, 4274.) There was a deadly knife wound to Michael's abdomen. (14-RT 4276-4277.) There were defensive wounds on Michael's left hand palm and his right wrist. (14-RT 4278.) There was an abrasion and bruise to the back of his left wrist and abrasions and bruises to his buttocks. (14-RT 4279, 4281.) Wounds on Michael matched some cuts in his sweatshirt. (14-RT 4473-4475.)

There were many tears and lacerations to his anus and severe hemorrhage inside his bowel and abdomen. (14-RT 4280.) There was no indication of scarring from previous molestation. (14-RT 4282.) There were only normal scars on Michael for an active eight-year-old. (14-RT 4306-4307.)

Bruises on Michael's lips were consistent with a penis being forcibly pushed in his mouth or consistent with a hand being forcefully placed over his mouth. (14-RT 4283.)

There were eight shallow stab wounds under Michael's chin, caused by a tip of a knife being jabbed, that went through the skin into the muscle, which would be painful, but not deadly. (14-RT 4284.) There were abrasions to his nose and face consistent with a serrated knife being scraped across the skin. (14-RT 4285.)

Abrasions to Michael's buttocks were consistent with a serrated knife being scraped across the skin and would have been painful. (14-RT 4286.) Scrapes on his thighs were consistent with a serrated knife being scraped across the skin. (14-RT 4287.) There were three stab wounds to his right hip and a fourth wound to the back of his buttock one-half inch deep, which were not deadly, but would have been painful. (14-RT 4288-4289.) Michael suffered scraping of his left thigh and knee by a blunt instrument. (14-RT 4290.)

Michael's death was caused by multiple stab and cutting wounds, and anal penetration, while repetitive minor injuries significantly contributed to his death. (14-RT 4291.) There was no way to determine the order these injuries were inflicted, though they could have been inflicted in less than thirty minutes or an hour. (14-RT 4291.) Dr. Dibdin estimated that Michael was killed sometime between 4:00 p.m. on May 16th, and 4:00 a.m. the following morning. (14-RT 4298-4299.)

The injuries suffered by Michael did not appear to have been inflicted in a random or frenzied manner. (14-RT 4292.) The injuries appeared to have been inflicted in a deliberate manner to particular areas of the body. (14-RT 4292-4294.) Michael's injuries were concentrated around his buttocks and thighs and along his face, caused by someone scraping a serrated knife there. In light of evidence of sodomy and forcible oral copulation, the injuries suggested the perpetrator was targeting the areas which he was sexually assaulting by scraping a knife across them. (14-RT 4292-4294.) Knives can have serrations in patterns of two or three. (14-RT 4300.) Appellant's knife had serrations in groups of three, while the serrations found on Michael's body were in groups of two. (14-RT 4300-4301.) Thus, the pattern of serrations on Michael was not consistent with appellant's knife. (14-RT 4303.)

FBI special agent Michael Prodan, supervisor of the Violent Crime Profiling Unit, testifying as an expert, opined that there was no evidence of staging at the crime scene. (15-RT 4771-4772.) There was nothing at the crime scene or the interaction between the victim and the perpetrator to suggest that there was more than one perpetrator involved. (15-RT 4772, 4774.) The defensive injuries indicated that the victim put up a minimal amount of resistance, which was overcome. (15-RT 4775.) The perpetrator then engaged in inflicting painstaking, methodical, deliberate, nonlethal injuries. (15-RT 4775.) Then, the perpetrator inflicted deadly wounds that were focused and direct. (15-RT 4775.)

C. The Hair and Bodily Fluid Evidence

Criminalist Stephen Bentley examined appellant's serrated knife, and found blood on the hilt end of the knife in both corners, which was somewhat covered with fine soil, so it was hard to see until he looked at it very carefully under a microscope. The soil was silty and sandy with niccolite particles -- very

shiny gold flecks -- found at river bottoms. (15-RT 4504-4505, 4597.) Appellant's thumb print was found on the serrated knife. (14-RT 4438-4440, 15-RT 4504-4505; Exhibit 23.) There was no blood on appellant's fingerprint. (15-RT 4597.)

Criminalist Nicola Duda-Shea completed a DNA analysis of some of the blood scraped from the hilt of appellant's knife, which matched Michael (1 in 24 million in the white population). (15-RT 4616-4618.) There were problems with contamination with respect to some of the blood. (15-RT 4620-4621.)

Mr. Bentley found semen and one sperm on an anal swab, but none on the oral swabs, which is typical in sexual assault cases. (15-RT 4502-4503.) He found no semen on appellant's underwear, but did find a weak positive result for blood, suggesting diluted blood. (15-RT 4506, 4625.) He found no semen on appellant's blue jeans, but did find human blood on the lower back right leg and many other areas of appellant's pants. (15-RT 4513-4515.)

Mr. Bentley found a heavy accumulation of human blood on the left shoulder and lower right-hand side of the shirt found in appellant's vehicle, but most of the shirt had been covered in blood and rinsed out. (15-RT 4507-4512.) The faint reddish haze stains on appellant's shirt was the same blood type as appellant's, but excluded Michael. (15-RT 4623-4624, 4629.) The stains were positive for blood and human DNA, but were so diluted that Ms. Duda-Shea could not tell if the DNA was from blood or sweat or skin. (15-RT 4623-4624, 4627.)

Mr. Bentley found four pubic hairs on Michael's sweater and one pubic hair on Michael's batman t-shirt. (15-RT 4517, 4527.) Based upon the hair characteristics of the five hairs found on the sweater and the shirt, they could have come from the pubic region of appellant; that is, appellant was not excluded. (15-RT 4530-4531, 4584.) Mr. Bentley admitted that the most that

could be said about the hairs was that they were consistent in color, shape and internal structure, but they could not be matched to anyone and he did not make any other comparisons with other pubic hairs. (15-RT 4530-4531, 4585.) Mr. Bentley did not examine the hairs under a microscope, though he examined them under "high magnification," and testified to their microscopic characteristics. (15-RT 4584, 4530-4531.)

After combing appellant's pubic area with a drop cloth under appellant, Mr. Bentley found silty soil with niccolite particles that one finds around the river bottom. (15-RT 4532.) He also found a very small green polyester fiber on the drop cloth. (15-RT 4532-4533; Exhibit 20.) Based on his examination of the fibers in a fiber comparison microscope, the fiber found on appellant could have come from Michael's sweater, because the sweater had the same type of polyester fibers in terms of color, shape, internal structure and fiber type and diameter, such that they were indistinguishable from each other. (15-RT 4518, 4532-4534; Exhibit 38.)

In sexual assault cases, finding a fiber in a pubic region of a victim or a suspect that relates back to the other person's clothes is very significant. (15-RT 4537.) A fiber is so small, however, that wind can carry it. (15-RT 4560.) Mr. Bentley found no green fibers on the blanket or in the vehicle. (15-RT 4562.) He did not look for green fibers on appellant's shirt. (15-RT 4563.) A green fiber found on Michael's pants also matched the sweater fiber. (15-RT 4536-4537.)

After making a foot cast of appellant's feet and comparing them to the footprints found at scene, Mr. Bentley opined that appellant's feet could have made the footprints found at the scene. The footprints were consistent in dimension of the overall foot and the shape of the toes, and where the pads of the toes fell. (15-RT 4545-4554; Exhibits 56, 57.) Thus, Mr. Bentley could not

exclude appellant's feet as making the foot impressions that were photographed and cast at the scene. (15-RT 4557, 4594.)

D. Appellant's Whereabouts and Possible Involvement

Appellant, born in December 1952, worked with his father, Boyd Rhoades, at his father's barber shop at 1016 Lincoln Road, about ½ mile from Highway 99 and about a mile and half away from his father's home at 1810 West Joseph, both in Yuba City. (12-RT 3751-3753.) Appellant was his father's only employee, and worked full time, renting a chair. Boyd knew appellant was on parole. (12-RT 3758-3759.) Appellant maintained a clean appearance. (12-RT 3759.) Appellant's mother, June Rhoades, was divorced from Boyd and lived at 605 Brown Ave. in Yuba City. (15-RT 4721.) Appellant lived eight miles west in Sutter. (15-RT 4721.) Appellant was married to Lynette, but the marriage had problems. (15-RT 4722.) Appellant owned the white pickup found stuck in the river bottoms. (15-RT 4724-4725.)

Appellant worked the day of Michael's death, but business was slow so appellant left about 10:30 or 11:00 a.m. and said he was going to get his truck's front end realigned at Sears.[6] (12-RT 3754.) Instead, appellant went to Rooney's Card Room at 505 Fourth Street, in Marysville and began a card game that started at 1:00 p.m. (12-RT 3776-3780, 3792-3793.) The house doubled appellant's money to gamble when he agreed to play for at least two hours. (12-RT 3777-3778.) Appellant said he would like to retire from the game early at

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6. The Yuba City Sears Automotive Service Department records reflect that no automotive services were provided to appellant on May 16, 1996. (RT 3771.) There was a Sears coupon for a free tire rotation and balance that expired May 31, 1996, in appellant's glove compartment. (RT 4496-4497.)

about 2:15 p.m. and Miguel Castellanos, who worked there, said no. (12-RT 3780-3782.)

Appellant called his father between 1:00 and 2:00 p.m. and said his truck was not finished. (12-RT 3754-3755, 3764, 3768.) Boyd did not approve of appellant playing cards. (12-RT 3760.) Boyd either told appellant to come back as soon as possible or, because business was probably slow that day, he probably had said "don't worry, don't come back." (12-RT 3755, 3764.) Because business was slow and Boyd had bills to pay, appellant let his father serve any customers. (12-RT 3760.)

According to Mr. Castellanos, appellant left Rooney's at 3:15 p.m. because the records show someone taking appellant's place at 3:20 p.m. (12-RT 3782-3785.) It was crowded so someone was waiting for appellant's seat. (12-RT 3804.) Valerie Lafontsee, another card dealer at Rooney's that afternoon, believed that appellant left about 3:12 or 3:15 p.m., during one of her breaks. (12-RT 3791, 3799.) Ms. Lafontsee told the police appellant left between 3:00 and 3:30 p.m. (12-RT 3802.)

Edward Gordon started a card game with appellant that day at 1:00 p.m. (12-RT 3827.) He remembered appellant leaving at 3:15 or 3:17 p.m. because the clock was in his line of sight. (12-RT 3828-3829.) Appellant was happy he had won, but was in a hurry to go fishing and Mr. Gordon got the idea he was going to meet someone to go fishing. (12-RT 3828-3829.)

Zepor Thao, another card dealer at Rooney's that day, did not remember if appellant was there when he returned at 3:00 p.m. (12-RT 3812, 3815-3816.) On March 26th, when Detective Vicki Van Natta interviewed Mr. Thao without an interpreter, he said that appellant was gone when he returned about 3:00 p.m. (12-RT 3822.)

It took Officer Michael Green three to four minutes to drive from Rooney's Card Room to the intersection of C and Boyd Streets, where Michael might have been picked up in a truck. (14-RT 4477-4478.)

Meanwhile, Pamela Lebhart and her husband Joris returned to their houseboat on May 16th about 4:30 p.m., which was moored in a lagoon off the Feather River in the river bottoms, and discovered a large tree had fallen on their boat. (13-RT 3975.) James Hickman lived with his girlfriend, Camille, at Shanghai Bend in the river bottoms, along with three other couples. (RT 4651-4652.) It was heavily forested and about the size of a baseball field. (RT 4653.)

Benny Strickland and his wife were down by the lagoon about 5:00 p.m. and heard Joris yelling for help. (13-RT 3991-3992.) They went to Randy Beutler's house to get a generator, chain saws, and floodlights. (13-RT 3994, 4005.) Gary Long and Mr. Beutler ferried the equipment to the house boat on jet skis, while Benny drove the pickup there. (13-RT 3995-3996, 4006, 4018-4019.) These friends hooked up a generator and cut the tree with chain saws for about 45 minutes to an hour, which made a lot of noise. (13-RT 3978, 4014.)

Ms. Lebhart saw lights on the Sutter side of the river that night. (13-RT 3987.) Around 10:00 or 11:00 p.m., as they worked, they saw lights back where their truck was parked, so Mr. Long went on his jet ski to check on the truck. (13-RT 3996, 4015, 4020.) They were concerned about vandalism, because there was a lot of it in the river bottoms and anything can happen at the river bottoms, so they did not want to leave the truck unattended. (13-RT 4003, 4015.)

Mr. Beutler saw headlights between the houseboat and the river. (13-RT 4007.) About half an hour after seeing the first light, he saw other lights that moved about 100 yards. (13-RT 4014-4015.) About 9:00 or 10:00 p.m., Mr. Long heard a truck spin out, like it was stuck. (13-RT 4028, 4030.) Mr. Long saw the vehicle's headlights go around the lagoon by the truck, but not by the

bank. (13-RT 4027.) The vehicle appeared to be in a hurry and was spinning hookers (peeling around) and then disappeared. (13-RT 4001.) Mr. Long heard someone in a vehicle, like he was stuck or playing around. (13-RT 4024; Exh. 70.) The truck made a lot of noise, as if a tool box was rattling around in the back. (13-RT 4002.) They freed the boat by 11:00 p.m. or midnight, after which they left. (13-RT 3986, 4017.)

While it is illegal to drive on the levy, it is possible to get onto the levy with a 4-wheel drive and use it as a road. (13-RT 4190-4194, 4743.) It is difficult to get out of the river bottoms via Shanghai Bend and over the levy. (RT 4469-4472.) It is equally difficult to get out of the river bottoms over the levy at Shanghai Bend or Bogue Road. (13-RT 4198, 4735-4742.) Trails that border the river are difficult to drive on. (13-RT 4199.) The entrance to the park by Second Street and Mosquito Beach area was several miles from Shanghai bend. (13-RT 4199-4200.)

The police went to the Lebhart boat about 11:30 a.m. the next day and Ms. Lebhart gave a false name and lied about her husband Joris not being there, but she gave permission for the police to search her boat and Joris revealed himself. (13-RT 3982-3983.)

On the morning of May 17th, Sean Harvey went with Robert Davis, Jeremy Griffin, and Danny Anderson to the Feather River bottoms to help with the search for Michael. (13-RT 4095, 4098, 4105, 4109.) As they were calling for Michael, they ran into appellant, who scared them, as he appeared out of nowhere from behind bushes, and because the water had come up so they were surprised to see anyone there. (13-RT 4096-4097, 4105, 4108.) Appellant was wearing nothing but a pair of jeans. (13-RT 4097, 4105, 4111, 4392.) Appellant seemed kind of nervous, a little bit like he was shocked or something. (13-RT 4111.) Appellant asked them if they could give him a hand to pull his vehicle out

of the mud, but they declined to help. (13-RT 4097-4098, 4105, 4111.) They told appellant they were looking for a missing little boy and appellant said he did not know anything about it. (13-RT 4111.) They handed appellant a flier about Michael and appellant said he needed to hurry and get out of town, but his truck was stuck. (13-RT 4111, 4113.)

That morning, Sergeant Jess Harris and Officer Barbara Burns were assigned to patrol Feather River in a loud boat clearly marked "sheriff" on both sides and the back. (13-RT 4049, 4052.) About 11:00 a.m., they drove to the area where they were told a body had been found, and then went south, downstream, stopping at Halpern's Lagoon where they contacted Kim Kingsbury and Joris Lebhart. (13-RT 4050.)

About a fifth or a quarter mile downstream from Halpern's Lagoon, as they were moving down river about 30 yards from the bank, Officer Harris saw a white pickup with a white camper shell in a heavily wooded area. (13-RT 4051.) The truck was stuck with water against the edge of the wheels. There was a come-along pulley attached to the rear bumper and a tree. (13-RT 4052.) Appellant was sitting in the truck not wearing a shirt. (13-RT 4052, 4065.) Appellant would have heard the boat, because it was so loud. (13-RT 4069.)

According to Officer Burns, who was in uniform, appellant did not see them or just did not want any help. (13-RT 4078, 4088.) Prior to eye contact, appellant remained motionless. (13-RT 4053.) Appellant's head was tilted slightly back and he was looking at Officer Harris. (13-RT 4052-4053.) According to one statement, Officer Burns said that appellant "exited the vehicle and hailed" them, but she told another officer that appellant did not hail their boat, but was watching them or staring at them intently. (13-RT 4079, 4086-4087.) Once eye contact was made, appellant exited the pickup and stood at the edge of the water. (13-RT 4053-4054.) When appellant exited the truck, he was

barefoot, shirtless (exhibiting tattoos on his chest and back and both arms), and wearing only a pair of wet jeans low on his hips without underwear, even though it was cold and breezy, with intermittent rain. (13-RT 4053-4054, 4067, 4079.)

Appellant did not appear enthusiastic about the police arrival. (13-RT 4062.) Once appellant was on board the boat, Officer Burns handcuffed him. (13-RT 4054, 4079.) After being handcuffed, appellant identified himself as Bob, then, after being asked for a complete name, Bob Rhoades. (13-RT 4063, 4079.) Appellant said he was on parole for drugs, robbery and kidnapping, but did not indicate he was also on parole for child molestation and oral copulation. (13-RT 4064, 4074.) Appellant said that he had been out there for a couple days fishing and got stuck and asked if they could help him get his truck out.[7] (13-RT 4065-4066, 4079, 4120.)

Appellant asked what was going to happen to his truck and why he was being detained and Officer Harris said that his arrest was due to his proximity to a major crime scene and his parole status. (13-RT 4066, 4071-4073.) Appellant did not appear to be under the influence of drugs. (13-RT 4074.) As they passed the shore where Michael was found, appellant did not look at the people with white suits, who were very visible. (13-RT 4080.)

Around noon, Sergeant Claudie Brookman located appellant's pickup truck. (13-RT 4118-4119.) Appellant's truck was found 400 to 500 yards south

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7. Appellant had gotten his truck stuck before and asked his father for help once. (RT 3756.) Appellant's father, Boyd, helped appellant with a dead battery once, but had never helped him get unstuck in the river bottoms because he had no way to do it, and the police report was wrong to indicate otherwise. (RT 3763, 3766.) Boyd told the police that a cousin helped appellant get unstuck once, but refused to identify him. (RT 3768.) Mr. Hickman once helped appellant get his pickup "unstuck" at the river. (RT 4662.) According to appellant's mother, June, appellant got stuck in the river bottoms often and June once helped him get his truck free. (RT 4725.)

of Michael's body, but the only way to get there was to go north and then south. (14-RT 4468.) When Sergeant Brookman first saw the pickup truck with a bed shell, the tailgate was open. As he approached the vehicle, it appeared it was stuck in four to ten inches of water and a portable come-along cable had been wrapped around the rear axle of the vehicle and the other portion was wrapped around a tree.[8] (13-RT 4119-4120, 4123.)

Sergeant Brookman noticed a dirty thin-bladed, fish filet type knife with a serrated edge and dark-colored handle lying on top of the open tailgate of the vehicle. (13-RT 4119-4120, 4123, 4176; Exhibit 23.) Appellant's father, Boyd, recognized this knife as appellant's fillet knife that he used while they both fished.[9] (12-RT 3769-3770; Exh. 23.) Appellant fished a lot at the river bottoms. (12-RT 3756.) Sergeant Brookman also found a folding knife on the front seat and underwear on driver's side floorboard. (13-RT 4126, 4129; Exhibit 49.)

FBI special agent John Reger examined appellant's truck (registered to Boyd Rhoades) on May 18th. (14-RT 4349, 4404.) He found a sleeping bag on the seats and a cotton shirt in the rear bed. (14-RT 4401; 4597; Exhibit 27.) He found a syringe that had .15 milliliters of liquid containing methamphetamine, a needle, underwear and leaves on the floorboard of the driver's seat. (14-RT 4405-4406, 4540, 4692; Exhibit 51.) He found a knife sheath behind the driver's seat. (14-RT 4408.) He also found two razor knives in the vehicle. (14-RT 4414.)

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8. After one unsuccessful try with a small tractor, which became stuck, a large tractor pulled appellant's truck out about 5:30 p.m. and the truck was taken to a secured locked police garage. (RT 4134-4137.)

9. In May 1996, Timothy Sullivan was appellant's parole agent. (RT 4635.) A standard parole term, to which appellant had agreed in writing, was that he was prohibited from having access to any knife with a blade longer than two inches, except kitchen knives in his residence and knives related to his employment. (RT 4637-4638; Exhibit 135.)

Agent Reger found a wallet with $101 in cash and appellant's driver's license in the glove compartment, along with $25 in cash loose in the glove compartment. (14-RT 4409, 4411.) Wedged between the two seats was .33 grams of methamphetamine, a usable amount in foil and toilet paper. (14-RT 4413, 4538-4539, 4690; Exhibit 52.) Appellant's blood sample taken that day contained methamphetamine, but not alcohol. (15-RT 4691; Exhibit 18.)

The next day appellant called his father and said he had been down at the river bottoms and had been arrested and was in jail on a parole hold, but did not know why. (12-RT 3755-3756, 3764-3766.) Appellant called his mother on Friday night, May 17th and said he was in Sutter County jail. (15-RT 4724.) He may have said he was in jail on a parole violation and asked her to try to get his truck out of impound to avoid a storage fee. (15-RT 4727-4728.) When appellant called, he did not seem concerned, other than for his truck and some money (more than $125) that he had left in his truck. (15-RT 4729.) Appellant also asked his mother to get his personal belongings they had taken from him at the jail, but the jail would not release them. (15-RT 4729.)

On May 18th about 1:00 a.m., nurse Julie Calcagno did a sexual assault exam of appellant. (14-RT 4311, 4314.) She saw a linear abrasion on his left inner arm as well as three linear, finger-type, abrasions on the ventral hip and scratches on the left outer hip around the buttocks. It was possible that the abrasions were scratches from shrubbery. They were fairly superficial. The ventral hip, however, appeared to have more finger-type scratches.[10] The width between each scratch was more fingerlike, and the depth was a little bit deeper than the scratches on the outer hip. (14-RT 4315-4316.) She found scattered

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10. She did not mention the possibility of fingernail scratches in her report. (14-RT 4319-4320.)

grains of dirt in appellant's pubic area, which was denser than in other areas. (14-RT 4317.)

On May 24th, appellant's windshield was removed from his truck. (13-RT 4142.) Michael's left and right footprints were found on the inside of appellant's truck windshield. (14-RT 4416, 4425-4427, 4434-4435.)

At a recess during appellant's preliminary hearing on October 22, 1996, just after the witnesses had been discussing the time of Michael's death, Deputy Carlton Dinwiddie took appellant to the jury room during a recess. He was standing at one door and another guard was at another door, when appellant stood up and said to the attorneys and investigator Larry McCormack: "I can give them a better time of death than what they have." (15-RT 4760-4762.)

E. Appellant's Alleged Threats To Kill His Next Child Victim Two Days Before Michael's Death

Early in the morning on May 14, 1996, two days before Michael was killed, Kevin Buchanan was riding a Yuba City bus and saw appellant, or someone who resembled appellant, get on.[11] (15-RT 4694, 4701, 4719.) Appellant told Mr. Buchanan that he had just gotten out of prison for child molestation. (15-RT 4697-4698.) Mr. Buchanan asked appellant if he ever felt as though he would do anything like that again. Appellant said yes, but explained that he would stop working at Lloyd's barber shop on Plumas (which appellant pointed out to him)

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[11] The prosecutor twice asked Mr. Buchanan if he could identify anyone in the courtroom as the person who got on the bus; he could not. (15-RT 4694, 4701.) Mr. Buchanan had previously identified appellant as the person on the bus from a T.V. clip of appellant being arrested at the Feather River. (15-RT 4694.) Mr. Buchanan did not remember being shown a photo lineup or live lineup to see if he could identify appellant, though he thought he might have picked appellant out of a live lineup. (15-RT 4705.)

and go to the Town Pump Bar next door to cool off "so I can get control of myself." (15-RT 4698, 4705-4706, 4717-4718.)

Mr. Buchanan asked appellant, if he did it again, would he threaten to kill them? Appellant said, "No, I'll kill them." (15-RT 4698.) Mr. Buchanan asked if appellant would break their necks. Appellant pulled out a knife with a serrated edge and waved it around, saying, "No, I'll use this. Because they make straight cuts. It's like a ginzu knife, they make straight, clean cuts. Not like other knives where they rip and cut. This makes a straight, precision cut." (15-RT 4695, 4699, 4709.) Mr. Buchanan thought appellant's knife with the serrated edge looked like the knife on the bus. (15-RT 4700-4701; Exhibit 80-A.) Appellant told Mr. Buchanan he used the knife for hunting. (15-RT 4671.)

Mr. Buchanan asked: "Well, where would you dump the body, the dumpster or something?" Appellant responded: "No, the river bottoms, down at Mosquito Beach [because] nobody goes down there, they'd never find the kid." (15-RT 4699.) Mr. Buchanan was mad at appellant and ready to fight him. (15-RT 4708.)

According to Mr. Buchanan, the person had black hair (appellant did not), his face was sunken in, and he was dirty. (15-RT 4702-4704.) The man had on a brown jacket, blue jeans, and black boots or black shoes. (15-RT 4702.) Mr. Buchanan thought he might have seen appellant again walking on the street and looking very dirty. (15-RT 4712.)

That day, Alicia Tapia, who was serving time for child endangerment, was riding the local bus in Yuba City, when a man she identified as appellant got on the bus at Clark and Washington with a large knife, which scared her older daughter. (15-RT 4669, 4675, 4680.) The knife was like a machete and was in a holster that went from his waist to close to his knee. (15-RT 4670, 4675.) According to Ms. Tapia, appellant was very dirty and was wearing blue jeans and

no shirt. He smelled badly as if he had not taken a bath in two weeks. She could not recall any tattoos. (15-RT 4675.)

Ms. Tapia talked in Spanish to the bus driver, Patsy Alvarado, about the knife and Ms. Alvarado told the person who looked like appellant that he needed to change the conversation because it was upsetting the passengers. (15-RT 4674, 4700-4701, 4707.) According to Ms. Tapia, appellant got off the bus at Clark and Ainsley. (15-RT 4675.)

Ms. Tapia saw a photo in the paper of appellant and thought it was the man on the bus. (15-RT 4675-4676.) The police did not show her a photo lineup or live lineup to see if she could identify appellant. (15-RT 4676-4677.) No one showed Ms. Tapia a knife to identify. (15-RT 4677.)

F. Appellant's Prior Conviction For Molestation Of Four-Year Old Crystal T.

At the time of her testimony, Crystal T., born on September 7, 1988, was nine years old, and in the fourth grade. (15-RT 4787.) Five years earlier, on January 8, 1993, when Crystal was four years old and lived in a trailer park in Pine Grove, her grandmother lived close by in a trailer with appellant. (15-RT 4787-4788, 4791.) One morning, appellant told Crystal to take off her clothes; he took off his and told her to orally copulate him, which she did. (15-RT 4788-4789.) Appellant touched her privates. (15-RT 4789.) That evening at the dinner table, Crystal told her mother, Helen Dalton, that appellant made her put his penis in her mouth. (15-RT 4791.) Ms. Dalton informed the police and appellant pleaded guilty to child molestation. (15-RT 4792; Exhibit 119.)

G. Appellant's Prior Conviction For Kidnapping, Forcible Oral Copulation, and Robbery Of Sharon T.

In August, 1985, 29-year-old Sharon T. worked at Mr. Steak as a waitress and lived at 1711 Swezy Street, Apartment # 10, in Marysville. On August 21, 1985, she was home when someone knocked on the door, but no one was there when she answered it. A few minutes later, the phone rang and appellant asked her why she had not answered the door, and that he wanted to come over and talk to her. She had lived at the apartment for about nine years and had known appellant for about seven years, but had no relationship with him. (15-RT 4794-4795.) Appellant said he was working for an investment company and that he wanted to talk about some property where they wanted to open a new restaurant, next to the Mr. Steak restaurant where she worked. Sharon agreed and appellant came over about five minutes later and she let him in. Appellant was dressed a little scruffy in a T-shirt and jeans, and had not shaved. He sat down and started asking questions about Mr. Steak. (15-RT 4797.) Appellant asked her to look to see what was in his eye and to get it out, so she looked, but did not see anything, and offered him a mirror, which he refused. (15-RT 4799.)

After Sharon got something to drink out of the refrigerator, she came back and appellant got up and came over and pushed her over on the couch and sat down next to her and started rubbing her leg. Then appellant came up behind her and grabbed her hair and pulled her head back very hard. (16-RT 4800.)

Appellant then pulled out a knife, put it to her throat and told her that he was wanted for armed robbery and that he needed some place to stay for 24 hours and that he was going to stay at her house. (16-RT 4800-4801.) Sharon told him she did not want him to stay and he said that that was too bad; that she did not have any choice. Sharon told him she had to go to work, but he said that was too bad. (16-RT 4801.)

Appellant threatened to kill her unless she did everything that he told her. The knife was black-handled and seven inches long, like a big hunting buck knife. Appellant asked her if she had any money in the house and if she had a checking account. He wanted her ATM card and the number for her ATM card. Sharon said she did not want to give it to him, but he still had the knife out, so she went and got the ATM card out of her purse. (16-RT 4801.)

Sharon got her money and the PIN number for the ATM, but he got mad because she had only $50. She asked appellant to leave. (16-RT 4802.) She asked him to let her go to the bathroom, so appellant took her down the hall to the bathroom and stood there while she went. He grabbed her by the arm and took her to the bedroom and told her to turn around, and he put handcuffs on her, put her on the bed, and told her to lay there and threatened to kill her if she made any noise. She just laid there and he walked off. Appellant came back into the bedroom, picked her up off the bed, and took off his clothes and started taking off her clothes. Appellant started pulling off her pajamas and robe, but he could not get them off because the handcuffs were on her. When it appeared he was going to tear off her clothes, Sharon asked him not to. Appellant unhooked one of the handcuffs and took her clothes off. (16-RT 4803.)

Appellant told her to perform oral sex on him. (16-RT 4803.) Appellant threatened her, saying she better do everything he told her or he would kill her. (16-RT 4804.) Because appellant held a knife to her throat, she performed oral sex until he ejaculated in her mouth. (16-RT 4804-4805.)

Appellant took Sharon into the living room and started gathering up his stuff. He pulled out a bandanna and began wiping his fingerprints off of everything, including a glass of water, that he had touched or picked up and all the stuff that was on the table that he had touched. (16-RT 4804.) Sharon asked appellant: "How can you remember everything in my apartment that you

touched?" Appellant coolly responded: "People who make mistakes get caught; people who don't, don't." (16-RT 4805.)

After appellant finished cleaning everything, he told Sharon to put on a pair of shorts and a shirt. Appellant said he was going to take her to River Front Park or Ellis Lake Slough, where Ellis Lake empties into the river. (16-RT 4805-4807.) He put his clothes on and took her back out in the living room. Appellant told her that he had to meet some friends at the river bottoms and was really concerned about the time. (16-RT 4806-4807.)

After Sharon got dressed, appellant took the handcuffs off her arm and told her that, if she got any ideas about running away from him, he would kill her with the .22 Derringer in his pocket, and that he would have no problem shooting her. (16-RT 4808.)

Appellant grabbed onto her arm and walked her down the stairs and to the car. He walked to the passenger side and opened the door and put Sharon in the car, and got in on the driver's side and told her to lock the door and took off. While appellant was driving, he laughed and said, "This is just like Bonnie and Clyde, but Bonnie's not going to make it." (16-RT 4809-4810.)

Appellant took her to a Foster Freeze and stopped the car and got out. He told her to stay in the car and not get any ideas about running away because he would shoot her if she got out of the car. (16-RT 4810.) He walked up to the window and ordered drinks, and watched her the entire time. He then came back to the car and they left. (16-RT 4811.) They headed in the direction of the Feather River bottoms. (16-RT 4835-4838; Exhibit 109.)

Sharon thought appellant was going to kill her once they got across the levy, so when he went to open a pack of cigarettes, she tried to jump out of the car. (16-RT 4812-4813.) She grabbed the door handle, squeezed it, and began to jump out. Appellant yelled at her and called her a little bitch. He said, "I told

you not to try to get away from me" and "I'm going to kill you." Appellant grabbed her arm and the back of her shirt while driving the car and began pulling her back into the car. (16-RT 4814-4815.)

Appellant took her hands and put them both together in one hand and went to reach for the gear to park. Sharon pulled up with her hands and fell out the door to the ground while the car was moving. She hit the ground, and cut her leg. She turned around, and saw the car door swinging back towards her, and saw the tires from the car turning towards her, so she ducked and rolled underneath the car door when it was coming at her and got up and ran. (16-RT 4815.) Sharon had hit her head and suffered a big road burn on her leg, a deep cut on her big toe and a lot of cuts and bruises on her body. (16-RT 4831.)

Sharon ran towards the Welfare Office, and kept pulling on a locked door until some people motioned for her to come over to the main entrance of the Welfare Office. She ran in and asked somebody to call the police because someone was trying to kill her. She saw appellant had already turned her car around and was going back in the direction they had just come. (16-RT 4831-4832.)

On August 3, 1985, [sic] [August 23] about 2:16 a.m., Officer Don Strickland made a traffic stop of a green Ford pickup in Marysville with appellant driving. (16-RT 4839-4840.) He searched it and found an eight-inch fixed blade knife in a brown leather sheath, commonly used for gutting game. Sharon could not identify this as the knife appellant used. (16-RT 4841-4842.)

Appellant was convicted of kidnapping, robbery and forcible oral copulation of Sharon. (16-RT 4847-4848; Exhibit 115.)

The Defense

H. Michael's Whereabouts And Habits

On May 16th about 4:15 p.m., Kenneth Slatton was walking by the river at Mosquito Beach and saw Michael, who was wearing dark-colored jeans and a long-sleeved shirt. (16-RT 5014, 5018.) Michael was with a Hispanic boy about the same age, who looked like Gabriel who had lived at the same apartments where Michael lived and where Mr. Slatton had lived two years before. (16-RT 5015, 5018.) Mr. Slatton remembered the boys playing because it was cold and rainy and normal kids were not playing outside. (16-RT 5019.) He reported his sighting to the police when he saw Michael's photo in the paper or on a flier or on the T.V. the next day. (16-RT 5015, 5020-5023.) He was positive it was Michael. (16-RT 5017, 5024-5025.) Mr. Slatton did not know appellant and hoped the police would catch Michael's killer. (16-RT 5023.)

Sherrie Luster reported seeing Michael as she fished on the Marysville side of the river between two bridges. (16-RT 5030.) She recognized Michael from a photo. (16-RT 5043.) She saw Michael with two adults, one of whom she thought was appellant, but the police said it could not have been appellant because of the clothes she described the man wearing. (16-RT 5032, 5043.) Nevertheless, Ms. Luster identified appellant in court as the man she saw drive up in the truck with Michael. (16-RT 5043.) The man in the truck looked like he was wearing jewelry, like a necklace. (16-RT 5046.)

Looking across to the Yuba City side of the river, she saw a man outside a tent sharpening a knife. (16-RT 5033, 5035.) Ms. Luster had seen the same man about four or five days before dressed raggedly and unclean. (16-RT 5034.) The man had on a dark Levi jacket and dark T-shirt, possibly a red tank top. The man had dark, scraggly hair and facial hair. (16-RT 5039.) A few days earlier, this man who was staying in the tent, had scared Ms. Luster. (16-RT 5035.) The

other man by the river was unkempt and had lots of facial hair, a beard, and wavy dark long hair. (16-RT 5046.)

A man in a white pickup truck got out and talked loudly to the man at the river who was camped there. Ms. Luster saw Michael standing by the back of the truck. (16-RT 5036.) Ms. Luster at first thought it was her nephew who looked similar to Michael and lived close by. (16-RT 5040, 5150.) The men walked up the hill to the driver's side of the white Toyota pickup truck, which was a two-wheel drive. Ms. Luster did not remember whether the truck had a camper shell. (16-RT 5037, 5041.) She asked the men and the boy for the time sometime between 3:00 and 4:00 p.m., but they ignored her. (16-RT 5038, 5042.) When she asked Michael, he looked "blank", not frightened or crying or happy. The men and Michael all left in the truck. (16-RT 5039.) The police told her she did not have the right time or the right clothing. (16-RT 5040.)

On May 19th, 1996, Ms. Luster told Officer Frank Starmer that she had seen a boy with a man on the river near a transient camp, which was a makeshift campground with boxes that led to a fire pit. (17-RT 5143-5144.) The boy was wearing a dark-colored sweat shirt with a zipper down the front and pockets in front also. (17-RT 5143-5144.) The man was in relatively close proximity to the boy. Ms. Luster described an older white boxy pickup pulling up to the camp. She said that the pickup did not have a camper shell. (17-RT 5143-5144.) She believed that the man she saw get out of the pickup truck was appellant. The boy she saw she described as Michael Lyons. (17-RT 5145.) From where she was standing, however, Officer Starmer could not identify a person he knew across the river. (17-RT 5147.)

Mark Regan was a licensed private investigator who worked with Larry McCormack. (17-RT 5148-5149.) He interviewed Ms. Luster on May 16th. She said the man she identified as appellant was wearing blue jeans, work style

boots, and a red tank top, over which he had a Levi type jacket with fleece. He had a chain around his neck, which was either gold or silver. (17-RT 5150.) Ms. Luster said that she recognized appellant when she saw a picture in the newspaper and told her husband that day or the following day that the picture in the newspaper was the man she saw on top of the levee. (17-RT 5151.) She saw a white pickup truck but she could not say whether or not it had a camper shell on it. (17-RT 5152-5153.)

Mrs. Lyons came to the Carlson apartment, number 45, at 370 McRae, about 8:30 p.m. looking for Michael. (16-RT 5048, 5054-5055.) Mrs. Lyons or someone else would come looking for Michael about once or twice a week. (16-RT 5049, 5054-5055.) The river bottoms were about a five minute walk, a block or two from their apartment, and about a 10 to 15 minutes walk from their apartment to Bridge Street school. (16-RT 5056.)

Christopher Carlson had seen Michael at the river bottoms two or three times, usually with a group of kids, just playing. (16-RT 5050.) Christopher saw Michael by the courthouse where the rope swing was and the Fifth Street Bridge, but never south of there and never alone. (16-RT 5051.) The last time Christopher saw Michael at the river bottoms was within one to six months before his death or at least within the past year. (16-RT 5051-5053.)

Michael Carlson saw Michael at the river bottoms by the courthouse with other kids two to four times, most recently about six months or a year before his death, but never alone. (16-RT 5056-5058.)

Marjorie Kearby lived next door to Michael's grandmother, Linda Lyons, and two doors from the Bridge Street School. Ms. Kearby would sit with Michael while he waited for his grandmother to come home. (16-RT 5063-5064.) Michael played with other children. (16-RT 5064-5065.) Sometimes Michael stayed there until 5:30 p.m. (16-RT 5066.)

I. The River Bottoms Inhabitants

In an attempt to identify alternative perpetrators, appellant suggested that one or more of the ex-convicts and criminals, who lived on the margins of society in the river bottoms, were more likely to have killed Michael than he.

Joris Lebhart lived on a houseboat in the river bottoms with his wife, Pamela. (16-RT 5068.) The Lemmons, Hickman, Camille Dugger, and Don Dugger lived in the bottoms. (16-RT 5070-5071.) A tree fell on the Lebhart's houseboat, and Mr. Beutler, the Stricklands, and others helped to remove it. (16-RT 5069.) Mr. Lebhart did not hear vehicles that night. (16-RT 5074.) Mr. Beutler would go over the levee illegally in a 4-wheel drive vehicle. (16-RT 5076.)

Bobbie Lemmons lived in a house trailer in the river bottoms with his wife for two years. (17-RT 5186.) He made money gathering cardboard and had a storage locker in Marysville. (17-RT 5187.) Around 8:00 or 8:30 a.m. on the 17th, he found shoes and gave them to Michael's mother and went to help her find clothing. (17-RT 5188.) He went ahead of her and found a pair of pants. (17-RT 5189.) The pants were in tall grass, not easy to see. (17-RT 5190.) The shoes were in the open, down a hill. He had seen the shoes the evening before around 8:00 or 8:30 p.m. or close to dusk. (17-RT 5192.)

Mr. Lemmons went to bed around 9:00 or 9:30 p.m. (17-RT 5194.) Lots of people get stuck in the bottoms; that night he heard a truck spinning its tires for about half an hour. (17-RT 5194-5195.) He heard the spinning wheels when he was with his wife at his trailer, but never told his wife to say he was not there when they heard the tires spinning. (17-RT 5203.) He did not have a vehicle in May 1996. (17-RT 5204.) His shoe size was 8 ½. (17-RT 5193.) His foot size was 9 ¾ inches. (17-RT 5213.)

Donald Dugger knew Mr. Lemmons since June 1994 and went looking for cardboard with him. (17-RT 5217.) The police spoke with him and Mr. Lemmons on May 17th. (17-RT 5217.) Mr. Dugger's trailer was half a mile upstream from the lagoon and ¼ mile downstream from the Lemmons' trailer. (17-RT 5218.) Mr. Lemmons told Mr. Dugger that the police had talked to him and asked Mr. Dugger to provide an alibi for him for the night of the murder. (17-RT 5219.) The police never questioned Mr. Dugger, but he told this to defense investigator McCormack. (17-RT 5219.) Mr. Dugger did not know appellant. (17-RT 5220.)

Detective Van Natta showed Mr. Lemmons a fishing pole found in his locker. (17-RT 5221.) Mr. Lemmons admitted ownership and said he found it near Whitaker Hall, right before the levees. (17-RT 5222.) Mr. Lemmons told Mr. McCormack that he got the brown fishing pole from a friend and found the black pole near a culvert pipe by his trailer and the river. (17-RT 5229.) Mr. Johner told Detective Van Natta that he had given one or both of the fishing poles to Mr. Lemmons. (17-RT 5224.) Mr. Johner said he got the poles from his father. (17-RT 5225.) When Mr. McCormack went to Lemmons' locker he seized a number of items, including a black fishing reel. He went with Van Den Heuval and Lynette Rhoades, who pointed items out. (17-RT 5234.)

Detective Van Natta showed Mr. Lemmons a knife found in the locker. (17-RT 5223.) The knife appeared to have initials L and R, for Lynette Rhoades. (17-RT 5230.) Mr. Lemmons said he found the knife somewhere or traded cigarettes for it. (17-RT 5230.)

Mr. Lemmons admitted to seeing Mr. Dugger a night or two after Michael was found. (17-RT 5223.) Mr. Lemmons never told Mr. McCormack he had seen the shoes the night of the May 16th. (17-RT 5227-5228.)

According to Janet Lemmons, her husband, Bobbie Lemmons, did not tell her he had seen Michael's shoes the day before. (17-RT 5273.) Mr. Lemmons

was with her when she faintly heard tires spinning. (17-RT 5273-5274.) In a taped interview with Mr. McCormack, she said she was alone when she heard the tires. (17-RT 5275.) She said Mr. Lemmons came home about 5:30 p.m. and stayed with her the rest of the night. (17-RT 5277.) Ms. Lemmons gets confused and has a nervous medical condition. (17-RT 5277.)

When Mr. McCormack interviewed and taped Ms. Lemmons, she never indicated she did not understand what "being by herself" meant, and she did not blame her medical condition for being unable to understand questions and was not nervous or crying. (17-RT 5279.) Ms. Lemmons said she was by herself when she heard the spinning tires. (17-RT 5282.) Mr. Lemmons said he was in the trailer when he heard them. (17-RT 5282.) Mr. Lemmons did not say anything about the spinning tires until the second interview. (17-RT 5283.) Ms. Lemmons did not say she was looking for shoe strings when she found Michael's shoes. (17-RT 5284.) Ms. Lemmons did not say anything about Mr. Lemmons saying he saw the shoes the day before. (17-RT 5284.) Mr. McCormack talked with Mr. Lemmons about ten times and taped formalized statements twice. (17-RT 5285.)

J. The May 14th Bus Incident

On May 14th, appellant returned his father's boat which appellant and his wife had borrowed and they both went to work as usual. (17-RT 5104.) Appellant dropped off his wife's car in the morning at Other Guy's Auto Repair just off Percy Avenue in Yuba City to replace a thermostat. (17-RT 5105-5106, 5124-5126; Exhibit 224.) According to Andrew Schuy, the owner of the garage, appellant was not dirty or scruffy looking. (17-RT 5125.)

According to appellant's father, appellant returned to work for the rest of the day. (17-RT 5106.) Boyd had never seen appellant wearing dirty shoes and

dirty jeans, or with a knife. Appellant did not have scraggly, dirty hair that day. (17-RT 5106.)

In 1996, Petra Garcia, formerly Patsy Alvarado, worked as a bus driver for Yuba City. (17-RT 5108.) If a passenger had taken out a knife, or exposed the knife in a threatening manner, she would use a code to report it to the police right away. That would be her obligation. Nobody was allowed on the bus without shoes and shirt. (17-RT 5108-5110.) Had such an incident occurred, she would have written a report, which she haf not. (17-RT 5109-5110, 5118-5120.) There were no records of this incident at the Yuba Sutter Transit Authority. (17-RT 5140.)

Neither Alicia Tapia or Kevin Buchanan, both of whom she knew, ever told her there was a guy on the bus who was waving a knife around. She never saw a man pull a knife out of his jacket and show it around. (17-RT 5111-5112.) She thought she had seen appellant on the bus in the past, but not with a knife. (17-RT 5114-5115.) The mere fact that a person had a knife would not concern her. (17-RT 5117.) A person called Rambo rode the bus in the Linda area: he was tall, with long blond hair, and always wore a long leather jacket and carried a knife. (17-RT 5121.)

According to Mr. McCormack, the bus routes described by Tapia and Buchanan were different. (17-RT 5135-5137.) The route described by Tapia would have taken one minute; the route described by Buchanan would have taken four or five minutes. (17-RT 5139.) Mr. Buchanan said he had suffered a coma. (17-RT 5139.)

K. Appellant's Testimony

Appellant, age 45, never saw Michael Lyons until he saw him on the TV, and had no contact with him. He did not kill, torture, or kidnap him or pick him up

in a gold pickup (which he did not own). (17-RT 5310-5311.) While the knife found in his truck was his fishing knife, he never used it on Michael. (17-RT 5311.)

Appellant was born in Marysville, California, in December 1952, and lived in the Yuba City/Marysville area for most of his life, except he lived briefly in the Stockton area with his wife, and in the Pine Grove area for about a year. (17-RT 5311-5312.) Appellant had an average IQ, and went to junior college at various times. (18-RT 5430.)

In May of 1996, he began work as a barber for his father. His father was a devout Christian with extremely high moral and social standards and unquestioned integrity. (17-RT 5312-5313.) Appellant never showed up to work dirty and full of mud and looking like he needed a bath. His father would not allow that. Appellant was a business man, and acted accordingly. He cut hair at the shop every day. He would give his father 30 percent of his earnings, instead of rent. (17-RT 5313.)

Appellant was never on a bus on May 14th with or without a shirt and did not pull out a knife and wave it around. (17-RT 5325, 5327.) On the morning of the 14th, his father called him at 6:00 a.m. and told him that he had gotten back from a trip to Washington State. (17-RT 5327.) His father asked appellant to bring his boat back. The boat was hooked up to his truck, so appellant and his wife, Lynette, dropped the boat off. Appellant arrived at work later that morning, and then drove Lynette's car over to the mechanic's. Appellant returned to work, and Lynette drove off in his truck. His father's barber shop was four or five miles from Lloyd's Barber Shop. (17-RT 5328.)

Appellant owned a white (not gold) pickup truck and had bought the truck in August or September the previous year, 1995. It was a four-by-four Toyota pickup with matching camper shell, heavy-duty suspension, and heavy-duty rear

bumpers. It had a tow package on it, with a gray interior. (17-RT 5315-5316.) He had owned four-wheel drive vehicles to go places that were inaccessible to anything other than a four-wheel drive or walking. Appellant spent a great deal of time down in the river bottoms fishing and in the mountains. He had been down to the river bottoms hundreds of times since he was a teenager, and knew the levee and Bogue Road very well. (17-RT 5312, 5316.)

As the years passed, there was less access to the levees and the gates were locked. (17-RT 5317-5318.) Appellant's Toyota was geared extremely well for four-wheel travel, so that he could quickly and easily get over the levee by Bogue Road and anywhere else. (17-RT 5317-5319.) It was more difficult to get to the Shanghai Bend area without climbing and driving the levee, which is illegal, and it was more difficult to get to the Shanghai Bend area from the river bottoms. (17-RT 5318.) While it was illegal to go over the levee in his four-wheel-drive pickup, he had done it many times, as everyone did. (17-RT 5385.) The main entrance was the easiest exit. The fastest way out of the lagoon was Bogue Road. (17-RT 5319.)

Appellant let Mr. Hickman and Camille Varney use his vehicle on several occasions to go to the stores and to go to court on some drug charges. (17-RT 5320.)

Appellant often got stuck unintentionally, and he would usually get himself out by doing a lot of hard digging, and jacking the truck up and putting things under it. (17-RT 5321.) If the tires started spinning, it was easy to get bogged down and stuck. (17-RT 5323.)

Previously, appellant had spent two or three days getting his truck out using a come-along, which is a hand wench with a cable that is approximately 10 to 12 feet long. He did not have it in his truck on the night of May 16th because it

was missing a hook, so it was in his shed until he repaired it. (17-RT 5322, 5402-5403.)

Appellant had always been a weekend drug user only, but stayed clean and sober all week long when he worked. (17-RT 5321.) Appellant would not call his father for help because he was either partying or doing drugs or engaged in activities that his father would not have approved of. (17-RT 5321.) Appellant stayed away from home on the weekends until late Sunday night to avoid his parole officer. (17-RT 5382.) Appellant injected methamphetamine. (17-RT 5335.) Appellant was doing drugs on May 16th later in the evening. (17-RT 5321.) Methamphetamine gave him a lot of energy and elevated his mood. (17-RT 5390.) It could sometimes have an effect on his sexual appetite, depending on the circumstances and the situation. (17-RT 5391.) He knew that after he used methamphetamine, he could still turn up a dirty test the next day, but he also could flush it out of his system in 24 hours. (17-RT 5382.)

Appellant had money to buy drugs; he always had at least $100 or $200 on him. (17-RT 5333-5334.) On Thursday, May 15th, appellant went to Harold Crane's home at Pine Court Way, in Linda, by Yuba College, with the hope of running into him, because Mr. Crane, his usual drug dealer, was hard to get hold of. (17-RT 5333-5335, 5383.) Appellant bought $60 worth of methamphetamine in a plastic bag, a little under a 16th of an ounce, between 1.25 to 1.5 grams. (17-RT 5333-5335, 5383, 5424.) He could get between six to ten injections from this amount. (17-RT 5384.) Almost everyone used methamphetamine at the river bottoms. (17-RT 5335.)

In May 1996, appellant was on parole. (17-RT 5328-5329.) Using drugs or having syringes was a violation of his parole. (17-RT 5405.) Sometime in the early 1980's, he had pleaded guilty to check forgery charges, which meant he defrauded people and lied, in both Sutter County, in 1984, and in San Mateo

County. (17-RT 5329, 5386-5388.) In 1985, he was charged and convicted of robbery, forcible oral copulation, and kidnapping in Yuba County. (17-RT 5329, 5388.) After he was released from prison, he entered a plea of no contest to lewd and lascivious acts with a child in Amador County. (17-RT 5329, 5389.)

As a parolee, appellant was not allowed to carry a knife with a blade over two inches on his person at any time. (17-RT 5329, 5363; Exhibit 135R.) Mr. Sullivan was his parole officer for approximately three months, but appellant never saw him, even though he was supposed to see him monthly, because he could never get hold of him. (17-RT 5329-5330.) In the year that he was on parole in Sutter County, he had five different parole officers. (17-RT 5330.)

Appellant owned and used the fillet knife found in his truck to clean salmon and other fish. (17-RT 5330, 5367; Exhibit 23.) One of his parole officers told appellant that as long as the knife was in the back of his truck with all the rest of his fishing gear, he could possess and use that knife to clean fish. (17-RT 5330-5331, 5364-5365, 5429.) Appellant did not think it was necessary to get the modification in writing, because his parole officer had given him a lot of verbal conditions that they could violate him for disobeying just as easily as they could violate him if he disobeyed their written ones. (17-RT 5365-5366, 5429.) Another time a parole officer allowed him and his wife keep a single-gauge .410 shotgun out in the shed hung up on the wall with a sign saying "for snakes only," because they had a rattlesnake problem.

In the fall of 1995, appellant and his wife, Lynette, went salmon fishing almost daily. They used his father's boat. They had fish-cleaning facilities to clean fish at the boat dock facilities, including a wood and metal table about 10 feet long with running water and slanted downhill. (17-RT 5330-5331, 18-RT 5426-5427.)

Appellant had five different knives, including Lynette's knife and a sharpening stone in his truck that night. (18-RT 5406.) The sharpening stone was one of his barber tools he used to sharpen his knives. (18-RT 5406.)

Appellant spent the night of May 15th at his home in Sutter with his girlfriend, Lisa Wilkinson. He was married but separated, and had been having marital problems for a long time. On May 16th, Lisa Wilkinson rode into work with him. Her apartment was close to the barber shop. (17-RT 5333.)

On May 16th, before appellant went to the card room, he worked at the barbershop and left a little before noon. (17-RT 5332.) That day and the day before, appellant was trying to give his father as much business as he could, because his father had just come back from an extended trip, and he had some big bills that were coming due the following week. Appellant usually just took the overflow customers. (17-RT 5333.) Appellant originally was going to get some work done on his truck, but instead, about 1:00 p.m., appellant arrived at Rooney's Card Room after injecting a small amount of methamphetamine. (17-RT 5326-5327, 5332, 5335, 5361.)

Appellant tried to leave about 2:30 p.m., because he planned on getting his truck fixed and perhaps go back to work that afternoon. He even called his father on the phone to check in, and lied to him and told him he could not leave until after 3:00 p.m. (17-RT 5362.) Appellant did not tell his father he was going to go play cards or buy drugs because his father would not have approved. (17-RT 5333-5334.)

Appellant was winning, so he stayed at the card room for between two and two and half hours. (17-RT 5331, 5363.) He was not in a hurry to leave after calling his father, because he had decided he was not going back to work. (17-RT 5362-5363.) He bought into the game with $25, which the house matched if he played for a minimum of two hours. (17-RT 5331.) Appellant remembered

that they told him he could not leave until 3:20 p.m. or later, around 3:30, so he knew he was there for over two hours. (17-RT 5332.) Appellant ended up winning and tipped the dealers. (17-RT 5332.) Appellant's investigator, Mr. McCormack, interviewed the card room witnesses and obtained records from Miguel Castellano, not the police. (17-RT 5141.)

When appellant left the card room, he drove approximately three blocks to a bar called The Play Room, where he stopped very briefly and looked inside for Julia Willoughby. (17-RT 5335.) Ms. Willoughby was a friend he had known since the early 80's. A few days earlier she had called him on his home phone in Sutter. She had recently had a baby and she needed him to give her a ride somewhere to pick up some things for the baby. He was not able to do that, but he was looking for her to find out what was going on with her, because she needed all the help she could get. (18-RT 5422.)

Appellant left The Play Room, and drove over to the Olympic Hotel in Marysville where she stayed. He was told she was at 602 Church Street, so he left the Olympic Hotel and drove over to Yuba City. He stopped at a bar called the Peach Bowl Club, and talked to the owner there. He then drove to 602 Church Street and spoke to two people, asking them if Ms. Willoughby was there. (17-RT 5335.) He never found Ms. Willoughby. (17-RT 5337.)

Appellant left Church Street and went home to Sutter. He stayed in Sutter for approximately an hour. He left Sutter because it was getting close to quitting time, and he did not want to run into his father or his mother, and headed for the river bottoms which were safe for him on weekends when he was doing drugs without any worries of running into his family, the police, or his parole officer. (17-RT 5336-5337.)

Appellant arrived at the river bottoms on the 16th about 5:30 p.m. and fished and drove around and did dope. (17-RT 5338-5339.) He got his truck

stuck the first time between 8:00 and 8:30 p.m., when it was just getting dark enough where he had to use headlights. (17-RT 5339.) For the next two hours, appellant tried to free his truck. (17-RT 5339, 5389.) He realized he needed his come-along, so he headed home by walking out about two miles to the barber shop. (17-RT 5340-5341, 5391-5392.) When he left, he thought he had locked up his truck completely, by locking the doors and closing the windows. (17-RT 5341.)

At about 11:00 p.m., appellant stopped at the barber shop, a safe haven for him, to rest for a few minutes and shoot some drugs with his syringe and needle. (17-RT 5391-5392.) His girlfriend lived about a hundred yards from the barber shop, but he did not try to contact her for help because she did not have a vehicle that could help him. (18-RT 5402.)

Appellant stayed about ten minutes and then hitchhiked west of Highway 99 on Lincoln Road out to his home in Sutter, about seven or eight miles west of Yuba City, while passing many pay phones. (17-RT 5340-5341, 5393, 5395.) He could not hitchhike on Highway 99, though it was a fairly heavily traveled highway, because it was illegal and he wanted to avoid the police. (17-RT 5393.) He did not call anybody, because he could not call his father, who lived about a mile away, and he thought he could get the truck out by himself. (17-RT 5341, 5393.) Appellant got a ride to the corner of Lincoln and Humphrey. (17-RT 5396.) It was very dark and muddy off the road. He walked home about four or five miles. (17-RT 5397-5398.) He probably walked about ten miles that night both ways. (17-RT 5398.)

Appellant carried the come-along and a rope back to the corner of Highway 99 and Humphrey down the railroad tracks, and hitchhiked from Sutter back to the barber shop on Lincoln Road, one mile north of Bogue Road. (17-RT 5341-5342, 5403.) He walked from there back to his truck, over the levee. He

got back to his truck between 3:00 and 4:00 a.m. (17-RT 5342- 5343, 18-RT 5403.)

When appellant returned to his truck, he found it had been broken into, ransacked, and torn apart. (17-RT 5344-5345, 5399.) There were papers from his glove compartment thrown all over the ground and all over the inside of his truck. Tools were scattered everywhere. His dash cover had been torn off. His mirror had been broken off. His sliding glass rear window to the cab was wide open. He did not know whether he had inadvertently left the windows open, though he thought he had locked the cab of his truck. (17-RT 5345, 5399-5402.) Somebody had been through everything. (17-RT 5345-5346.) The camper shell did not lock, because the latches were broken. An adult could probably not fit through the back window of the cab. (18-RT 5400.) He had a piece of surgical tubing in his truck to use when he was salmon fishing. (18-RT 5423.) When the FBI found the truck, they found that surgical tubing hooked through the passenger side seatbelt, but he did not do that. (18-RT 5423.)

It took him about 30 minutes to get his truck out with the come-along. (17-RT 5343-5345.) He was not comfortable staying there because he did not know who had broken into his truck or if they were still around. (17-RT 5345.)

At about 4:00 a.m., appellant headed down to the Shanghai Bend area because he knew everyone down there, was comfortable down there, and usually ended up in that area whenever he went to the river bottoms. (17-RT 5345, 5369.) He was driving into an area where he knew he could get stuck rather than driving out of the area. If he had wanted to leave the river bottoms, he would not have gone down to where he got stuck. The easiest way to get out of the lagoon area was Bogue Road. (17-RT 5324.) Another easy way out was through the main entrance, up farther north. Bogue Road heading due east ended a very short distance from the levee. They had a wooden barricade, but

he could go around that barricade and go across the bridge and climb the levee. It was not difficult. He and others did it all the time. There was a bridge across that ditch. (17-RT 5323-5324.)

While heading towards his friends, appellant got his truck stuck for the second time that night, and tried to get out, spinning his tires. (17-RT 5345, 5369.) He took off his shoes, got out, and saw there was nothing he could do until daylight, so he sat there. (17-RT 5369.)

His main problem was trying to find something to hook onto so that he could pull the truck back. (17-RT 5371.) He tried to get his vehicle unstuck for about eight hours until about noon. (17-RT 5371-5372.) He never tried to contact anybody he knew to help him because there was no one he could contact who could help him other than his father, and he was not going to contact him or another family member. He believed he would have gotten his truck out eventually by himself. (17-RT 5372.) Mr. Hickman was a hundred yards away through the jungle, but he did not go to him, even though Mr. Hickman had helped him out one other time, because he needed somebody with a vehicle which Mr. Hickman did not have. (17-RT 5372.)

Earlier that morning, appellant did not call his cousin Matt, who had a four-wheel-drive, because Matt was a very sick young man on dialysis. Appellant probably would have called Matt eventually if he could not have gotten his truck out by later that afternoon. He did not call his father because he was doing drugs, even though he was trying to get into a rehabilitation program. (17-RT 5373.) His father would have been very upset with him for missing work and doing the drugs and would have probably fired him from his job. (17-RT 5373-5374.) Appellant probably would have called his father later on, but he was still working to get his truck out, and he thought he would eventually succeed as he had always in the past. (17-RT 5374.) By noon on May 17th, appellant's truck

was quite stuck, but he was confident he would have gotten out eventually. (17-RT 5323.) He had never been stuck in that particular location before, but had not gone down there under similar conditions. (17-RT 5324.)

Appellant used logs to try to get out because he needed something to tie onto with the come-along, but the only trees were off to the side and a little behind his truck. He could not pull the truck in the right direction from those trees, so he had to go find 20 or 30 foot logs that would stretch across from tree to tree to give him something directly behind his truck to tie onto. (18-RT 5425.)

On the morning of the 17th, appellant heard yelling so he walked out about a hundred yards. He met four young men and asked them to help him get his truck out. (17-RT 5351, 5407-5408.) They said they could not leave their trucks, because they were afraid that their trucks would be broken into. (17-RT 5352.) They told appellant they were looking for a little boy, but that did not mean anything to appellant as he had not seen any little boys. Appellant asked them to help him with their trucks, and they said that they would, so he went back to his truck and waited for them. (17-RT 5352.) To get to his truck, they would have had to walk through a short stretch of water. (18-RT 5408.) When they did not show up in five or ten minutes, appellant did not know what had happened to them. He was not concerned about it; he just kept trying to get the truck out himself. (18-RT 5409-5410.) The water was not rising when he was there. (18-RT 5409.)

Appellant heard a boat coming down river that was obviously marked as a police boat. He was not overjoyed to see a police boat because he had drugs in his truck. He had no reason to think the police were going to bother him. After appellant got out of his truck, he asked the police if the water was going to come up any higher, and they told him they did not know, but it might. Appellant asked

them if they could get him some help, and the female police officer told him they would. (17-RT 5354-5355, 5410.)

Appellant requested help from the sheriff's office because they did not leave him much choice. He did not ask for help before then because he was getting the truck out himself. He had moved the truck with the come-along about a foot or two. His main problem was getting something to tie onto to move the truck in the right direction. (18-RT 5410.)

When appellant was arrested on May 17th, the female officer told him to get on the boat to go a short distance up river, because one of her superiors wanted to talk with him about an incident that had happened in the river bottoms. (17-RT 5313-5314, 5355-5356.) Appellant walked back to his truck to get it ready to be towed, which would cost about $100. (17-RT 5355.) He would have preferred to get his truck out himself. (17-RT 5356.) Appellant left his truck unlocked with his keys in it, and his wallet inside, because he assumed he would be coming right back to his truck. (17-RT 5356.)

On the boat ride, appellant saw some guys on the left-hand side of the river bank wearing white, who looked like they were on the moon. He was wondering what was going on, and why they were taking him to the boat docks, rather than back to his truck. (17-RT 5356.)

Appellant was dressed only in blue Levi's jeans, which was not unusual under the circumstances. He was not cold because he had been doing a lot of physically hard work. He took off his underwear and a good, casual dress shirt he wore at the barber shop, because they were white, and river water ruins white clothes and permanently stains them. He took off his shirt, because he had to go down into the water waist deep to work around a tire to try to get jacks underneath it. (17-RT 5357-5358.) He was in and out of the water all morning trying to free his truck. (17-RT 5358.)

Appellant asked the detectives what was going on and why he was being held, and about his stuff in his truck. (17-RT 5358-5359.) His truck had been ransacked, and the list of his belongings that the police provided him was missing items like money and tools. He wanted to know where his truck and his property was, and wanted to get his truck out of impound to avoid daily storage fees. (17-RT 5359.) He had never seen the bracelet. He had at various times different blankets in the truck. (17-RT 5359.) He kept clothes and an extra pair of shoes in the truck. (17-RT 5360.) He did not throw a knife, a blanket, or a bracelet into the river or any of his clothes or a body into the river. (17-RT 5360.) He never threw anything into the river, which was flowing at a good rate, because he had no reason to hide anything from anybody. (17-RT 5361.)

He was taken into custody on a parole violation, and was not charged with Michael's murder for at least two months. (18-RT 5431.) He wrote letters to his wife that were subject to censor; he knew the prison authorities read the letters before they went out and would give copies of them to the District Attorney. (18-RT 5431.) He had an attorney at that time and Mr. McCormack was his investigator at that time. They had problems with communication because of his incarceration. (18-RT 5431.)

After appellant became a suspect in Michael's murder, he told his mother and father and Mr. McCormack about what he had been doing that day. (17-RT 5314.) Appellant told them about the card room. He instructed his mother to call the FBI or the authorities about the card room. (17-RT 5315.) From jail, he wrote a letter to his wife asking her to search the Hickman's camp for stuff stolen out of the truck because he believed that James Hickman and Camille Varney might have been involved in Michael's murder. (17-RT 5370.)

The conversation among appellant and his attorney and Mr. McCormack about appellant saying he had a better idea of the time of Michael's death than a

prosecution witness was based on the fact that appellant knew Michael was in his truck and was probably killed when he was gone that night to get his come-along. (17-RT 5343-5344.)

The black fishing pole found in Mr. Lemmons' locker had been in the back of his pickup. (17-RT 5348; Exhibit 228.) The Buck lock blade knife, with his wife's initials on it, an L on one side and an R on the other, for Lynette Rhoades, found in Mr. Lemmons' locker, had also been in his truck. (17-RT 5349; Exhibit 229.) There were several knives belonging to his wife in the truck, including one of the utility knives that the police found. (17-RT 5349.)

Appellant had some methamphetamine in a blue, clear plastic container, in the truck when he was arrested. (17-RT 5350.) He did not remember buying the drugs that were stuffed down in the passenger seat, but he could have or they might have been somebody else's, as there were a lot of people in his truck, and almost everyone he knew used drugs. (17-RT 5351.)

Appellant had an old pair of blue slip-on tennis deck shoes with a hole in one toe that he always kept in back of the truck, one of which ripped that night from the suction of the mud and the sand. When he took off his socks and underpants, they were not brown and stained, and he did not want to get them dirty unlike his Levi's, which he put back on. (17-RT 5375-5376, 5378, 5399.) He did not change his work shoes before going fishing, which was normal. (18-RT 5424.)

Blood got on his shirt when he was scratched from dragging all those logs to his truck. (17-RT 5377.) He was aware he was bleeding, but did not realize that he was scratched as badly as he was in his waist area and did not know how heavily he was bleeding. (17-RT 5378, 5382.) He had a cut on one arm that was fairly bad. As he dragged those logs out, he slipped and fell. He got the scratches on his rear end and on his thighs when dragging those logs out of a big

log pile. (17-RT 5378.) One time he got pinched between a big limb that he dragged and some other logs. (17-RT 5378.) He had no way of knowing and did not remember how a fairly large area of blood staining got on the left shoulder of his shirt and down to the right armpit and on the entire right and left thigh of his pants, though he may have wiped his bloody hands there. (17-RT 5380; Exhibits 28 & 31.)

L. Comparison of Appellant's Feet

Stephen Bentley made a cast of appellant's feet. (17-RT 5290.) It was his first time he had qualified to testify about foot impressions. (17-RT 5296.) The foot impressions at the scene were made by a foot about 10 ½ inches to 11 inches. (17-RT 5297.) Mr. Bentley testified only that appellant was not excluded; that appellant could have made the foot impressions. (17-RT 5299.)

Rebuttal

According to Officer Michael Green, on the morning of May 17, 1996, the FBI kept everybody out while searching the crime scene, but he was not present. He spoke to Janet Lemmons, whose camp was located 1500 to 1600 feet away from the crime scene. He asked her permission to search her campsite, which she gave. (18-RT 5440.) Officer Green searched her campsite, the trailer, cabinets and miscellaneous belongings. (18-RT 5441-5443.) There were no vehicles there. He did not find anything of evidentiary value at the camp. (18-RT 5441-5442.) He did not take apart everything and go through each individual item. He went back but no one was there. Then, Officer Green went over to the Hickman's campsite; but there was nobody living there, and there were no vehicles there. (18-RT 5443-5444.) The Hickman structure was kind of an informal one, made out of some blankets and some tarps and miscellaneous

pieces of plastic and stuff wrapped over the top of some trees and bushes. (18-RT 5444-5445.) Lynette Rhoades and Mr. McCormack were there to point things out to him that they thought he ought to seize, which he did. (18-RT 5445 .) He did not remember locating a machete when he went to the Lemmons residence on September 30, 1996. (18-RT 5445-5446.)

The Court Trial on Appellant's Priors

On June 17, 1998, the court found appellant had suffered all the alleged priors. (9-CT 2546.)

SECOND PENALTY PHASE[12]

The People's Case

M. The Prosecution's Aggravating Evidence: Victim Impact

Sandra Friend was Michael's mother. (31-RT 9562.) Tina Lyons, Sandra's younger sister by two years, had stayed close to her sister. (32-RT 9639-9641.) Since Michael's death, she saw her sister once every three or four days and had her nieces over a couple nights a month. (32-RT 9681.) Prior to Michael's death she spoke with Sandra every other week and they spent most holidays together. (32-RT 9681.) The last time Tina saw Michael was on Easter Sunday, April 13, 1996, when she told Sandra not to wake up her daughter Alithya and Michael. (32-RT 9690.)

Alithya missed Michael a lot; he was her protector. (32-RT 9684.) Once, after Michael's death, Alithya shouted to a waitress: "And there's a boy in this family too, my brother." (32-RT 9685.) With respect to Sandra, "there's a part of her that's missing." (32-RT 9686.) Sandra had become "lifeless," the sparkle in her eye was now missing. (32-RT 9687.) She was no longer carefree and happy, like she was before Michael's death. (32-RT 9687.) Tina lost a sense of security because of Michael's death, missed him a lot and wished she had spent more time with Michael. (32-RT 9689.) Tina had not been able to get over Michael's death. (34-RT 10313.)

N. The Crimes Against Michael

David Derolf searched for Michael on the morning of May 17th in Halpern's Lagoon area and found Michael naked, lying in a muddy area. (32-RT

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12. Because the first penalty phase ended in a hung jury, appellant will recount the facts only of the second penalty phase that resulted in appellant's death sentence.

9698-9700.) FBI special agent Todd Drost went to Michael's body and had photos taken. (32-RT 9719-9724.)

According to Officer Michael Green, Michael was wearing a black T-shirt with a Batman emblem and green sweatshirt. (33-RT 9975.) Both items of clothes had holes in the upper left chest area. (33-RT 9976-9977.)

Dr. James Dibdin, forensic pathologist, did an autopsy on Michael. (32-RT 9741.) Michael was four feet five inches, and weighed 80 pounds. (32-RT 9743.) Michael died of multiple stab wounds and anal penetration. (32-RT 9788.) Some wounds were inflicted by a single-edge serrated knife. (32-RT 9790.) Dr. Dibdin concluded that appellant's knife could not have caused the serrated scratches on Michael because the pattern was in threes not pairs. (32-RT 9819-9820.) Dr. Dibdin could not tell if the stab wounds were made by a serrated knife. (32-RT 9821.) Michael died between 4:00 p.m. on May 16th and 4:00 a.m. on May 17th. (32-RT 9822.) Michael's mouth injury was consistent with a penis forced in his mouth or a hand forced over his mouth. (32-RT 9891.) Michael's anal injury was consistent with a penis. (32-RT 9892.) A person can lose consciousness because of loss of blood, but not die. (32-RT 9896.) Michael had several scars on his body. (33-RT 9901.)

Officer Jess Harris and his partner were patrolling on a boat looking for Michael when he saw appellant by a truck. (33-RT 9921-9925.) His boat was marked: "Sutter County Sheriff's Department." There was no question they were police officers. (33-RT 9939.) Appellant's demeanor was "rather casual" and it "appeared to him that appellant was not happy." (33-RT 9926-9928.) Officer Harris detained appellant for questioning. (33-RT 9929-9930.) Appellant exited his truck and asked the police officers if they could help him with his truck. (33-RT 9936-9937.) Officer Harris tried but failed to extricate the truck. (33-RT 9929-9930.)

Officer Claudie Brookman saw a long serrated knife on appellant's pickup truck tailgate. (33-RT 9947-9948; Exhibit 23.) Appellant admitted that the fillet knife was his knife. (33-RT 10036.) Appellant's latent print was found on his knife. (33-RT 10175-10177.)

Nicola Duda-Shea was a criminalist, specializing in DNA. (33-RT 10037-10049.) Blood DNA on appellant's knife was not consistent with appellant's DNA, but was consistent with Michael's DNA profile. (33-RT 9949, 10027, 10049, 10115.) The DNA profile of the blood was consistent with 1 in 24 million Caucasians; 1 in 16 million Hispanics; and 1 in 1.6 billion blacks. (33-RT 10114.) Ms. Duda-Shea was not saying the blood on the knife was Michael's blood. (33-RT 10115.)

Three of Michael's footprints were found on the inside of the window shield of appellant's truck. (33-RT 10136, 10148, 10155-10158, 10178-10179.)

O. Crime Against Crystal

Crystal T., age 10, testified that at age four, appellant, her "grandfather," asked her to come over to his trailer in the morning, which she did. (34-RT 10318-10319.) Appellant told her to take her clothes off, which she did and he took his off and took her to his bedroom. (34-RT 10320.) Appellant put his penis in her mouth. She did not want him to put his penis in her mouth, but she was frightened and appellant was bigger than she was. (34-RT 10320-10321.) She told the policeman the truth when she talked to him. (34-RT 10321-10322.)

According to Crystal's mother, Helen Shamberger, one evening in January 1993, Crystal, while eating a French fry at the dinner table in Pine Grove, said, "Grandpa is disgusting," because he had made her stick his "pee-pee" in her mouth. (34-RT 10355.) Crystal had not said anything the entire day until dinner.

(34-RT 10341.) Appellant walked in just after Crystal accused him and Ms. Shamberger threw a knife at him. (34-RT 10343.)

On January 8th, Detective Weldon Lincoln spoke with Crystal. (34-RT 10348.) According to his report, she said, "He made me lick his pee-pee." "He made me suck his pee-pee." "He rubbed his pee-pee on my pee-pee and butt." "He told me it was his finger." Detective Lincoln asked Crystal who that was, and she said it was "Grandpa." Crystal explained that in the morning, "Grandpa made oatmeal," and then she became still and said "He made me lick his pee-pee." (34-RT 10349-10352.)

Crystal said she did not want to suck his hard pee-pee and that it hurt. Crystal did not complain of pain. She said that grandpa's pee-pee was hard, but not sticky and he did not ejaculate. She said that appellant also licked her buttocks. (34-RT 10352.)

Detective Weldon Lincoln talked to Crystal again on January 12th, 1993, at her home. Crystal identified appellant from a photo and said, "He made me put his pee-pee in my mouth." (34-RT 10352.)

On January 19th, Detective Lincoln arranged for an interview of Crystal with a child interview expert, Paula Christian. Ms. Christian and Crystal were the only ones in the room. Detective Lincoln watched the interview, and it was recorded on a video and audio tape. (34-RT 10352.)

Crystal told Ms. Christian that her grandfather had grabbed and pulled her hair when he put his pee-pee in her mouth. She protested by saying, 'Let me go.'" Crystal said that it hurt when her grandpa pulled her hair. Crystal said Grandpa's pee-pee tasted "'Yucky." (34-RT 10353.)

Detective Weldon Lincoln, who wore his hair extremely short, asked Crystal if she knew what the truth was and what a lie was. He asked Crystal, "If I

told you my hair was really long, would that be a lie or the truth?" Crystal smiled and said, "The truth." (34-RT 10356.)

Appellant entered a plea of no contest to lewd and lascivious acts with a child in Amador County. (34-RT 10482.)

P. Crimes Against Sharon

Sharon described the crimes of August 21, 1985, as she had done at trial. (34-RT 10365-10377.) Appellant said he wanted to take her to the river bottoms at Ellis Lake Slough where the lake emptied into river, but she did not know where that was. (34-RT 10377-10378, 10416-10417.) He laughed and said "This is just like Bonnie and Clyde, but Bonnie's not going to make it." (34-RT 10382.) Appellant said he was going to kill her and put a knife to her throat. (34-RT 10385.) Sharon thought appellant was going to kill her if they got over the levee so she jumped from car. (34-RT 10384, 10390.) She was still afraid of appellant and, since then, had been very fearful and did not trust people. (34-RT 10400.)

At trial, appellant admitted he was charged and convicted of robbery, forcible oral copulation, and kidnapping of Sharon in Yuba County. (34-RT 10482.)

Q. Other Past Crimes

At trial, appellant admitted to pleading guilty to check forgery charges in Sutter County and either Santa Clara or San Mateo County in the early 1980's. (34-RT 10482.)

Defense[13]

R. The Defense's Mitigation Evidence

Joris Lebhart lived on a houseboat on the river by Yuba City in May 1996. (34-RT 10489.) There were homeless camps in the river bottoms. (34-RT 10496.) There were lots of motorcycles and loud noise south of Halpern's Lagoon. (34-RT 10499.) He was afraid of things being stolen if he left for even two hours. (35-RT 10525.)

Katherine Menghini was Michael's third grade teacher at Bridge Street School in 1996. (35-RT 10555.) Michael was very outgoing, very friendly, liked people, and was probably the happiest child she had ever met. (35-RT 10558.) He came to school clean and showered and was always smiling. (35-RT 10559.) Michael liked to play in the rain. (35-RT 10560.) Michael was clingy with good hygiene, though he sometimes came to school dirty. (35-RT 10566-10567.) Michael wrote that he went to the river bottoms with his father fishing. (35-RT 10569.)

At about 2:50 p.m. on May 16th, Ms. Menghini hurried Michael and others out of her classroom so she could have a reading class at 3:00 p.m. (35-RT 10570.) It was raining hard that day. (35-RT 10586.) She did not remember what she told the FBI agent. (35-RT 10576-10578.) She refused to speak to defense investigator McCormack. (35-RT 10586.)

Susan Cuquet, a school counselor, saw Michael leave school at 3:05 p.m.; he was the last student to leave. (35-RT 10589-10590.)

Henry Battles, a welder on his way home from work between 2:30 and 3:00 p.m. on May 16th, saw Michael with a construction marker stick in his hand on Wilber at C Street by the park. (35-RT 10595-10596.) It was around 3:00

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[13] The court permitted the defense to introduce limited "guilt-phase" evidence trying to raise a "lingering doubt" about appellant's guilt.

p.m. or a little after. (35-RT 10596-10597.) He knew Michael because Michael had played with his children. (35-RT 10601.)

On May 16th, Ray Clark was visiting his cousin Charlie at Bridge View apartment #48, on 370 McRae Way in Yuba City and went out on the balcony for a cigarette. (35-RT 10644.)

Mr. Clark saw a "shiny gold, brand-new Toyota 4-wheel drive pickup" with a camper driving fast down Boyd Street. (35-RT 10647-10648.) It was raining, but the sun was out "real bright," shining through a cloud. (35-RT 10648.) He saw a blond-haired little boy with dark, either green or black, pants. (35-RT 10652-10655.)

The little boy ran up to the truck, and it seemed like he knew the driver, like it might have been his father coming to get him after school because it was raining. Then the little boy backed up, started pointing, and went back up to the truck. When the truck pulled off, the little boy was not there. As the truck was moving, the passenger door swung open and it slammed shut. (35-RT 10656-10657.)

Charlie came outside and Mr. Clark said, "Didn't you see that? That was kind of curious, I mean, kind of weird." Mr. Clark said, "That little boy was standing there and now he wasn't standing there." Charlie said he did not see it; he just saw the truck drive off. (35-RT 10657-10658.)

After Mr. Clark learned someone had been arrested, he saw appellant's truck on the T.V. and it looked like the truck he had seen "to a certain extent." (35-RT 10658-10662.) The model and the shape of the truck looked the same, but not the color, so he could not be sure. (35-RT 10665-10666, 10671.) His wife was picking him up about 3:00 p.m. after school, but had not done so when he saw the truck. (35-RT 10668-10669.)

Mr. Clark told Officer Green he saw the boy at 2:40 or 2:45 p.m. (35-RT 10669-10670.) He said he saw a brand new gold truck, at least a 1995. (35-RT 10673, 10682.) He said he saw a blond boy with green or dark green pants. (35-RT 10673-10675, 10680.) There were brand new shiny rims on the truck and tinted windows. (35-RT 10677.) The boy pointed like he was giving directions. (35-RT 10681.)

Miguel Castellanos worked at the casino where, on May 16, 1996, someone replaced appellant at a card game at 3:20 p.m. (35-RT 10691-10692, 10697; Exhibit 67.) On January 7, 1998, he told Detective Van Natta that appellant cashed out between 3:00 and 3:15 p.m. (35-RT 10693-10695.) Walter Yee, who worked at the casino, said that appellant stopped playing around 3:00 p.m. and left sometime after. (35-RT 10705.) Ed Gordon, who played that day at the casino, said appellant left around 3:15 p.m. (35-RT 10713.) Appellant said he was late for an appointment and he was in a hurry to leave. (35-RT 10717.)

On May 16th, Jolene Preader lived with Edwin Helsome on Church Street. (35-RT 10723.) She was convicted of a felony for using Mr. Helsome's checks. (35-RT 10725.) Sometime between 1:00 and 4:00 p.m., a person looking like appellant came to the door. (35-RT 10730.) The man asked for Julie Willoughby. (35-RT 10731.) Ms. Preader left, leaving Shirley Galbraith and Edwin Helsome inside. (35-RT 10731.) Ms. Preader spoke with Mr. McCormack a few days after Michael was found and she had no doubt about the man. (35-RT 10732.) The man might have been shirtless. (35-RT 10733-10734.)

Ms. Preader told Detective Van Natta that the man came between 2:00 and 4:00 p.m., but it could have been the day before or after the 16th. She saw a blue car she did not recognize and she could not identify the man. (35-RT 10737.) Ms. Preader told Officer Green the man arrived between 1:00 and 4:00

p.m. (35-RT 10738.) She was using drugs heavily on a daily basis at the time. (35-RT 10738.)

On May 16, 1996, Shirley Galbraith Christianson's father, Edwin Helsome, lived at 602 Church Street until he died on April 29, 1998. (35-RT 11032.) Ms. Christianson checked out of a Las Vegas casino on May 16th and her bill was processed at the front desk at 11:10 a.m., but there was no way to tell when she left. (35-RT 10750-10762.) Ms. Christianson and her husband arrived home from Las Vegas about 3:00 p.m. or later on May 16th. (36-RT 11035-11046, 11057.) She did not discuss finances or rent money around Ms. Preader, who lived there in 1996 and stole from Mr. Helsome. (36-RT 11034, 11048-11049.) Ms. Christianson did not hear a knock on the door that day. (36-RT 11052.) She talked with her father about finances about 3:30 or 4:00 p.m. (36-RT 11053.)

Randy Beutler let Joris and Pam use his houseboat. (36-RT 10764-10765.) He arrived around 10:00 p.m. to get a tree off the boat. (36-RT 10769.) Within 20 to 30 minutes, while working on the houseboat he saw headlights heading south by his pickup. (36-RT 10770-10775.) Mr. Beutler sent Gary Long to check on his truck to make sure no one was stealing from it, explaining: "You just don't leave a vehicle unattended down there very long." (36-RT 10784-10785.) Mr. Long saw headlights of a truck between 9:00 and 10:00 p.m. (36-RT 10792.) He saw the vehicle head back to the levy. (36-RT 10796.) Mr. Long jumped on his jet ski to make sure no one was messing with his tools and truck. (36-RT 10852.)

Benjamin Strickland also helped remove the tree from the houseboat. (36-RT 10844.) Sometime between 9:00 and 11:00 p.m., he saw headlights. (36-RT 10846-10848.) Mr. Strickland heard a vehicle spinning around, peeling out around 11:00 p.m. (36-RT 10854-10856.) He saw the vehicle heading south. (36-RT 10862-10863, 10886.) Not many people were in the river bottoms

at the time. (36-RT 10866.) Mr. Long heard the truck spinning doughnuts around 10:30 or 11:00 p.m. (36-RT 10804-10806.)

Wanda Strickland saw a white pickup truck partly covered by water about 4:00 or 5:00 p.m. (36-RT 10894-96.) On May 19th, she told Detective Starmer that she saw a small white station wagon partly submerged. (36-RT 10918-10919.) She saw the headlights and heard banging as if a tool chest was hitting the sides of a truck. (36-RT 10909-10.) The truck was heading north and she heard spinning in a gravel area. (36-RT 10911.) She saw the vehicle around 11:30 p.m. or midnight. (36-RT 10916-17.) She left around midnight. (36-RT 10922.)

On May 16th, Bobbie Lemmons was living at Mosquito Beach in Yuba City on the Feather River. (36-RT 11061.) He was living with his wife, Janet, in a 13-foot camping trailer and returned home about 4:30 p.m. after collecting cardboard. (36-RT 11064.) Upon arriving home, he heard children playing, as usual. (36-RT 11066.) Around 5:00 p.m., he saw a pair of new shoes in the open that were not muddy or dirty. (36-RT 11066, 11068, 11101.) The next day, Mr. Lemmons did not tell the police about the shoes. (36-RT 11067.)

There were children on top of the levee, but not down in the river bottoms. (36-RT 11068.) Mr. Lemmons returned to his trailer and wife around 6:00 p.m. after his walk. (36-RT 11070.) He may have gone to see Don and Darlene later who lived upstream. (36-RT 11071.) About 7:00 or 7:30 p.m., he heard tires spinning for an hour or a hour and a half. (36-RT 11071.) On the 16th, Mr. Lemmons went to bed around 9:30 p.m. and heard a truck with tires grinding and trying to get unstuck. (36-RT 11099.) He did not tell the police about the truck. (37-RT 11100.)

On May 17th, about 8:00 or 8:30 p.m., Mr. Lemmons and his wife went for a walk to look for shoe strings, because they needed some. (36-RT 11073-74.)

After Mr. Lemmons found a pair of shoes, a lady approached and he gave the shoes to her. (36-RT 11076.) The lady asked if they could help her find Michael's clothing. Mr. Lemmons agreed and found pants and a shirt which he gave to the woman. (36-RT 11078-11079.) The pants were in the brush and long grass. (37-RT 11101.) He did not recall whether the shoes or clothing were wet. (36-RT 11081.) He did not mention a shirt before and could be mistaken. (37-RT 11111.) He testified that he picked up other clothes. (37-RT 11112-13.) There was a lot of old clothing in the river bottoms. (37-RT 11114.)

After speaking with the FBI on the 18th, Mr. Lemmons asked Don Dugger to confirm where he was on the 16th. (37-RT 11109.) Around the 17th, he spoke with Mr. Dugger. (37-RT 11102-04.) Mr. Lemmons asked Mr. Dugger to give him an alibi about where he was on the 16th. (37-RT 11114.) He meant to ask Dugger to verify that he was going back and forth between camps. (37-RT 11114.)

Mr. Lemmons was not carrying a knife on the 16th and 17th and never did. (37-RT 11113.) He could not remember the times he did things or saw things that day and had given many different times to questioners. (37-RT 11107-08.)

On May 16, 1996, Janet Lemmons lived in a trailer at the river bottoms. (37-RT 11147.) It was not unusual for there to be traffic in the area day and night. (37-RT 11150.) Her husband, Bobbie, returned that day about 5:00 or 5:30 p.m. (37-RT 11151.) Bobbie walked to Mr. Dugger's place and returned and went to bed. (37-RT 11152.) Ms. Lemmons heard a truck spinning its tires, as if it was stuck. (37-RT 11152-53.) The next day she went to look for shoestrings with Bobbie. (37-RT 11153-11154.) After she found the shoes, which no one pointed out, a lady came and she gave her the shoes, which were dry. (37-RT 11155, 11161-62.) People spin around in the mud, mostly in the

daytime, and sometimes at night. (37-RT 11157.) She and Bobbie did not own a vehicle. (37-RT 11160.)

At 7:00 p.m. on May 17th, Officer Fred Cotton, a reserve officer for Yuba City, met with Sandy Lyons who pointed out Michael's pants and shoes in the back of an open pickup truck, which were damp because it was drizzling outside. (37-RT 11453, 11463-11466.) He tried to take photos of the tire tracks, but forgot to put film in his camera. (38-RT 11469-11470.) He used a GPS global positioning system to indicate relevant places. (38-RT 11470-11490.)

Billy Friend had lived with Sandy Lyons for about 10 years; he began living with her when Michael was about two years old. (38-RT 11505.) In 1995, Mr. Friend was charged with felony spousal abuse of Sandy, and pleaded guilty to misdemeanor spousal abuse. (38-RT 11506, 11508-11509.) In October 1995, he was convicted of felony evading a police officer. (38-RT 11510-11512.) He had one beer and ran from the police because he did not have a license. (38-RT 11519-11520.) He got into trouble because of drinking. (38-RT 11515.)

Mr. Friend was Michael's "dad," and Michael was like a son. It "killed him" when he died. (38-RT 11516.) He did not go to counseling sessions with Sandy. (38-RT 11521.) He was very angry; Michael's murder had ruined his life; he started drinking heavily; and he no longer lived with Sandy. (38-RT 11517.) He quit drinking four months before Michael's death and began one month after it. (38-RT 11518.)

On May 16th, Donald Dugger was living on Mosquito Beach. (38-RT 11526.) On May 17th about 5:30 p.m., Bobbie Lemmons asked Mr. Dugger while visiting him at his trailer if he would provide an alibi for him and Mr. Dugger refused. (38-RT 11526-27, 11541-42.) On May 18th about 6:00 p.m., Mr. Lemmons again asked Mr. Dugger while visiting him at his trailer if he would provide an alibi for him and he said no; the police already knew he was at work.

(38-RT 11527-29, 11541-42.) On May 18th, Mr. Lemmons, on verge of tears, told Mr. Dugger that the police were harassing him and he needed an alibi. (38-RT 11542.) Mr. Lemmons was afraid the police were going to arrest him and he was crying. (38-RT 11545.)

Mr. Dugger had observed Mr. Lemmons at the river bottoms handling kitchen and fishing knives. (38-RT 11533.) Mr. Dugger's trailer was north of the Lemmons' trailer. (38-RT 11535.) Mr. Lemmons told him he found child's tennis shoes and pants. (38-RT 11536-38.) Mr. Lemmons said he gave the clothes to Michael's mother. (38-RT 11542-43.)

Officer Michael Green, the lead detective, searched the Lemmons' camp on May 17th with Detective Starmer and several other times. (39-RT 11787-89.) He interviewed Ray Clark four or five times. (39-RT 11807.) Mr. Clark told him that the color of the entire vehicle he saw someone pick up a little boy about 3:00 p.m. was shiny gold metal flake. (39-RT 11840.) The vehicle had brand new mag rims, silver in color and tinted windows. (39-RT 11841.) The little boy Mr. Clark saw had blond hair and was wearing green pants. Mr. Clark asked Charlie Wilbur "did you see that" and Mr. Wilber said something along the lines of "no, see what?" (39-RT 11842.) Mr. Clark gave several time estimates: 2:40 p.m. and after 3 p.m. (39-RT 11843.)

Officer Green interviewed Mr. Clark on May 17th, the day after Michael's disappearance. During that interview Mr. Clark said: "I was the only one there. As soon as the truck was driving off that's when Charlie came to the door." (39-RT 11845.) Officer Green asked Mr. Clark how he knew it was 3:00 p.m. and Mr. Clark answered that his wife usually picked up their son and came home about 2:55 p.m. and he saw the truck about five minutes after he saw his wife and about three to four minutes after he saw the truck and Charlie said it was about 3:05 p.m. (39-RT 11846.) Mr. Clark also said that as the truck was driving off

Charlie came out the door and he pointed out the truck to Charlie. (39-RT 11848.) The next day in a different interview, Mr. Clark said he saw the truck at 2:40 p.m. (39-RT 11847, 11850.)

On October 9, 1996, Vicki Van Natta, criminal investigator for the Sutter County District Attorney's Office, interviewed Ms. Preader, who told her that a man came to her house looking for Julia Willoughby between 2:00 and 4:00 p.m. (39-RT 11818-11819.) Ms. Preader indicated that she could not identify the person who came by and said the person could have come by on May 15th, 16th, or 17th. (39-RT 11821-11822.) Detective Van Natta contacted Ms. Galbraith with the phone number provided by Ms. Preader. (39-RT 11821.)

Larry McCormack, appellant's defense investigator from May 19, 1996, spoke with Jolene Preader on May 24, 1996, about a week after appellant's arrest. (39-RT 11828-29.) She told him that a man came to her house looked for Julia Willoughby about 4:00 p.m. on the day Michael disappeared. (39-RT 11828-29.) Mr. McCormack had Ms. Van Natta's report about Ms. Galbraith, so he did not interview her at the time. (39-RT 11833-34.) Later, Mr. McCormack interviewed Ms. Galbraith at attorney Bigelow's request and she said she had told Detective Van Natta that something had occurred at her father's residence involving Ms. Preader. (39-RT 11836.) Prior to his interview with Ms. Galbraith, Mr. McCormack did not have any information that she recalled the events of May 16, 1996. (39-RT 11838.) Ms. Galbraith had filed a declaration stating that she did not tell Ms. Van Natta that she did not recall. (39-RT 11838.)

Dr. Donald M. Henrikson, a forensic pathologist since 1982, testified on behalf of appellant and challenged the competency of Dr. Dibdin, the state's forensic pathologist. (37-RT 11116.) In the spring of 1995, he was asked to review Dr. Dibdin's conclusion that Lila Cummings died of blunt force injury to her head in the course of a burglary. (37-RT 11121-27.) Dr. Henrikson believed that

Dr. Dibdin's conclusion was wrong and that Ms. Cummings died of a heart attack and fell down. (37-RT 11128-29.) Dr. Dibdin did not mention her heart disease in his pathologic diagnoses. (37-RT 11130.)

Dr. Henrikson was also asked to review Dr. Dibdin's findings about Mr. Evans, a forest worker. (37-RT 11131.) He never saw the autopsy protocol, but was told about it. (37-RT 11134.) Dr. Dibdin said the cause of death was gunshot wounds, when the death was caused by shrapnel from an artillery piece exploding. (37-RT 11136-37.) All doctors can make mistakes; he had. (37-RT 11137.) He had not reviewed the protocol, reports or photos in appellant's case. (37-RT 11138.) Postmortem wounds tend to be bloodless; while ante-mortem and peri-mortem wounds around the time of death tend to be bloody. (37-RT 11140-41.)

James Park, a consultant in prison matters, worked as a senior clinical psychologist in prison in Chino and spent 31 years working for the California prison system. (38-RT 11599.) He had qualified as an expert in prison classification and adjustment about 110 times in capital cases. (38-RT 11623.) He reviewed appellant's prison record and interviewed him. (38-RT 11624.)

Appellant was committed to prison from January 1986 to October 1990 and from July 1993 to September 1994. (39-RT 11725-29.) Appellant had almost no disciplinary infractions while in prison, except a couple minor matters when he first got there. (38-RT 11627-32.) Appellant admitted to lying to a CDC officer about being married. (38-RT 11632, 11699.) The jail, however, also considers whether an inmate had ever been married, which appellant had been. (39-RT 11736.)

Appellant received top ratings and leadership qualities for his work microfilming documents for the state. (38-RT 11633.)

Appellant was a useful and productive prisoner and did not cause trouble; he was not assaultive or dangerous; and, in fact, was the opposite. He communicated well and related well with both staff and inmates. (38-RT 11634.)

A supervisor wrote this evaluation dated, July 18th, 1989:

> "From April 1988 to the present, July 1989, I have been the supervisor of Inmate Rhoades.
>
> I have been continually impressed with his work habits, leadership ability and his ability to rapidly digest and learn new information and skills.
>
> Inmate Rhoades has advanced in his job performance and position in fifteen months from trainee-clerk to billing and records clerk to special skill technician in charge of billing and records of the Shipping and Receiving Department.
>
> Inmate Rhoades has now currently reached a level of achievement and professionalism that makes him eligible and deserving of the lead man position in charge of several departments overseeing other inmates.
>
> Inmate Rhoades is resourceful, skillful and reliable and has excellent communication skills with both his subordinate workers as well as his employers and supervisor.
>
> He has been a tremendous asset to this industry. I have no doubt that Inmate Rhoades will be an asset to and success in any endeavor he chooses to pursue in the future." (38-RT 11635-11636.)

This was an unusual letter which would indicate appellant was an exceptional worker. (38-RT 11636.) A second memorandum dated February 6, 1989, also praised appellant's behavior in jail. (39-RT 11735.) Mr. Park would accept the opinion of the supervisor who gave appellant a good review and indicated that Mr. Rhoades would leave prison with a positive attitude to adjust to society. (39-RT 11723, 11737-38.) Mr. Park was aware that since 1989 appellant had been convicted of child molestation and murder. (39-RT 11723.)

Lead men are few and the position is earned by the prisoner based upon on-job skill and performance and his ability to relate to other people. Appellant

took a social skills program in prison. (38-RT 11639.) Based upon his previous incarceration, he was "an outstanding prisoner." (38-RT 11642.) Mr. Park believed that "Mr. Rhoades will again make a positive and useful adjustment if he serves a subsequent prison term." (38-RT 11642.)

In July 1988, appellant was stabbed, but he did not retaliate and reported the incident to the jail with the knife still in him. (38-RT 11637.) Appellant had four disciplinary actions. (39-RT 11710-16.) When appellant was disciplined he did not act out or get mad. (38-RT 11683.) Appellant was moved from a more secure prison to a less secure prison. (38-RT 11691-11694.)

S. Appellant's Testimony

Appellant's Background

Appellant never saw or met Michael: "As God is my witness I have never seen or been in the presence of Michael Lyons." (37-RT 11180-81.) Appellant was not responsible for Michael's death or abduction. (37-RT 11181.) Appellant did not sodomize, stab, or commit a lewd act on Michael, and was not involved in any way in Michael's death. (38-RT 11437.)

Appellant's 1989 Toyota four-wheel-drive was seven years old at the time of Michael's death. (37-RT 11222.) A four-wheel-drive vehicle was necessary to be a hunter or a fisherman, because he was out in the boondocks a great deal of the time. He loved four-wheel driving, but was always getting stuck in different areas of the river bottoms and getting himself out. (37-RT 11201, 11443.) The longest he had been stuck was for three days before he finally gave up and walked out to get help, which was the only time when he had to call his cousin Matthew to help him free his four-wheel-drive. (38-RT 11443.) Appellant did not own a gold pickup and his Toyota did not have shiny "mag" rims. (37-RT 11181.)

Appellant was 46 years old and weighed about 190 pounds at the time of his arrest. (37-RT 11186, 11217.) He was born in Marysville. (37-RT 11186.) Appellant had a normal childhood and was happy as a child and grew up in a happy household out in the country where he could play most of the time. (37-RT 11241.)

His father was an avid fisherman who taught him to fish and took him camping, fishing, water skiing, snow skiing, and to various church activities. (37-RT 11241-46; Exhibits 271. 272, 273.) Appellant loved his sister, Janet, who was six years younger than him. (37-RT 11241.) Later in life, there were a few times when he and his wife, Lynnette, and his sister, Janet, and her husband and would do drugs. (37-RT 11242.)

Appellant went to Christian schools until his senior year of high school when he rebelled against the restrictions and the confinement of the church and the school system and transferred to the public high school in Yuba City, which displeased his father. (37-RT 11186, 11200.) As a teenager he was selected to be in an elite choir that traveled the western states to sing, mainly in churches. (37-RT 11199.) Appellant was deaf in his left ear, but it did not affect his singing. (37-RT 11247.) His mother and father separated and divorced when he was in high school or shortly thereafter, which did not affect him much at his age. (37-RT 11242.)

Appellant was drafted into the Army in 1972, where he was a skipper of a 65-foot landing boat. (37-RT 11187.) He went to barber school from 1974 to 1975 and began to work with his father in 1976. (37-RT 11188-90.)

In 1984 appellant was convicted in Santa Clara County and in Sutter County of forgery. (37-RT 11248.) In 1985, appellant was convicted of kidnapping, armed robbery and oral copulation of Sharon. (37-RT 11187-88, 11248.) He was in prison from 1985 to 1990. (37-RT 11187.)

In 1993, appellant made a specialized no-contest plea to child molestation or a lewd act with a child with respect to Crystal, where he said, "I'm not guilty of this crime but because of prevailing attitudes, I believe I will be convicted. So, therefore, I plead no contest." (37-RT 11188, 11248, 11387.) Appellant believed he could not have a fair trial because Ellie Nesler had shot an alleged child molester in a courtroom two weeks before his trial. (37-RT 11188.) Appellant was sentenced to three years and was imprisoned from 1993 to 1994. (37-RT 11187, 11251.)

Appellant and his wife, Lynette, were separated in May 1996, and had an on-again/off-again relationship. (38-RT 11403, 37-RT 11189-90.) She would come down periodically to help him work on their house, which they were remodeling before selling it. (38-RT 11403.)

Appellant had studied every piece of paperwork in his case for the past two years. (38-RT 11450.) Appellant did not review his previous testimony prior to testifying in his second trial. (38-RT 11442.)

Appellant's Activities on May 16th and May 17th

Appellant testified in detail about his whereabouts and activities on May 16th and 17th that was consistent with his testimony at the guilt phase, which has been summarized above. (37-RT 11191 through 38-RT 11443; Exhibits 23, 135, 157, 231, 232, 275, 276; see AOB at 41-55.) To avoid repeating virtually the same testimony, appellant will omit another rendition. Suffice it to say that appellant's testimony exonerated him and provided an alibi when Michael was kidnapped and killed.

T. Appellant's Family Testimony

Boyd Leon Rhoades, appellant's father, described the family history. (37-RT 11268-75.) Appellant and he had a normal father/son relationship and normal home, except when Boyd would gamble or drink. (37-RT 11275.) Boyd decided to go back to the Seventh Day Adventist Church to set a good example when appellant was 10 years old. (37-RT 11277-78.) Boyd would not let appellant play football on Friday nights, which was the Sabbath. (37-RT 11281.)

Appellant was a gifted singer. (37-RT 11282.) Appellant got involved with drugs during the end of high school, which made him more irritated and rebellious. (37-RT 11284.) Appellant's first wife left him with a little boy. (37-RT 11286.) Appellant's second wife abused his son and they divorced. (37-RT 11288.) Though appellant tried to stay away from drugs, he had a drug problem, but drugs did not interfere with his barber work. (37-RT 11289.) Boyd loved appellant "very, very much." (37-RT 11289.)

June Rhoades, appellant's mother, married Boyd in 1950, and her first child, appellant, was born on December 11, 1952. (38-RT 11554-11555.) For the first 12 years of their marriage, Boyd gambled, ran around, and drank. (38-RT 11555.) June's four brothers drank and one killed his wife and himself. (38-RT 11574.) She loved appellant and had been in court almost every day. (38-RT 11575.)

When appellant said he did not want to go to church unless his father did, Boyd went. (38-RT 11560.) Boyd became strict and they kept the Sabbath. (38-RT 11561.) At the age of nine or 10, appellant went to a private Yuba City Seventh Day Adventist Church school. (38-RT 11563.) He went to the Yuba City Junior Academy through the 10th grade and then to a boarding school, Rio Linda Academy, in Healdsburg for 11th grade. (38-RT 11564.) Around the 9th grade, appellant did not want to go to church and had arguments with father.

(38-RT 11565-66.) June divorced Boyd in 1978, remarried him in 1979, and divorced him again in 1982. (38-RT 11567.)

Appellant did mediocre in school because he was lazy; teachers said he could have gotten all A's. (38-RT 11570.) In senior year, after six weeks at Healdsburg, appellant came home and went to Yuba City high school. (38-RT 11570.) Appellant always worked summers. (38-RT 11571.) He joined the army and returned with his wife Elizabeth and baby Robbie born September 28, 1974. (38-RT 11571.) Appellant's wife left and June helped raise Robby. (38-RT 11572.) Appellant married Kathy Osmond shortly thereafter. (38-RT 11572.) They split up and Kathy took their new baby, Adam. (38-RT 11573.) Appellant married Lynette when he was in prison. (38-RT 11574.)

Lavena Cater, Boyd's younger sister, was a Seventh Day Adventist, who did not believe in drinking or gambling and kept the Sabbath. (38-RT 11579.) She took appellant at age 9 or 10 and his sister Janet to church. (38-RT 11582.) At that age, appellant was enthusiastic and a talented and very kind person, who appeared to enjoy Bible studies and the church. (38-RT 11585.) Boyd was a very loving father who wanted the best for his children, but he was overly protective. (38-RT 11586.) Lavena was aware of appellant's drug problem. (38-RT 11586.) She loved appellant with all her heart. (38-RT 11587.)

Janet Cordero was appellant's younger sister by five years. (38-RT 11588.) At age 12 or 13, appellant battled his father and there was a lot of yelling. (38-RT 11589.) They went camping and had a boat. (38-RT 11590.) She knew appellant had a drug problem and she had abused drugs herself for 14 months at age 36. (38-RT 11593.) Boyd seemed overly critical of appellant because he did not want him to repeat his mistakes. (38-RT 11594.) Her earliest memories of appellant was of him singing as she went to sleep. (38-RT 11594.)

Prosecution Rebuttal

On May 16th, 1996, Charlie Wilber lived at 370 McRae Way, Apartment Number 48. (39-RT 11871.) Ray Clark was standing on the balcony. Mr. Clark pointed out a vehicle that was headed eastbound on C Street and told him that there was a kid that was grabbed and put into the vehicle. Mr. Wilber did not see the child enter the vehicle. He saw the vehicle speeding off on C Street going eastbound. He saw a dingy white-looking or a creamy color Toyota four-wheel-drive, which either had a camper shell or was a 4-runner. (39-RT 11871-73, 11890-92.) He saw it anywhere from 3:30 to 4:00 p.m. (39-RT 11871-73.)

Mr. Wilber never saw a child around the vehicle. (39-RT 11888.) When Mr. Clark made the statement: "Did you see that?" He said to Mr. Clark: "No, I was standing there talking with people." (39-RT 11888.) Mr. Wilber never contacted anyone about what he knew, because he did not want any attention or reporters coming after him, like they did Mr. Clark. (39-RT 11895-97, 11902, 11936.) Mr. Wilber said that all he saw was a truck when Mr. Clark pointed it out, but that he had not seen the child so he did not think what he saw was important. (39-RT 11903, 11932.)

Jail records showed that Julia K. Willoughby was brought into jail on May 3, 1996, and was booked on May 4, 1996. She was not released from custody until June 10, 1996. (39-RT 11907-09.)

Officer Michael Green estimated the driving time between Rooney's card room and 602 Church Street at approximately three and a half minutes; between 602 Church Street and C and Boyd at approximately two minutes; and driving straight from Rooney's to C and Boyd Street, at approximately three and a half minutes. (39-RT 11912-13.) The population of Marysville is about 12,000. The population of Yuba City is between 35,000 and 37,000. (39-RT 11920.) Traffic in Yuba City at 3:00 and 4:00 p.m. is not particularly heavy. (39-RT 11923.)

Detective Van Natta testified it took approximately ten and a half minutes to walk from Bridge Street School to C and Boyd Streets. (39-RT 11943.)

INTRODUCTION TO ARGUMENT

The argument part of the brief is divided into three sections. The first section deals with guilt phase issues, including a pretrial issue, which strongly suggest the court unfairly favored the prosecution. The second section deals with penalty phase issues arising from the second penalty phase trial, including a compelling "first-stage" *Wheeler/Batson* issue. (Any penalty phase issues from the first trial became moot when the jury could not reach a verdict.) The third section deals with federal constitutional issues that render California's death penalty illegal.

The cumulative effect of the many errors in this close case were obviously prejudicial, where the first jury could not reach a unanimous verdict on several charges (which were dismissed) nor on penalty, and the second penalty jury deliberated more than five hours over two days, and requested a readback of the testimony of Ray Clark [truck picking up boy did not resemble appellant's truck], and Ms. Duda-Shea [Blood DNA on appellant's knife was not consistent with appellant's DNA, but was consistent with Michael's DNA profile], before returning a verdict of death. (15-CT 4431-4433, 4437-4440; 41-RT 12541-42, 12553; see *People v. Sturm* (2005) 37 Cal.4th 1218, 1243 ["We look very closely at the question of prejudice in this instance, where the death penalty was imposed on a penalty phase retrial after the majority of the prior jury would have voted in favor of a sentence of life in prison without the possibility of parole"]; *People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [hung jury]; *People v. Little* (1956) 142 Cal.App.2d 513, 518 [acquittal on some counts suggests close case]; *People v.*

Brown (1993) 17 Cal.App.4th 1389, 1398 [close case indicated when jury was able to reach a verdict on only one of the two counts]; *People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [hung jury]; *People v. Taylor* (1986) 180 Cal.App.3d 622, 634 [reversible error under *People v. Watson* (1956) 46 Cal.2d 818, 836, "considering the entire record, including the first trial having ended with the jury unable to reach a verdict"]; *Christopher v. Florida* (11th Cir.1987) 824 F.2d 836, 846-847 [hung jury at first trial]; *In re Martin* (1987) 44 Cal.3d 1, 51 [lengthy deliberations]; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1140-1141 [three days of deliberations]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F. 3d 915, 932 [reversible error in light of defense counsel's incompetence, a jury question, and one and a half days of juror deliberations]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["juror questions and requests to have testimony reread are indications the deliberations were close"]; *People v. West* (1983) 139 Cal.App.3d 606, 610 [jury's requests during deliberations material to prejudice analysis]; *People v. Beeman* (1984) 35 Cal.3d 547, 562; *People* v. *Williams* (1971) 22 Cal.App.3d 34, 40 [request for rereading of testimony suggests close case].)

ARGUMENT

SECTION 1 –PRETRIAL AND GUILT PHASE ISSUES

I. THE COURT DENIED APPELLANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY NOT RELEASING MICHAEL AND SANDRA LYONS' MEDICAL AND PSYCHOLOGICAL RECORDS

A. The Relevant Facts

On September 10, 1997, appellant moved for the release of Michael's medical and psychological records. (2-CT 517-556, 568-576.) On September 16, 1997, the prosecutor, Michael's mother, and Yuba City School District opposed the motion under Evidence Code section 1014. (2-CT 557-565, 577-580.)

On September 23, 1997, the trial court ruled that *People v. Hammon* (1997) 15 Cal.4th 1117, did not authorize pretrial discovery of this information, but found good cause to review Michael's subpoenaed medical records in camera. (2-CT 585-586; 1-RT 234-264.)

On October 9, 1997, the court denied appellant's request for discovery of Michael's psychotherapist's records, mental health records, and school records, finding "no relevant evidence" that would assist appellant in his defense or in confronting witnesses. (1-RT 288-290.)

On March 23, 1998, appellant asserted that Susan Craig, the psychologist at Michael's school, had waived her privilege, and that her testimony about Michael would be relevant to some of the coroner's findings that could be explained by previous molestation. (6-RT 1802.) Appellant stated that school principal Gilpatrick described Michael's home life as unbalanced, and believed Michael had problems. (6-RT 1818.) School teacher Ray said that Michael often went to the river bottoms and was neglected. (6-RT 1820.)

The prosecutor responded that the court had already ruled and the documents were privileged. (6-RT 2068.)

On May 14, 1998, appellant argued that because Michael did not have a representative, there was no privilege under Evidence Code section 1014 or Welfare and Institutions Code section 5328. (7-RT 2310.) Appellant also argued that the civil suit filed by Michael's mother waived any privilege because the information was discoverable in the civil action. (11-RT 3525.)

On June 3, 1998, the court denied discovery of Michael's school records. (8-CT 2360.)

With respect to a 1995 Child Protective Services (CPS) report about Michael, after a referral from his school, and a FBI supplemental report about Michael dated May 17th, with two photos, the court upheld a claim of privilege under Penal Code section 11167.5 [Reports of suspected child abuse or neglect and the names of persons making them are deemed confidential]. (11-RT 3471-3479; 3488-3493; Exhibit B.)

Roxanne Gilpatrick, the former principal of Bridge Street elementary school attended by Michael, confirmed that Michael wrote in a journal, which would be in his classroom. (11-RT 3484-3486.)

Dr. Alfred French, a psychiatrist who examined Michael had uncertified records from his mental health file and the psychological team report of July 10, 1995, but did not want to assert a privilege, so the court ruled it would wait to see if Mental Health would assert privilege. (11-RT 3499-3506.) Dr. French later called the court and suggested that records from Sutter-Yuba Mental Health Services were privileged and confidential under Welfare and Institution Code section 5328 and could be released only by court order. (11-RT 3497-3498, 3527; Exhibit C.)

Susan Craig, the school psychologist for Bridge Street School, objected to the release of Michael's school records as privileged on behalf of the Yuba School District. (11-RT 3508-3509.)

Ms. Craig advised the FBI that she had been counseling Michael at the school due to molestation by other people. She said that the molestation may have been long term and further advised that contact may have been ongoing. (11-RT 3509-3514.)

Because Michael was missing, she believed it was appropriate to speak to the authorities to help find him. She did not intend to waive confidentiality that either Michael or his parents might have with respect to his school records. (11-RT 3517.) The lawyer for the school argued that it is not a waiver to talk to the police. (11-RT 3523.)

The court read the previous court order and agreed that most of the documents were "rather remote" to Michael's death in May 1996. (16-RT 5078.) The court also did not see any significant information that appellant did not already have. (16-RT 5078.)

The court found that under *People v. Hammon* (1997) 15 Cal.4th 1117, the Sutter County court had simply ruled on pretrial discovery. (16-RT 5084.)

The court stated it was inclined to rule that there was no effective waiver of privilege by talking to the police or providing them documents, because under Evidence Code section 1027, if a person is required to report, that is not an abandonment of the privilege. (16-RT 5084-5085.)

Appellant argued that with respect to Michael's uncle, they wanted discovery to see whether or not there was an ongoing molestation, whether the molestation occurred just before his death, and whether the autopsy surgeon could be incorrect. The prosecutor argued that Evidence Code section 1013(c), states that the "personal representative of the patient" is the holder of the

privilege if a patient is dead, and under Evidence Code section 1014. (16-RT 5086.) Appellant argued that any privilege expired upon Michael's death, because there was no estate, no personal representative, and a civil suit pending. (16-RT 5086-5087.)

The court stated that the records have "all kinds of numbers" that he did not understand so he could not intelligently rule on what the records had to do with the issues. (16-RT 5090.) The court questioned the relevance of what happened when Michael was two years old. (16-RT 5091.)

The prosecutor cited *Boling v. Superior Court (Economy Medical Equipment Co., Inc.)* (1980) 105 Cal.App.3d 430, on the issue of waiver under Evidence Code section 1014 of the privilege between a deceased child and his psychiatrist and Welfare and Institutions Code section 5328, a separate and distinct privilege. (16-RT 5093-5097.) The court stated it would defer its ruling. (16-RT 5098.)

On June 3, 1998, the court, relying on *Rittenhouse v. Superior Court* (1991) 235 Cal.App.3d 1584, reviewed all the documents in camera from the mental health department, from health services, from Yuba City's Unified School District, from Child Protective Services and from the Yuba County Police Department. The court found that there was no relevant evidence in the entire packet of information that would lead to or would assist the defendant in his right to confront witnesses in the case or his right to present a defense. The court noted that most of the documents in the file were "rather remote" to May of 1996. Thus, the court ruled it would not release any of the items of information in the packet, pretrial as requested by the defense. (17-RT 5249.)

The court denied appellant's motion for discovery as to that information that was subpoenaed by the defense for the September 23, 1997 hearing, subject to renewal during the trial should any of the evidence become relevant or

admissible. (17-RT 5249.) The court found nothing that was relevant or helpful with respect to the defenses asserted by appellant. (17-RT 5252.)

Appellant argued that there was new evidence that Michael had gone to the river bottoms on his own and played with other children. There was evidence, based on the police report, that he had been previously molested. Appellant argued that he was placed in a Catch-22 situation, because he was unable to develop at trial further facts without having access to the records. (17-RT 5250-5251.)

The prosecutor responded that defense counsel had said that the pathologist would testify about some sort of scarring or other markings on Michael's body indicated a history of molest. The pathologist, however, had testified that he found nothing like that on the body, so it was irrelevant, despite a babysitter's indication that there may have been cuts on the back and the chest of the child, which have nothing to do with any of the sexual organs of the child. (17-RT 5251.)

The court was troubled that Michael's mother had not applied to be appointed to be his personal representative. (17-RT 5252.) The court was concerned that the case law did not indicate whether someone has to assert the privilege or whether someone has to waive it. Because there was nothing relevant or helpful to the defense, however, the court believed that it did not penalize the defense "in the slightest" by denying the motion for discovery. (17-RT 5253.)

On January 7, 1999, the court held an in camera hearing on appellant's sealed motion to produce mental health and medical health records of Michael for impeachment of prosecution witnesses. (29-RT 8957.) Appellant asked the court to review in camera the psychological records for impeachment of Dr. Dibdin and to order the release of Michael's medical records, which were not

privileged. (29-RT 8957-63.) Appellant asserted that Dr. Dibdin had left a false impression about there being no prior molestation. (29-RT 8964.) Appellant argued that the prosecutor did not have standing to object and that Michael's mother had not shown she was the personal legal representative of Michael under *Boling v. Superior Court, supra*, 105 Cal.App.3d at 439. (29-RT 8965-66.) Appellant argued that the psychotherapist cannot claim the privilege if there is no holder of the privilege. (29-RT 8968.) Appellant cited *Caro v. Calderon* (9th Cir. 1998) 165 F.3d 1223 and *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073. (29-RT 8970-71.) Appellant also asserted that Susan Craig had written things about Sandra Lyons that impeached her. (29-RT 8973.)

The court denied appellant's motion without prejudice, because he wanted to give the prosecutor a chance to respond. (29-RT 8975-76, 8979.)

On January 13, 1999, appellant subpoenaed Sutter/Yuba County Human Services and Mental Health documents (Michael) (EXHIBIT F-1: 51-CT 15124); Sutter County Medical Records (Sutter County Department of Human Services). (EXHIBIT F-2: 51-CT 15252); Rideout Memorial Hospital Medical Records: Sandra Lyons. (EXHIBIT G-1: 52-CT 15332); Freemont Medical Records: Sandra Lyons (EXHIBIT G-3: 52-CT 15497); Freemont Medical Records: Michael Lyons (EXHIBIT G-5: 53-CT 15695); and Rideout Memorial Hospital Medical Records: Michael Lyons. (EXHIBIT G-6: 53-CT 15771.)

On January 15, 1999, appellant filed a motion to compel discovery and production of records of Michael and Sandra Lyons for the same reasons he had argued earlier. (13-CT 3706-3731.)

Over the next ten days, the prosecutor and the custodians of these records filed opposition and/or moved to quash the subpoenas and/or requested an in camera review by the court. (13-CT 3735, 3757, 3774, 3794, 3801, 3869.)

The Yuba County school district argued that Education Code section 49076 and the Federal Educational Rights and Privacy Act (20 U.S.C. 1232g) protected such records without parental consent or court order. (13-CT 3735-3740.) The Sutter County Department of Human Services argued that Evidence Code section 1040 and Welfare and Institutions Code section 10850 protected the records, because appellant had not shown "just cause" for their release. (13-CT 3757-3764.) The Rideout Memorial Hospital argued that Michael and Sandra Lyons' medical records were privileged under the physician-patient (Evid. Code section 993) and psychiatrist-patient (Evid. Code section 1014) privileges. (13-CT 3777-3783.)

The prosecutor first argued that it had standing; that appellant could not relitigate his discovery motion; and that the subpoenaed records could not impeach either Dr. Dibdin's testimony about Michael having no scaring from previous molestation or Tina Lyons' testimony that Michael's mother, Sandy, was always protective of her children and even more so after Michael's death. (13-CT 3869-3876.) The court did not rule on any of these arguments.

The prosecutor also asserted privileges for these records, including the federal and state constitutional rights to privacy, Evidence Code sections 954, 1014, and 1040, Welfare and Institutions Code sections 5328 and 10850, Education Code section 49076, Penal Code section 11167.5, and 20 U.S.C. 1232g. (13-CT 3876-3883.)

The prosecutor finally argued that if the court were to review the records, they would not contain any information necessary to vindicate appellant's right to a fair trial and to confront Dr. Dibdin and Tina Lyons, and therefore would not outweigh Michael and Sandy's right to privacy. (13-CT 3883-3890.)

On February 10, 1999, the court quashed the subpoenas directed to the custodians of records of Michael and Sharon, finding that the privileges were

properly asserted, aside from the physician/patient privilege, and that the files contained nothing relevant or helpful to the defense that they did not already possess. (14-CT 4076.)

B. The Relevant Law

The trial court had the right to postpone its review of the subpoenaed records in camera until trial. (*People v. Hammon* (1997) 15 Cal.4th 1117, 1124-1128.) Yet, as the *Hammon* court explained, the Sixth Amendment confrontation clause, as interpreted in *Davis v. Alaska* (1974) 415 U.S. 308, confers a right of a defendant during trial to discover privileged information, when the defendant's need for the information outweighs the patient's interest in confidentiality:

> When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the court may be called upon, as in *Davis*, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. (See *Davis, supra*, 415 U.S. at 319.) Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily.

Further, the *Hammon* court acknowledged that under the Fourteenth Amendment due process clause as construed in *Brady v. Maryland* (1963) 373 U.S. 83, 87, the prosecution is generally required to turn over to the defense all material, exculpatory information in the government's possession. Thus, in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, the Court held that due process principles required the trial court to review the agency records in camera to determine whether they would assist in the defense, which would then have required disclosure.

Appellant argued and the prosecution essentially conceded that all the cited privileges and the right to privacy can be superseded by the need to afford appellant the right to a fair trial and to confront witnesses. (13-CT 3883-3890;

see *Jaffee v. Redmond* (1996) 518 U.S. 1, 18, fn. 19, [there is no doubt that there are situations in which the federal psychotherapist privilege must give way]; *People v. Boyette* (1988) 201 Cal.App.3d 1527, 1531-1532 [in camera review was necessary to determine whether the defendant's constitutional rights to a fair trial overcame the psychotherapist-patient privilege under Welfare and Institutions Code section 5328].)

Thus, in light of the trial court's ruling after its in camera review of the subpoenaed privileged documents, the issue is whether the court denied appellant his federal due process and confrontation rights by denying him access to Michael and Sandra's medical and psychological reports at any time during trial. Moreover, if relevant information was kept from the jury because of the court's denial, then appellant was also denied his right to present a defense. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 684, 690-691; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Washington v. Texas* (1967) 388 U.S. 14, 19; *People v. Reeder* (1978) 82 Cal.App.3d 543, 552.)

Some documents marked confidential were not provided to appellant in his copy of the record on appeal. (EXHIBIT 1: Yuba County Child Protective Service Records. (49-CT 14264-14418.) Defendant's EXHIBIT A: Subpoenaed records of Yuba City Police Department. (49-CT 14419-14430.) DEFENDANT'S EXHIBIT B: Subpoenaed records of Sutter County Department of Human Services. (49-CT 14431-14439.) DEFENDANT'S EXHIBIT C: Subpoenaed records of Sutter/Yuba County Mental Health. (49-CT 14440-14574.) DEFENDANT'S EXHIBIT D: Subpoenaed records of Sutter Yuba County Mental Health submitted by Dr. French. (49-CT 14575-14639.) DEFENDANT'S EXHIBIT E: Photocopy of handwritten notes. (49-CT 14640.)

Some of other confidential documents were initially made part of the clerk's transcript, but returned to the trial court in 2007 without breaching their

confidentiality. (See 58-CT 17136-17137; see EXHIBIT F-1: Sutter/Yuba County Human Services and Mental Health documents (Michael) (51-CT 15124); School psychological report of Michael by Susan Craig (51-CT 15153); Counseling report by Craig (51-CT 15160); Personality inventory for children (PIC). (51-CT 15165.) EXHIBIT F-2: Sutter County Medical Records (Sutter County Department of Human Services). (51-CT 15252.) EXHIBIT G-1: Rideout Memorial Hospital Medical Records: Sandra Lyons. (52-CT 15332.) EXHIBIT G-3: Freemont Medical Records: Sandra Lyons. (52-CT 15497.) EXHIBIT G-5: Freemont Medical Records: Michael Lyons. (53-CT 15695.) EXHIBIT G-6: Rideout Memorial Hospital Medical Records: Michael Lyons. (53-CT 15771.)

Appellant requests this Court to review these confidential documents to determine whether the trial court erred in refusing to disclose them, as he is not entitled to a copy of them. (See *People v. Montgomery* (1988) 205 Cal.App.3d 1011 [surveillance location privilege].) While appellant will not speculate what might be in Michael and Sandra's medical and psychological reports, information contained in these documents could have been relevant to both the guilt and penalty phases, including possible other molestations and suspects, and important impeachment evidence concerning Michael's family, including the rosy picture painted of Michael and his family in the victim impact portion of the penalty phase. (32-RT 9639-9689.)

If this Court finds that the trial court erred by refusing disclosure, appellant requests this court to reverse under *People v. Memro* (1985) 38 Cal.3d 658, 684-685, as a denial of his federal constitutional rights, which was prejudicial on its face, rather than remand for a determination of prejudice. (See *People v. Hustead* (1999) 74 Cal.App.4th 410, 418-419.)

II. THE COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION AND HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY ADMITTING HEARSAY OF APPELLANT'S WIFE AS A SPONTANEOUS STATEMENT AND STATEMENT AGAINST SOCIAL INTEREST AND PAST-RECOLLECTION RECORDED

A. The Relevant Facts

At a pretrial hearing on April 14, 1998, appellant's wife, Lynnette Rhoades, asserted her marital privilege not to testify. (5-RT 1684.)

Sergeant Michael Johnson testified that on May 20, 1996, (three days after appellant's arrest), he spoke with Mrs. Rhoades in Stockton. (5-RT 1686-1688, 14-RT 4246.) Mrs. Rhoades said she would not talk unless the police could prove to her appellant did it. When Sergeant Johnson told Mrs. Rhoades that Michael Lyon's footprint had been found inside appellant's vehicle, she started to hyperventilate for five minutes and to dry heave or vomit. (5-RT 1689-1692, 1701.)

Mrs. Rhoades started calming down and within minutes began to breathe fairly normally, but was still visibly upset, and crying, with tears rolling down her cheeks. As she was calming down, the police sat with her at the kitchen table in her mother's house. Sergeant Johnson pulled out the pictures and asked her if she recognized those items. She was still visibly upset even though she was answering the officer's questions. (5-RT 1691-1692.)

Mrs. Rhoades said that she recognized the bracelet as one she had seen in her husband's vehicle two days prior to the incident on Tuesday, May 14th, 1996, when she took appellant's pickup to the car wash about 10:30 and washed the outside and cleaned the inside of the cab and found the bracelet under the driver's seat and put it on the dash, while wondering to whom it belonged. (5-RT 1690-1692.)

The prosecutor argued that the hearsay statements of Mrs. Rhoades were admissible as a spontaneous statement. (5-RT 1704; 6-CT 1570.) Appellant disagreed, stating that his wife's request for evidence suggested that her statements were more calculated than spontaneous, and thus inadmissible hearsay. (5-RT 1704-1706, 1688.)

The court found that Mrs. Rhoades' statements were admissible as spontaneous statements under Evidence Code section 1240 as construed in *People v. Poggi* (1988) 45 Cal.3d 306, 318-320, where this Court found statements were spontaneous, even though they were delivered about 30 minutes following an attack and in response to questioning and after the declarant had been calmed down sufficiently to be able to speak coherently. (5-RT 1709.)

The trial court also found that Mrs. Rhoades' statements were admissible, because they were against her social interest under Evidence Code section 1230. (5-RT 1710-1716.) While the court found that Mrs. Rhoades' statements were not contrary to her pecuniary or proprietary interest, the court found that they did create a risk of making her an object of hatred, ridicule, or social disgrace in the community such that "a reasonable lady in her position would not have made the statement unless she believed it to be true." (5-RT 1712-1716.)

Finally, the Court found portions of Mrs. Rhoades' written statement would be admissible under Evidence Code section 1237, as past recollection recorded, assuming Mrs. Rhoades testified (which she did not) and appellant had another chance to object to parts of her statement. (5-RT 1715-1716; see 50-CT 14796; Exhibit 82 B.)

Thereafter, at trial, Mrs. Rhoades did not testify. Sergeant Johnson testified that on May 20th, he went with FBI agent Jeff Rinek to Stockton to talk with Mrs. Rhoades. (14-RT 4246.) Sergeant Johnson testified, over a renewed

hearsay objection, that Mrs. Rhoades said that based on the photos of the blanket found at the scene, the blanket appeared to be the one appellant kept in back of his pickup. (14-RT 4248-4249, 4251-4254.) Sergeant Johnson testified that Mrs. Rhoades also said that she had seen the bracelet found under Michael in appellant's truck under the driver's seat the Tuesday before when she was cleaning the vehicle, after which she left it on the dashboard. (14-RT 4252-4253; Exhibit 103.)

B. No Hearsay Exceptions Were Applicable To Mrs. Rhoades' Statements

The hearsay exception for spontaneous declarations is among those 'firmly rooted' exceptions that carry sufficient indicia of reliability to satisfy the Sixth Amendment's confrontation clause. (*Idaho v. Wright* (1990) 497 U.S. 805, 820; *White v. Illinois* (1992) 502 U.S. 346, 355-356, & fn. 8.) To qualify for admission under the spontaneous statement exception to the hearsay rule, "an utterance must first purport to describe or explain an act or condition perceived by the declarant. (Evid. Code § 1240, subd. (a);[14] *People v. Farmer* (1989) 47 Cal.3d 888, 901.) For purposes of the exception, a statement may qualify as spontaneous if it is undertaken without deliberation or reflection. (*Id.* at 903.) Although responses to detailed questioning are likely to lack spontaneity, an answer to a simple inquiry may be spontaneous. (*Id.* at 904.) The trial court must consider each fact pattern on its own merits and is vested with reasonable discretion in the matter. (*Ibid*; *People v. Farmer* (1989) 47 Cal.3d 888, 903-904.)

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14. Evidence Code section 1240 provides:

"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."

With respect to "excited utterances" or "spontaneous declarations" the Supreme Court has explained that such statements are "given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation," so that "the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." (*Idaho v. Wright*, *supra,* 497 U.S. at 820.) In other words, a statement made *after* the declarant has had an opportunity to reflect or discuss the matter with others does not carry "the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." (*Idaho v. Wright*, 497 U.S. at 817.) For purposes of the Confrontation Clause analysis, what makes a spontaneous declaration an exception to hearsay is the declarant's lack of opportunity to reflect or fabricate. Given that a genuine spontaneous statement is not testimonial under *Crawford v. Washington* (2004) 541 U.S. 36, 60, admission of Mrs. Rhoades testimonial statements violated the Confrontation Clause because the circumstances surrounding her statements do not fit the Supreme Court's descriptions of the excited utterance or spontaneous declaration exception to hearsay, as set forth in *Wright* and *White.* (See section C., *infra.*)

The mere fact that Mrs. Rhoades was upset as she spoke did not make her utterance reliable. As the Supreme Court has recognized, a spontaneous statement is reliable because it is offered "without the opportunity to reflect on the consequences of one's exclamation." (*White v. Illinois*, *supra,* 502 U.S. at 356.) Just because a subject is or appears to be upset offers no guarantee that he or she has not taken time to consider the matter. The subject may be upset precisely because he has had time to reflect, or he may feign emotional distress in a calculated effort to appear more credible. (*Winzer v. Hall* (9th Cir. 2007) 494

F.3d 1192, 1199 [Because the witness was able to calmly and coolly call 911 several hours after the threat and discuss both the threat and other circumstances, she must have weighed the costs of intrusion against the benefit of obtaining help from the police].)

The determination of preliminary facts by the trial court will be upheld if supported by substantial evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 540-541; *People v. Phillips* (2000) 22 Cal.4th 226, 236.)

> When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. . . . . "Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*." (*People v. Poggi* (1988) 45 Cal.3d 306, 319, quoting *People v. Washington* (1969) 71 Cal.2d 1170, 1176, italics added in *Poggi*.)

Substantial evidence did not support the trial court's ruling. Mrs. Rhoades' statement was made days after her observations, which were hardly exciting events. (See *People v. Raley* (1992) 2 Cal.4th 870, 893-894 [statement made 18 hours after event held spontaneous under Evid. Code § 1240].)

Here, Mrs. Rhoades did not perceive any disturbing or startling events; she simply was disturbed by the officers' accusation that her husband had committed a terrible crime. That does not mean that whatever she said she saw prior to that time was admissible, reliable, hearsay.

Here, there was no evidence of an ongoing emergency or that Mrs. Rhoades had been threatened or feared appellant; the questioning occurred during a police investigation into Michael's murder. (See *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1597 [Rachel's account to Officer Hawkins of having been assaulted and threatened by Saracoglu was non-testimonial,

because her primary purpose for making her initial statements to Hawkins was to gain police protection and the primary purpose of Hawkins's interrogation was "to enable police assistance to meet an ongoing emergency"].)

The court also erred in admitting these statements under Evidence Code section 1230,[15] the hearsay exception for declarations against penal and social interest. Contrary to the trial court's assumption, Mrs. Rhoades's remarks about the blanket and bracelet obviously would not subject her to "hatred, ridicule, or social disgrace in the community."

It is the content of the statement that must create a risk of making the declarant an object of hatred, ridicule, or social disgrace in the community; not the collateral consequences. (*In re Weber* (1974) 11 Cal.3d 703, 721-722.) The *Weber* court rejected the contention that by "snitching" on a cellmate, the declarant was risking hatred, social disgrace, and physical injury, explaining it is the content of the statements that control:

> Nothing in the content of Anderson's statement reflects adversely on his character in such a way as to guarantee that it is reliable. The statement reveals nothing with respect to Anderson's character. He merely related certain hearsay statements of Devins. But in order for a declaration to be against the declarant's social interest to such an extent that it becomes admissible under section 1230 of the Evidence Code, both the content of the statement and the fact that the statement was made must be against the declarant's social interest. Otherwise,

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[15] Evidence Code section 1230 provides:

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

> exception to the hearsay rule consistent with trustworthiness. That it did not intend to eliminate that important requirement is evident from the comment.

Obviously, Mrs. Rhoades's statements did not meet several of the requirements of section 1237, including the fact that Mrs. Rhoades did not suffer from inability to recollect; she did not attest that the statement she made was true; and the statements were not necessarily so reliable as to eliminate the need for confrontation and cross-examination.

C. The Admission Of Mrs. Rhoades' Statements Violated The Confrontation Clause

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The right of confrontation and cross-examination is an essential and fundamental requirement for a fair trial. (*Pointer v. Texas* (1965) 380 U.S. 400, 405.) "The Confrontation Clause advances [this goal] by ensuring that convictions will not be based on the charges of unseen and unknown — and hence unchallengeable — individuals." (*Lee v. Illinois* (1986) 476 U.S. 530, 540; *Winzer v. Hall* (9th Cir. 2007) 494 F.3d 1192, 1194.) The Confrontation Clause commands that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation." (*Crawford v. Washington* (2004) 541 U.S. 36, 60.)

In *Crawford*, the court overruled *Ohio v. Roberts* (1980) 448 U.S. 56, holding that out-of-court statements by witnesses in response to police questioning are testimonial and therefore barred under the federal confrontation clause, unless such witnesses are unavailable and the defendant had a prior opportunity to cross-examine them. (See *Davis v. Washington* (2006) 547 U.S. 813, 822 [hearsay statements are testimonial when made in the course of police interrogation and "the circumstances objectively indicate that there is no . . .

ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"].) This new rule is applicable because it was decided while appellant's case was on direct review and "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

Before *Crawford, Roberts* provided the procedure for determining whether the admission of hearsay statements violated the confrontation clause. In overruling *Roberts*, the court in *Crawford* made a clean break from the line of precedent established by *Roberts* and rejected its continuing application. (*Crawford, supra*, 541 U.S. at 62-69; see *People v. Cage* (2007) 40 Cal.4th 965, 981-982, fn. 10 [*Roberts* and its progeny are "overruled for all purposes, and retain no relevance to a determination whether a particular hearsay statement is admissible under the confrontation clause"].)

Thus, it would have been futile for appellant to object under the reasoning of *Crawford,* because that case had not been decided, and it is irrelevant that defense counsel did not believe an objection under *Roberts*, unlike a *Crawford* objection, would have been successful. Moreover, this Court in *People v. Partida* (2005) 37 Cal.4th 428, 437-438, held that a defendant may argue an additional legal consequence of the asserted error in overruling the Evidence Code section 352 objection is a violation of due process]; but see *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19 [hearsay objection did not preserve confrontation clause claim]; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14 [hearsay objection does not preserve claim that the "error constituted a violation of his Sixth Amendment right to confrontation].)

In any event, the trial court's evidentiary ruling violated appellant's federal constitutional right to confront a witness against him. The trial court's ruling to

admit Mrs. Rhoades' statements violated appellant's right to confrontation under the state and federal Constitutions, because he was unable to cross-examine Mrs. Rhoades, who asserted her marital privilege not to testify.

This Court, analyzing *Davis* in *People v. Cage, supra,* 40 Cal.4th 965, said:

> We derive several basic principles from *Davis*. First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony -- to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial. (*People v. Cage, supra,* 40 Cal.4th at 984, fns. omitted.)

Under this standard it is clear that the statements given by Mrs. Rhoades to Sergeant Johnson were testimonial primarily "to establish or prove past events potentially relevant to later criminal prosecution." Thus, their admission was violative of the confrontation clause.

D. The Admission Of This Hearsay Was Not Harmless Beyond A Reasonable Doubt

Violation of the Confrontation Clause is trial error subject to harmless-error analysis, because its effect can be "quantitatively assessed in the context of other evidence presented" to the jury. (See *Delaware v. Van Arsdall* (1986) 475

U.S. 673, 684; *Arizona v. Fulminante* (1991) 499 U.S. 279, 308.) In appellant's case, the erroneous admission of testimonial hearsay was not harmless beyond a reasonable doubt. (See *People v. Cage, supra,* 40 Cal.4th at 991-994.) The statements of Mrs. Rhoades were very prejudicial.

Mrs. Rhoades said that the blanket found at the scene appeared to be the one appellant kept in back of his pickup. (14-RT 4251-4254.) She also said that the bracelet found under Michael appeared to be the one she saw in appellant's truck the Tuesday before. (14-RT 4252-4253; Exhibit 103.) These statements strongly implicated appellant and tied his truck to Michael's murder, which was highly prejudicial because the jury did not believe appellant's defense that someone else murdered Michael in his truck. Significantly, these hearsay statements also suggested that Mrs. Rhoades had turned on appellant and believed he was guilty, as she had told the police that she would not talk to them unless they could prove to her appellant did it. (5-RT 1689-1692, 1701.) Thus, the fact Mrs. Rhoades did talk to the police suggested that she believed appellant was guilty. Thus, the admission of these statements not subject to cross-examination was not harmless beyond a reasonable doubt, requiring reversal.

III. THE COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND HIS RIGHT TO COUNSEL BY ADMITTING APPELLANT'S STATEMENT HE MADE TO HIS ATTORNEYS THAT WAS OVERHEARD BY TWO BAILIFFS GUARDING HIM

A. The Relevant Facts

The prosecutor moved to admit the testimony of the two bailiffs who overheard a statement appellant made to his lawyers at a break during his preliminary hearing. (5-CT 1409, 6-CT 1723.) Appellant argued that the attorney-client privilege protected this statement. (8-CT 2123-2128.)

On April, 15, 1998, the court held an Evidence Code section 402 hearing at which Officer Dinwiddie testified that as the jail transportation officer on October 22, 1996, he transported appellant to court for his preliminary hearing. (5-RT 1725.) At the morning recess, appellant and his lawyer went to the jury room, which measured 20 feet by 30 feet, and was the only room in which a lawyer could talk to his client. (5-RT 1726, 1728.) Officer Dinwiddie was about 10 or 15 feet away, guarding one door, and the other officer was about 10 feet from appellant, guarding the other door, which were both open. (5-RT 1726, 1728.) It was obvious appellant and his lawyer were talking about the case. (5-RT 1730.)

At first, Officer Dinwiddie could not hear them speak. (5-RT 1727.) Then appellant stood up and said, "I can give them a better time of death than what they have." (5-RT 1727.) Appellant's lawyer told appellant to be quiet, that the walls and doors have ears. (5-RT 1727.) They continued to talk and Officer Dinwiddie could not hear what they were saying. (5-RT 1727.)

Appellant argued that his statement was a confidential, privileged communication to his lawyer. (5-RT 1731.) The prosecutor argued that under *People v. Poulin* (1972) 27 Cal.App.3d 54, 64, defendants must keep their voices low or they waive the privilege. (5-RT 1730.)

The court ruled appellant's statement was admissible and not privileged, despite being troubled by the fact that a lawyer must sometimes speak with a defendant. (5-RT 1732.) The court stated it would follow the law, but made "that finding with a great deal of dislike for it. . . . It's not a ruling that I care for in the slightest." (5-RT 1732.)

Consequently, at trial, Deputy Carlton Dinwiddie testified that at a recess during appellant's preliminary hearing on October 22, 1996, just after the witnesses had been discussing the time of Michael's death, he took appellant to

the jury room during a recess. He was standing at one door and another guard was at another door, when appellant stood up and said to the attorneys and investigator Larry McCormack: "I can give them a better time of death than what they have." (15-RT 4760-4762.)

In his testimony, appellant explained that when he told his attorney and Mr. McCormack that he had a better idea of the time of Michael's death than a prosecution witness, he was surmising that Michael was probably killed in his truck after he had left that night to get his come-along. (17-RT 5343-5344.)

B. The Relevant Law

In *People v. Poulin* (1972) 27 Cal.App.3d 54, 64, the court held that admitting a defendant's communication with his lawyer was not a violation of Evidence Code section 954 (the lawyer-client privilege) which provides, in pertinent part, that a client "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." The court explained:

> No privilege of confidential communication attaches to a statement which is made in the presence of a third person who is ostensibly present" (*People v. Cox* (1968) 263 Cal.App.2d 176, 188 [police matron overheard defendant's telephone call to an attorney]; *People v. Castiel* (1957) 153 Cal.App.2d 653, 659 [court reporter overheard conversation between attorney and client during recess]). Evidence Code section 952 defines a confidential communication between client and attorney, in part, as a communication made "by a means which, so far as the client is aware, discloses the information to no third persons . . . ." If a communication is made so that it can be overheard by a third person, it obviously is not calculated to insure confidentiality. There is no indication that the bailiff was eavesdropping. He was seated at the far end of the jury box. "The burden of establishing the privileged nature of confidential communications between an attorney and client is upon the parties seeking to suppress the evidence." (*People v. Sturgess* (1960) 178 Cal.App.2d 435, 441.) (*People v. Poulin*, *supra,* 27 Cal.App.3d at 64-65.)

Evidence Code section 952 provides that attorney-client communications remain confidential when disclosed to third persons present at the consultation to further the interest of the client or when disclosed to persons "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (*Insurance Co. of North America v. Superior Court (GAF Corp.)* (1980) 108 Cal.App.3d 758, 765-771.) Thus, while involvement of an unnecessary third person in attorney-client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication. (See *D. L. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, [when "the client communicates with his attorney in the presence of other persons who have no interest in the matter . . . he is held to have waived the privilege"]; *People v. Castiel* (1957) 153 Cal.App.2d 653, 659, [court reporter permitted to testify about statement made by defendant to his attorney during a recess]; *Ver Bryck v. Luby* (1945) 67 Cal.App.2d 842, 844, [defendant present at conversation between plaintiff and her attorney].) In appellant's case, however, appellant had no choice but to speak with his lawyer in the only room available to them and in the presence of the bailiffs. This unavoidable situation should not be deemed to be a voluntary waiver of his right to confidential communications with his lawyer.

In *People v. Urbano* (2005) 128 Cal.App.4th 396, 401-403, the court upheld the admissibility of a defendant's gesture and comment to his lawyer while in the jury box during a break. *Gonzales v. Municipal Court (People)* (1977) 67 Cal.App.3d 111, 118-119, held that "if the communication is made by the client in the open presence of a third party not present to further the interest of the client in the consultation, it is not privileged." In such a case, the court found that "the circumstances mandate the conclusion that the communication

was not intended to be confidential, notwithstanding the protestations of the client as to his subjective intent." (*Ibid.* [citations omitted].)

In appellant's case, however, he had no choice but to speak to his lawyer in the only room provided, while the bailiffs were just feet away. Simply because he did not whisper softly enough the entire time is no indication that his attorney-client conversation was not intended to be confidential. The surrounding circumstances clearly indicated that appellant was engaging in privileged communication. The unnecessary proximity of the guards to appellant could not forfeit his right to consult with his lawyers about his ongoing preliminary hearing or waive confidentiality. The court was correct that its ruling was unseemly and unfair; it also violated appellant's due process right to a fair trial and his right to counsel. (See *Medina v. California* (1992) 505 U.S. 437, 448 [trial of a defendant who is unable to consult with his lawyer because of his incompetency violates due process]; see *Dusky v. United States* (1960) 362 U.S. 402 [competency]; *Escobedo v. Illinois* (1964) 378 U.S. 478, 490- 491 [right to consult lawyer].)

This ruling prejudiced appellant, as his overheard statement to his lawyers made it appear that he was responsible for Michael's death, simply because he speculated about his time of death. Although appellant's explanation for his remark was plausible -- he was surmising that Michael was probably killed in his truck after he had left that night to get his come-along (17-RT 5343-5344) – the jury apparently disbelieved appellant with respect to much of his testimony, so it is likely that the bailiff's testimony about appellant's statement affected the jury to appellant's detriment.

Moreover, a bailiff is supposed to be neutral, but here he assumed an adversarial role by essentially spying and "snitching" on appellant. (See *Gonzales v. Beto* (1972) 405 U.S. 1052, 1055-1056 ["Our adversary system of criminal justice demands that the respective roles of prosecution and defense

and the neutral role of the court be kept separate and distinct in a criminal trial. When a key witness against a defendant doubles as the officer of the court {bailiff} specifically charged with the care and protection of the jurors, associating with them on both a personal and an official basis while simultaneously testifying for the prosecution, the adversary system of justice is perverted."].) The court's ruling permitting the introduction of this testimony was another example of the court favoring the prosecution over appellant, resulting in a violation of appellant's due process right to a fair trial.

IV. THE COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY ADMITTING HIS PRIOR SEX AND KIDNAPPING CRIMES AGAINST SHARON AND HIS CHILD MOLESTATION CONVICTION AGAINST CRYSTAL UNDER EVIDENCE CODE SECTIONS 1108, 352, AND 1101, PARTICULARLY BECAUSE THE EVIDENCE OF FORCIBLE ORAL COPULATION WAS SO WEAK

A. The Relevant Facts

The parties briefed at length the critical issue of whether to admit evidence of appellant's prior sex convictions with respect to incidents involving the kidnapping and forcible oral copulation of 20-year-old Sharon in 1985 and the sexual molestation of four-year old Crystal in 1993. (6-CT 1750, 5-CT 1214, 1230, 7-CT 2081, 2130, 8-CT 2184.)

The court ruled that the crimes against Sharon and Crystal were admissible under both Evidence Code section 1101(b)[17] [hereafter section

[17] Evidence Code section 1101, subdivision (a) generally prohibits the admission of evidence of a prior criminal act against a criminal defendant "when offered to prove his or her conduct on a specified occasion." Subdivision (b) of that section, however, provides that such evidence is admissible when relevant to prove some fact in issue, such as motive, intent, knowledge, identity, or the existence of a common design or plan.

1101(b)], to prove intent, and common scheme and plan, and Evidence Code section 1108[18] [hereafter section 1108] for propensity. (8-CT 2262; 6-RT 2030-2032.)

Consequently, the prosecutor in his opening statement explained that appellant had pleaded no contest with respect to a crime against Crystal, saying appellant had forced her to suck his penis. (12-RT 3651-3652.) He explained that a jury had convicted appellant of kidnapping Sharon, threatening her with a knife to force her to orally copulate him, and, afterwards, threatening to kill her in the river bottoms. (12-RT 3652-3657.) He told the jury: "You can use that [other crime's evidence] to determine whether the defendant was guilty or innocent of charged crimes." (12-RT 3658.)

Consequently, in the guilt phase, the prosecutor introduced the details of the crimes against Sharon (15-RT 4794-4799; 16-RT 4800-4848), and Crystal. (15-RT 4787-4792; Exhibit 119.)

In his closing argument in guilt phase, the prosecutor argued: "The defendant is guilty. And, ladies and gentlemen, this is not the first time he did it. Sharon would have ended up dead, too, but she jumped out." (19-RT 5814.)

B. The Prior Crimes Were Inadmissible Under Evidence Code Section 1108

This Court has upheld the constitutionality of section 1108, which allows evidence of other sexual assaults to show a defendant's propensity to commit these acts. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Reliford* (2003) 29 Cal.4th 1007, see *People v. Wilson* (2008) 44 Cal.4th 758, 797.)

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[18] Evidence Code section 1108, subdivision (a) provides:

In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

Section 1108 abrogated prior appellate decisions indicating that "propensity" evidence is per se unduly prejudicial to the defense. (See, e.g., *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.)

A trial court's ruling on the admissibility of propensity evidence "will not be disturbed on appeal absent a showing of an abuse of discretion." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183; *Thompson v. Keohane* (1995) 516 U.S. 99, 111.) The trial court in appellant's case abused its discretion by admitting testimony about his prior convictions with respect to Sharon and Crystal that was unduly prejudicial under *Falsetta*.

With respect to 1108 evidence, the *Falsetta* Court explained that in weighing probative value against prejudicial effect under section 352, the trial court must consider such factors as:

> its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. (*People v. Falsetta, supra,* 21 Cal.4th at 917-919.)

As will be further examined in section D., the trial court failed to properly consider the above factors in weighing the prejudicial impact against the probative effect of the evidence of the uncharged crimes. Instead, the trial court myopically focused on the similarity of the offenses, a factor which, although relevant, was specifically de-emphasized by the Legislature in enacting section 1108. As noted in *People v. Soto* (1998) 64 Cal.App.4th 966, 984, the Legislature deliberately chose not to add a similarity requirement to section 1108. Further, this Court has not addressed the issue of "whether the uncharged sex

acts must be similar to the charged offenses in order to support the inference." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012, fn. 1.)

The evidence that appellant kidnapped Sharon after the forcible sex crime was not relevant to prove the sex crimes against Michael, but allegedly to prove his murder and kidnapping. Section 1108 evidence is not admissible to prove murder or kidnapping, it is admissible to prove sex crimes only. Here, at a minimum, the trial court should have limited the evidence, but instead it essentially and improperly allowed the prosecution to prove the murder and kidnapping of Michael by using the kidnapping of Sharon, which does not qualify as a "sexual offense." Thus, the prosecution with the help of the trial court, effectively and impermissibly bootstrapped otherwise inadmissible evidence onto the 1108 evidence. (See *People v. Earle* (2009) 172 Cal.App.4th 372, 396-400 [commission of indecent exposure does not rationally support an inference that the perpetrator has a propensity or predisposition to commit rape].)

In *People v. Harris* (1998) 60 Cal.App.4th 727, 738-741, the court of appeal held that a prior rape was so dissimilar to the charged rape and so remote that it was inadmissible. The prior offense was a violent forcible rape committed against a stranger; the current offense involved an abuse of trust. (*Id.* at 738.) The court held that "the evidence [of the prior rape] did little more than show defendant was a violent sex offender"; it was so dissimilar that it did not even bolster the victim's credibility. (*Id.* at 740.) Moreover, given the total dissimilarity of the offenses, it was not probative of a predisposition to commit the charged offense. (*Id.* at 740-741.) In other words, it was pure propensity evidence, as in appellant's case.

The trial court, however, also admitted the evidence under section 1101. (8-CT 2262; 6-RT 2030-2032.) Section 1108, however, is far less restrictive than section 1101, so if evidence is more prejudicial than probative under section

1108, it would likewise be inadmissible under 1101 and 352, as sections C. and D. will explore. As will be further examined in section E., the consideration of appellant's prior crimes by this capital jury violated appellant's rights to due process and a fair trial under the Sixth and Fourteenth amendments to the United States Constitution.

C. The Prior Crimes Were Inadmissible Under Evidence Code Section 1101

Evidence Code section 1101, subdivision (a) expressly prohibits the use of other crimes evidence as evidence of a defendant's guilt of a charged crime if the only theory of relevance is that the defendant has a propensity or disposition to commit the charged crime and this propensity is circumstantial proof that the defendant behaved accordingly on the occasion of the charged offense. (*People v. Thompson* (1980) 27 Cal.3d 303, 316; *People v. Kelley* (1967) 66 Cal.2d 232, 238.) Evidence of a defendant's bad character or his propensity to commit crime in general is not excluded because it is irrelevant. Rather, "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*Michelson v. United States* (1948) 335 U.S. 469, 475-476; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 915.)

The admission of any evidence which involves crimes or conduct other than those for which a defendant is being tried has a "high inflammatory and prejudicial effect" on the trier of fact. (*People v. Carpenter* (1997) 15 Cal.4th 312, 380 ["evidence of uncharged crimes is inherently prejudicial, but may still be admitted if it has substantial probative effect"].) This Court has repeatedly ruled that the admissibility of this type of evidence must be "scrutinized with great care." (*People v. Durham* (1969) 70 Cal.2d. 171, 186-187; *People v. Thompson, supra*, 27 Cal.3d at 315.)

Section 1101, subdivision (b), however, allows evidence of prior acts of criminal conduct for certain purposes. (*People v. Ewoldt* (1994) 7 Cal.4th 380.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance." (*Id.* at 402.) There was no evidence appellant's intent with respect to Michael was similar with respect to Crystal and Sharon. There were no distinctive elements of appellant's conduct in committing nonforcible oral copulation with Crystal and forcible oral copulation with Sharon that logically and naturally tended to establish his intent to kidnap, sodomize and kill Michael. The evidence of forcible oral copulation against Michael was so weak that the jury could not reach a verdict and the charge was dismissed before the penalty retrial. Thus, the proven sex acts against Michael were not similar to those against Crystal and Sharon.

If there is no similarity between the prior crime and the present crime, the prior crime is irrelevant and inadmissible on the issue of intent. (*People v. Thompson, supra*, 27 Cal.3d at 314, 321.) In *Thompson*, evidence of a prior restaurant robbery was not similar and was not admissible in the trial of a later murder occurring at a residence. The prosecutor argued that the prior restaurant robbery was relevant to prove the defendant's intent to commit robbery at the time of the murder, bringing the case within the felony murder rule. The Court held that it was error to admit the evidence of the prior restaurant robbery. The lack of similarity between the restaurant robbery and the residential murder made evidence of the prior robbery irrelevant on the issue of the defendant's intent at the time of the murder.

In *People v. Guerrero* (1976) 16 Cal.3d 719, 725-729, the defendant was charged with the murder of a 17-year-old girl by striking her in the head after giving her a ride in his car. The prosecution offered evidence that on a prior

occasion the defendant and two friends had raped another 17-year-old girl and had threatened her with a wrench. This evidence was offered to prove that at the time of the murder the defendant harbored an intent to rape which would bring his case within the felony murder rule. The Court reversed the murder conviction and held that the evidence of the uncharged rape was not properly admitted to show the defendant's intent to commit rape at the time of the murder. Because of a lack of similarity between the prior rape and the facts and circumstances surrounding the charged murder, the Court concluded that "the evidence of the Lopez rape is inadmissible to show intent to rape Miss Santana [the alleged murder victim]." (*People v. Guerrero, supra,* 16 Cal.3d at 729.)

In appellant's case, appellant's prior sex crimes were not similar to the murder and sex crimes against Michael. The facts of the three cases are too dissimilar to raise an inference that the commission of one crime was relevant to prove appellant's intent at the time of the commission of the second crime. Appellant entered a *West* no contest plea to committing a nonforcible molestation of Crystal, his four-year-old granddaughter, in his home. Appellant was convicted of forcing Sharon, an adult woman, whom he knew, to orally copulate him in her home, after which he drove her against her will towards the river bottoms, until she escaped.

These incidents are not similar to sodomizing, torturing, and murdering Michael in the river bottoms. Moreover, the evidence that appellant had kidnapped Michael and committed forcible oral copulation was so weak that the guilt-phase jury did not reach a verdict on these counts and they were dismissed. It violated appellant's right to due process to permit the prosecutor to use the highly prejudicial evidence of other crimes to bolster a weak case.

"A greater degree of similarity is required in order to prove the existence of a common design or plan. . . . To establish the existence of a common design or

plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. (*People v. Ewoldt, supra*, 7 Cal.4th at 402-403.) The court in *Ewoldt* held, that common features of the crime must be "markedly similar to the charged offense . . . to establish that the uncharged offenses and the charged offense are manifestations of a common design or plan." (*People v. Ewoldt, supra,* 7 Cal.4th at 399, 402). In *Ewoldt*, for example, the defendant molested his youngest daughter and stepdaughter in a similar fashion to his oldest daughter. He always provided the same excuse when confronted by his wife in the daughters' bedrooms, and this evidence provided the basis for a common scheme. (*Id.* at 403.)

In *People v. Sam* (1969) 71 Cal.2d 194, 204-205, in contrast, the California Supreme Court held that the evidence of the uncharged conduct was inadmissible to demonstrate a common design, because "no connecting link between the prior and present acts was alleged or could reasonable be inferred. The acts were independent of one another and apparently spontaneous in each instance." Likewise, in appellant's case, there were no "distinctive characteristics" of appellant's priors or connecting links that supported the evidence against appellant with respect to Michael. Rather, this evidence was probative only if the court drew the improper inference from the priors that it was appellant's inclination or nature to commit sexual crimes, and that this aspect of his character caused him to commit the charged sodomy and murder. This is nothing but criminal propensity evidence which should be excluded.

The sexual assault of Sharon did not support a strong inference of a common design or scheme since that isolated incident many years before could not reasonably suggest a "planned course of action rather than a series of spontaneous events." (See *People v. Ewoldt, supra*, 7 Cal.4th at 403; *People v.*

Sam (1969) 71 Cal.2d 194, 205.) Nor did the 1985 sexual assault of Crystal tend logically, naturally, or by reasonable inference, to prove appellant's intent, motive, or plan to murder Michael in 1996. (See *People v. Peete* (1946) 28 Cal.2d 306, 315.)

The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Ewoldt, supra,* 7 Cal.4th at 403).

In appellant's case, there were insufficient degrees of similarity for the prosecutor to argue that appellant's prior crimes against Crystal and Sharon were relevant to prove the identity of Michael's assailant. The two instances of sexual assault did not convincingly establish a "peculiar pattern in defendant's past conduct that establishes his identity" as the killer of Michael by "setting him apart from the general class of violent offenders." (See *People v. Alcala, supra*, 36 Cal.3d at 633.) The other crimes evidence in appellant's case was probative only if the jury drew the improper inference from the priors that it was appellant's inclination or nature to kidnap and sexually assault people, and that this aspect of his character caused him to commit the charged crimes. This is nothing but criminal propensity evidence which should have been excluded under section 1101, subdivision (a).

Even though the jury could not agree whether appellant kidnapped Michael – and the charge was dismissed -- the prosecutor continued to argue at the second penalty phase that the kidnapping conviction of Sharon was evidence that proved that appellant was more likely to have kidnapped and killed Michael. (40-RT 12218.) This highly prejudicial evidence about Sharon was irrelevant and should have been excluded.

D. The Court Abused Its Discretion in Admitting the Prior Crimes under Evidence Code Section 352, Which Thus Precluded Their Admission under Sections 1108 Or 1101

Other crimes evidence, otherwise admissible under section 1101, subdivision (b) or 1108, is subject to exclusion by application of Evidence Code section 352. (*People v. Fitch, supra*, 55 Cal.App.4th at 183.) Thus, even if section 1108 or 1101 applied, the court abused its discretion by admitting the evidence despite section 352. Section 352's primary purpose is to "ensure[] that the presumption of innocence and other characteristics of due process are not weakened by an unfair use of evidence of past acts." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1334.)

This Court in *Falsetta* held that the trial court's discretion to exclude propensity evidence under section 352 "saves section 1108 from defendant's due process challenge" because "section 352 affords defendants a realistic safeguard in cases falling under section 1108." (*People v. Falsetta, supra*, 21 Cal.4th at 917-918.) Appellant respectfully disagrees with the court's assessment that section 352 protects defendants from the inherent prejudice in admitting propensity evidence.

The fundamental flaw of the *Falsetta* court's analysis is that it is the trial court, and not the jury, which employs a section 352 analysis to admit or exclude evidence. It is almost tautological to say that a trial court has discretion to exclude prejudicial propensity evidence when propensity evidence is, by its nature, highly prejudicial because the jury can find the defendant guilty based on who he is and what he did in the past, rather than the evidence to support his current prosecution. Furthermore, once the trial court has decided the propensity evidence is admissible, it is then introduced to the jury without any effective limitations on how it can use the evidence.

In making a section 352 decision concerning evidence to be admitted under section 1108, the court is to weigh the probative value of the evidence against four factors: "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) the remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

It has long been the rule that evidence of other crimes may be admitted only if it (1) tends logically, naturally and by reasonable inference to prove the issue on which it is offered; (2) is offered on a material issue that will ultimately prove to be disputed; and (3) is not merely cumulative with respect to other evidence that the prosecution may use to prove the same issue. (See, e.g., *People v. Guerrero* (1976) 16 Cal.3d 719, 724; *People v. Bigelow* (1984) 37 Cal.3d 731, 747.)

Furthermore, if the connection of evidence of the uncharged act with the crime charged is not clear, the doubt should be resolved in favor of the accused and the evidence should be excluded. (*People v. Thompson*, *supra,* 27 Cal.3d at 314, 321; *People v. Guerrero*, *supra,* 16 Cal.3d at 724; see also *People v. Smallwood* (1986) 42 Cal.3d 415, 428-429 ["while to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime, the law regards the inference from general to specific criminality so weak, and the danger of prejudice so great, that it attempts to prevent conviction on account of a defendant's bad character'"]; accord, *People v. Garceau* (1993) 6 Cal.4th 140, 186.)

Here, the court abused its discretion in admitting the evidence since it misapplied the above-enumerated factors in exercising its discretion. "This

standard is deferential. But it is not empty." (*People v. Williams* (1998) 17 Cal.4th 148, 162 [citations omitted].)

In light of the paucity of evidence the prosecution was able to present on the charged offenses, the prospect of finding appellant guilty beyond a reasonable doubt without the aid of the propensity evidence was low. The "safeguard" of section 352 was unrealized by a trial court who ignored 352's primary purpose and failed to properly weigh any of the salient factors discussed in *Falsetta* by instead focusing on the relatively irrelevant factor of the similarity of offenses. Had the trial court considered the proper factors in weighing the prejudicial impact of the evidence against its probative value, it would have found that the prior crimes evidence was inadmissible because the probative value was substantially outweighed by the probability that its admission would create substantial danger of creating undue prejudice. (See *People v. Johnson* (2000) 81 Cal.App.4th 1301, 1314 ["weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules."].)

1. Nature of the past crimes

The evidence of appellant's prior crimes against Sharon and Crystal would incense the jury such that they would be incapable of rationally considering the evidence about who murdered, tortured, and sodomized Michael.

2. Likelihood of Confusing, Misleading or Distracting the Jurors from Their Main Inquiry

Three separate crimes are at issue here. In one, appellant was convicted for the kidnapping and forcible oral copulation of an adult female. In the other, appellant was convicted of the molestation of a very young female granddaughter. In neither case was the victim killed, sodomized or tortured, the crimes with which appellant had been charged and convicted of by his first jury.

Appellant was not convicted of kidnapping or forcible oral copulation of Michael, and thus the other crime evidence was an attempt to bolster a weak case against appellant on these two counts. Given the disparate nature of the charges concerning appellant's choice of victims and their dissimilarity, it would be easy for the jury to combine the incidents and facts of these two priors and assume appellant commits indiscriminate sexual assaults against children, as well as adults.

Here, the "trial within a trial" presentation of direct testimony and cross examination of Sharon and Crystal distracted the jury from their main inquiry: whether appellant murdered Michael, and if so, whether he did so in the commission of lewd acts, forcible oral copulation, kidnapping, sodomy and torture.

Even with cautionary instructions, jurors could not compartmentalize the use of the inflammatory evidence, leading to an unreliable verdict. (9-CT 2402.) These instructions added to the already considerable body of law the jurors were given to decide the case. The additional instructions distracted the jurors from their duty to render a verdict as to the charged offenses. (See *People v. Harris, supra*, 60 Cal.App.4th at 739 [time spent on instructions and admonitions were part of the consideration of consumption of time, a factor that is part of the 352 analysis].)

The prosecutor argued Sharon's and Crystal's testimony extensively. (12-RT 3651-3652, 19-RT 5814, 40-RT 12202, 12214-18.) The conclusion the jury was told to draw was that because of these prior offenses, appellant not only acted in conformity with his propensity to commit sexual assault, but his resulting prison terms provided the motive to kill Michael. The probative value of Sharon's and Crystal's testimony was not outweighed by its tendency to mislead, confuse and distract the jury.

3. Remoteness of the offense

The first prior in 1985 was over 11 years old and such remoteness of prior conduct is an appropriate factor to consider in a section 352 analysis. (*People v. Burns* (1987) 189 Cal.App.3d 734, 737-739.) Although there is no bright rule, 11 years is a long time. In addition, the 1993 child molestation conviction was a convenience *West* plea, in which appellant denied guilt, made during a period of time when it was unlikely appellant would have received a fair trial. Thus, remoteness weighs heavily in favor of exclusion.

Although the crimes against Sharon were not as remote as those in *People v. Harris, supra,* 60 Cal.App.4th at 739 (23 years prior to the charged offenses), they were substantially more remote than those committed in *People v. Balcom* (1994) 7 Cal.4th 414 and *People v. Matthews* (1988) 201 Cal.App.3d 385.) The crime charged in *Balcom* was committed only six weeks after the prior uncharged crime; the *Matthews* incidents occurred only two months and one month apart respectively. By comparison, 11 years separated the Sharon incident and the charged offenses in appellant's case. Appellant concedes that possible remoteness carries the least weight of all the factors listed in *Falsetta.* Nothing in *Falsetta*, however, supports a claim that propensity evidence is admissible merely because it is not remote.

4. The overall probative value

On the issue of probative value, the incident with Sharon, an adult woman, was a forcible oral copulation and kidnapping of an acquaintance. Crystal involved nonforcible oral copulation of a four-year old granddaughter. The charged offenses, for which there was sufficient evidence for the jury to convict, were capital murder, torture and sodomy. While the kidnapping and oral copulation charges were similar to the oral copulation and kidnapping accusations in appellant's trial, the jury failed to reach a verdict on these charges,

which were dismissed prior to appellant's second penalty phase. "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code § 210.) Whether Sharon's testimony that appellant forced her to orally copulate him, threatened to cut her if she resisted, and afterward kidnapped her and threatened to kill her had a tendency to prove that appellant kidnapped, sexually assaulted, sodomized and murdered Michael 12 years later is very questionable, in light of the insufficient evidence presented of kidnapping and oral copulation. Whatever the minimal relevance of the crimes against Sharon, they should have been excluded under section 352. Similarly, appellant's conviction of nonforcible oral copulation against Crystal was not relevant to prove appellant kidnapped, sexually assaulted, sodomized and murdered Michael several years later.

5. Degree of Certainty of its Commission and the Burden on Appellant in Defending Against the Prior Sex Crimes.

Falsetta explained that the general rule excluding uncharged acts relieves the defendant of the often unfair burden of defending against both the charged offense and the other priors and promotes judicial efficiency by avoiding protracted 'mini-trials' to determine the truth or falsity of the prior charge. (*People v. Falsetta, supra*, 21 Cal.4th at 915.) Here, appellant was faced with two mini-trials within his capital murder trial, which constituted a large part of the prosecutor's penalty phase evidence against appellant. (34-RT 10318-10400.)

The court failed in its duty under section 352 to consider all the circumstances surrounding the prior offenses, including the degree of certainty in its commission. (*People v. Falsetta, supra*, 21 Cal.4th at 918-919.) Here, there is a very real question as to the reliability of the prior child molestation conviction

which was based on an induced plea of guilty. (30-RT 9218-9220; 9234-9235.) The trial court, in admitting the evidence however, found it irrelevant that appellant's plea was pursuant to *People v. West* (1970) 3 Cal.3d 595, and that appellant pleaded only for the benefit of a "sweet" three-year deal versus going to trial and facing a much more severe sentence. (30-RT 9218-9220; 9234-9235 [court rules appellant's *West* plea admissible under factor (b) and *People v. Bradford* (1997) 15 Cal.4th 1229]; 37 RT 11188; see also 30-RT 9469-70 [*West* plea to molestation in Crystal's case is not admissible under factor (c)].) This was error, as it was certainly relevant that appellant denied guilt, while entering his *West* plea.

Moreover, at the time of the plea in 1993, Evidence Code section 1108 was not yet enacted. Thus, appellant did not have the benefit of weighing the potential collateral consequences of the plea when deciding to take the deal for three years at half-time. Further, despite appellant's plea, the certainty that he committed this offense was minimal; no physical evidence of the crime linked appellant and Crystal did not immediately report the crimes and told different stories about what had happened.

Thus, the jury had to decide between appellant's credibility and Crystal's as to the crimes admitted under section 1108 or 1101. The prejudicial impact outweighed the probative value because appellant was forced to defend against the crime and there was minimal degree of certainty that it had even occurred. This also meant the jury was distracted from its job of determining whether appellant was guilty of the charged offenses because it first had to decide whether he had committed the other offense, which leads to the next factor set out in *Falsetta*.

6. Similarity to the Charged Offense

As argued above, the "similarity" factor is of marginal importance when assessing whether evidence should be admitted pursuant to 1108. (*People v. Soto, supra,* 64 Cal.App.4th at 984; *People v. Reliford, supra*, 29 Cal.4th at 1012.) However, similarity among appellant's prior incidents with Crystal and Sharon and the murder of Michael was essential under section 1101. (*People v. Ewoldt, supra,* 7 Cal.4th at 402-403.) There were marked differences between an acquaintance rape and kidnapping of a woman and the molestation of a young female family member, and the kidnapping, torture, rape, and murder of a male child, who was a stranger to appellant.

7. Likely Prejudicial Impact on the Jurors

Here, the testimony of Sharon and Crystal served essentially to inflame passion against appellant more than to provide probative value, which was minimal. Conversely, the prejudicial value of the evidence was enormous. Sharon and Crystal were devastating witnesses against appellant. A sympathetic young woman and a child in the courtroom, their demeanor on the witness stand, and their emotional communication all combined to inflame and arouse passion in the jury. Further, they did not testify to relatively neutral offenses, instead they described particularly inflammatory crimes, including oral copulation and kidnapping. Such testimony is bound to arouse empathy and great sympathy in the jury for Sharon and Crystal. Concomitantly, their testimony was calculated to incite great passion and anger, if not loathing, fear and hatred, against appellant.

Undue prejudice is present, not simply in the accepted "inherently prejudicial" nature of other crimes evidence as observed in *People v. Carpenter* (1997) 15 Cal.4th 312, and not simply in the inflammatory nature of a sympathetic young woman and child describing a degrading and fearful

experience, but because of the synergistic nature of these circumstances that mark human nature as emotional, as fearful and as hateful in such circumstances. The weighing and balancing of these negative and emotional factors against any perceived probative value finds the latter wanting and nearly non-existent.

E. The Admission of This Propensity Evidence of Prior Crimes Violated Appellant's Rights under the United States Constitution

Convicting appellant of a crime based largely on evidence that he had committed some other crimes and was a person of general bad character is a violation of his federal constitutional right to due process of law. (See *Michelson v. United States* (1948) 335 U.S. 469; *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [We express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of "prior crimes evidence to show propensity to commit a charged crime"]; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564, 574-575 [conc. and dis. op. of Warren, C.J.]; see also *Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337.) The prosecutor's argument in appellant's case encouraged the jury to use the prior crimes evidence to show propensity to commit the charged crimes. (40-RT 12202, 12214, 12216, 12218.)

Due process is transgressed by a state rule that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Medina v. California* (1992) 505 U.S. 437, 445-446.) A defendant's federal constitutional right to a fundamentally fair trial is guaranteed by the due process clause of the Fifth and Fourteenth Amendments. It has long been held and recently reaffirmed that Due Process prohibits the use of state procedures that offend the principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, and procedures which

undermine "the ultimate integrity of the fact finding process." (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 356; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105; *Ohio v. Roberts* (1980) 448 U.S. 56, 64.) Such evidence would include the propensity evidence introduced in appellant's case. The Due Process Clause precludes the admission of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, 1384-1386, held that the use of character evidence deprived the defendant of a fair trial because the prohibition against the use of such character evidence "is based on a fundamental conception of justice and the community's sense of fair play and decency within the meaning of *Dowling v. United States* (1990) 493 U.S. 342, 352." The *McKinney* court explained that, "It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are." (*McKinney v. Rees, supra*, 993 F.2d at 1384.) In *McKinney*, a California state prosecution for murder, evidence of the defendant's possession of a weapon that could not have been the murder weapon was irrelevant to the charged crime and was therefore improperly admitted to prove his character as a person who had the propensity to own knives. In finding a due process violation by the admission of evidence relevant only to prove character, the *McKinney* court looked to the basis of the longstanding prohibition against it. (*Id.* at 1384 [courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt].) While the federal rules of evidence now also include provisions for propensity evidence, the United States Supreme Court has not ruled on their constitutionality either.

Similarly, the Fifth Circuit noted that, "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not who he is."

(*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044.) This Court has also recognized that the introduction of propensity evidence may reduce the prosecution's burden of proof, thus "raising the possibility that defendant's constitutional right to due process of law was impaired." (*People v. Garceau* (1993) 6 Cal.4th 140, 186; see also *People v. Kelley* (1967) 66 Cal.2d 232, 238-239.) In light of these principles of law, the introduction of evidence about appellant's prior crimes against Crystal and Sharon deprived him of his constitutional right to a fair trial.

Fairly considered, the history of Anglo-American jurisprudence and the development of the common law demonstrate that the "right not to permit a jury to use character evidence to show disposition to commit the charged offense is a fundamental principle of justice." (*People v. Fitch, supra*, 55 Cal.App.4th at 180.) Because there was no permissible inference (one other than disposition or propensity) which the jury could have drawn from the testimony, its admission violated appellant's right to federal due process. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920.)

The Ninth Circuit has recognized that in federal cases, although "there is nothing fundamentally unfair about the allowance of propensity evidence" . . . ""such [propensity] evidence will only sometimes violate the constitutional right to a fair trial , if it is of no relevance, or if its potential for prejudice far outweighs what little relevance it might have." (*United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1022, 1026-1028; see also, e.g., *People v. Schader* (1969) 71 Cal.2d 761, 772-773, fn.6; see *People v. Walkey* (1986) 177 Cal.App.3d 268, 279-280.) This is particularly so in cases such as this one, where the balance of the prosecution's case in the charged offense is circumstantial, the uncharged offenses are similar to the charged offenses, the prosecution relies on the other crimes evidence heavily in proving his case, and the other crimes evidence was

emotionally charged. (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775, quoting *McKinney v. Rees, supra*, 993 F.2d at 1381-1382, 1385-1386.)

In sum, the use of evidence of prior offenses to establish appellant's guilt on the basis of criminal propensity and/or disposition evidence violated the constitutional guarantees of due process and a fair jury trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

F. The Cautionary Instruction Was Ineffective

Here, the prosecutor proposed CALJIC No. 2.50.01. (9-CT 2404.) The court refused to give it. (9-CT 2485.) The court instead gave CALJIC No. 2.50, a cautionary instruction.[19] (9-CT 2402.)

This admonition did not eliminate the risk of prejudice. (*People v. Bracamonte* (1981) 119 Cal.App.3d 644, 650; *People v. Reliford* (2003) 29 Cal.4th 1007 [CALJIC No. 2.50.01 adequately sets forth the controlling principles under section 1108]; but see *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 [the pre-1999 version of CALJIC No. 2.50.1, and 2.50.01, violated Gibson's due process rights under *In re Winship* (1970) 397 U.S. 358, which requires the prosecution to prove every element charged in a criminal offense beyond a reasonable doubt]; see also *People v. Fitch, supra,* 55 Cal.App.4th at 183 [the jury was instructed that it could not convict defendant simply because it found he had a character trait that tends to predispose him to commit the crime charged].)

It is often assumed that limiting and cautionary instructions can cure or protect against prejudicial matters to which the jurors were exposed. Not so. In

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19. CALJIC No. 2.50 stated: "Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes."

People v. Gibson (1976) 56 Cal.App.3d 119, 129-130, the court analyzed the prejudice flowing from the admission of uncharged crimes evidence used to prove state-of-mind and concluded:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals . . . . We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

(*Id.* at 130; see also, *People v. Karis* (1988) 46 Cal.3d 612, 636; *Krulewitch v. United States* (1949) 336 U.S. 440, 453, Jackson, J. concurring ["The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."]; see also *People v. Guerrero* (1976) 16 Cal.3d 719, 729 ["no limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds [the inadmissible evidence]"]; *People v. Fabert* (1982) 127 Cal.App.3d 604, 610; *People v. Coleman* (1985) 38 Cal.3d 69, 94 [limiting instruction inadequate to ensure that jurors would consider inflammatory hearsay only for limited purpose of supplying basis for expert opinion].) Evidence of such a prejudicial character will "find permanent lodgment in [a juror's] mind." (*People v. Albertson* (1944) 23 Cal.2d 550, 577.) "You can't unring a bell." (*People v. Hill* (1998) 17 Cal.4th 800, 845.) "The juror does not possess that trained and disciplined mind which enables him . . . to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge." (*Ibid.*.) Accordingly, even a full and forceful admonition may be inadequate "to overcome the substantial danger of undue prejudice." (*People v.*

Allen (1978) 77 Cal.App.3d 924, 935; *People v. Roof* (1963) 216 Cal.App.2d 222, 225 [prior charge].)

The court "normally presume[s] that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions." (*Greer v. Miller* (1987) 483 U.S. 756, 764.) This presumption, however, is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208.) With regard to "an explicit statement, the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt." (*Ibid.*; see also *United States v. Kallin* (9th Cir. 1995) 50 F.3d 689, 694-95; *United States v. Copelin* (D.C. Cir. 1993) 996 F.2d 379 [limiting instruction must be given immediately after evidence of defendant's prior conviction is admitted for purposes of impeachment].)

As noted in *Old Chief v. United States* (1997) 519 U.S. 172, 181 "'[a]lthough . . . "propensity evidence" is relevant, the risk that a jury will convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment -- creates a prejudicial effect that outweighs ordinary relevance.'" This is particularly the case with sexual offenses, which are always inflammatory.

In cases where the prosecutor has improperly argued to the jury that evidence of one crime should be used to convict the defendant of a second crime, the courts have looked to the jury instructions to see if the harm done by the prosecutor's argument was lessened by a cautionary jury instruction. (*People v. Grant* (2003) 113 Cal.App.4th 579, 591-592.) For example, in *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084, where the Court found that joinder

of two murder cases resulted in a violation of the defendant's federal constitutional right to due process, the Court noted that the prosecutor repeatedly encouraged the jury "to consider the two sets of charges in concert." The Court stated that "The general instructions the trial court issued availed little in ameliorating the prejudice arising from joinder." (*Ibid.*) "[T]he instructions here did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other." (*Ibid.*)

In appellant's case, as noted above, the prosecutor encouraged the jury to use evidence of appellant's guilt with respect to Sharon and Crystal in order to convict appellant of the crimes against Michael. (12-RT 3651-3652, 19-RT 5814, 40-RT 12202, 12214-18.) The cautionary instruction to the jury did not prevent the jury from using this evidence as proof of appellant's guilt in the capital murder case.

G. The Error Was Prejudicial

Sharon's and Crystal's testimony resulted in prejudice to appellant. In the most literal sense of the word, it created a jury predisposed to believe that he was the kind of person who would sodomize and murder Michael. Without the propensity evidence, the jury would have been presented with a case involving no witnesses, little or no physical evidence, and defense evidence that appellant was away from his truck when Michael was murdered

When the error is of constitutional dimension, as it is here, reversal is required unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The error in admitting this evidence reasonably must be considered prejudicial for the reasons explained in the introduction. On this record, it is reasonably probable that the jury's knowledge of defendant's prior sex crimes tipped the balance in favor of the prosecution. In

short, under any standard, the evidence of defendant's prior sex crimes was prejudicial, requiring reversal of his conviction.

If the error is evaluated under the test for state evidentiary error established in *People v. Watson* (1956) 46 Cal.2d 818, 836, appellant has also shown a reasonable probability that the result would have been different.[20] By allowing the jury to consider the evidence from Sharon and Crystal, an unreliable verdict was reached; the jury's verdict reflects a finding that appellant was the kind of person who would do such things, and therefore, if he had sexually assaulted two female acquaintances, he necessarily must have assaulted a young boy, but this time murdered his victim to cover up his crime. If the jury had been required to find appellant guilty beyond a reasonable doubt on the merits of the prosecution's case in the charged offense alone, without evidence of appellant's propensity to commit such acts, there is a reasonable probability the result would have been different.

The risk of prejudice is increased when the prosecutor argues to the jury that they should use evidence of one crime to convict the defendant of the other crime, as the prosecutor did here. (12-RT 3652-3657, 3658, 19-RT 5814, 40-RT 12202, 12214, 12216, 12218; *People v. Grant* (2003) 113 Cal.4th 579, 589-591; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084.) For all of the reasons discussed above, the error in admitting this evidence not only contributed to his conviction of the murder, torture, and sodomy of Michael, but was its linchpin. (See Introduction, *supra*.)

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[20] This Court has "made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, citing *People v. Watson* (1956) 46 Cal.2d 818, 837, and *Strickland v. Washington* (1984) 466 U.S. 688, 693-694, 697, 698; see also *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051.)

V. THE COURT VIOLATED APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO PRESENT A DEFENSE BY EXCLUDING IMPEACHMENT EVIDENCE RELEVANT TO BOBBIE LEMMONS' POSSIBLE CULPABILITY

A. The Relevant Facts

On May 12, 1998, at the start of trial, the prosecutor objected to any third-party culpability evidence with respect to Bobbie Lemmons. (12-RT 3674.) The court also ruled that appellant could not make any reference to Mr. Lemmons' sex offender registration under Penal Code 290, as impeachment. (12-RT 3677, 17-RT 5255.)

Appellant argued that, aside from impeachment, Mr. Lemmons' prior child molestation misdemeanor conviction, for which he was a 290 registrant, was an important piece of evidence under *People v. Hall* (1986) 41 Cal.3d 826, to raise a reasonable doubt that someone other than appellant could have committed this offense. (17-RT 5254.)

Appellant argued that the fact of Mr. Lemmons' prior conviction was relevant under Evidence Code sections 1108 or 1101 to show the possibility of him committing the crime, which the jury was entitled to know to give a full picture of the possible culpability of a third person. (17-RT 5255-5256.) The court stated that Evidence Code section 1108 deals only with a criminal action in which the defendant is accused of a sexual offense. (17-RT 5257.) With respect to Evidence Code section 1101, the court asked for a detailed offer of proof, including whether the evidence was offered for motive, opportunity, or intent, as specified in section 1101. (17-RT 5257.)

Appellant's only information was that Mr. Lemmons was a 290 registrant, having suffered a prior conviction of child molestation. (17-RT 5257-5258.) Appellant argued the prior showed Mr. Lemmons' motive, intent to lie and

fabricate, and opportunity. (17-RT 5258-5259.) Appellant explained that Mr. Lemmons had lied about when he saw Michael's shoes, lied that he had heard nothing, and lied that he was at his trailer all night. (17-RT 5259.) Appellant argued that the conviction helped explain Mr. Lemmons' deceptiveness, his changing story, and his initial statement to the police when he said that he had found Michael's shoes only the night afterwards and had not seen the shoes the night before or the day before. It also explained Mr. Lemmons' wife's testimony that he was not in the trailer that night after 9:30, which was a statement she also gave to appellant's investigator. It also explained Mr. Lemmons' statement that he had not told the police about children screaming and the tires spinning again. (17-RT 5257-5258.) The court ruled Mr. Lemmons' prior misdemeanor conduct with the child was not admissible under Evidence Code sections 1101(a) and (b), as there were no similarities between the crimes, and appellant could not "introduce it for disposition to commit the act." (17-RT 5260-5261.)

Testimony at trial revealed that Mr. Lemmons told Mr. Dugger that the police had talked to him and asked Mr. Dugger to provide him an alibi for the night of the murder. (17-RT 5219.) Mr. Lemmons said that he had either found or traded cigarettes for the knife in his locker, which appeared to have initials L and R, for Lynette Rhoades. (17-RT 5223, 5230.)

In closing argument, the prosecutor, assisted by the court's ruling, argued, without contradiction, that Mr. Lemmons could not have committed the crimes against Michael:

> Bobbie Lemmons is not a smart man. You saw him testify.
>
> A crime like this would have taken somebody who was bold, somebody who took the initiative in things, somebody who is a gambler and somebody who had a car or a truck, and Bobbie Lemmons has none of these things.
>
> Bobbie Lemmons is afraid to go outside in the dark.

> The defendant is comfortable down there.
>
> Now, while Bobbie Lemmons is doing all these things to this truck, that's got to take him a couple of hours, I would think it took him awhile, but he doesn't know where the owner of that truck is. As far as he knows, that fellow's down there fishing and standing twenty feet away when he's going through his truck and maybe molesting the child or maybe doing these other things in the truck. Or the owner of that vehicle has gone over the levy to make a phone call, and he's going to be back in ten minutes before Bobbie Lemmons gets through doing this.
>
> See what I mean? Approaching that truck makes no sense from the standpoint of a Bobbie Lemmons.
>
> And the other thing that's wrong with that, too, is this, in the final analysis, if Bobbie Lemmons went to all that trouble to set up the defendant and the defendant comes back and gets in his truck and drives out of there, what has he accomplished?
>
> Not a damn thing. Not one thing. And yet he's gone to all this trouble. (17-RT 5808.)

B. The Relevant Federal And State Law

This Court explained the right to confrontation in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1137:

> The Sixth Amendment guarantees the right of an accused in a criminal prosecution "'to be confronted with the witnesses against him.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.) "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas* (1965) 380 U.S. 400, 405.)

This Court also provided an enlightening footnote tracing the Confrontation Clause's "ancient Roots with a lineage that traces back to the beginnings of Western legal culture." (*Alvarado v. Superior Court*, *supra,* 23 Cal.4th at 1137-1138, fn. 8.)

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants "the right to present a complete defense." (*Crane*

v. Kentucky (1986) 476 U.S. 683, 690-691; see also *Washington v. Texas* (1967) 388 U.S. 14, 22-23; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Presenting the jury with substantial material evidence impeaching the credibility of prosecution witnesses can be critical: "We have recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316 [defendant entitled to present evidence of a witness's juvenile records despite a state policy of sealing such records].)

"The Sixth Amendment requires at a minimum, that criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) The court's refusal to permit the jury to hear all relevant evidence was inimical to the three-fold purpose of confrontation: (1) to ensure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weigh his demeanor. (*California v. Green* (1970) 399 U.S. 149, 158.)

In *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1178, the Ninth Circuit reversed because the trial court excluded evidence that would have tended to undermine a main prosecution witness's credibility. The court reiterated that "where a defendant's guilt hinges largely on the testimony of a prosecution's witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution." (*Id.*; *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062.) The *Hubbard* court held that the truncation of witness's cross-examination also implicated Thomas's Confrontation Clause rights. (*Thomas v. Hubbard, supra,* 273 F.3d at 1178-1179.) Similarly, in *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 873-879, the

Court reversed the habeas petitioner's conviction because the trial court erred in excluding impeachment evidence of an important prosecution witness.

The trial court's exclusion of this impeachment evidence concerning Mr. Lemmons also denied appellant his constitutional right to present a defense and thus is reversible unless harmless beyond a reasonable doubt. Due process requires that the accused have a reasonable opportunity to present his defense. (*People v. Wright* (1989) 209 Cal.App.3d 386, 392-393.) Every criminal defendant has a constitutional right to present all favorable relevant evidence of significant probative value. (*People v. Jennings* (1991) 53 Cal.3d 334, 372.) Few such rights are more fundamental than that of the accused to "present his 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.)

C. California Law Independently Guarantees The Right To Put On A Defense, And Does Not Favor The Exclusion Of Relevant Evidence

The right to compulsory process and confrontation are independently guaranteed by the California Constitution. (Cal. Const., Art. I, § 15.) "The defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant's behalf . . . and to be confronted with the witnesses against the defendant." (*In re Martin* (1987) 44 Cal.3d 1, 29-30; *People v. Riser* (1957) 47 Cal.2d 566, 571.)

Mr. Lemmons' conviction for misdemeanor child molestation was relevant to whether his account of that night was reliable and whether he had a motive to cover up possible involvement in the crimes against Michael. (*People v. Castro* (1985) 38 Cal.3d 301, 314, 317.) "Misconduct involving moral turpitude may suggest a willingness to lie [citations]" and, therefore, is relevant to a witness's honesty and veracity. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295; see Evid.

Code, § 210; see also *People v. Vera* (1999) 69 Cal.App.4th 1100, 1102 [providing a place for drug abusers to gather is a crime of moral turpitude].)

Moreover, Mr. Lemmons' child molestation prior and his inconsistent testimony he gave at appellant's trial was anything but collateral to the issue of whether he was telling the truth about his involvement with Michael's death.

It is particularly unjust to exclude Mr. Lemmons' child molestation prior and admit appellant's prior sex convictions against Sharon and Crystal under Evidence Code section 1101(b), to prove intent, and common scheme and plan, and Evidence Code section 1108 to prove propensity. (8-CT 2262; 6-RT 2030-2032.) This is another example of the court's bias towards the prosecution, assuming appellant's guilt while protecting Mr. Lemmons from legitimate impeachment and character evidence suggesting intent, common scheme, and propensity. If propensity evidence was admissible against appellant, it violated due process to exclude the same with respect to Mr. Lemmons.

Impeachment evidence has always been relevant. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-537; *People v. Memro* (1985) 38 Cal.3d 658, 674-684 [defendants allowed to present evidence undermining the credibility of police officers].)

Evidence that a third person actually committed a crime for which the defendant has been charged is relevant but, like all evidence, subject to exclusion at the court's discretion under Evidence Code section 352 if its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion. (*People v. Hall* (1986) 41 Cal.3d 826, 834.) "Section 352 must bow to the due process right of the defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense." (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 594.)

"To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall*, *supra,* 41 Cal.3d at 833.) However, "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*; *People v. Yeoman* (2003) 31 Cal.4th 93, 140-141.) Here, there was circumstantial evidence linking Mr. Lemmons to Michael's murder, as he not only had the opportunity to kill Michael, he lied about where he was and what he was doing the night of Michael's murder, and asked a friend to provide him an alibi, and the excluded evidence was relevant to those issues.

Article I, section 28, subdivision (d) of the California Constitution, which provides that "relevant evidence shall not be excluded in any criminal proceeding," was not designed to liberalize the rules of admissibility only for evidence favorable to the prosecution while retaining restrictions on the admissibility of evidence tending to prove a defendant's innocence. (*In re Lance W.* (1985) 37 Cal.3d 873, 887, fn. 7; see also *People v. Harris* (1988) 47 Cal.3d 1047, 1081-1082.) If propensity evidence was admissible against appellant, it violated due process to exclude the same with respect to Mr. Lemmons.

The excluded evidence was relevant and admissible under *Davis v. Alaska* (1974) 415 U.S. 308, 317, because, it was essential to bolster appellant's defense that Mr. Lemmons was not a credible witness about where he was and what he was doing that night. More fundamentally, the court's ruling denied appellant his constitutional right to present all favorable relevant evidence of significant probative value. (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

Whether the error is measured by the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 21, or the *People v. Watson* (1956) 46 Cal.3d 818, 836, standard, a new trial is warranted because there is a reasonable probability that the exclusion of this highly relevant evidence affected the verdict to appellant's detriment. The error was prejudicial because, while the jury was not compelled to accept appellant's defense, the jury could have disbelieved Mr. Lemmons' claim that he had nothing to do with Michael's killing, in light of his lack of credibility, his desire to establish an alibi, and the different accounts he gave. Therefore, the court's failure to permit appellant to impeach him during cross-examination and develop his defense requires reversal. (See *People v. Godinez* (1992) 2 Cal.App.4th 492, 503-504.)

VI. THE PROSECUTOR'S EGREGIOUS AND PERVASIVE MISCONDUCT IN HIS CROSS-EXAMINATION OF APPELLANT AND IN HIS GUILT PHASE ARGUMENT VIOLATED APPELLANT'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL AND COULD NOT HAVE BEEN CURED BY ADMONITIONS AND THUS NO OBJECTION WAS REQUIRED

A. The Prosecutor's Cross-Examination Of Appellant and Examination Of Sergeant Harris, Who Disobeyed A Court Order, Violated Appellant's Due Process Right To A Fair Trial

1. The Prosecutor's Cross-Examination Of Appellant

During cross-examination, appellant admitted that it was illegal to go over the levee in his four-wheel-drive pickup, although he had done it many times. (17-RT 5385.)

The prosecutor asked if it was "illegal because it tears up the levees and might cause the levees to break." Appellant responded that was "probably the reasoning." (17-RT 5385.)

The prosecutor asked: "Is there some reason you persist in doing this when it's dangerous to the whole community?"

Appellant objected as speculation, and the court sustained the objection to the form of the question.

The prosecutor persisted: "Is there some reason you when you know this is dangerous that you continue to do it?:

Appellant objected: "What's dangerous?"

The prosecutor responded: "Driving on the levee."

Appellant interrupted and explained: "It's not necessarily dangerous. Everybody does it, so I'm not -- I'm not unusual."

The prosecutor stated: "Okay. We had a flood in that area in '96; is that right?"

Appellant answered: "Yes." (17-RT 5385.)

The prosecutor stated: "Across the river in Yuba County the levee broke, right?"

Appellant objected as to the relevancy of the levee break. (17-RT 5386.)

The prosecutor withdrew the question and then made the following outrageous, gratuitous observation:

"Well, I guess what I'm getting at is you just don't care about other people." (17-RT 5386.)

The court again sustained appellant's objection. (17-RT 5386.)

2. The Prosecutor's Examination Of Sergeant Harris, Who Disobeyed A Court Order

During his direct examination of Sergeant Jess Harris, the prosecutor asked him if appellant looked happy to see him, after appellant's vehicle had become stuck in the mud by the flooding river. (13-RT 4055.) Appellant objected and the court held a 402 hearing outside the presence of the jury. (13-RT 4056.) The court ruled that Officer Harris could say that appellant "indicated no enthusiasm to see him," but warned him to confine his testimony just to his observations. (13-RT 4059-4060.)

Thus, Officer Harris testified that appellant was not enthusiastic at all about the police arrival. (13-RT 4063.)

Then, in deliberate defiance of the court's order, Officer Harris gratuitously added: Due to his predicament, Harris thought appellant would be glad to see them. (13-RT 4063.)

Appellant objected and the court struck the statement. (13-RT 4064.)

3. The Prosecutor's Misconduct And Officer Harris's Defiance Of The Court Order Violated Appellant's Due Process Right To A Fair Trial

The prosecutor's irrelevant cross-examination of appellant about allegedly not caring about placing the community in danger by driving on the levees, and inferentially suggesting that he was somehow responsible for the 1996 flood, as well as Officer Harris' testimony that he thought appellant would be glad to see the police, given that his truck was stuck, unfairly prejudiced appellant.

In similar circumstances, a Court of Appeal strongly condemned a prosecutor's cross-examination which was designed primarily to prejudice an accused:

> "The highly prejudicial implications arising from the improper questions asked of appellant on cross-examination impaired his credibility and presented him as a person of criminal tendencies. (See *People v. Wagner* (1975) 13 Cal.3d 612.) The challenged

> remarks of the prosecutor went far beyond the scope of legitimate argument. The challenged questions were argumentative and were designed to prejudice the jury against appellant. 'The prosecuting attorney may well be assumed to be a [person] of fair standing before the jury, and the members thereof may well have thought that improper questions and the claims he made in his argument concerning the characteristics of the defendant.' (*People v. Duvernay* (1941) 43 Cal.App.2d 823, 828.)" (*People v. Hudson* (1981) 126 Cal.App.3d 733, 741.)

The deliberate asking of questions calling for inadmissible and prejudicial answers, as well as questions that themselves reveal inadmissible and prejudicial information constitutes misconduct. (*People v. Bell* (1987) 49 Cal.3d 502, 532-534.) "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. Wagner* (1975) 13 Cal.3d 612, 619-620, quoting from *People v. Hamilton* (1963) 60 Cal.2d 105, 116; see also *People v. Ledesma* (1987) 43 Cal.3d 171, 238; *People v. Bonin* (1988) 46 Cal.3d 549, 589.)

It is well-established that it is misconduct for the prosecutor "to ask questions which clearly suggested the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them if their existence should be denied." (*People v. Blackington* (1985) 167 Cal.App.3d 1216, 1221 quoting from *People v. Lo Cigno* (1961) 193 Cal.App.2d 360, 388; see also *People v. Perez* (1962) 58 Cal.2d 229.)

Courts are not blind to a prosecutor cleverly making insupportable insinuations "to discredit" a defense witness "by fair means or foul." (*People v. McGreen* (1980) 107 Cal.App.3d 504, 517-518.) In *McGreen*, the court reversed

a conviction, in part, because "the prosecution was not being discriminating as to which means [fair or foul] he employed." (*Id.* at 517.) For the same reason, reversal is required here.

People v. Johnson (2003) 109 Cal.App.4th 1230, 1236, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 755, also condemned prosecutor's questions that were improperly argumentative and went beyond an attempt to elicit facts within appellant's knowledge and were instead designed to engage him in an argument. The prosecutor's irrelevant cross-examination of appellant was also intended to inflame the jury's passions and prejudices.

Here, the prosecutor had the nerve to state that because appellant drove on the levees: "you just don't care about other people." (17-RT 5386.) And, in deliberate defiance of the court's order, Officer Harris testified that he thought appellant would be glad to see the police, given appellant's predicament. (13-RT 4063.)

Prosecutorial misconduct that appeals to the jury's passion and prejudice can be reversible federal constitutional error, as it was in appellant's case. (See *Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 774-779 [prosecutor's religion-based closing argument denied defendant a fair penalty phase trial]; *People v. Talle* (1952) 111 Cal.App.2d 650, 673; *People v. Adams* (1939) 14 Cal.2d 154, 161-162; *People v. Kirkes* (1952) 39 Cal.2d 719, 722.)

The prosecutorial misconduct was prejudicial error because of the high esteem prosecutors are held by jurors. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-846; *People v. Fosselman* (1983) 33 Cal.3d 572, 580-581; *People v. Criscione* (1981) 125 Cal.App.3d 275, 293; *People v. Hudson* (1981) 126 Cal.App.3d 733, 741.)

It is not appellant's fault the court failed to rein in the prosecutor. The prosecutorial misconduct in appellant's case went beyond the pale and deprived

appellant of his due process right to a fair trial. For the same reasons reversal was mandated in *Hill,* reversal is required here. (*People v. Hill* (1998) 17 Cal.4th 800, 844-847.) The misconduct was not harmless beyond a reasonable doubt. It is also reasonably probable the jury would have rendered a more favorable verdict in its absence.

B. The Court's Actions In Sustaining Appellant's Objections And Striking The Inadmissible Testimony Did Not Cure The Prejudice Arising From The Inadmissible Evidence And The Prosecutor's Or Police Officer's Misconduct

The court's actions in sustaining appellant's objections to the prosecutor's gratuitous denigration of appellant, and striking Officer Harris's testimony did not cure the prejudice, as the damage was already done.

Courts have held admonitions to be insufficient to cure the error. (*People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 ["ex-convict"]; *People v. Figueredo* (1955) 130 Cal.App.2d 498, 505-506 [defendant "did time"].) "It is the essence of sophistry and lack of realism, however, to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130; see also *Krulewitch v. United States* (1949) 336 U.S. 440, 453 [Jackson, J. concurring] ["The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."]; see also *People v. Guerrero* (1976) 16 Cal.3d 719, 729 ["no limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds [the inadmissible evidence]"]; *People v. Coleman* (1985) 38 Cal.3d 69, 94 [limiting instruction inadequate to ensure that jurors would consider inflammatory hearsay only for limited purpose of supplying basis for expert opinion]; see Arg. IV. F.)

In *People v. Wagner* (1975) 13 Cal.3d 612, 616-621, for example, the prosecution asked a number of questions which implied that the defendant, who was charged with a narcotics offense, had been involved in prior drug related activity. Despite the defendant's negative answer to all the questions, a full admonition by the trial court and a specific jury instruction, this Court unanimously held that the prejudice of the insinuation that appellant had engaged in prior drug activity had not been cured and reversed appellant's drug conviction. (*Id.* at 621.)

In appellant's case, the nature of the misconduct was such that it was extremely unlikely that any timely objection and admonition would have cured the harm. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 339 ["Some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect"]; *People v. Hill, supra,* 17 Cal.4th at 845-846; *People* v. *Johnson* (1981) 121 Cal.App.3d 94, 103-104; *People* v. *Ghent* (1987) 43 Cal.3d 739, 770; *People* v. *Adams* (1939) 14 Cal.2d 154, 162.)

Here, the prosecutor deliberately suggested appellant did not care about other people because he drove on the levees. Either the prosecutor failed adequately to admonish to Officer Harris regarding the court's order or he deliberately violated the court order. While appellant objected, and the trial court struck the testimony, it was too late, and the damage was already done -- the officer had clearly indicated that he thought appellant should have been happy to see the police.

Thus, it is clear that either the officer or the prosecutor committed misconduct. As the state supreme court explained in *People v. Warren* (1988) 45 Cal.3d 471, 481-482:

> A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. (*People v. Glass* (1975) 44 Cal.App.3d 772, 781-782; *People v. Schiers* (1971) 19

> Cal.App.3d 102, 112; *People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688; *People v. Figuieredo* (1955) 130 Cal.App.2d 498, 505-506.) If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement. (*People v. Schiers, supra*, 19 Cal.App.3d at p. 113.)

This reprehensible prosecutorial misconduct deprived appellant of a fair trial guaranteed by the due process clauses of the federal and state Constitutions and a fair and impartial jury.[21] (See *Estes* v. *Texas* (1965) 381 U.S. 532, 540; *People* v. *Harris* (1989) 47 Cal.3d 1047, 1083-1084; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 470; *People* v. *Rodgers* (1979) 90 Cal.App.3d 368, 372.)

C. The Prosecutor's Final Closing Argument In Rebuttal Was Not In Response To Appellant's Argument And Thus Prevented Appellant From Responding And Thus Was Unconstitutional

In her guilt phase final argument, the prosecutor told the jury:

> Walking ten miles in the rain, in the wet in his shoes. Take a look at those shoes and tell me Robert Rhoades walked ten miles in those when they were wet and didn't come up with one blister.
>
> I used to be a, runner and I'm now a walker. And even with ideal footwear, you get wet and your feet are going to get chewed up real good. He's wearing these cruddy things, okay. And even he admitted he walked ten miles. Okay. That didn't happen.
>
> What else could he have done? He says he had nobody to call. Well, that's really not true. Because he didn't have to walk all the way up to Sutter. Remember, he walks by his dad's barber shop. In fact, he even stops there. Who lives across the street, according to his own testimony? His girlfriend. He's just slept with her the night before. Why couldn't he borrow her car? I understand it's not a four-wheel-drive vehicle, but why can't he borrow her vehicle, get his come-along, get the hook that goes along with it? You're not going to do that? You're going to go

[21] In *People v. Partida* (2005) 37 Cal.4th 428, 435-436, this Court held that appellant may assert that an error in admitting evidence over a statutory objection (e.g. Evidence Code section 352) had the additional legal consequence of violating due process.

> walk ten miles out there? That doesn't make any sense at all. (19-RT 5810-5811.)

Appellant objected that the prosecutor's argument was not "proper rebuttal," because if "he wanted to argue this, he should have argued it in his initial argument." (19-RT 5811.) The court overruled the objection. (*Id.*) Appellant was correct.

In *People v. Sandoval* (1992) 4 Cal.4th 155, 193, this Court held that the prosecutor's argument, citing the Bible to justify the imposition of the death penalty, "crossed the line of permissible argument and rebuttal," because it was not fairly responsive to the argument of defense counsel. Similarly, the prosecutor's argument was not responsive to defense counsel's argument and should have been argued in his initial argument so that appellant would have a chance to respond.

Moreover, the prosecutor introduced facts not in evidence about being a walker and appellant getting his shoes wet and "chewed up real good." This was also legal error as the next section, D., explains.

D. The Prosecutor's Assertion That Appellant Had Washed Off Michael's Blood From His Shirt Had No Evidentiary Support

The prosecutor argued that appellant's shirt had large amount of blood washed off and that because there was no evidence that appellant was scratched enough to cause the blood, the blood must have come from Michael. (19-RT 5700-5701.) The prosecutor stated:

> The other thing we have is we have the defendant's shirt. And this has blood on it, and a fair amount of blood even though it's been washed off, over a large section which extends from his left shoulder, around his back, underneath his right armpit. The defendant can't explain to you how that blood got there, and particularly all that blood. He says he was scratched, and yet he has shown you no evidence whatsoever that he was scratched in those areas.

> As you know, some of the scratches you get on your body bleed and some don't. Most of them don't bleed much unless they're deep. When they are deep, they form healing scars that are visible for a period time afterwards. There's no evidence that Mr. Rhoades had scratches or anything else. Not just here, not just on the left, but all the way across his back.
>
> Now the DNA coming off that shirt is Robert Rhoades'. As the DNA expert told you, she has no confidence that the DNA is coming from the blood. As a matter of fact, she indicates There's a good likelihood it's not because this shirt has been washed out.
>
> If you'd killed somebody and got their blood on your shirt, it probably would be a good idea to wash it out. We know Robert Rhoades was in that river that night, don't we. It's a good likelihood the DNA that's coming is coming off his skin or sweat from this. The defendant hasn't given you a satisfactory explanation of where all that blood came from. (19-RT 5700-5701.)

This argument contradicted the evidence presented in this case, and was not fair comment. (15-RT 4470-4474.) The prosecutor's criminalist, Mr. Bentley, testified that there was a heavy accumulation of human blood on the left shoulder and lower right-hand side of the shirt found in appellant's vehicle, but most of the shirt was covered in blood and rinsed out. (15-RT 4507-4512.) The faint reddish haze stains on appellant's shirt was the same blood type as appellant's, but excluded Michael. (15-RT 4623-4624, 4629.) The stains were positive for blood and human DNA, but were so diluted that Ms. Duda-Shea could not tell if the DNA was from blood or sweat or skin. (15-RT 4623-4624, 4627.)

Prior to the second penalty phase, appellant requested the court to issue an order preventing the prosecutor from making this argument that appellant's shirt had Michael's blood on it. (10-CT 2998-3002.) Appellant renewed this argument in his motion for new trial after the second penalty phase. (15-CT 4450-4452.)

It is settled that "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection

of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner* v. *Louisiana* (1965) 379 U.S. 466, 472-473.) It is improper for a prosecutor to present potentially prejudicial "evidence" to a jury in the form of argument. (*People v. Hill* (1998) 17 Cal.4th 800, 827-829; *People* v. *Pitt* (1990) 223 Cal.App.3d 606, 722.)

The Supreme Court has held "that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." (See *People* v. *Kirks* (1952) 39 Cal.2d 719, 724.) When the prosecutor offers evidence outside of the record, such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*People* v. *Bolton* (1979) 23 Cal.3d 208, 213.) When the prosecutor offers unsworn testimony not subject to cross-examination, this misconduct violates a defendant's Sixth Amendment right to confrontation. (*Id.* at 213-215; *People* v. *Barajas* (1983) 145 Cal.App.3d 804, 810.) The prosecutorial misconduct in appellant's case was prejudicial because it referred to critical evidence outside of the record. (See *People* v. *Talle* (1952) 111 Cal.App.2d 650, 673; *People* v. *Adams* (1939) 14 Cal.2d 154, 161-162; *People* v. *Kirkes*, *supra*, 39 Cal.2d at 722.) The introduction of this evidence was neither harmless beyond a reasonable doubt, nor more likely than not harmless, because the argument that appellant's shirt had Michael's blood on it was, if true, devastating to his defense.

In *People v. Hall* (2000) 82 Cal.App.4th 813, 817, the court held that the prosecutor's argument effectively told the jury that the witness, if called, would have testified exactly as Officer Williams did, in a manner favorable to the prosecution. The *Hall* court found this argument to be misconduct and reversible error for the following reasons:

> The prosecutor, in the guise of closing argument, told the jury what the testimony of an uncalled witness would have been, thus implying that he decided not to call Officer Tinsley as a witness after determining that his testimony would have been the same as and corroborative of Officer Williams's testimony. This tactic denied appellant his Sixth Amendment rights to confront and cross-examine an uncalled prosecution witness. Therefore, reversal is required unless we are satisfied beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825
>
> A statement of supposed fact not in evidence is a highly prejudicial form of misconduct. As such, it is a frequent basis for reversal. The California Supreme Court has explained, in *People v. Hill, supra*, 17 Cal.4th 800, that such testimony, " ' "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' " (*Id.* at p. 828.)
>
> We have reviewed the record carefully. But our review is confined to the cold pages of the transcript, denying us the opportunity to observe Officer Williams's demeanor while testifying. It is impossible to know whether the prosecutor's improper argument contributed to the jury's conclusion that the officer was credible. Whether judged under the *Chapman* harmless-beyond-a-reasonable-doubt standard (*Chapman v. California* (1967) 386 U.S. 18) or the *Watson* reasonable-probability-of-a-more-favorable-result standard (*People v. Watson* (1956) 46 Cal.2d 818), we cannot conclude the error was harmless. Therefore, we must reverse.

For the same reasons, reversal is mandated in appellant's case.

E. The Cumulative Effect of the Prosecutorial Misconduct was Prejudicial Error

The cumulative effect of the prosecutorial misconduct in appellant's case requires reversal because it was not harmless beyond a reasonable doubt under *Chapman* v. *California* (1967) 386 U.S. 18, 25-26. As a Court of Appeal stated:

> It is idle for us to speculate whether the prosecutor's conduct resulted from ignorance of the law and his official duties, or was a 'dishonest act or an attempt to persuade the court or jury, by use of deceptive or reprehensible methods.' Under either circumstance the unfair trial and the resultant conviction and

> punishment of the accused is an outrage, and the insult to our system of criminal justice, intolerable. (*People* v. *Rodgers* (1979) 90 Cal.App.3d 368, 372-373; *see People* v. *Pitts*, *supra*, 223 Cal.App.3d at 816.)

A court must assess the cumulative effect of all the prosecutorial misconduct in determining whether a defendant has been denied his right to a fair trial. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-846; *People v. Fosselman* (1983) 33 Cal.3d 572, 580-581; *People v. Criscione* (1981) 125 Cal.App.3d 275, 293; *People v. Hudson* (1981) 126 Cal.App.3d 733, 741.)

If any of multiple errors implicates the *Chapman* standard of review, then the *Chapman* standard applies to cumulative error analysis. (*People v. Woods* (2006) 146 Cal.App.4th 106, 117 [because some of prosecutor's improper arguments were of federal constitutional magnitude, cumulative effect of misconduct is assessed under the *Chapman* standard; the state has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict]; see also *United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6 ["if any of the errors being aggregated are constitutional in nature, then the harmless-beyond-a-reasonable-doubt standard announced in *Chapman* should be used in determining whether the defendant's substantial rights were affected. Any lesser standard would potentially denigrate the protection against constitutional error announced in *Chapman*"]; see also *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1220.)

The prosecutorial misconduct in appellant's case went beyond the pale and deprived appellant of his due process right to a fair trial. For the same reasons reversal was mandated in *Hill,* reversal is required here. (*People v. Hill* (1998) 17 Cal.4th 800, 844-847.) The misconduct was not harmless beyond a reasonable doubt; it is also reasonably probable the jury would have rendered a

more favorable verdict in its absence. The cumulative effect of the misconduct was sufficient to cast doubt on the reliability of the guilt and penalty verdicts.

VII. APPELLANT'S CONVICTIONS MUST BE REVERSED BECAUSE MICHAEL'S STEPFATHER YELLED AT APPELLANT AND HAD TO BE REMOVED FROM THE COURTROOM

During appellant's testimony during penalty phase, in the presence of the jury, Mr. Friend yelled: "You're going to die you slimy piece of shit," and/or "slimy son of a bitch." (38-RT 11403-11404, 11417.) Appellant requested a mistrial for several reasons:

> "Mr. Schroeder had Tina Lyons testify about this wonderful, warm relationship between Mr. Friend and Michael Lyons. One of the reasons he did that, rather than put Mr. Friend on the stand himself, is that Mr. Friend is impeachment seven ways from Sunday with a number of prior convictions, and also the fact that there was considerable rancor -- and I make this by way of proffer -- considerable rancor which we could establish.
>
> But we've been precluded from doing so by the Court's previous ruling that we can't show what a terrible mother Ms. Lyons is. We could establish that Mr. Friend pretty much could have cared less about Michael Lyons. In the in the words of one of our witnesses whose testimony I was not able to adduce, the language that she used when she described the relationship was: New husband, new child, get rid of Michael. And that was Michael's school teacher. Mr. Friend came to the bar, he was restrained by Detective Mike Green. What we effectively have is we have Friend testifying in a very emotional manner which -- and I can't get to him. I can't impeach him. I can't do anything with it. And, therefore, I am moving for a mistrial because of that outburst.
>
> Now, whether it was choreographed and orchestrated by the family is a completely different matter. In fact, I rather imagine that it was. (38-RT 11405-11406.)

Even the prosecutor agreed that Mr. Friend was in contempt of court:

> Well, what he did was in contempt of this Court. That's direct contempt. And I think one of the things you could do and rule, if

anything else, is ban him from this trial for the remainder of this trial. (38-RT 11408.)

Appellant replied:

> I mean, this guy has got a history of violence. There's a 273 conviction in his background where he assaulted Ms. Lyons. . . . This guy has a history of assaultive behavior. Lynette Rhoades is present in court. She related to us that Mr. Friend, who is apparently becoming increasingly more violent, yelled at her and called her a "fucking bitch" outside the courtroom. So he is becoming increasingly violent. Now we get this tremendous display of emotion which is about as phony as a nine dollar bill. And I can't get to him. Juror # 3 is emotional. (38-RT 11410-11411.)

Appellant said that he would call Billy Friend as a witness. (38-RT 11412.) The court stated it would permit appellant to develop this "spousal situation," but nothing else. (38-RT 11415.)

The court found Mr. Friend in contempt of court, but reserved sentencing to see how he conducted himself for the remainder of the trial. (38-RT 11418.) The court denied appellant's mistrial motion, but admonished the jury. (38-RT 11420.) All the jurors assured the court that the outburst would not influence them. (38-RT 11428-11430.)

Subsequently, Mr. Friend testified that in 1995 he was charged with felony spousal abuse of Sandy, and pleaded guilty to misdemeanor spousal abuse. (38-RT 11506, 11508-11509.) In October 1995, he was convicted of felony evading a police officer. (38-RT 11510-11512.) Mr. Friend was Michael's "dad," and Michael was like a son. It "killed him" when he died. (38-RT 11516.) He was very angry; Michael's murder had ruined his life; he started drinking heavily again; and he no longer lived with Sandy. (38-RT 11517-11518.)

In *People v. Panah* (2005) 35 Cal. 4th 395, 451, this court explained:

> Misconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict. A trial court is afforded broad

discretion in determining whether the conduct of a spectator is prejudicial." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.)

The *Panah* Court found that the trial court did not abuse its discretion in denying defendant's mistrial motion, because "the incident appears to have been brief and it was not clear that any juror even witnessed it." (*Ibid.*) Here, in contrast, the incident was not brief and all the jurors witnessed it. It was clearly prejudicial given the charges appellant was defending against and the court's admonition did not cure the error for the reasons explained above. (See sections IV.F., and VI. B, *supra*.)

VIII. THE COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY INSTRUCTING THE JURY IN TERMS OF GUILT AND "INNOCENCE" UNDER CALJIC NOS. 1.00, AND 2.01

The trial court instructed the jury in terms of guilt and "innocence" in CALJIC Nos. 1.00 and 2.01, which provide, in relevant part, as follows:

> You must not be influenced by pity for a defendant or by prejudice against. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. *None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent.* You must not be influenced by more sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the people and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences. (RT ; 8-CT 2380-2381; CALJIC No. 1.00 [emphasis added].)

> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, *one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence*, and reject that interpretation which points to his guilt. (RT ; 8-CT 2388; CALJIC No. 2.01.)

In the CALJIC Sixth Edition, CALJIC No. 1.00, was amended to replace the term "innocent" with "not guilty," apparently because the instructions as read to appellant's jury implies that the defendant must "prove innocence."

One of the most fundamental principles of criminal law is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684, 686 [holding unconstitutional jury instructions which shifted to defendant the burden of disproving implied malice by a "fair preponderance of the evidence"].) An essential rule that emanates from this burden is that the defendant need not prove his innocence, but need raise only a reasonable doubt as to guilt. (See *People v. Hall* (1980) 28 Cal.3d 143, 159.) Jury instructions which suggested that the jury must decide between "guilt" or "innocence" violated appellant's state and federal constitutional rights to due process and trial by jury. (See Bugliosi, *Not Guilty and Innocent -- The Problem Children Of Reasonable Doubt* (1981) 4 Crim. Justice J. 349.)

In *People v. Frye* (1998) 18 Cal.4th 894, 957-958, this court held that in light of other instructions given in that case, and the prosecutor's argument, use of the term innocence in CALJIC No. 2.51 regarding motive did not shift the burden of proof to the defendant to prove his innocence. (See also *People v. Han* (2000) 78 Cal.App.4th 797, 809 [CALJIC No. 2.01]; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1491-1492.)

In appellant's case, however, the jury was repeatedly instructed under the concept of guilt and innocence, improperly suggesting that appellant needed to prove his innocence. Because it is the trial court's duty to see that the jurors are adequately informed on the law, appellant's failure to request a clarifying instruction or object to an erroneous and misleading instruction does not forfeit the issue. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 490-491; Pen. Code § 1259; see Arg. XXVI, *infra*.)

SECTION 2 - PENALTY PHASE ISSUES[22]

IX. THE COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND HIS RIGHT TO AN IMPARTIAL, REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AND A RELIABLE DETERMINATION OF PENALTY, BY DENYING BOTH OF APPELLANT'S *WHEELER/BATSON* MOTIONS WITHOUT INQUIRING OF THE PROSECUTORS ABOUT THEIR REASONS FOR PEREMPTORILY EXCUSING ALL FOUR AFRICAN-AMERICAN WOMEN FROM THE JURY

A. The Relevant Facts

On January 11, 1999, during jury selection for appellant's second penalty phase trial, the prosecutors, Frederick Schroeder and Susan Nolan, peremptorily excused all four African-American prospective jurors, all of whom were women. (30-RT 9016-9019, 9026, 9035.) The prosecutors used their first strike against Shirley Rakestraw (78), a black woman. (30-RT 9016.) After excusing a white man, the prosecutors excused Adrienne Ayers (62), another black woman. (30-RT 9018.) After excusing a second white man, the prosecutors excused Alice Spruil (110), a third black woman. (30-RT 9019.) Only until after the prosecutors had used three of their first five peremptory challenges to excuse all three female African-American jurors, did appellant object under the federal constitution, *Batson v. Kentucky* (1986) 476 U.S. 79, and *People v. Wheeler* (1979) 22 Cal.3d 258:

> *Your Honor, the district attorney has exercised challenges against both* [sic] *black women immediately upon entering the box.* It's quite clear they are exercising challenges based on

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[22] Appellant will address only the errors in appellant's second penalty phase because any errors with respect to appellant's first penalty phase became moot when that jury could not reach a unanimous verdict.

> race and violation of *Wheeler* and *Batson*. And I would object and ask for a new panel based on that because it has denied my client his Sixth Amendment rights to a cross section of the community and to a fair jury as well as his 14th Amendment rights to due process. (30-RT 9020.)

The prosecutor argued that appellant had "the burden to show that's why we're exercising these challenges, and they haven't established that." (30-RT 9020.) The court appeared to agree, stating: "She said you have the burden of establishing that race is the reason for the challenge and you haven't established that." (30-RT 9020.)

Appellant disagreed:

> I made a prima facie showing. It is up to them now, upon questioning by the Court, to establish it is not based on race, I beg your pardon. Now, if you want to go further in this process, we'll be glad to brief. We can recess now and brief it later, but it is up, I made a prima facie showing, as soon as these *three jurors* were challenged, they challenged them, period. They made no showing. I made a showing they were exercised due to race. It's up to them to justify. (30-RT 9020 [emphasis added].)

The prosecutor argued: "I don't think that's a sufficient showing. Second of all, the defendant isn't black." (30-RT 9021.)

The prosecutor did not claim that any of the remaining jurors were black, but argued that appellant had "merely pointed out who we bumped," and that the prosecution had also "booted two white males." (30-RT 9021.)

The court, acknowledging that the prosecution had struck three black women, ruled: "There have been three exercised. . . . there's not been a sufficient showing at this point. I note there are a number of other [African-American] jurors in the venire in the courtroom. . . . I'm denying this without prejudice to renew it." (30-RT 9021.) Obviously, the court was indicating that despite the fact that the prosecutors had excused all the African-American from

the jury, there were still African-American jurors in the venire. The inescapable inference is that there were no remaining African-American jurors on the jury.

Appellant again asked the Court to require "the prosecution to justify their challenges on other than race." (30-RT 9021-9022.) The prosecutor responded: "I don't believe we have to do that, Your Honor. But we're prepared to do that. . . But I don't feel – we do not have to do that right now. They have not made a showing." (30-RT 9022.) The court agreed. (30-RT 9022.)

After the prosecution used two more strikes against female jurors, and accepted the jury twice, the prosecution peremptorily excused a fourth African-American juror, Alicia Richard (145), as soon as she was seated. (30-RT 9023-9026, 9035.) Appellant again immediately objected on the ground that "the prosecution just exercised a peremptory challenge of another black woman . . . after they had passed the panel twice." (30-RT 9026.)

The court stated: "We're obviously going to have a hearing on this right now." (30-RT 9027.)

Appellant responded:

> I honestly did not believe that the prosecution's exercise of peremptories would be so blatantly in violation of *Batson* and *Wheeler*, but I would like to recess for all of this and perhaps come back at 1 o'clock for this hearing because there is some, Ms. Nolan obviously does not know the law. And I would like to provide the Court with some authority that stands for the proposition that it is not our burden beyond a prima facie showing, which we have made. (30-RT 9027.)

The court asked the parties to give him their "best case on this shot so I can see what . . . your respective positions are." (30-RT 9030-9031.) Appellant agreed to waive his personal presence. (30-RT 9030.)

The court asked the parties to tell him "which of the jurors were black jurors. I've forgotten their names." (30-RT 9035.) The prosecutor informed the

court that the black jurors were Alicia Richard, Shirley Rakestraw, Adrienne Ayers, and Alice Spruill. (30-RT 9035.) The inescapable conclusion from this statement, as well as the record as a whole, is that the prosecutor had excused all four African-American jurors.

The prosecutor relied on *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1157, which required the defense to show "*a strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias," citing *People v. Wheeler* (1978) 22 Cal.3d 258, 280. (30-RT 9034 [emphasis added].) The Supreme Court, however, overruled this aspect of *Howard* in *Johnson v. California* (2005) 545 U.S. 162, 170.[23]

Appellant presciently argued that *Howard* was a distortion of the law that in fact required the defense to raise only an inference of racial discrimination to carry his burden of showing a prima facie case:

> I think that since the prosecution has read *Howard*, I think that we're all pretty much on the same page as far as what the requirements are. *And I would point out that, though, that Wheeler and Batson require only that the defense make a prima facie showing from relevant circumstances or that the relevant circumstances raise an inference that the government use the challenges to exclude a class of jurors because of their race.*
>
> Now, I don't think there's any question that, first of all, my motion was timely. I don't think there's any question that the,

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23. The *Johnson* Court overruled *Howard* on this point, holding that "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred," and did not "have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination." (*Johnson, supra,* 545 U.S. at 170-173; see *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1105-1110.) Here, the trial court ruled only that appellant had failed to meet the even more strenuous standard of a "strong likelihood," and thus had failed to establish a prima facie case. (30-RT 9050.)

there is an inference that these jurors have been excused solely because of their race.

Now, one of the factors, if the Court wishes me to go further, is that *as soon as one of these jurors is available to be excused by the prosecution, they're excused.*

For example, and the best is the most recent juror, Richards [sic] (145), they had passed her for a number, they passed the panel a number of times, Ms. Richards (145) hit the stand and she was immediately challenged and excused.

Now, the only reason is that she's a black woman. I mean, at least that's the inference, at least.

Her answers to voir dire questions are quite similar to answers to voir dire questions by others, by other white women, whether they be her age or not.

There are some similar characteristics between Ms. Richards (145) and Ms. . . . LaForm (88)[24] -- I beg your pardon, Spruill (110), yeah, and Tremblay (118).[25] Both of them worked with WEAVE [Women Escaping A Violent Environment] or volunteered or had some connection to.

So the answers to her questions on voir dire to Ms. Richard's (145) questions, answers on voir dire are quite similar to the other questions on voir dire. We haven't had time, and, that is, unless the Court wants us to take the time, we can go through and draw other comparisons.

Ms. Spruill (110), for example, her answers were quite similar, another black woman who was excused immediately, if I'm not mistaken, upon hitting the box, her answers were quite similar to other prospective jurors' answers.

She has a brother in prison. There's another white woman who has a brother in prison.

There are two -- okay, there's another white woman on the jury who has a relative or had a relative in prison.

So all of the jurors have answered that they can be fair and impartial and they have no particular views toward the death

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24. Ms. LaForm stated that her son had been in prison for six years. (28-RT 8431.) Ms. LaForm became a juror.

25. Ms. Tremblay stated that verbal and physical abuse twelve years ago with her former husband would not carry over into her evaluation of this case, nor the assault by an inmate at Folsom, where she worked. (28-RT 8465-8466.)

> penalty. Some are, may be a bit in favor or a bit opposed to the death penalty as a first alternative, first, and none of those women were challenged for cause.
>
> *So I think that we have more than made a prima facie showing that these four woman have been excused simply because they are African-American.*
>
> And that then denies Mr. Rhoades his . . . Sixth and Fourteenth Amendment rights under the Federal Constitution and Article 1, Section 16 under the California Constitution to a trial by an impartial jury drawn from a representative cross-section of the community. And, in addition, such a peremptory challenge also violates the equal protection and due process rights, interestingly enough, of the excluded jurors.
>
> And for that reason, Your Honor I would ask that this entire venire be dismissed and that we begin again. (30-RT 9036-9038 [emphasis added].)

The prosecutor argued that appellant had not met his burden to show a prima facie case under the stringent state standard of *strong likelihood*:

> First of all, the burden does not shift to the People until prima facie case of bias has been shown. That is, a showing of individual discrimination. Specifically, they lay out three factors in *Wheele*r and *People vs. Howard* which is the case that we gave to the Court. The third factor which the defense must show from all the circumstances in the case *a strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias.
>
> And the showing that the defense has made does not rise to the level to the standards set out in *People vs. Howard* or *People vs. Wheeler*, therefore, we would ask that you deny their motion. (30-RT 9038-9039 [emphasis added].)

Appellant argued that in *Howard*, the prosecution went on to exercise eleven other peremptory challenges.

The court found that the prosecutor in appellant's case had used four of eight peremptory challenges to excuse the four African-American women. (30-RT 9039.) The court noted that the defense had excused two black jurors out of

11 peremptory challenges.[26] (30-RT 9040.) In appellant's case, however, appellant made his first *Batson/Wheeler* motion after the prosecution had used three of their first five peremptory challenges to excuse all three African-American jurors. (30-RT 9016-9019.) Although the court did not know it when it ruled against appellant with respect to his second *Batson/Wheeler* motion, the prosecution exercised only three more peremptory challenges before the jury was selected. (30-RT 9054-9058.)

While the court correctly noted that a defendant need not be African-American to make a *Batson/Wheeler* challenge to excusing African-American jurors, the prosecutor argued it was a "fact that the Court could take into consideration and even considering that what the defense had presented was not a prima facie showing." (30-RT 9040.)

Appellant disagreed:

> Your Honor, that is not a factor in *Howard* the Court considered. And I really resent the district attorneys misleading, that is -- then let's put it this way: Okay, they want you to consider the fact that my client is white. They are asking to you do something that flies in the face of all case law. And I'm tired of the district attorney attempting to mislead this Court down the primrose path which it has done continually, at least, since I've been involved in it. (30-RT 9040-9041.)

Appellant was correct. (*Powers v. Ohio* (1991) 499 U.S. 400, 415-416 [the defendant need not be of the same race to object to a prosecutor's race-based exercise of peremptory challenges]; *People v. Bell* (2007) 40 Cal.4th 582, 597

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26. In *Brinson v. Vaughn* (3d Cir. 2005) 398 F.3d 225, 233-234, the court granted relief under *Batson* when the trial court did not find a prima facie case, because the fact the prosecutor did not to use all his peremptories did not "cure discrimination against others"; the race of the decedent, defendant and witnesses is not dispositive; and a legitimate strike by the defense does not insulate race-based strikes by the prosecution.

["the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule"].)

The court noted it was troubled by the fact that in *Howard*, there were two out of eleven challenges while, in appellant's case, there were "four out of eight."[27] The prosecution admitted that was "quite a distinction," but persisted that it did not "amount to a prima facie showing," which requires "a showing of *a strong likelihood* that that [discrimination] is the reason we excused the jurors." (30-RT 9042 [emphasis added].)

The court stated:

> Do I not have before me right now I'm looking at either side of this case, what I have is one fact, I have four jurors who are of the black race who have been excused by the district attorney out of eight challenges. So I have whatever the significance is of that number. . . . What do I have other than that for me to make a judgment that there is discrimination and sufficient . . . (30-RT 9046.)

Appellant answered:

> There are no other discernable differences based on their questionnaire and their voir dire questions, there are no other discernible differences between those women and the other . . . eight jurors in the box, from what I can tell. And the Court has the questionnaires, and I presume the Court has made the same comparisons and analyses that we have. There are no discernable differences. (30-RT 9046.)

The prosecutor asserted: "Oh, I think there are significant differences." (30-RT 9046.)

The court asked her to explain. (30-RT 9046.)

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[27] When appellant made his first *Batson/Wheeler* objection, the prosecution had used three of their first five peremptory challenges (60%) to excuse all three African-American jurors. (30-RT 9016-9019.)

The prosecutor *refused to explain*, which in itself, could be taken as further proof she had a discriminatory intent:[28]

> Your Honor, I don't think that the defense counsel has shown that there are differences, excuse me, similarities. I think he's merely, he hasn't brought the questionnaires to you and said, These answers are the same as jurors that we kept. And I think that it is his burden to show the Court that. And the burden does not shift to the People until he shows that there is *a strong likelihood* that the reason we excused those jurors is based on their race. (30-RT 9047 [emphasis added].)

Appellant responded:

> I would invite the Court to review the questionnaires and voir dire questions. *I did state a number of similarities, specific similarities between the black women and the white jurors*," such as relatives in prison; formerly victims of assault; strong religious views; volunteers somehow related to WEAVE, a volunteer organization in this area that assists women who are in fear or have been battered by their husbands, spouses, significant others. *And so there is this comparison that I have listed between the, the black women and the other, the others who sit on the jury*. (30-RT 9047-9048 [emphasis added].)

Here, counsel again made an unrefuted statement that the prosecutor had excused all the prospective African-American women jurors and that there were only white jurors left of the jury. (30-RT 9047.) The discussion among the parties and the court clearly indicate and assume that there were no African-Americans on the jury after the prosecutors had used their peremptory challenges and that only white jurors, and a woman with some Native American

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28. *Johnson v. California, supra,* 545 U.S. at 171, fn. 6, states:

> "In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised by a defendant's prima facie case."

ancestry, remained. (30-RT 9026-9050.) The prosecutors never claimed that any African-American jurors remained on the jury; the court never mentioned it; and appellant generally referred to the African-American jurors the prosecutor had excused, in contrast to the white jurors left on the jury.

The prosecutor solely argued that appellant had not shown "*a strong likelihood*" that the African-American jurors were excused based on their race, or had not shown how the answers on the questionnaires of the black women were "the same as jurors that we kept." (30-RT 9047.)

The prosecutor argued:

> I don't think he's mentioning any things, number one, that we can't legitimately consider in . . . using our peremptory challenges. Two, he's not saying we booted Juror Number 4, she has the same background as Juror Number 2 who they kept.
>
> I mean, he's not saying anything specific to say we exercised these challenges for race-based reasons. (30-RT 9048.)

The court responded:

> Well, let me put it this way. If you have, I don't know if this is the case, but if you have Juror A who is white who is in her questions answered matters of one, two, three, four, so to speak, and then you have a black juror who answered one, two, three, four, and you exclude the black juror but you don't exclude the white juror, isn't that a fair inference? I mean, the only difference between the two -- (30-RT 9048.)

The prosecutor disagreed:

> I think my reading of the cases is that he needs to demonstrate to you how these answers are different. He needs to come in with a questionnaire that says, Juror Number 4, who they booted, answered the question this way. However, they kept Juror Number 2 who answered the question in the same way. He has not demonstrated that the people that were kept are different than the people that we booted. And that's his burden to show it. The Court doesn't have to go back in chambers and read through the entire voir dire or review his notes. It's his burden to show that, and it's not our burden. (30-RT 9049-9050.)

The Court ruled:

> At this juncture, [I] accept the authority of this *Howard* case. In doing so, I need to look very carefully at the representatives of the People and say that any further matters of this kind will weigh heavily on this Court. . . I'm very close, I'm going to go with *Howard* for the time being, but if I see very much more of this, I'm going to indicate to you, you may well have a serious problem on your hands. (30-RT 9050; 13-CT 3703-3705.)

Implicit in the court's ruling was the court's denial of appellant's request "to take the time . . . [to] go through and draw other comparisons [between the excused black female jurors and white female jurors]." (30-RT 9037.)

The trial court expressed the same kind of reservations under the now overruled "*strong likelihood*" standard that the Court in *Johnson v. California* (2005) 545 U.S. 162, found significant:

> In this case, the inference of discrimination was sufficient to invoke a comment by the trial judge "that 'we are very close,'" and on review, the California Supreme acknowledged that "it certainly looks suspicious that all three African American prospective jurors were removed from the jury." 30 Cal.4th at 1307, 1326 . . . Those inferences that discrimination may have occurred were sufficient to establish a prima facie case under *Batson*. [¶] The facts of this case well illustrate that California's "more likely than not" standard is at odds with the prima facie inquiry mandated by *Batson*. (*Johnson v. California, supra,* 545 U.S. at 173.)

Similarly, in appellant's case, the trial court explicitly used the "strong likelihood," standard of *Howard,* as repeatedly urged by the prosecution, and still found the circumstances to be "close." (30-RT 9050.) If California's "more likely than not" standard is "at odds with the prima facie inquiry mandated by *Batson*," then *Howard's* "strong likelihood" standard is *doubly* at odds with the prima facie inquiry mandated by *Batson*. Applying the proper standard, the circumstances of the prosecution excusing all three African-Americans, and then a fourth, some of whom were remarkably similar to white jurors whom the prosecution accepted,

were clearly sufficient "to permit the trial judge to draw an inference that discrimination may have occurred," which is the law again, even in California. [29] (30-RT 9050.)

B. This Court Should Conduct A Comparison Of The Four Excused African-American, Female Jurors With The Eleven White Jurors And One Juror With Some Native-American Ancestry, Who Served, To Determine That Appellant Raised An Inference Of Discrimination

While appellant presents the facts suggesting a discriminatory intent with respect to all four African-American female jurors, *Batson* error may be found if only one juror was impermissibly excused, while considering all peremptory challenges. In *Snyder v. Louisiana* (2008) 552 U.S. 472, 478, the court held that because "the trial court committed clear error in overruling petitioner's *Batson* objection with respect to Mr. Brooks, we have no need to consider petitioner's claim regarding Ms. Scott . . . [I]f there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks." (*Ibid.*) The Court then proceeded to do an in-depth comparative juror analysis at the third stage, finding, in one instance, that the "implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks." (*Id.* at 483, 477-484.) There is no requirement that jurors be identically situated in order for meaningful comparison to take place. (*See Miller-El v. Dretke* (2005) 545 U.S. 231, 247, fn.6 [*Miller-El II*].) "If a prosecutor's proffered reason for striking a black panelist

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[29] Whether one of the two jurors who voted in favor of a life sentence at appellant's first penalty phase was a minority --- which might have given the prosecutor an extra motive to discriminate -- will have to wait for habeas review. (See 9-CT 2679-2687.)

applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." (*Id.* at 241.)

In *People v. Lenix* (2008) 44 Cal.4th 602, 620-622, fns. 14 & 15, this court approved of comparative juror analysis for the third stage, citing *Miller-El, II, supra,* 545 U.S. 231, but not the first stage of *Wheeler-Batson* analysis:

> As our case law establishes, "[t]he high court [in *Miller El II*] did not consider whether appellate comparative juror analysis is required 'when the objector has failed to make a prima facie showing of discrimination.' [Citation.] A fortiori, *Miller-El [II]* does not mandate comparative juror analysis in a first-stage *Wheeler-Batson* case when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or have hypothesized any possible reasons." (*People v. Lenix, supra*, 44 Cal.4th at 622, fn. 15 [citations omitted].)

In appellant's case, however, appellant explicitly engaged in comparative juror analysis in attempting to meet his burden of presenting a prima facie case, and asked for more time to do a more complete comparative juror analysis. (30-RT 9037, 9036-9038, 9046-9048.) Under these circumstances, appellant believes comparative juror analysis is appropriate, including a review of the jury voir dire and juror questionnaires, and will do both for the benefit of this Court and to preserve the issue for possible review in federal court. When the jurors who sat on appellant's jury are compared with the four African-American women whom the prosecutor excused, it is clear that appellant had met his burden of raising a prima facie case that one or more of the female black jurors were excused based on race and/or sex discrimination.

Moreover, appellant believes that the Ninth Circuit has more convincingly construed the relevant case law. In *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 921-923, the court did a comparative analysis under *Batson* at the first stage, finding that the "totality of the circumstances" raised an inference of impermissible discrimination, sufficient to make out a prima facie case: "[N]one

of the African-American juror's "answers to the court's [few] questions suggests a reason for her removal," comparison of her answers with those of "similarly situated panel members who were allowed to serve reveals little distinction that could account for the . . . strike," and "the prosecutor did not pursue further questioning before striking" her. (*Id.* at 922-923.)

When a trial court denies a *Wheeler* motion because the movant failed to establish a prima facie case of group bias, the reviewing court examines the entire record of voir dire for evidence to support the trial court's ruling. The ruling is affirmed if the record "suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." (*People v. Young* (2005) 34 Cal.4th 1149, 1172 [citations omitted]; *People v. Farnam* (2002) 28 Cal.4th 107, 134-135.)

Appellant believes that this kind of speculation violates due process and supreme court law. (*See Miller-El, supra,* 545 U.S. at 252 [stating a court of appeals may not supply a reason for a challenge when the prosecutor's stated reason is insufficient]; *see also Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken"].) This is particularly true if the court also refuses to do a juror comparison analysis while conjuring up reasons the prosecutor might have had. (*Johnson v. California, supra,* 545 U.S. at 172-173 and *Miller-El, II, supra,* 545 U.S. at 247-248.) The Ninth Circuit has held that the state trial court could not substitute its own reasons for the challenges, even though the prosecutor was present during the colloquy. (*Williams v. Runnels*, *supra,* 432 F.3d at 1107; see also *Riley v. Taylor* (3rd Cir. 1999) 277 F.3d 261, 282; *Bui v. Haley* (11th Cir. 2003) 321 F.3d 1304, 1313-1316; see section C, *infra*.)

Appellant will now conduct a comparison of the four female, African-American, prospective jurors whom the prosecutor peremptorily excused (in the order excused) -- Shirley Rakestraw (78), Adrienne Ayers (62), Alice Spruil (110), and Alicia Richards (145)[30] – with the twelve jurors the prosecutors allowed to sit on appellant's jury for his second penalty phase trial. (30-RT 9016-9019, 9026, 9035.)

1. The Prosecutor's First Strike: Shirley Rakestraw (78)

Juror Shirley Rakestraw (78) had worked at Sacramento State for 19 years as an administrative assistant. (25-RT 7662.) A friend of hers was a victim of a homicide when she was 12 years old. (25-RT 7663.) She had a lot of confidence in DNA evidence. (25-RT 7663-7664.) As a mother she felt very sympathetic and very strongly about any parent losing a child: "It's a feeling that no one should ever really have to experience. And having experienced it myself I guess I'm maybe very overly sympathetic to anyone having to experience something like that. . . My loss occurred years ago. My -- my last daughter died when she was just three weeks old. And I remember the pain and I can still feel the pain that I felt then, so I can imagine how it would be magnified if it would happen to a child that you had spent a lot time with and had raised. And I can imagine how this would be magnified even more. It's a very, very painful thing." (24-RT 7664-7665.) She said she would be able to consider both penalties after hearing the evidence. (24-RT 7665.)

The prosecutor questioned her about her views on the death penalty:

> So I take it in certainly not all, and perhaps not even in most, but in many cases of even murder you feel that the death penalty would be inappropriate, but there are some cases that are so -- such bad cases -- in other words, what the defendant did was so

[30] The juror number key is found at 54-CT 16077.

bad that the death penalty might be an appropriate punishment? (24-RT 7666-7667.)

Ms. Rakestraw answered: "Yes. Yes." (24-RT 7667.)

In response to the prosecutor's question that if she concluded that based upon all the facts and the law, that the factors in aggravation far outweighed those in mitigation so that she objectively thought that the death penalty would be the appropriate punishment in this case because this case is just really a real horrible case, she said she could vote for the death penalty. She also thought she could be fair to both sides. (24-RT 7667.)

In her juror questionnaire, Ms. Rakestraw stated she was 60 years old, married for 43 years, with two adult daughters and four grandchildren from ages 14 to 24. (23-CT 6859-6860.) She worked full-time as the Assistant to the Director of Equal Opportunity/Affirmative Action at Sacramento State. (23-CT 6861-6862.) Her husband was employed full-time at McClellan Air Force Base as an Energy Control Specialist and had been in the Air Force for 20 years from 1955 to 1975. (23-CT 6864-6865.) She was a member of the New Testament Church and attended weekly. (23-CT 6866, 6869.) She believed that "life is not always fair," and "do unto others as you would have them do unto you." (23-CT 6866.) She sometimes listened to Rush Limbaugh on the radio.[31] (23-CT 6868.) She enjoyed church, singing, movies, writing poetry, and plays. (23-CT 6869.) Politically, she considered herself "middle of the road." (23-CT 6870.) She had never served as a juror before and believed an "open mind, objectivity, alertness and attentiveness," would be important attitudes to have as a juror, and prejudice should disqualify. (23-CT 6871.) A daughter had been the victim of spousal abuse, resulting in a conviction. (23-CT 6874.) Her step-father served time for

[31] Appellant requests this Court to take judicial notice of the fact that Mr. Limbaugh, a popular radio talk show host, is known as a "conservative," if not a radical, right-wing extremist.

assault. (23-CT 6874.) A close family member had been convicted of shoplifting twice. (23-CT 6876.)

In her juror questionnaire, Ms. Rakestraw gave pro-prosecution responses such as: "I could not advocate letting a known guilty person go free under any circumstances." She agreed somewhat that the "rights of persons charged with crimes are better protected than the rights of the alleged victims." She agreed somewhat that "too many people charged with serious crimes try to excuse their crimes by claiming that they were abused as children by their parents." (23-CT 6885.) She believed that "the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crime . . . by dismissing or not considering evidence or testimony that should be taken in consideration." (23-CT 6886.) She had heard that methamphetamine is "very addicting and dangerous," and that it "robs a person of all dignity and common respect for others or themselves." (23-CT 6885.) She would give defense psychiatric testimony "little importance." (23-CT 6890.) She stated her feelings about the case: "As a mother who has experienced the loss of a child, my heart bleeds for the family. But I will remain unbias [sic] until I have heard all facts." (23-CT 6892.)

Ms. Rakestraw felt uncomfortable discussing her feelings about the death penalty in the questionnaire, though she was more forthcoming in voir dire. (23-CT 6895-6900.) She chose not to answer several such questions. (*Ibid.*) She did reveal she believed that an "eye for an eye," had been "grossly misinterpreted and misused." (23-CT 6895.) She believed that the death penalty should be reserved for "premeditated, planned murder." She believed that the death penalty sometimes serves as a deterrent. (23-CT 6895.) No one would criticize her for voting one way or the other. (23-CT 6896.) Most of her immediate family and friends were against the death penalty. (23-CT 6896.) She believed that

LWOPP was more of a punishment than the death penalty. (23-CT 6897.) She later explained her answer that she would always vote for LWOPP, given the choice between life and death, and said she could vote for death. (23-CT 6897; 24-RT 7666-7667.)

If this rather conservative, older, married woman had been white, there is little doubt that the prosecutor would not have peremptorily excused her. At a minimum, a prima facie case of discrimination appeared on the record.

2. The Prosecutor's Second Strike: Adrienne Ayers (62)

Juror Adrienne Ayers (62) revealed that her brother-in-law was murdered when she was about sixteen years old about ten years ago. An investigation found nothing to explain why he was found stabbed in a fast-food restaurant parking lot. (24-RT 7424.) She said she could impose the death penalty, though she indicated at one point that she did not think the death penalty served any purpose, in the cases she had seen. "Of course, I wasn't there to try the case so I wasn't aware of the evidence and the circumstances behind the ruling. So I believe after I view all the evidence, if that was the just verdict, then that's what I would vote for." (24-RT 7425-7526.)

In a very brief voir dire the prosecutor asked:

> If you find, after listening to all of the evidence and the instructions the judge gives you . . . that the evidence in aggravation far outweighs that in mitigation, and in your own mind, you form the opinion that, under the law, the appropriate punishment in this case would be the death penalty, could you vote for that? (24-RT 7426-7427.)

Ms. Ayers responded: "I could." (24-RT 7427.)

In her juror questionnaire, Ms. Ayers stated she was a 26-year-old single woman, who grew up at Travis Air Force Base in Fairfield, and still lived with both parents, who were both employed. (22-CT 6403-6404, 6409.) She worked full

time as a customer service representative for Sprint long distance. (22-CT 6405.) She had earned a B.A. in Interior Design from California State University in Sacramento. (22-CT 6406.) She had plans to attend graduate school in architecture. (22-CT 6407.) She learned to "stay open," and "be flexible." (22-CT 6410.) She attended church weekly and was a middle of the road Democrat. (22-CT 6413-6414.) She stated that it was most important as a juror to listen and not form an opinion until the end of the case. (22-CT 6415.) Family and friends had been victims of serious crimes. (22-CT 6418, 6422.) She had a friend who had contact with WEAVE. (22-CT 6423.) Ms. Ayers disagreed strongly with the proposition that it is better to let some guilty people go free than to risk convicting the innocent, believing in the appeal process. (22-CT 6429.) Ms. Ayers strongly agreed with the proposition that prison inmates who have been convicted of horrible crimes receive too many luxuries in prison. (22-CT 6429.)

Ms. Ayers was moderately against the death penalty in principle. (22-CT 6438-6440.) Ms. Ayers, however, believed the death penalty should be imposed "if the act was premeditated," or it was an intentional killing. (22-CT 6440-41.) Ms. Ayers believed the death penalty is imposed "about right," as opposed to too often, too seldom or randomly. (22-CT 6441.) Ms. Ayers believed that neither death nor LWOPP was the appropriate sentence in all cases. (22-CT 6441-42.) She believed that whether the defendant had committed other crimes and their impact on the victims would be important to her. (22-CT 6443.) Ms. Ayers believed a defendant's background was of little importance. (22-CT 6443-44.)

In short, Ms. Ayers was amazingly neutral with no disqualifying answers. There is no way the prosecutor could explain excusing her, except the fact of her being an African-American woman. At a minimum, a prima facie case of discrimination appeared on the record.

3. The Prosecutor's Third Strike: Alice T. Spruill (110)

Alice T. Spruill (110) was the mother of a six-month-old child. (28-RT 8452.) She stated that "I don't have a lot of opinions except I do feel sometimes blacks are not always treated fairly by our system." She was sure appellant was treated fairly. (28-RT 8453.) Her brother had difficulty with alcohol. (28-RT 8455.) She would be able to consider both penalty options fairly and impartially. (28-RT 8456.)

The prosecutor briefly examined Ms. Spruill about her brother, who had been convicted, but she believed that he was innocent. Because of his alcoholic problem, he had no accountability. He was pretty much homeless and did not have any place to live. She felt like he was an alcoholic, but he was not a molester. She believed, however, that people "should be held responsible if they are convicted, even if there was alcohol or drugs." (28-RT 8458.)

At first she said she could not answer whether she would vote to put another human being to death. (28-RT 8458.) Then she clarified that if "I'm given instructions from the judge and I have the facts in front of me, I will follow the instructions. And based on those facts, I will be able to make a decision." (28-RT 8459.)

Ms. Spruill answered "yes," to the prosecutor's last question: "Obviously, based on what you hear in court, if all the facts in evidence, all the aggravating evidence, any mitigating evidence is presented, if you feel it's an appropriate verdict, can you sit across the room from someone and sentence them to death? (28-RT 8460.)

In her juror questionnaire, Ms. Spruill revealed she was a 36-year-old woman who had been married for 12 years, had an infant, and worked full-time for the Franchise Tax Board as a budget coordinator/analyst, after she received a MBA in Business Administration and Finance. (26-CT 7770-7773.) Ms. Spruill's

husband was an auditor who worked full time at the Franchise Tax Board. (26-CT 7774-75.) She had learned "never take life for granted." (26-CT 7777.) She attended church weekly and was a middle of the road Democrat. (26-CT 7780-81.)

Ms. Spruill said that being a juror was a "sensitive area," as her brother was jailed for a sexual offense, of which she believed he was innocent, in part due to his alcoholism. (27-CT 7803.) Ms. Spruill believed that neither death nor LWOPP was the appropriate sentence in all cases. She believed that the death penalty could be appropriate for all kinds of killings. (27-CT 7808.) Ms. Spruill believed the death penalty was imposed "about right," as opposed to too often, too seldom or randomly. (27-CT 7808.) She believed that neither death nor LWOPP was the appropriate sentence in all cases. 7808-09.) She believed that many factors would be important to her in deciding a penalty. (27-CT 7810.)

In short, there were no nondiscriminatory reasons to explain why the prosecutor excused Ms. Spruill, except the fact of her being an African-American woman. At a minimum, a prima facie case of discrimination appeared on the record.

4. The Prosecutor's Fourth Strike: Alicia Richard (145)

In voir dire, Alicia Richard (145) explained she volunteered with WEAVE, listening to women who had been battered, physically, emotionally or verbally. (26-RT 7933.) She belonged to the Church of God in Christ. She had used the services of the district attorney for child support. (26-RT 7933.) She was physically assaulted at one time; but not hurt badly. (26-RT 7934.)

She had an unpleasant experience with the police on New Year's Eve, the year before. She had forgotten to get a sticker so that she could park her car in front, because they had just purchased the car. The officer said, "Well, I'm going

to cite you because these tags were put on here illegally." And she responded: "Well, I don't know anything about that. The car doesn't work, whatever. It's not even my car. If you want to cite me, fine. I'll go inside, whatever." (26-RT 7934.) And as she went to walk away, the police rushed her and handcuffed her: "They didn't even halfway try to talk with me or work with me or anything, you know, they was just being jerks." Charges were never filed. (26-RT 7935.) She said she could impose the death penalty, after hearing all the facts. (26-RT 7935.)

In her juror questionnaire, Ms. Richard stated she had three sons, ages 15, 13 and 6, and was married to a man with a full-time job. (28-CT 8340, 8345.) Ms. Richard worked full time as a customer service representative with USAA Insurance. (28-CT 8342.) Ms. Richard had one or two years of college, focusing on engineering, and had attended business college. (28-CT 8343-44.) She was currently in training to become a volunteer at WEAVE. (28-CT 8347, 8360.) She described herself as a middle of the road, non-political person who attended church several times a month. (28-CT 8350-51.) She thought a juror should be open-minded and fair. (28-CT 8352.) Ms. Richard thought the death penalty was acceptable in some cases, though imposed "randomly." (28-CT 8375, 8378.) In determining death or LWOPP, "the facts surrounding the event are important." (28-CT 8379.)

The prosecutor's very brief voir dire started off asking Ms. Richard: "Was your unpleasant experience with the police such as would bias you in this case? (26-RT 7936.) She answered "no" and agreed with the prosecutor: "There's some cops who are jerks and some cops who are nice people." She said she could put the incident aside. Ms. Richard said she could listen to the evidence and decide between life and death. (26-RT 7937-7938.)

In comparison to these four African-American female jurists the prosecutor peremptorily challenged, the sitting jurors displayed a similar range of beliefs and experience.

5. The 12 Sitting Jurors

Juror # 149 (1) was a 27-year-old single, female, high school graduate, who worked full-time. (19-CT 5642-45.) She considered a law enforcement career, but accepted a job with the DMV. (26-RT 7826; 19-CT 5663.) She was a somewhat liberal Democrat who never attended church. (19-CT 5652-53.) She had a sister and boyfriend in jail. (19-CT 5660.) She disagreed somewhat with the proposition that persons convicted of horrible crimes receive too many luxuries in jail. (19-CT 5668.) She believed the death penalty was warranted in murder cases, depending upon the circumstances, particularly serial killers and parents who kill their children. (19-CT 5677-78, 5680-81.) She thought the death penalty was imposed "about right." (19-CT 5680.)

The prosecutor accepted juror # 149 after she assured him she could chose death if she formed a "strong opinion." (26-RT 7830.) This juror was remarkably similar to Ms. Ayers, except for her race. The fact this woman remained on the jury while Ms. Ayers was peremptorily excused, is inexplicable. At a minimum, the fact the prosecutor accepted this young, single white woman, while excusing Ms. Ayers, a young black woman, raised an inference of prejudice

Juror # 142 (2) was a single mother of five children with one or two years of business college, who worked full-time in legal/clerical. (19-CT 5686-89.) She was a middle of the road Republican who went to church weekly. (19-CT 5696-97.) She indicated it was important that a juror have an open mind and listen. (19-CT 5698.) She had been a victim of a burglary and her mother a victim of a purse snatching. (20-CT 5701.) Her ex-husband used methamphetamine at the

time of his death. (25-RT 7738; 20-CT 5714.) She did not have much confidence in circumstantial evidence or photocopies of documents. (20-CT 5713.) She supported the death penalty in "certain cases," depending upon the circumstances. (20-CT 5721-24.) She believed the death penalty had a deterrent effect. (25-RT 7739; 20-CT 5723.) The age of the victim and the defendant, as well as whether the defendant had committed other crimes, were not at all important in deciding the death penalty. (20-CT 5726.) She thought the testimony of family members of the victim and other victims would have no impact on her. (20-CT 5726.)

The prosecutor accepted juror # 142 after she assured him she could chose death and be fair to both sides. (25-RT 7738, 7740-7741; 20-CT 5714.) If this woman had been black, the prosecutors would at least have had several reasons to challenge her, given her belief that victim impact evidence and the age of the victim and the defendant's past crimes would not important to consider. (20-CT 5726.) The fact this woman remained on the jury, while black women with less surprising and objectionable answers were peremptorily excused, is inexplicable. At a minimum, the prosecutor accepting this single white mother as a juror, while excusing all the black women, raised an inference of prejudice.

Juror # 69 (3) was a 55-year-old married man, with two adult children, who worked full-time in the electronics field, after 22 years in the U.S. Air Force. (20-CT 5730-36.) He described himself as a somewhat conservative man, without party affiliation, who rarely attended church. (20-CT 5740.) He had a son with a drug problem, but who was now drug free after attending narcotics anonymous. (20-CT 5758.) He was supportive of the death penalty as a deterrent and for most kinds of murder. (20-CT 5765-68.) He favored the death penalty as the "ultimate deterrent." (28-RT 8660.) He explained: "I believe in that punishment.

If it's necessary, if it's a required and warranted thing, that would have to be the decision." (28-RT 8665.) He said: "People have to think about consequences of their actions." (28-RT 8660.) The age of the victim and the defendant were not important to him, and the defendant's background and use of drugs was of little importance. (20-CT 5770.)

The prosecutor accepted juror # 69 after he assured her that he could chose death if appropriate. (28-RT 8665.)

Juror # 74 (4) was a 31-year-old married woman with three children, who worked as a secretary 30 hours a week. (20-CT 5774-77.) She had been a victim of domestic violence by her husband, who was angry. (27-RT 8353.) She donated clothes to WEAVE. (27-RT 8357.) She told the prosecutor that being a mother she holds life as something that is precious. (27-RT 8361.) This juror was not in favor of the reinstatement of the death penalty, because it cost too much money. (20-CT 5809.) She believed the death penalty should be reserved for "international" crimes, mass murderers and serial killers. (20-CT 5810-11.) When presented with a list of possibilities, she also believed death would be appropriate for intentional killings, killing a child, killing of two or more people, and torture. (20-CT 5812.)

The prosecutor accepted juror # 74 after she assured him he could chose death if appropriate, even knowing appellant was someone's child. (27-RT 8362.) The fact this woman remained on the jury, while black women with less surprising and objectionable answers were peremptorily excused, is inexplicable. At a minimum, the prosecutor accepting this white mother as a juror, while excusing all three black women who were mothers, raised an inference of prejudice.

Juror # 111 (5) was a 51-year-old married man with three adult children, who worked full-time. (20-CT 5818-22.) He had been in the military from 1966 to

1986. (27-RT 8393.) This juror did not have much confidence in circumstantial evidence or photocopies. (20-CT 5845.) He thought the death penalty should be used sparingly. (20-CT 5853.) He believed the death penalty should be reserved for execution-style murders and murders for hire. (20-CT 5854.) When presented with a list of possibilities, he also believed death would be appropriate for intentional killings, killings with a gun, killing of two or more people, and torture. (20-CT 5856.) He thought that the testimony of family members of the victim and other victims would be biased, although tear jerking. (20-CT 5858.)

The prosecutor accepted juror # 111 after he assured her he could chose death if appropriate. (27-RT 8397-8398.) This white male juror's moderate and temperate views about the death penalty did not get him excused, even though they were no less moderate than the views of the challenged black women.

Juror # 188 (6) was a 52-year-old married man, with two years of college and a full time job as an identification technician with law enforcement. (27-RT 8110-12; 20-CT 5862-65.) He had been charged with a DUI. (20-CT 5878.) A family member or close friend had been arrested or convicted of assault, auto theft and robbery. (20-CT 5879.) He refused to answer whether he or anyone he knew had an alcohol or drug problem. (20-CT 5890.) He was strongly in favor of the death penalty, but it would depend upon the evidence. (20-CT 5897-5901.) The age of the victim and the defendant was not important at all. (20-CT 5902.) The prosecutor accepted juror # 188 after he assured her he could chose death if appropriate. (27-RT 8116.)

Juror # 179 (7) was a 32-year-old single woman with a high school education, who had a full-time job as a computer operator. (20-CT 5006-09.) She described herself as a middle-of-the-road Democrat who attended Catholic church several times a year. (20-CT 5915-16.) She was molested as a school-aged child. (20-CT 5924.) She agreed somewhat with the proposition that a

defendant should be required to prove his innocence. (20-CT 5930.) She was supportive of the death penalty and believed it appropriate for murder and most killings. (20-CT 5940-43.) The only factors she thought were at least somewhat important in deciding to impose the death penalty was whether the defendant had committed other crimes and her personal philosophy about the death penalty. (20-CT 5945.) She said she believed in the death penalty, because "if somebody kills somebody, then maybe they should be killed too. I don't know." (25-RT 7725-7726.) The prosecutor accepted juror # 179 (7) after she assured him she could chose death and be fair to both sides. (25-RT 7727-7728.)

Juror # 107 (8) was a 47-year-old married woman with three adult children, who worked full-time as a secretary. (20-CT 5948-51.) She had worked for the D.A.'s office for 20 years and had a son-in-law who had been molested as a young boy. (24-RT 7450-7451; (20-CT 5967, 5969.) This juror described herself as a middle of the road Republican who attended the Mormon church several times a year. (20-CT 5958-59.) She agreed strongly with the proposition that a defendant should be required to prove his innocence. (20-CT 5973.) She disagreed strongly with the proposition that it is better to let some guilty people go free than to risk convicting the innocent. (20-CT 5974.) She was strongly supportive of the death penalty, though she believed it was imposed randomly. (20-CT 5983-86.) The prosecutor accepted juror # 107 (8) after she assured him she could chose death and be fair to both sides. (24-RT 7461.)

Juror # 86 (9) was a 54-year-old, college-educated, married man, with two adult children, worked full-time as an engineer after 20 years in the Air Force. (20-CT 5992-98.) He described himself as a somewhat conservative Republican who rarely attended church. (21-CT 6002-03.) He was mildly supportive of the death penalty for most killings. (21-CT 6027-30.) He wrote that he did not "know which is worse, the death penalty or life without parole." He stated: Me,

personally, I wouldn't want to spend the rest of my life in jail. . . . but I wouldn't want to be executed either. . . both punishments, in my mind, are on an even keel." (24-RT 7444.) The prosecutor accepted juror # 86, after he assured her that he could chose death and be fair to both sides. (24-RT 7448.)

Juror # 88 (10) was a 67-year-old divorced, retired woman with three adult children. (21-CT 6036-39; see Argument X, *infra*.) She had worked as a special education teacher with children in the fifth and sixth grades at North Sacramento School District. (28-RT 8430.) She described herself as a somewhat conservative Republican who attended religious services weekly. (21-CT 6046-47.) Her son was still in prison after six years, but due out in May. (28-RT 8431.) She believed that sometimes she thought people were imprisoned for longer than necessary and sometimes they were not in long enough. (28-RT 8433.) She thought it was "really good" that her son was "incarcerated when he was," even though "it's a terrible thing for a mother to say." (28-RT 8433.) He had gotten his college degree and a lot of help since being sent to prison. (28-RT 8433.) Her son-in-law had a problem with alcohol and drugs, but no longer. (28-RT 8433-8434.) She admitted it was "going to be very difficult" for her to see the pictures, but she "could listen to the testimony and everything and be fair about it." (28-RT 8436-8437.) She said she was "leaning towards the death penalty." "But I would have to listen to everything first before I could definitely say for sure." (28-RT 8442.) She was in favor of the death penalty, particularly for the killing of children and the elderly, and believed it was imposed too seldom. (21-CT 6071-74.) She agreed with the proposition that a defendant convicted of sexual assault and murder of a child should receive the death penalty regardless of any other facts. (21-CT 6075.) The age of the victim and the manner in which the victim was killed was very important in deciding to impose death, but none of the other factors. (21-CT 6076.)

The prosecutor accepted juror #88 after she assured her he could chose death if appropriate. (28-RT 8444-8445.) The court denied a defense challenge to her after questioning her himself. (28-RT 8446-8451; see Argument X, *infra*.)

Juror # 146 (11) was a 46-year-old, divorced man, with three adult children, and who worked full-time in a warehouse. (21-CT 6080-84.) He had a knife pulled on him and a friend knocked the boy to the ground. (26-RT 7860-7861.) He described himself as middle of the road, who did not vote or attend religious services. (21-CT 6090-91.) He agreed strongly with the proposition that a defendant should be required to prove his innocence. (21-CT 6105.) Juror # 146 indicated that he was not certain of his ability to be unbiased, but having thought about it, he believed he could be fair and unbiased. (26-RT 7863; 21-CT 6113.) He would not have a difficult time voting for life in prison where someone had been convicted of murder with the special circumstances of torture and sodomy. If he were Mr. Rhoades, he would want to have twelve people on that jury with his state of mind. (26-RT 7863-7864.) He was mildly in favor of the death penalty depending upon the circumstances. (21-CT 6115-19.) The age of the victim or the defendant was not important in deciding the penalty. (21-CT 6120.)

The prosecutor accepted juror # 146 (11) after he assured him he could chose death if appropriate. (26-RT 7864-7865.)

Juror # 131 (12) was a 58-year-old married woman, who had done post-graduate work, had six adult children, and worked full-time as a financial aid officer. (21-CT 6124-28.) She was of Native American heritage (Wintun and Modoc) on her father's side of the family, though she was not a registered member of any tribe. (26-RT 7853-7854.) She described herself as a somewhat conservative Republican who attended Catholic church several times a week. (21-CT 6134-35.) A son and two cousins were in jail because of drugs or

alcohol. (21-CT 6141-42.) A grandfather, grandmother, sisters, a son, and a daughter were alcoholics. (21-CT 6152-53.) She was strongly in favor of the death penalty for most killings and believed it was imposed too seldom. (21-CT 6159-63.) Troy Ashmus, on death row, had murdered and raped her seven-year old niece; and her brother-in-law was killed or murdered; and a gay uncle was murdered in the course of a car theft. (26-RT 7852-7853; 21-CT 6139, 6143.) As a child, her mother, sister and herself were victims of her father's violence. (26-RT 7853-7854; 21-CT 6142.) When she was 10 years old, she and her siblings thought their father was going to kill them all and they ran terrified out of the house. (26-RT 7853-7854.)

The prosecutor accepted juror # 131 after she assured him she could chose death, if "appropriate." (26-RT 7859.)

C. The Prosecutors' Exclusion Of All Three African-American Female Jurors And Then All Four African-American Female Jurors Raised An Inference Of A Discriminatory Intent Sufficient To Require The Prosecutors To Explain Their Reasons

Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial or other cognizable group. (*People v. Box* (2000) 23 Cal.4th 1153, 1187; *Wheeler, supra,* 22 Cal.3d at 276-277 [using "peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to a representative cross-section of the community under article I, section 16, of the California Constitution"]; *Batson* v. Kentucky, *supra*, 476 U.S. at 89, 96-97 [the State's purposeful or deliberate exclusion of individuals from participation as jurors on account of race violates the Equal Protection Clause of the Fourteenth Amendment]; *Powers v. Ohio* (1991) 499

U.S. 400, 409 ["racial discrimination in the jury selection process cannot be tolerated"].)

African-Americans of any sex, as well as black women, are a cognizable group under *Wheeler* and *Batson.* (*Ibid.; People v. Cleveland* (2004) 32 Cal.4th 704, 734; *People v. Clair* (1992) 2 Cal.4th 629, 652, *People v. Motton* (1985) 39 Cal.3d 596, 605-606.) Here, because the prosecutor excused all four African-Americans, the fact they were also all female would not seem to alter the analysis. 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; *Williams v. Runnels*, *supra,* 432 F.3d at 1107.)

"Although *Wheeler* motions may be made seriatim, each *Wheeler* motion is itself separate and discrete and is resolved definitively and independently of each other." (*People v. Irvin* (1996) 46 Cal.App.4th 1340, 1351.) In appellant's case, he made two such motions.

Batson sets forth a three-step process to determine whether a peremptory challenge is race-based in violation of the Constitution. (*Batson, supra,* 476 U.S. at 96-97.) First, the defendant must make a prima facie showing that the prosecution has exercised a peremptory challenge on the basis of race. (That is, the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has excluded venire members from the petit jury on account of their race.) (*Id.* at 96.) If a defendant makes this showing, the burden then shifts to the prosecution to provide a race-neutral explanation for its challenge. (*Id.* at 97.) The trial court then has the duty to determine whether the defendant has established purposeful racial discrimination by the prosecution. (*Id.* at 98; *Snyder v. Louisiana, supra,* 552 U.S. at 476-477.) "The burden for making a prima facie case is not an onerous one." (*Boyd v.*

Newland (9th Cir. 2006) 467 F.3d 1139, 1151.) In *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 920, the court explained:

> At the prima facie stage of a *Batson* challenge, the burden of proof required of the defendant is small, especially because proceeding to the second step of the *Batson* test puts only a slight burden on the government. This is because the government never bears the ultimate burden of persuading the district court that it did not act with a discriminatory purpose; that burden persists with the defendant. *Johnson*, 545 U.S. at 170-71. Rather, an easily met burden of proof momentarily shifts, at step two, to the government: to meet its burden, the government need only disclose its (nondiscriminatory) purpose for striking the potential juror. See *id.* at 171 (stating that the government satisfies its burden of proof even if it presents "only a frivolous or utterly nonsensical justification for its strike"). The ultimate burden then returns to the defendant at step three, and the defendant must persuade the district court that the government's (nondiscriminatory) reason is pre-textual. *Id.* A single inference of discrimination based on "all [the] relevant circumstances" and the "totality of relevant facts" is sufficient to move the *Batson* inquiry to step two. *See, e.g., Batson*, 476 U.S. at 94, 96.

In appellant's case, the trial court reached only the first step, finding that although the issue was close, appellant had not shown a *strong likelihood* of discrimination, the now discredited standard for determining whether the defendant had met his burden of showing a prima case of discrimination. (30-RT 9042-9050.)

Applying a de novo review when the trial court may have applied the wrong standard, this Court in *People v. Bell* (2007) 40 Cal.4th 582, held that the defendant had not established a prima facie case of discrimination, even assuming the trial court applied the wrong standard:

> Where it is unclear whether the trial court applied the correct standard, we review the record independently to "apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror"

on a prohibited discriminatory basis. (*People v. Bell, supra,* 40 Cal.4th at 597; *People v. Kelly* (2007) 42 Cal.4th 763, 779.)[32]

In *Bell,* this Court held that the defendant had not established a prima facie case of discrimination:

> It was defendant's burden to make a prima facie case. His attempt to do so fell short because he presented no factual circumstances other than the numbers of peremptory challenges used against each group -- which in this case were too small to raise, by themselves, any inference of discrimination -- and a record of voir dire that appellate counsel himself characterized as "unremarkable." (*People v. Bell, supra,* 40 Cal.4th at 600.)

The *Bell* Court explained the relevant facts as follows:

> While the prosecutor did excuse two out of three members of this group, the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. "[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion." (*People v. Harvey* (1984) 163 Cal.App.3d 90, 111.) (*People v. Bell, supra,* 40 Cal.4th at 597-598 [footnotes omitted].)

In contrast, the prosecutor in appellant's case excused from the jury first all three African-American women and then a fourth. (30-RT 9016-9019, 9026, 9035.) Moreover, appellant argued to the court that there were no "discernable differences" among the excused black juror and the accepted white jurors, and

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[32] The de novo standard of review has been adopted by several other courts in reviewing for a prima facie case ruling under *Batson.* (*See, e.g., See Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 [de novo review proper when the state court has applied the wrong standard by requiring defendant to "show a strong likelihood" of bias]; *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 484; *United States v. Hartsfield* (10th Cir. 1992) 976 F.2d 1349, 1355-56; *State v. Sledd* (Kan. 1992) 825 P.2d 114, 119, 250 Kan. 15, 21; *State v. Butler* (Tenn. Crim. App. 1990) 795 S.W.2d 680, 687; *State v. Pharris* (Utah Ct. App. 1993) 846 P.2d 454, 459; *Valdez v. People* (Colo. 1998) 966 P.2d 587, 591 [question of whether the defendant has established a prima facie case under *Batson* is a matter of law, and appellate court applies a de novo standard of review to a trial court's prima facie determination].)

the prosecutor refused to rebut appellant's argument. (30-RT 9036-9038, 9046-9048.)

The facts that are relevant to the step one determination include the removal of most or all of an identifiable group from the venire, a disproportionate number of strikes against the group, the fact that the stricken jurors shared only their membership in the group but were otherwise as heterogeneous as the community as a whole, and the failure to engage group members in more than desultory voir dire. (*Wheeler, supra,* 22 Cal.3d at 280-281 & fn. 27; *Batson, supra,* 476 U.S. at 96-97.)

An analysis both of the disproportionate number of blacks struck by prosecutor, coupled with an examination of the backgrounds of the jurors whom he struck, demonstrated beyond cavil that the defense established a prima facie case of racial discrimination. The jurors who were impermissibly challenged by the prosecutor lived in economic circumstances that were as diverse as a jury venire in the Sacramento area can produce, and had varying lifestyles, personal experiences, and employment histories and situations. (See section B. *infra*.) They were exactly the type of "heterogeneous" prospective jurors that this Court referred to *Wheeler*. (*People v. Wheeler, supra*, 22 Cal.3d at 281.)

The *Bell* Court explained another relevant fact as follows:

> Nor did the prosecutor use "a disproportionate number of his peremptories against the group" (*Wheeler, supra*, 22 Cal.3d at p. 280); only two of the prosecutor's 16 peremptory challenges were exercised against African-American women. (*People v. Bell, supra,* 40 Cal.4th at 598 [footnote omitted].)

Most significantly, in *Bell,* the prosecutor did not exercise peremptory challenges against most or all members of African-American men; three of them served on the jury. (*People v. Bell, supra,* 40 Cal.4th at 599.) In contrast, no African-Americans served on appellant's jury.

When appellant first complained under *Wheeler/Batson*, the prosecution had used 60% of their strikes to excuse three black woman and two white men, and had used 50% of their strikes (four of their eight challenges) to excuse from the jury all four African-American women at the time appellant made his second *Wheeler/Batson* motion. (30-RT 9016-9026, 9035, 9042.)

Clearly, these strikes constitute "a disproportionate number." (See *Snyder v. Louisiana, supra,* 552 U.S. at 475-476 [prosecution had 12 peremptory challenges and used five of those to eliminate all of the African-American prospective jurors from the panel].) *In Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1087-1089, after the prosecutor had exercised five of six peremptory challenges against African Americans, defense counsel objected, citing *Wheeler*. The trial judge reviewed the five strikes and found no prima facie case. Defense counsel argued it was statistically improbable that none of the five strikes was based on race and that the numbers gave rise to an "inference" of discrimination. (*Id.* at 1089.) The appellate court found that Paulino's statistical evidence raised an inference of discrimination, observing that "a defendant can make a prima facie showing based on statistical disparities alone." (*Id.* at 1091, citing *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077-1080 [finding an inference of bias where four of seven Hispanics and two African-Americans were excused by the prosecutor]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812 [there was a prima facie showing of discrimination where the prosecutor exercised peremptory challenges to exclude five out of a possible nine African-Americans]; *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107, 1105-1110 [the court found that the prosecutor's use of its strikes to eliminate three of the four African-American potential jurors presented a "statistical disparity" sufficient to make a prima facie showing]; *People v. Crittenden* (1994) 9 Cal.4th 83, 119 [the excusal

of all members of a cognizable group may give rise to an inference of impropriety but is not dispositive of whether defendant has shown purposeful discrimination].)

In *People v. Lancaster* (2007) 41 Cal.4th 50, 73-77, this court rejected a claim that the prosecutor had peremptorily challenged three female African-American prospective jurors for discriminatory reasons, in part because three of the four African-American women who remained on the panel at the time of his *Wheeler* motion ultimately served on the jury. Thus, this court distinguished *Johnson*, "where a 'suspicious' appearance was created by the prosecutor's removal of all prospective jurors in a cognizable group." (*Id.* at 76, citing *Johnson, supra*, 545 U.S. at 173 and *People v. Johnson, supra*, 30 Cal.4th at 1326.) Moreover, in *Lancaster*, "the views or family experiences disclosed by the challenged women were more than sufficient to overcome any inference of improper discrimination." (*People v. Lancaster*, *supra*, 41 Cal.4th at 76-78.)

The *Bell* Court explained another relevant fact as follows:

> Defendant does not contend Gwendolyn J. and Lisa J.-S. shared only the characteristic of being African-American women and were otherwise "as heterogeneous as the community as a whole." (*People v. Bell, supra,* 40 Cal.4th at 598, citing *Wheeler*, at p. 280.)

In contrast, appellant does contend and did contend that the excused African-American women shared only the characteristic of being African-American women and were otherwise similar to the non-challenged sitting jurors, as explained above. (See section B. *infra*.; 30-RT 9036-9038, 9046-9048.)

The *Bell* Court explained another relevant fact as follows:

> Nor does he assert the prosecutor engaged these prospective jurors in particularly "desultory"questioning on voir dire. (*People v. Bell, supra,* 40 Cal.4th at 598, citing *Wheeler*, at p. 281.)

In contrast, appellant does contend that the prosecutor engaged the African-American women in particularly "desultory" questioning on voir dire,

which was further evidence of invidious discrimination. "A prosecutor's failure to engage . . . prospective jurors 'in more than desultory voir dire, or indeed to ask them any questions at all,' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." (*People v. Turner* (1986) 42 Cal.3d 711, 727; see *United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 987, 905 ["the prosecutor had very little hard information to base this decision on. Although the prosecutor has no obligation to question all potential jurors, his failure to do so [before] removing a juror of a cognizable group . . . may contribute to a suspicion that this juror was removed on the basis of race."].)

The final composition of the jury -- whether the final jury included minorities -- is not determinative. What matters is whether the prosecutor struck even one prospective juror based on impermissible group bias. (*People v. Silva,* (2001) 25 Cal.4th 345; see *Snyder v. Louisiana, supra,* 552 U.S. at 478 [having found *Batson* error with respect to one juror, the Court did not consider the other juror].) Here, the record indicates that there were no African-Americans and only one minority (a woman with Native American relatives on her father's side of the family) on appellant's jury, which supports an inference that the prosecutor excused at least one of the African-American women as a result of impermissible group bias. (See 26-RT 7853-7854.) Moreover, the record is fatally silent as to the prosecutor's reasons in striking them, because the prosecutor refused to give reasons. (30-RT 9046-9048.)

Step one entails a shift in the burden of production effectuated by a reasonable inference of the discriminatory use of a peremptory challenge. The evidence of discrimination is difficult to ferret out and will seldom involve direct evidence of clear discriminatory intent. (*See O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 574-575 [in employment context,

elaborate structure of burden shifting needed to ferret out employers' true motives].) The purpose of this series of burden-shifting mechanisms is to facilitate the fact-finder's inquiry "into the elusive factual question of intentional discrimination." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255, fn.8.)

These principles warrant a prima facie burden that is not onerous in order to ensure a full record and accurate determination on the "elusive" question of discrimination. Acknowledging that the moving party will usually be without any direct evidence of discrimination at the prima facie stage, the Supreme Court has repeatedly emphasized that a prima facie burden is low, describing it as "minimal," and "not onerous." (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 506 [in section VII context petitioner must first make only a "minimal" showing of intentional discrimination]; *Burdine*, 450 U.S. at 253 [discussing burden of establishing a prima facie case of disparate treatment].) Because the step one decision precedes the prosecution's duty to come forward with a neutral explanation for the challenge, it must be based on the historical facts which occur at trial, not on the credibility or perceived good faith of the prosecution, which come into play *after* the prosecution has tendered a race-neutral reason for a strike. (*Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 690 [en banc]; *Purkett v. Elem* (1995) 514 U.S. 765, 768-769.)

Indeed, at step one, the prosecution may remain silent and let the facts speak for themselves, as the prosecutor did in appellant's case. (30-RT 9047; *Batson, supra,* 476 U.S. at 96-97.) Thus, the step one burden of production "was intended to significantly reduce" the proof needed to raise a claim of discriminatory use of peremptory challenges, and is not the type of credibility and observation-based determination which should be accorded deference, in

contrast to the trial court's step three ruling. (*See Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1197.)

Where group discrimination is a motivating factor for a governmental decision -- even if it is not the only motivation -- the Constitution has been violated. (*Miller-El II, supra*, 545 U.S. at 265 ["The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny"]; *People v. Alvarez* (1996) 14 Cal.3d 155, 197.)

Arlington Heights v. Metropolitan Housing Development (1977) 429 U.S. 252, 264, could not have been clearer on motivation:

> "[Establishing an equal protection violation] does not require [proof] that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a . . . decision [was] motivated by a single concern or even that a particular purpose was the 'dominant' or 'primary' one. . . . When there is proof that a discriminatory purpose has been a motivating factor in the [governmental] decision, [that is enough]." (*Id.* at 264.)

The Supreme Court's equal protection cases should have particular applicability under the *Batson* context, which was an equal protection case. (See *Batson v. Kentucky*, *supra,* 476 U.S. 79.) In applying Title VII of the Civil Rights Act of 1964 (which bars discrimination in employment), the Supreme Court has also made clear where unlawful discrimination is a motivating factor in an employment decision, that decision is unlawful. (See, e.g., *Desert Palace v. Costa* (2003) 539 U.S. 90, 98-101; *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 258.) Thus, a prosecutor cannot legitimately strike a juror in California because of her race or gender even if the prosecutor has other reasons as well.

Appellant's case is so strikingly similar to *Johnson* that there can be no question that the trial court erred in not requiring the prosecutors to explain their

reasons for excusing all the African-American jurors. The trial court was troubled by the peremptory challenges and admitted it was "very close" to finding a *strong likelihood* of discrimination, and warned the prosecutor to be careful. (30-RT 9050.) Obviously, the court's decision was affected by the erroneous *strong likelihood* standard in *Howard* that the prosecutor kept arguing was the correct standard. (30-RT 9042-9050.)

The *Johnson* Court explained why even the "more likely than not" standard in California, never mind the more heightened "strong likelihood" standard urged by the prosecutor, was "at odds with the prima facie inquiry mandated by *Batson*."

> Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson v. California, supra,* 545 U.S. at 170.)
>
> The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U.S., at 97-98, and n. 20. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. See *Paulino v. Castro*, 371 F.3d 1083, 1090 (C.A.9 2004) ("[I]t does not matter that the prosecutor might have had good reasons ... [w]hat matters is the real reason they were stricken" (emphasis deleted)); *Holloway v. Horn*, 355 F.3d 707, 725 (C.A.3 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory strike). The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages "prompt rulings on objections to peremptory

> challenges without substantial disruption of the jury selection process." *Hernandez v. New York*, 500 U.S. 352, 358- 359 (1991) (opinion of Kennedy, J.) (*Johnson v. California, supra,* 545 U.S. at 172-173.)
>
> The disagreements among the state-court judges who reviewed the record in this case illustrate the imprecision of relying on judicial speculation to resolve plausible claims of discrimination. In this case the inference of discrimination was sufficient to invoke a comment by the trial judge "that 'we are very close' . . . . The facts of this case well illustrate that California's "more likely than not" standard is at odds with the prima facie inquiry mandated by *Batson.*" (*Johnson v. California, supra,* 545 U.S. at 173.)

Here, the trail court erred in denying either or both of appellant's *Wheeler/Batson* motions.

This Court has held that *Johnson v. California, supra,* 545 U.S. at 173, which precludes speculation about the reasons the prosecutor might have offered, applies only after the defendant has made a prima facie showing. (*People v. Cornwell* (2005) 37 Cal.4th 50, 73-74.) Without waiving any objection to this Court speculating about what reasons the prosecution might have had to excuse the four female, African-American jurors, appellant will address the issue, because in recent cases, this Court has affirmed trial court's rulings at the first step of *Batson*, by speculating about reasons the prosecutor might have had. (*People v. Cornwell* (2005) 37 Cal.4th 50, 73-74 [the record was "devoid of any suggestion" that the basis for the challenge to Juror T. was even "close" or "suspicious"].)

In *People v. Panah* (2005) 35 Cal.4th 395, 441, this Court affirmed the trial court's finding of no prima facie showing by finding that the prosecutor could have struck the jurors for various nondiscriminatory reasons. In *People v. Griffin* (2004) 33 Cal.4th 536, 555, this Court looked to the questionnaires and the voir dire to determine whether there were "grounds upon which the prosecutor properly might have exercised the peremptory challenges." Similarly, in *People*

v. Gray (2005) 37 Cal.4th 168, 191-192, this Court affirmed the trial court's finding of no prima facie showing by finding that the prosecutor could have struck the jurors for various nondiscriminatory reasons.

Appellant believes that this is precisely the kind of speculation about what other explanations the prosecutor might have offered that *Johnson v. California, supra,* 545 U.S. at 172-173 and *Miller-El, II, supra,* 545 U.S. at 247-248, 252, disapproved. Appellant believes that the Ninth Circuit in *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1105-1110, has the better of the argument. Noting the factual similarities to *Johnson*, the court found that "the trial judge's actions limit the scope of appellate review," i.e., by not requiring the prosecutor to offer his explanations and then conducting the entire *Batson* analysis. "*Speculation about what reasons the prosecution might have had is prohibited.*" (*Williams v. Runnels*, *supra,* 432 F.3d at 1106-1108.)

The Ninth Circuit explained:

> We cannot determine the reasonableness of the prosecutor's challenges, but can only review the record to determine whether "other relevant circumstances" eroded the premises of Williams' allegations of discrimination based on statistical disparity. (*Williams v. Runnels*, *supra,* 432 F.3d at 1108.)
>
> [T]he question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges. *Johnson*, 125 S. Ct. at 2418; see also *Miller-El*, 125 S. Ct. at 2332 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.") (*Williams v. Runnels*, *supra,* 432 F.3d at 1109.)
>
> Second, as made clear by *Johnson*, Williams, having presented a statistical disparity based on the information then known to him, cannot be charged, prior to the prosecutor's explanation of his challenges, with developing a record that might refute the prosecutor's possible explanations. Instead, it appears that if there are other relevant circumstances that might dispel the inference, it was the state's responsibility to create a record that dispels the inference. (*Williams v. Runnels*, *supra,* 432 F.3d at 1110.)

Thus, the Ninth Circuit granted habeas relief, because the lower courts had:

> failed to appreciate that (1) Williams' showing of statistical disparity was only required to raise an inference of purposeful discrimination, and (2) refutation of the inference requires more than a determination that the record could have supported race-neutral reasons for the prosecutor's use of his peremptory challenges on prospective African-American jurors. (*Williams v. Runnels*, *supra,* 432 F.3d at 1110.)

In *People v. Bell, supra,* 40 Cal.4th at 600-601, this court refused to use comparative juror analysis in a "first-stage" *Wheeler/Batson* case, because "where, as here, no reasons for the prosecutor's challenges were accepted or posited by either the trial court or this court, there is no fit subject for comparison. Comparative juror analysis would be formless and unbounded. " (See also *People v. Bonilla* (2007) 41 Cal.4th 313, 350 [*Miller-El v. Dretke* does not require comparative juror analysis in a "first-stage" *Wheeler-Batson* case].)[33]

In appellant's case, however, comparative juror analysis would not be "formless and unbounded," because appellant did offer some comparisons among the excused black jurors and the seated jurors; appellant asked for more time to do further comparison; and the prosecutor urged the court to reject a prima facie finding because of appellant's alleged failure to offer more comparisons. (30-RT 9037, 9036-9038, 9046-9050.) Thus, appellant believes that this Court should use comparative juror analysis, particularly if it speculates about what reasons the prosecutors might have had to excuse the black jurors.[34]

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[33] Since then, this court has used comparative juror analysis in a "third-stage" *Wheeler/Batson* case. (*People v. Salcido* (2008) 44 Cal.4th 93, 141, relying on *Snyder v. Louisiana*, *supra,* 128 S.Ct. at 1211, fn. 2.)

[34] The United States Supreme Court finds a comparative analysis useful. (*Miller-El v. Cockrell* (2003) 537 U.S. 322 , 342-343, 154 L.Ed.2d 931, 123 S.Ct. 1029; *Miller-El v. Dretke* (2005) 545 U.S. 23), as do all twelve federal circuits. (See, e.g. *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 653; *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 282; *Jones v. Ryan* (3d Cir. 1993) 987 F.2d 960, 973; *Bell v. Ozmint* (4th Cir. 2003) 332 F.3d 229, 241; *U.S. v. Smith* (7th Cir 2003) 324 F.3d 922, 927; *United States v. Sowa* (7th Cir. 1994) 34 F.3d 447 (cert. den. 513

The purpose of a prima facie case under *Batson* "'is to help courts and parties answer, not unnecessarily evade, the ultimate question of discrimination, vel non.'" (*Jones v. Plaster* (4th Cir. 1995) 57 F.3d 417, 421.) Additionally, prohibiting appellant on appeal from rebutting speculative reasons by pointing to evidence in the record that similar white jurors had not been challenged (*People v. Johnson* (2003) 30 Cal.4th 1302, 1318) presents a double standard, and offends the Fifth Amendment's due process clause, because the bar to new arguments on appeal would not thereby apply to the prosecution. Under current California procedure, (a) the state is regularly allowed, for the first time on appeal, to advance possible reasons for challenges (which were not presented at trial), but (b) the defense is not allowed to rebut those speculations, when it hears about them, years later, for the first time on appeal. This double standard allowing one side, but not the other, to raise new arguments on appeal, and not allowing the other side to respond, offends "the old adage about sauce and geese, which need not be given a citation." (*Midstate Co. v. Penna. R. Co.* (1943) 320 U.S. 356, 367.)

This Court's refusal to apply even a limited degree of scrutiny via comparative juror analysis to speculative reasons advanced by the prosecutor or

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U.S. 1117); *Devose v. Norris* (8th Cir. 1995) 53 F.3d 201, 204; *Doss v. Frontenac* (8th Cir. 1994) 14 F.3d 1313, 1316-1317; *Kesser v. Cambra* (9th Cir. 2004) 392 F.3d 327, 343, fn. 13; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251; *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424 [approving of comparison juror analysis for the first time on appeal].

Similarly, some state courts also use comparative analysis; see, e.g. *Hall v. State* (Ala. 1999) 816 So.2d 80, 86; *Devose v. Norris* (Ark. 1995) 53 F.3d 201, 204; *State v. Arteaga* (Kan. 1995) 896 P.2d 1035, 1042; *Aguilar v. State* (Miss. App. 2002) 847 So.2d 871; *State v. Guzman* (N.M. 1994) 889 P.2d 225, 229; *People v. Wint* (N.Y. 1997) 655 N.Y.S.2d 469, 471; *Com. v. Stern* (Pa. 1990) 573 A.2d 1132, 1135; *Mayr v. Lott* (Tex. 1997) 943 S.W.2d 553, 557; *State v. Lamon* (Wis. 2003) 664 N.W.2d 607. Appellant respectfully requests that this Court reconsider its reluctance to use a tool found helpful by so many courts.

on appeal for the first time violates due process and is contrary to *Miller-El v. Dretke* (2005) 545 U.S. 23 [*Miller-El II*] which uses comparative juror analysis on appeal. *Miller-El* retroactively applies to the instant case. (*Griffith v. Kentucky* (1987) 479 U.S. 314.) Second, under federal law, comparative juror analysis may be used for the first time on appeal. (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969, fn. 5.) Third, any claim that comparative juror analysis could have been more developed at appellant's trial is inaccurate. For many years, California barred comparative juror analysis from being used at any stage, including at trial. Thus, any attempt to use it more vigorously at trial here would have been futile. Moreover, appellant asked the court for more time to do a more complete comparative juror analysis, but the court ruled against appellant – at the prosecutor's urging -- without permitting appellant more time to do such an analysis. (30-RT 9037, 9046-9050.)

In *People v. Arias, supra*, 13 Cal.4th at 136, fn. 16, for example, the court held:

> Just as an appellate court will not compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. "[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparison mid-trial." (*People v. Johnson* [(1989)] 47 Cal.3d 1194, 1220.) Moreover, as we have indicated, such an analysis is largely beside the point, . . .

Whether or not this Court does a comparative juror analysis, the presumption of discriminatory intent was not dispelled on this record, and the conviction must be reversed because appellant was denied his rights to equal protection, a jury chosen from a fair and representative cross-section of society, a reliable determination of penalty, and due process. (United States Constitution Amends. V, VI, VIII, XIV.)

Fairly considered in its entirety, the record of jury selection establishes the existence of a prima facie case of invidious discrimination on the part of prosecutor. While the trial court arrived at a conclusion to the contrary, it did so only because it used the overruled "strong likelihood" standard of review, and thus reached a "clearly erroneous" conclusion. (*Hernandez v. New York, supra*, 500 U.S. at 369; *Montiel v. City of Los Angeles* (9th Cir. 1993) 2 F.3d 335, 339.)

In appellant's case, appellant asserted that the prosecutor had excused all the black jurors and that there was little difference between the excluded African-American women and the white jurors remaining on the jury. (30-RT 9037, 9046-9050.) To require more would be to legitimize racially discriminatory strikes without even requiring the prosecutor to respond. Such a burden would fly in the face of *Johnson*, overruling this Court's overly-demanding standard requiring the defense to make a prima facie case. No longer is appellant's burden a "strong likelihood," as the prosecutor repeatedly urged, or even, simple "likelihood;" his burden is simply to raise an inference of discriminatory intent – a burden he met.[35]

D. The Prosecutors' Discriminatory Exclusion Of All Four African-American Female Jurors Is Reversible Per Se, Because A Remand To Permit The Prosecutor To Explain Would Be Futile In Light Of The Judge's Death And The Delay Of More Than A Decade

The trial court's ruling that appellant had not made a prima facie case that the challenges against the first three or four African-American jurors were exercised for discriminatory reasons was erroneous, and reversal is required.

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[35] As noted, the *Johnson* court disapproved of this Court's more lenient standard of persuading the judge that "the challenge was more likely than not the product of purposeful discrimination," and reiterated that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California, supra,* 545 U.S. at 170.)

When seen in the context of the entire record, the evidence of discriminatory intent presented here was stronger than in many cases where a prima facie case was found. As such, the trial court erred by not requiring the prosecutor to show genuine, nondiscriminatory, reasons for the challenges. (*See People v. Fuentes* (1991) 54 Cal.3d 707, 714; *Wheeler, supra*, 22 Cal.3d at 280-281.)

The *Wheeler/Batson* error committed by the trial court compels reversal of the charges and the judgment of death. (*People v. Wheeler*, *supra*, 22 Cal.3d at 283 [error "prejudicial per se"]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 6; *People v. Hall* (1983) 35 Cal.3d 161, 170-171; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 ["reversible per se"]; *People v. Fuentes, supra,* 54 Cal.3d at 721 [reversal "compelled"].) Such error was structural and requires per se reversal. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282.)

This Court, and the Ninth Circuit, however, have held that a remand for a further hearing may be the appropriate remedy for a *Batson* error with respect to the first-stage prima facie showing. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1099-1104; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1092, citing *Batson*, *supra*, 476 U.S. at 100; see also *United States Postal Service Bd. of Governors v. Aikens* (1983) 460 U.S. 711, 717 [remanding for a determination of discrimination].)

Appellant, however, believes that in light of the great length of time between the jury selection and a remand -- much longer than any other case -- and because of the death of the trial judge[36] -- and because the record is clear -- it would be futile to remand, because the prosecutors cannot carry their burden of proof and there is no "realistic possibility" that their reasons for exercising these

[36] This Court can take judicial notice of the fact that the trial judge passed away in 2005 and the case was reassigned to Judge Maryanne G. Gilliard for purposes of correcting and completing the record.

four strikes "could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." (*Snyder v. Louisiana, supra,* 552 U.S. at 485-486.)

In *Snyder,* the United States Supreme Court simply reversed, without a remand, for third-stage *Batson* error, given that there was so nothing "in the record showing that the trial judge credited the claim that Mr. Brooks was nervous" and thus there was no "realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." (*Ibid.*) Similarly appellant's trial judge will not have a chance to determine the credibility of the prosecutor's non-record excuses, such as nervousness, and thus the record should control. In *People v. Johnson* (2006) 38 Cal.4th 1096, 1103, for example this Court held:

> In this case, for example, it is certainly possible that due to the passage of time or other reasons, the trial court will find that it cannot reliably determine whether the prosecutor exercised his peremptory challenges in a permissible manner. If that occurs, the court should order a new trial. (See *People v. McGee* (2002) 104 Cal.App.4th 559, 573-574.)

Here, the trial judge has died so it will be impossible for him – or any other judge -- to make a reliable determination about whether the prosecutor exercised these four peremptory challenges in a nondiscriminatory manner – at least by relying on facts outside the record.

It was a perversion of the constitutional right to a representative jury -- a true cross section of the community acting as the conscience of the community -- to permit the prosecutor to exclude all four female African-American jurors – at least one of whom was excused based on her race. As a consequence of the error, the death judgment must be set aside, and the case remanded for retrial, because "the exclusion of even a single juror based on race is unconstitutional

and requires reversal." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1254 [Mosk, J., concurring]; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

X. THE COURT VIOLATED APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY DENYING APPELLANT'S CHALLENGE TO EXCUSE A JUROR FOR CAUSE WHOM SERVED ON THE JURY

A. The Relevant Facts

The court denied appellant his due process rights in refusing to accept appellant's challenge for cause of Juror # 88 (10), after questioning her himself. (28-RT 8446-8451.) Juror # 88 sat on appellant's jury. (54-CT 16077.)

Juror # 88 was a 67-year-old divorced, retired woman with three adult children. (21-CT 6036-39.) She had worked as a special education teacher with children in the fifth and sixth grades at North Sacramento School District. (28-RT 8430.) She described herself as a somewhat conservative Republican who attended religious services weekly. (21-CT 6046-47.) Her son was still in prison after six years, but due out in May. (28-RT 8431.) She believed that sometimes she thought people were imprisoned for longer than necessary and sometimes they were not in long enough. (28-RT 8433.) She thought it was "really good" that her son was "incarcerated when he was," even though "it's a terrible thing for a mother to say." (28-RT 8433.) He had gotten his college degree and a lot of help since being sent to prison. (28-RT 8433.) Her son-in-law had a problem with alcohol and drugs, but no longer. (28-RT 8433-8434.) She admitted it was "going to be very difficult" for her to see the pictures, but she "could listen to the testimony and everything and be fair about it." (28-RT 8436-8437.) She said that based on the crimes appellant had been convicted of she was "leaning towards the death penalty." "But I would have to listen to everything first before I could definitely say for sure." (28-RT 8442, 8446, 8450.) She was in favor of the

death penalty, particularly for the killing of children and the elderly, and believed it was imposed too seldom. (21-CT 6071-74.) *She agreed with the proposition that a defendant convicted of sexual assault and murder of a child should receive the death penalty regardless of any other facts.* (21-CT 6075.) *In voir dire, she reiterated that "because a child was involved," it would be difficult for her honestly to consider life without possibility of parole.* (28-RT 8339-8440.) *If appellant did not prove to her that LWOPP was an appropriate sentence, she would "have to" vote for death.* (28-RT 8440.) The age of the victim and the manner in which the victim was killed was very important in deciding to impose death, but none of the other factors. (21-CT 6076.)

After these disqualifying answers that clearly demonstrated an inability to perform her duties as a juror, the court attempted to rehabilitate Juror # 88. (28-RT 8446-8449.) The juror assured the court she "could listen," to circumstances in mitigation and aggravation in determining the penalty, despite leaning towards the death penalty based solely on the convictions appellant had suffered, and then affirmed she said she would "really listen." (28-RT 8446-8447.) The court chastised Juror # 88 for not answering his questions directly, after which she stated she could honestly say she would be fair, and would want 12 people like her on her death penalty jury. (28-RT 8448-8449.)

The court overruled appellant's challenge for cause to this juror, because she said she could consider other circumstances, despite her "leaning" towards the death penalty for a person convicted of appellant's crimes. (28-RT 8450.) The court thought it had been a mistake to tell the jurors of what appellant had been convicted. (28-RT 8450.) The trial court erred in not granting appellant's challenge to this juror.

B. The Relevant Law

A prospective juror may be excused for cause if that juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Morgan v. Illinois* (1992) 504 U.S. 719, 728.) It is undisputed that a "juror who will automatically vote for the death penalty in every case [or] will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do," is subject to being excused by a challenge for cause. (*Morgan v. Illinois, supra,* 504 U.S. at 728; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Obviously, Juror # 88's rabid pro-death penalty views would "prevent or substantially impair" their ability to be fair to appellant. Neither the court nor the prosecutor were able to rehabilitate the prospective juror, who stated in her juror questionnaire that she agreed with the proposition that a defendant convicted of sexual assault and murder of a child should receive the death penalty regardless of any other facts. (21-CT 6075.) In voir dire, she reiterated that "because a child was involved," it would be difficult for her honestly to consider life without possibility of parole. (28-RT 8339-8440.) If appellant did not prove to her that LWOPP was an appropriate sentence, she would "have to" vote for death. (28-RT 8440.) She also reaffirmed she was leaning towards the death penalty based on the crimes appellant had been convicted of, though she said she "would have to listen to everything first before I could definitely say for sure." (28-RT 8442, 8446, 8450.)

In *People v. Boyette* (2002) 29 Cal.4th 381, 416-418, this Court held that the court erred in denying the defendant's challenge for cause against a juror less biased than juror # 88. For the same reasons, the court erred in denying appellant's challenge for cause against juror # 88.

C. The Error Was Reversible Because The Juror Served On Appellant's Jury

The Supreme Court has held that a denial or impairment of the right to exercise peremptory challenges "is reversible error without a showing of prejudice." (*Swain v. Alabama* (1965) 380 U.S. 202, 219, overruled in part by *Batson v. Kentucky, supra,* 476 U.S. 79.) In *United States v. Annigoni* (9th Cir. 1996) 96 F.3d 1132 [en banc], the court held that the erroneous denial of a peremptory challenge was fundamental error requiring reversal.

The Supreme Court has held that a trial court's erroneous refusal to strike a juror for cause does not violate a defendant's Fifth Amendment right to due process by impairing his right to the full complement of peremptory challenges to which state law entitled him, because a defendant is not "forced" to use a challenge. (*United States v. Martinez-Salazar* (2000) 528 U.S. 304, 314-317.) Instead, the defendant may let the juror sit on the jury and pursue a Sixth Amendment challenge on appeal. (*Id.* at 315.) Here, appellant took this risky approach and left this biased juror on the jury, apparently in the hope and expectation that the courts would uphold his Sixth Amendment challenge on appeal.

In *People v. Yeoman* (2003) 31 Cal.4th 93, 114, and *People v. Hillhouse* (2002) 27 Cal.4th 469, 487, this Court reiterated that the loss of a peremptory challenge is reversible error only if the defendant exhausts all challenges and an incompetent juror is forced on him. This error should not be considered to be waived by counsel's failure to use all his peremptory challenges. It is illogical and unfair to equate the non-use of peremptory challenges with the absence of prejudice to a defendant resulting from the trial court's error in failing to grant a challenge for cause to excuse Juror # 88. Moreover, the Supreme Court has ruled that, in federal cases, the defendant may let the juror sit on the jury and

pursue a Sixth Amendment challenge on appeal. (*United States v. Martinez-Salazar, supra,* 528 U.S. at 315.)

Thus, counsel's failure to exhaust his peremptory challenges must not be used to insulate the trial court's bizarre ruling from this Court's review, because the right to an impartial adjudicator is essential to a fair trial. (*Gray v. Mississippi, supra*, 481 U.S. at 668.) The error was not harmless, as in *People v. Boyette, supra,* 29 Cal.4th at 419, because the entire jury selection process was so biased that it resulted in a "hanging" jury that was death-primed and not a cross-selection of the community.

Nothing Juror # 88 said during the court's attempted rehabilitation contradicted her previous statements: In her jury questionnaire she agreed with the proposition that a defendant convicted of sexual assault and murder of a child should receive the death penalty regardless of any other facts. (21-CT 6075.) In voir dire, she reiterated that "because a child was involved," it would be difficult for her *honestly* to consider life without possibility of parole. (28-RT 8339-8440.) If appellant did not prove to her that LWOPP was an appropriate sentence, she would "have to" vote for death. (28-RT 8440.)

The jury selection process used at appellant's trial resulted in a denial of his state and federal constitutional rights not only to an impartial jury, but one that is drawn from a representative cross-section of the community. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 528, 530.) In "the special context of capital sentencing" (*Lockhart v. McCree* (1986) 476 U.S. 162, 182), the court's refusal to permit appellant's peremptory challenge to Juror # 88, who sat on appellant's jury, skewed the sentencing process and rendered it unfair, unreliable, unrepresentative, and unconstitutional.

XI. THE FEDERAL AND STATE CONSTITUTIONS BAR THE RE-TRIAL OF THE PENALTY PHASE OF A CAPITAL CASE AFTER THE JURY IN THE FIRST PENALTY TRIAL WAS UNABLE TO REACH A UNANIMOUS VERDICT

A. The Relevant Facts

On June 17, 1998, the jury found appellant not guilty of both counts of kidnapping, forcible oral copulation, and the kidnapping special circumstance, but guilty of the other counts and special circumstances. (9-CT 2474-2475, 2526-2546.)

At the first penalty trial, the jury was unable to reach a unanimous verdict on the penalty for the murder of Michael. (9-CT 2679-2687.) The vote was two in favor of a life sentence and 10 in favor of the death penalty. The court declared a mistrial and the jury was discharged. (9-CT 2679-2687.)

B. Penalty Phase Retrials After A Hung Jury Are In Conflict With Evolving Standards Of Decency, Which Are Reflected In The Death Penalty Statutes Of 28 State And Federal Jurisdictions, And Such Retrials Are Barred By The Federal And State Constitutions

Appellant urges this Court to reverse his death sentence on the ground that the penalty phase retrial after the original jury was unable to reach a unanimous verdict violated appellant's federal and state constitutional rights to a fair jury trial, to a reliable penalty determination, to be free of cruel and unusual punishments, and to due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as the State Constitutional protections in Article I, sections 7, 15, 16 and 17 of the California Constitution.

Retrial of the penalty phase should have been barred pursuant to the Penal Code section 1385, which permits dismissal of an action "in furtherance of justice." Because this is a death penalty case, a technical insufficiency in the

form of the objection will be disregarded and the Court must examine the record to determine if a miscarriage of justice resulted. (*People v. Frank* (1985) 38 Cal.3d 711, 729, fn. 3; *People v. Bob* (1946) 29 Cal.2d 321, 325; Pen. Code § 1239, subd.(b).) Furthermore, this Court has allowed defendants to raise constitutional challenges to California's Death Penalty Statute without requiring that the constitutional challenge be raised first in the trial court. (See *People v. Holloway* (2004) 33 Cal.4th 96, 157; *People v. Snow* (2003) 30 Cal.4th 43,125-127; see also *People v. Mattson* (1990) 50 Cal.3d 826, 854; *Reed v. Ross* (1984) 468 U.S. 1, 16 [Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures].)

If the first penalty jury results in a hung jury, the Eighth Amendment requires that the defendant be sentenced to life without possibility of parole. A retrial of the penalty phase after the first jury is hung violates the Eighth Amendment's "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100-101.)

The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In the case of *Trop v. Dulles, supra*, 356 U.S. 86, 100-101, the United States Supreme Court stated that "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Following *Trop*, the United States Supreme Court has prohibited the use of the death penalty in several cases under the evolving standards of decency theory of the Eighth Amendment. (*Roper v. Simmons* (2005) 543 U.S. 551, 570-578 [individuals under the age of 18]; *Atkins v. Virginia* (2002) 536 U.S. 304, 321 [mentally retarded]; *Thompson v. Oklahoma* (1988)

487 U.S. 815 [15 year old minor]; *Ford v. Wainwright* (1986) 477 U.S. 399 [insane person]; *Enmund v. Florida* (1982) 458 U.S. 782 [accomplice in a robbery]; *Coker v. Georgia* (1977) 433 U.S. 584 [person convicted of rape].)

In the *Atkins* case, the Court stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins v. Virginia, supra*, 536 U.S. at 312, citing *Penry v. Lynaugh* (1989) 492 U.S. 302, 331.) In addition to reviewing the laws of the various states, the Court must also apply its "own judgment . . . on the question of the acceptability of the death penalty under the Eighth Amendment." (*Atkins v. Virginia, supra*, 536 U.S. at 312-313.)

In *Roper v. Simmons, supra*, 543 U.S. at 564-568, 570-578, the Court applied the *Atkins* case to the issue of executing juvenile offenders under the age of 18. The Court found a national consensus against the death penalty for juveniles and then applied the Court's own independent judgment to determine whether the death penalty is a disproportionate punishment for juveniles. (*Id.* at 564-569.) The Court stated: "A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment." (*Id.* at 567-568.)

In *Coker v. Georgia, supra*, 433 U.S. at 592, the Supreme Court held that the imposition of the death penalty for the rape of an adult woman is grossly disproportionate and excessive punishment and is forbidden by the Eighth Amendment as cruel and unusual punishment. The Court found that only three states provided the death penalty for rape. (*Id.* at 594.) The Court stated that "the current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." (*Id.* at 596.)

In *Enmund v. Florida, supra*, 458 U.S. 782, the Supreme Court held that it violated the Eighth and Fourteenth Amendments to impose the death penalty upon a defendant who participated in a robbery during which a murder was committed, where the defendant did not himself kill or intend the victim to be killed. The Court noted that out of thirty-six states, only eight states authorized the death penalty solely for participation in a robbery in which another robber takes a life. Twenty eight states rejected the death penalty in robbery murder cases where the defendant neither killed nor intended to kill the victim. (*Id.* at 789-793.) The Court concluded that although not unanimous, the great weight of the state legislative judgments against imposing the death penalty "weighs on the side of rejecting capital punishment for the crime at issue." (*Id.* at 793.)

In *Atkins v. Virginia, supra*, 536 U.S. 304, the issue was whether sentencing the mentally retarded to death violated the prohibition against cruel and unusual punishments under the Eighth Amendment. The Court found that eighteen states and the federal government prohibited imposition of the death penalty on the mentally retarded. (*Id.* at 314-315.) The Court stated that the number of states barring the death penalty for mentally retarded offenders had grown impressively and had consistently changed in the direction of prohibiting its use. This was seen as "powerful evidence that today our society views mentally retarded offenders as categorically less culpable." (*Id.* at 315-316.) Applying its own independent evaluation, the Court concluded that "death is not suitable punishment for a mentally retarded criminal." (*Id.* at 321.)

In California, the first death penalty statute enacted in order to comply with *Furman v. Georgia* (1972) 408 U.S. 238, barred any retrial of the penalty phase after the first jury could not reach a unanimous verdict. (*People v. Kimble* (1988) 44 Cal.3d 480, 511.) Former Penal Code section 190.4, subdivision (b) provided that "If the trier of fact is a jury and has been unable to reach a unanimous verdict

as to what the penalty shall be, the Court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole." (Stat. 1977, ch. 316 §12.)

Section 190.4, subdivision (b) was amended by ballot initiative in 1978 to permit retrials of the penalty phase after a hung jury. Section 190.4, subdivision (b) now provides: "If the trier of fact is a 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 empaneled to try the issue as to what the penalty shall be." After two hung juries, the Court has the discretion to either order a new jury or sentence the defendant to life without possibility of parole. (*Id.*)

California is part of a small minority of states that permit retrial of the penalty phase in a capital case after the first jury is unable to reach a unanimous verdict. In additional to California, nine other states permit retrials of the penalty phase after a hung jury.[37]

A majority of the states and two federal death penalty statutes do not permit a retrial of the penalty phase of a capital case if the jury is unable to reach a unanimous verdict.[38]

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37. Alabama, Ala. Code §13A-5-46(g) (1981); Arizona, Ariz. Crim. Code §13-703.01(J), (K) and (L) (2002). Connecticut, Conn.Gen.Stat.Ann. §53a-46a (2001); Delaware, 11 Del. Code § 4209(d)(1) and (2) (2003); Florida, Fla.Stat.Ann. §921.141(2) and (3) (1996); Indiana, Ind.Code § 35-50-2-9(f) (2002); Kentucky, Ky.Rev.Stat.Ann.§532.025(1)(b) (2001); Nevada, Nev.Rev.Stat. §175.556 (2003); Oregon, Or.Rev.Stat.Ann. §163.150(5)(b) (2001). In Montana, the judge decides the penalty after the jury finds at least one aggravating factor. Mont.Code.Ann.§46-18-305 (2003).

38. Federal Death Penalty Act of 1994, 18 U.S.C. §3594; Federal Anti-Drug Abuse and Death Penalty Act of 1988, 21 U.S.C. §848(l); Arkansas, Ark.Stat.Ann. §5-4-603(c) (1993); Colorado, Col.Rev.Stat. §18-1.3-1201(2)(b)(II)(d) (2003); Georgia, Ga.Code.Ann. §17-10-31.1(c) (Supp.1994); Idaho, Id.Code §19-2515(7)(c) (2003); Illinois, Ill.Ann.Stat.Ch. 720,§5/9-1(g) (2003); Kansas, Kan.Stat.Ann. §21-4624(e) (1994); Louisiana, La.Code Crim.Proc.Ann.Art. 905.8 (1997); Maryland,

This constitutes twenty seven states out of the thirty six states that have death penalty statutes. (See *Jones v. United States* (1999) 527 U.S. 373, 419 [Ginsburg, J., dissenting].) This is very close to the number of states that the United States Supreme Court found to be persuasive in *Enmund v. Florida, supra*, 458 U.S. 782, 789 [Twenty-eight states rejected the death penalty as punishment for participation in a robbery in which another robber takes a life]. In these twenty seven states and in federal death penalty cases, "the jury's inability to produce a unanimous penalty-phase verdict results in the defendant's being sentenced to life imprisonment or life imprisonment without parole." (Acker and Lanier, *Law, Discretion And The Capital Jury: Death Penalty Statutes And Proposals For Reform* (1996) 32 Crim. L. Bull. 134, 169.)

The Model Penal Code also prohibits retrial of the penalty phase if the jury is unable to reach a unanimous verdict on the penalty. It states: "If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose a sentence for a felony of the first degree [life]." (A.L.I., Model Penal Code §210.6(2).

Md.Ann.Code.Art.27, §413(k)(2) (1996); Mississippi, Miss.Code.Ann. §99-19-103 (2000);Missouri, Mo.Rev.Stat. §565.030(4) (2000); New Hampshire, N.H.Rev.Stat.Ann. §630:5 (IX) (1995); New Jersey, N.J.Stat.Ann. §2C:11-3(c)(3)(c) (Supp. 2004); New Mexico, N.M.Stat.Ann. §31-20A-3 (2004);New York, N.Y.Crim.Proc.Law §400.27(10) (2001); Nebraska, Neb.Rev.Stat. §29-2520 (4)(f) and (h) (2002); North Carolina, N.C.Gen.Stat. §15A-2000 (b) (2001); Ohio, Ohio.Rev.Code.Ann. §2929.03(D)(2) (1996); Oklahoma, Okla.Stat.Ann.Tit. 21 §701.11 (1987);Pennsylvania, Pa.Stat.Ann.Tit. 42 § 9711(c)(1)(v) (1998); South Carolina, S.C. Code.Ann. §16-3-20 (c) (2002); South Dakota, S.D. Codified LawsAnn. §23A-27A-4 (1979); Tennessee, Tenn.Code Ann. §39-13-204 (h)(2002); Texas, Tex.Crim.Proc.Code Ann.Art. 37.071 (2)(g) (2001); Utah, Utah Code Ann. §76-3-207 (5)(c) (2003); Virginia, Va. Code Ann. §19.2-264.4 (E) (2003); Washington, Wash.Rev.Code Ann. §10.95.080 (2)(1981); Wyoming, Wyo.Stat.Ann. §6-2-102 (d)(ii) (2001).

By permitting a retrial of a penalty phase after the jury is deadlocked on the penalty, California is in conflict with a clear majority of the states on this issue. Under the Eighth Amendment's "evolving standards of decency" approach, this Court should find that the Eighth Amendment bars the retrial of a penalty phase after the jury is deadlocked. The clearest objective evidence of contemporary values and evolving standards of decency is the legislation enacted by the various state legislatures. The overwhelming majority of the states with death penalty laws prohibit such retrials and this Court should adopt that view as an appropriate interpretation of the Eighth Amendment's applicability to the retrial issue.

A retrial of a penalty phase in a capital case is different from the retrial of an ordinary criminal case because the death penalty is "unique in both its severity and its finality." (*Monge v. California* (1998) 524 U.S. 721, 732; *Gregg v. Georgia* (1976) 428 U.S. 153, 188.) 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, 313; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427.) This requires a death penalty statute to narrow the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 256.)

When a jury at a penalty phase is unable to reach a unanimous verdict, it means that some of the jurors believe that the defendant's life is worth sparing. It also means that some of the jurors were not convinced that the evidence presented during the penalty trial was sufficiently aggravating to warrant a death sentence. To allow a retrial of the penalty phase after the first jury is hung, creates a risk that the death penalty may later be imposed in a wanton and

freakish manner. The United States Supreme Court has stated that "the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" violates the Eighth and Fourteenth Amendments to the federal constitution. (*Lewis v. Jeffers* (1990) 497 U.S. 764, 771; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465.)

A retrial of a penalty phase in a capital case also places a heavy burden on the defendant who must be subjected to a second trial for his life. In the context of the Double Jeopardy Clause, the Supreme Court has stated that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual of an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty." (*Green v. United States* (1957) 355 U.S. 184, 187-188.) As one Court noted, "repeated trials subject a defendant to serious hardship." (*Carsey v. United States* (D.C. Cir. 1967) 392 F.2d 810, 812.)

Moreover, in appellant's case, the prosecutor denigrated lingering doubt as impossible to find while retrying a penalty phase, because the second penalty jury had not heard the entire case the prosecutor presented to the first jury. (Arg. XIII, B.; 41-RT 12358-12372.) Thus, appellant was at a distinct disadvantage at his second penalty phase trial.

Recently the United States Supreme Court rejected the argument that the double jeopardy clause or the due process clause barred the State from retrying a penalty phase after the first jury was unable to reach a unanimous verdict. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101; see also *Richardson v. United States* (1984) 486 U.S. 317, 324-326 [neither the failure of the jury to reach a verdict nor a mistrial following a hung jury is an event that terminates the original jeopardy].) The *Sattazahn* case, however, did not address the Eighth

Amendment issue appellant now raises. The Eighth Amendment's evolving standards of decency require that the state be limited to one opportunity to present its case for death to a jury. If the original jury cannot reach a unanimous verdict of death, twenty seven states and the federal government have stated that the death penalty should not be imposed upon the defendant. The jury should be discharged and the defendant should be given a sentence of life imprisonment without parole.

To paraphrase the language in the Supreme Court's *Green* decision, repeated attempts to convince a jury to return a death verdict, enhances the possibility that even though the defendant's crime warrants a life sentence, he may be sentenced to death. (See, *Green v. United States, supra,* 355 U.S. at 188.) Therefore, appellant urges this Court to reverse his death sentence by finding that retrial of the penalty phase after a hung jury violates the Eighth and Fourteenth Amendments.

Appellant also argues that penalty phase retrials after a hung jury at the first penalty trial violate the California Constitution under its provisions ensuring the right to a fair jury trial, to a reliable penalty determination, to be free from cruel and unusual punishment, and to due process of law. (Cal. Const. Art. I, §§ 5, 7, 16 and 17.) The California Constitution may provide greater protections to a defendant in a capital case than those afforded by the Federal Constitution. (*People v. Ramos* (1984) 37 Cal.3d 136, 152; see also, *California v. Ramos* (1982) 463 U.S. 992, 997; *People v. Ramos* (1982) 30 Cal.3d 553.)

In *People v. Ramos, supra*, 37 Cal.3d 136, 153-155, the Court held that the Briggs instruction, informing the jury that a sentence of life without the possibility of parole may be commuted, violated Article I, Section 15 of the California Constitution which guarantees the right to due process of law. This occurred after the United States Supreme Court found no federal constitutional

violation in giving the instruction. (*California v. Ramos, supra*, 463 U.S. 992.) This Court stated that the term "due process" in the California Constitution "encompasses a broad range of safeguards," and includes the right to "a fundamentally fair decision-making process."[39] (*People v. Ramos, supra*, 37 Cal.3d at 153.)

Therefore, appellant asks the Court to find that penalty phase retrials after the original jury has failed to reach a unanimous verdict are unconstitutional under both the federal and state constitutions. When the original penalty phase jury becomes deadlocked on the penalty, a mistrial must be declared, the jury must be discharged, and the defendant must be sentenced to life imprisonment without possibility of parole. Penal Code section 190.4, subdivision (b) should be declared unconstitutional to the extent that it permits the retrial of a penalty phase after a hung jury. Since appellant received a death sentence as a result of a penalty phase retrial after a hung jury, appellant's death sentence should be reversed and the case should be remanded for re-sentencing to impose a sentence of life imprisonment without possibility of parole on Count 1.

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39. Article I, section 27 of the California Constitution provides in part that "the death penalty ... statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments ... nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution." In the *Ramos* case, this provision of the California Constitution was considered and was found to be no bar to the Court's authority to insure the fundamental fairness of the trial court proceedings at which the death penalty is being considered. (See *People v. Ramos, supra*, 37 Cal.3d 136, 161-162 [Lucas, J. dissenting, indicating that Article I, Section 27 was considered, but rejected by the majority opinion].) Article I, Section 27 only "validates the death penalty as a permissible type of punishment under the California Constitution." (*People v. Frierson* (1979) 25 Cal.3d 142, 186.)

XII. THE COURT'S DENIAL OF FUNDING TO DO MITROCONDRIAL DNA TESTING ON THE BLOOD ON APPELLANT'S SHIRT AND THE FINGERNAIL SCRAPINGS UNDER MICHAEL'S FINGERNAILS AND THE COURT'S REFUSAL TO PERMIT APPELLANT TO SHOW THAT MTDNA TESTING WAS ACCEPTABLE IN THE SCIENTIFIC COMMUNITY, AND THE COURT'S REFUSAL TO ALLOW COMMENT ON THIS LACK OF EVIDENCE VIOLATED APPELLANT'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FAIR PENALTY DETERMINATION

A. The Relevant Facts

On September 21, 1998, appellant filed a declaration of Mr. Greiner under seal regarding examination of physical evidence, and DNA testing, pursuant to *Prince v. Superior Court* (1992) 8 Cal.App.4th 1176, 1181 [the trial court erred by preventing the petitioner from conducting confidential, independent DNA tests of extracted semen, half of which had been allocated to it]. (10-CT 2860 [sealed].) Mr. Greiner requested a blood DNA survey on appellant's shirt. (10-CT 2861.) Appellant requested that Lisa Calandro do the survey. (10-CT 2862.) Appellant requested mtDNA testing on pubic hairs by Boyd Technology and Mr. Makelfresh. (10-CT 2862-63; Exhibits 34, 41; 17-2A, 17-2B, 17-3, 17-7, and 18).) Appellant also requested funding for Gary Harmor to do PCR-DNA testing on fingernail scrapings from Michael. (10-CT 2863-64.)

On October 5, 1998, in an in camera hearing, appellant complained to the trial court that because the funding court had denied funds for a DNA expert, the court should sustain his objection to evidence about Michael's blood on his shirt and fingernail scrapings. (22-RT 6711-6715.) Appellant said that the funding judge suggested that appellant file an in limine motion to exclude the evidence. (22-RT 6716.) Appellant explained that he wanted to do mtDNA testing on pubic

hair and fingernail scrapings and testing on fibers, but that he had been denied funds. (22-RT 6719.)

On December 1, 1998, appellant explained that the previous jurors told his counsel that the green fiber and pubic hair and the blood on appellant's shirt were important to them. (23-RT 7118-19; Exhibits 34, 41.)

On December 23, 1998, appellant requested funding for Gary Harmor to do PCR-DNA testing on fingernail scrapings, which the court has previously denied. Appellant asked the court to reconsider in light of *Caro v. Calderon* (9th Cir. 1998) 165 F.3d 1223 and *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073. (10-CT 2863-64; 43-RT 12780.) Appellant also requested testing of the blood found on appellant's shirt. (43-RT 12781-83.) Appellant also requested funding to do mtDNA testing on pubic hair: four on Michael's sweatshirt and one under his t-shirt. (43-RT 12783-84; Exhibits 34, 41.) Appellant agreed with the court that he would share the results with the prosecutor. (43-RT 12785-86.) The court denied funding for serology and pubic hair testing. (43-RT 12797.)

On February 1, 1999, in an in limine motion, appellant requested permission to argue that mtDNA testing of hairs and fingernail scrapings could have been done, but was not, and that the defense asked for funds to do it, but were denied. (30-RT 9242-44.) The prosecutor objected as he did not know if mtDNA analysis was admissible, and argued that the denial of funding was inadmissible. (30-RT 9245-46.) The court denied appellant's motion without prejudice for more authority and a better record. (30-RT 9247.) Appellant asked to have Lisa Calandro testify about DNA evidence. (30-RT 9248.) In November, the court refused appellant's request for a "mini" *Kelly/Frye* hearing. (30-RT 9249.) Appellant indicated that if the court ruled in his favor, the testing would take four to six months. (30-RT 9251.)

On February 8, 1999, appellant again moved to fund and appoint experts for mtDNA testing of evidence. (14-CT 4049-4053.) On February 8, 1999, appellant moved the court to instruct the jury that the prosecutor failed to test the pubic hairs found on Michael's clothes and his fingernail scrapings using mtDNA analysis. (14-CT 4054-4065.)

On February 8, 1999, the trial court denied funding for mtDNA testing, which he could not order under *People v. Anderson* (1987) 43 Cal.3d 1104, 1133 [confidentiality requirement of section 987.9 proceedings], particularly because the funding judge denied it and the Third District had denied a writ. (31-RT 9368.)

On February 10, 1999, appellant requested funding to fly Mr. Beaver to Sacramento for a 402 hearing on mtDNA, as the prosecutor objected to his phone testimony. (42-RT 12798-99.) Mr. Beaver would testify that mtDNA testing had been around since about 1991 and existed in 1995 or 1996, and had been used to a 99.5% certainty. (42-RT 12800-04.) Appellant wanted to argue that the state had potentially stronger evidence that it did not present. (42-RT 12804.) Appellant wanted to cross-examine Bentley and Duda that they did not consider or do mtDNA testing of evidence. (42-RT 12805.)

The court and appellant agreed that mtDNA testing must be accepted in scientific community, which is why appellant needed Mr. Beaver to testify. (42-RT 12806-07.)

The court asked about whether the prosecutor could mention appellant's polygraph test. (42-RT 12807-08.) The court found that there was no distinction between polygraph inadmissibility and mtDNA testing, which the court declared: "it's not generally known, as best as I can tell, in the scientific community and it's not known in the legal community so I'm not going to bring somebody here to create a windmill of glass." (42-RT 12809-10.)

In an Evidence Code 402 hearing, Lisa Calandro testified that she was the supervisor of the DNA Analysis section of Forensic Analytical and knew about mtDNA. (31-RT 9371-79.) She did not do mtDNA testing herself. (31-RT 9380.) She examined material sent to her by defense attorney Van den Heuval. (31-RT 9382.)

Appellant requested the court hear his expert witness about mtDNA testing over the phone. (31-RT 9389.) The prosecutor objected to hearing the witness over the phone, citing Evidence Code section 711. (31-RT 9384.) The court denied appellant's request, citing *Stevenson v. Superior Court* (1979) 91 Cal.App.3d 925. (31-RT 9387.) Appellant explained there was no other way to proceed and the hearing was not a preliminary hearing. (31-RT 9389.) Appellant explained the issue was whether mtDNA testing could have been done in 1996 by the state and the defense wanted to comment on the lack of such testing. (31-RT 9391.) Appellant cited *United States v. Thompson* (9th Cir. 1994) 37 F.3d 450 which held that it was proper to comment on testing that was available, but was not done, and the district court had committed prejudicial error by precluding Thompson from commenting on the lack of fingerprint and other evidence tending to establish her knowledge of what was in the suitcase. (31-RT 9392.) The prosecutor argued that the fingernail scrapings were sent to Bentley, who said they were useless. (31-RT 9399.) Appellant argued that a phone appearance was the only way for the court to determine whether appellant could ask Bentley and Duda about the lack of mtDNA testing. (31-RT 9401.) The prosecutor objected that neither he nor Duda knew about it. (31-RT 9402.) The prosecutor also argued that appellant had not proved mtDNA testing was admissible. (31-RT 9404.)

The court ruled that it would not take phone testimony and denied appellant's request to the mention the lack of mtDNA testing of the evidence.

(31-RT 9404, 9406.) The court said its ruling was without prejudice to renewing if appellant wanted to provide the court more information. (31-RT 9405.) Appellant objected that not permitting Beaver to testify by phone violated his constitutional rights. (31-RT 9407-08.) The court reiterated that it would not order funding for mtDNA testing, but would not rule on whether appellant could do it. (31-RT 9413-14.)

On March 2, 1999, appellant told the court that the funding judge had denied appellant's request for funds to do DNA testing on the fingernail scrapings. (36-RT 10821-24.) Appellant explained that he had told the funding judge he would forego other funding to get the DNA testing. (36-RT 10827.) The court stated it did not need to make a ruling on DNA issue yet. (38-RT 11663.) Appellant asked the court to permit him to tell the jury that the state prohibited appellant from doing DNA testing. (38-RT 11665.)

The court ruled that it did not know what DNA testing would have produced, so he would not permit comment on why it was not done. (39-RT 11739.) Appellant objected to the ruling. (39-RT 11742.)

On March 10, 1999, the court ruled that appellant was entitled to comment that there was no evidence of DNA, but the prosecutor was entitled to comment that he had delivered the evidence to the defense. (39-RT 11755.) Appellant agreed, but argued that he should be entitled to "present our minute order that says that I requested funding to do DNA testing of fingernail scrapings. And that was, and that funding was denied." (39-RT 11758-59, 11762.) The court stated: "I frankly feel totally without any authority to allow [this testing] in this case." (39-RT 11765.) Appellant explained that the funding judge denied him funds in November and December "on that specific issue of trying to get the mitochondrial testing for the fingernail [scrapings] and for the pubic hair." (39-RT 11767.)

The court held an in camera proceedings about DNA funding. (39-RT 11769-72.) The court ruled: "I don't see any middle ground that I could feel totally comfortable with in using." (39-RT 11774.) The court expressed its frustration:

> I don't know what a DNA test would produce because I don't have one. So I'm going to proscribe both sides from commenting in argument on either of the matters. That's going to have to be the ruling. If I'm wrong, I'm wrong. But I just, when I open it up, I just have to keep opening it up by stages. I have, if I play with the DNA matter, then I, I say on one occasion, the matters were sent down to an expert, the defense did not follow them up. However, later on, they did request again, and then they were denied. Then why were they denied? What does Judge Evans tell me is the reason? The reason is not in the minute order. So perhaps I have to bring him down here and testify. I don't think that's appropriate. This goes on and on and on. As they, perhaps a misnomer, but I can't think of anything in either area that creates more of what I'll call a can of worms. And that's perhaps the stupidest reason for making a ruling that I can think about. (39-RT 11774 -75.)

The prosecutor then objected to appellant telling the jury that "there is no evidence before you of DNA testing of the biological evidence in this case." (39-RT 11779, 11775.) The court stated that it would not permit any evidence on the failure to produce evidence, even in the penalty phase in this death penalty case. (39-RT 11781-82.)

Appellant again argued he should be able to argue "there was no [DNA] testing done that points to my client." (39-RT 11951-53.)

The court refused: "No, you're not going to argue it, sir. I'm going to order you at this time you will not mention that. And you have your remedy of appeal, but you will not mention that, sir, for reasons I've just indicated. Now that's my order." (39-RT 11951-53.)

Appellant then offered to stipulate that the prosecutor "turned over the fingern[redacted] scrapings to me for examination and that neither side conducted DNA

testing." (39-RT 11956-57.) The court thought that was "a very fair offer." (39-RT 11957.)

While preserving his prior objections, the parties agreed to the following stipulation read to the jury:

> "It's hereby stipulated to and agreed to by the parties that the fingernail scrapings taken from the body of Michael Lyons were appropriately transported to Forensic Analytical, DNA laboratory for the defense. The defense had the possession of the scrapings from January 19, 1998 until April 1998, after which time they were returned to the People. The defense did not test the fingernail scrapings." (40-RT 12200-01.)

In closing argument, appellant was able to argue that no one did DNA testing on the fingernail scrapings, but not the failure to test the hairs by mtDNA. (41-RT 12331-32.) Appellant explained:

> I believe she [Miss Duda] testified [she] was not able to do a DNA analysis because of the damage to the cell structure. Ten years ago we couldn't do DNA testing on anything. We couldn't do DNA analysis on anything. Now since technology has permitted us to examine biological matter for the presence of human DNA, and that to match it to possible donors, do you have any idea how many people have actually been released from death row and imminent execution because they have been scientifically proven not to be the donor of blood or sperm or epithelial cells such as would be found under fingernails? What scientific evidence is there that connects Robert Rhoades, my client, to this very horrific crime? There is none.
>
> Let me posit a question. Five years from now might a technique of analysis be developed that would enable scientists to repair or to analyze the spermatozoa found on Michael Lyons by Dr. Dibdin who did the swab? What if that technological breakthrough comes ten years from now? What if that technological breakthrough comes after Robert has been executed? These are all things that you might rightfully consider in attempting to determine whether you really want to execute Robert Rhoades.
>
> What . . . if a DNA examination of the fingernail scrapings eliminates Robert Rhoades? That's scary. That's real scary.
>
> Now yeah, Mr. Rhoades' first lawyers had the stuff. (41-RT 12333.)

In response, the prosecutor made the following argument which resulted in the court sustaining appellant's objection and admonishing the jury:

> Okay, counsel makes a big deal about the fingernail scrapings, and he's the one who brought this whole idea up.
>
> Note what counsel did in this regard.
>
> We only know that Bentley had those fingernail scrapings, I believe from Duda, because she said she got it for him. There's no other evidence I believe that it got from Michael's body to Bentley.
>
> It's one of those holes in the cases I was talking about when counsel left.
>
> Duda says she got it from Bentley. And she says, "Can that sometimes be -- can that be of evidentiary value?"
>
> She said, "Well, sometimes."
>
> Okay. At that point, counsel stops asking questions. He doesn't ask her, Well, why didn't you do it in this case?
>
> Why didn't he ask that question, okay?
>
> Defense's own expert had it for almost three months. They didn't examine it either. Why didn't he present their expert to tell you why that wasn't done? (41-RT 12389.)

Appellant objected: "Your Honor, we went through this. I asked for money to get it done and it wasn't, and he is walking right into it. . . . I asked for money to get this done and you know it." The prosecutor protested: "No way. . . That is not correct, your Honor." (41-RT 12389-90.) The court overruled appellant's objection, and at sidebar explained:

> I'm going to read this to the jury. I'm going to tell the jury that any comment in the last few moments from the district attorney regarding tests or failure to test are being stricken as well as the defense's comment about some money of some kind. That's also going to be stricken.
>
> I'm then going to read this stipulation to them and advise them that either counsel will be permitted to stay within the confines of this stipulation in commenting on testing -- or failure to test. (41-RT 12397.)

The prosecutor proceeded with his argument:

> The fingernail scrapings were with Forensic Analytical for three months.
>
> Counsel has not called up Mr. Bentley. He didn't ask Nikki Duda Shea. He hasn't asked anybody else why those weren't tested. . . .
>
> There is a number of good scientific reasons why they might not be, but he never asked. So that should have foreclosed him from trying to make any argument out of that. (41-RT 12402-03.)

The court admonished the jury as follows:

> [A]ny comment that counsel make is pursuant to the stipulation that the Court read to you during the course of the trial. It's not to go beyond that. And all the remarks by either counsel for the People or the defendant regarding testing prior to the resumption of the argument after this recess are stricken and you're admonished to disregard them. (41-RT 12403.)

The prosecutor continued with his argument:

> Okay. He's the one who wants to prove lingering doubt.
>
> And as he told you, when somebody goes forward and tries to prove something, they bear the burden of showing it.
>
> If there are unanswered questions with regard to the fingernail scrapings, that's where you look for the answer. He didn't provide it to you. (41-RT 12403.)

Appellant again objected: "We had a long discussion about this, your Honor. He's making me provide it and the Court knows full well why . . . (41-RT 12403.)

The court sustained appellant's objection and admonished the jury: "The jury will disregard the question to which the Court just sustained the objection." (41-RT 12404.)

The prosecutor continued with his argument: "His expert had it for almost three months." (41-RT 12404.)

In final closing argument, appellant argued that advancements in technology could exonerate him, to which the court sustained the prosecutor's objection as "bald speculation. (41-RT 12451-52.)

The court erred in limiting appellant's argument and refusing to fund mtDNA testing of the hairs and fingernail scrapings in this case.[40]

B. The Relevant Law

The erroneous denial of a request for funds for expert or investigative assistance or for other types of assistance reasonably necessary to present a defense may violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment right to counsel, and the Fifth, Sixth and Fourteenth Amendment rights to present a defense. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227 [indigent defendant is entitled to "the basic tools of an adequate defense"]; *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320.)

In *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, the court found that the failure of a psychologist retained by the defense for penalty phase purposes to make a proper inquiry into the defendant's background may constitute a failure to provide competent psychiatric assistance in violation of *Ake v. Oklahoma* (1985) 470 U.S. 68. In *Terry v. Rees* (6th Cir. 1993) 985 F.2d 283, the court held that the trial court's denial of petitioner's request for an independent pathologist to challenge the state's evidence regarding nature of death violated his right to present a defense. In *Dunn v. Roberts* (10th Cir. 1992) 963 F.2d 308, the court held that the trial court's denial of funds to retain an expert to assist in explaining the nature and effect of battered wife syndrome violated due process and the right to present a defense. In *Little v. Armontrout* (8th Cir. 1987) 819 F.2d 1425,

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40. The prosecutor committed misconduct by arguing that appellant had the evidence for almost three months, but did not do DNA testing either, despite the fact that appellant was not allowed to inform the jury that the court had denied him funding to do such testing. (41-RT 12389.) That issue is presented in the next argument. (Arg. XIII, D.)

the court held that where the state's case rested on posthypnotic identification testimony, defendant was entitled to an expert on hypnosis. In *Starr v. Lockhart* (8th Cir. 1994) 23 F.3d 1280, 1289-1290, the court found that "due process requires access to an expert who will conduct not just any, but an appropriate examination," and the right to experts who will "assist in evaluating the preparation and presentation of the defense." In *Cowley v. Stricklin* (5th Cir. 1991) 929 F.2d 640, the court held that where defendant presented ample evidence that insanity would be a significant issue at trial, refusal to grant request for a defense psychiatrist violated due process; neither the services of a psychiatrist employed by the state whose report was submitted to the court, nor the services of a psychologist who testified for defendant without charge, were adequate substitutes for a defense psychiatrist. (Accord, *Doe v. Superior Court* (1995) 39 Cal.App.4th 538, 545-547 [under *Ake*, the right to a competent expert means access to someone with expertise in the relevant specialty].)

C. Recent Scientific Developments Established That mtDNA Analysis Was Scientifically Accepted At The Time Of Retrial

It was established by 1996 that mitochondrial DNA (mtDNA) analysis was scientifically accepted. (*State v. Council* (S.C. 1999) 515 S.E.2d 508, 516-517.)

The South Carolina supreme court affirmed the trial court's admission of the mtDNA evidence stating:

> Mitochondrial DNA analysis has been subjected to peer review and many articles have been published about this technology. The F.B.I. laboratory validated the process and determined its rate of error. Its underlying science has been generally accepted in the scientific community. Further, while forensic application of mtDNA analysis is fairly new, the technology has been used in other contexts for several years. (*State v. Council*, *supra,* 515 S.E.2d at 517-518.)

Thus, the trial court erred in suggesting that mtDNA testing was unreliable and not accepted in the scientific community and in refusing to listen to Mr.

Beaver's testimony by telephone or otherwise. In *State v. Pappas* (2001) 256 Conn. 854, 875-890, 776 A.2d 1091, the court held that the procedures used to extract and chart the chemical bases of mtDNA are scientifically valid and generally accepted in the scientific community, and that questions concerning contamination and matching criteria may bear on the weight of mtDNA evidence but do not render it inadmissible, and that the court carefully considered the proffered testimony of the state's expert and concluded that it was statistically sound and likely to be helpful to the jury in assessing the probative value of the mtDNA evidence.

In *State v. Scott* (Tenn. 2000) 33 S.W.3d 746, 758-761, the court held that mtDNA analysis falls within the statutory definition of "DNA analysis" and was admissible without a hearing].) In *People v. Klinger* (N.Y.Co.Ct. 2000) 713 N.Y.S.2d 823, 823-828, the court upheld the admissibility of mitochondrial DNA evidence as "generally accepted as reliable in the scientific community."

Since *Klinger*, virtually every court that has considered the issue has held that the results of an mtDNA analysis are admissible. (See e.g., *Wagner v. State* (2005) 160 Md. App. 531, 864 A.2d 1037, 1046 & fn. 10; *Magaletti v. State* (Fla. Dist. Ct. App. 2003) 847 So. 2d 523, 527-528 [holding use of mtDNA analysis to prove identity satisfied *Frye* test for admissibility of new or novel scientific evidence); *People v. Ko* (N.Y. App. Div. 2003) 304 A.D.2d 451, 757 N.Y.S.2d 561, 563 [upholding trial court's admission of mtDNA evidence]; see *United States v. Coleman* (N.Y. App. Div. 2003) 202 F. Supp. 2d 962, 970-971; *State v. Underwood* (N.C.App. 1999) 518 S.E.2d 231, 232-239.)

In conclusion, mtDNA analysis has been established as reliable, and thus defendant was entitled to an analysis of the fingernail scrapings and blood on his shirt, or at least to comment on the prosecution's failure to conduct such testing.

Moreover, appellant would have been entitled to a mtDNA analysis under Penal Code section 1405, because the identity of the perpetrator was a significant issue in the case under Penal Code §1405(a)(1)(A). (See *Richardson v. Superior Court (People)* (2008) 43 Cal.4th 1040, 1051-1054 [the trial court did not abuse its discretion in finding that it was not reasonably probable that the DNA evidence would have altered the outcome of either the guilt or penalty phase].) In light of the prosecutor's misuse of the blood and fingernail evidence, the requested mtDNA testing would have raised a reasonable probability that defendant's verdict or sentence would have been more favorable if the results of DNA testing had been favorable and available the time of conviction. (Penal Code §1405, subd. (a)(1)(B).)

D. The Court Erred In Refusing To Permit Appellant To Comment On The Prosecutor's Failure To Subject Certain Critical Evidence To DNA Testing

As explained above, appellant repeatedly urged the court to allow him to argue the prosecution had not done any DNA testing of the biological evidence that the prosecutor argued was inculpatory. (14-CT 4054-4065; 31-RT 9404, 9406; 39-RT 11665, 11739, 11775, 11779, 11781-82, 11951-53.) The court repeatedly ruled that it would not permit any evidence or argument on the failure of the prosecution to conduct DNA testing. (*Ibid.*) The court erred.

Comments on the state of the evidence or a party's failure to call logical witnesses, introduce material evidence, or rebut the opposing party's case are generally permissible. (See *People v. Medina* (1995) 11 Cal.4th 694, 755 [prosecutor's comments on defense's failure to explain or produce evidence].) In *People v. Stankewitz* (1990) 51 Cal.3d 72, 102, the court sustained a prosecutor's objection to defense counsel arguing that three potential prosecution witnesses were available to testify, because "[n]othing in the record

indicated whether [the three potential witnesses] were available. It is axiomatic that counsel may not state or assume facts in argument that are not in evidence."

Here, there was no dispute that the prosecution had failed to conduct mtDNA testing of biological evidence in the case. And there was no dispute that appellant had been prevented by the court's refusal to provide money to permit appellant to conduct his own mtDNA testing and no dispute appellant had offered to prove the scientific validity of such testing. Therefore, defense counsel had a right to comment on the fact that the prosecution had not done such testing that might have led to highly reliable evidence either exonerating or inculpating appellant. (See *People v. Ford* (1988) 45 Cal.3d 431, 442-447 [prosecutor did not err in commenting on defendant's failure to call several codefendants who might have substantiated his alibi defense and who were available to testify].)

XIII. THE PROSECUTORS' EGREGIOUS AND PERVASIVE MISCONDUCT IN THEIR PENALTY PHASE ARGUMENTS VIOLATED APPELLANT'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FAIR PENALTY DETERMINATION AND WAS NOT CURED BY THE COURT SUSTAINING OBJECTIONS, WHICH THE PROSECUTOR IGNORED

A. The Prosecutor's Use Of Appellant's "Normal Childhood," As A Factor In Aggravation Was Unconstitutional

In the initial penalty phase argument, the prosecutor told the jury that appellant had a "normal childhood," and inferentially, deserved death. (40-RT 12225.) Then, in final closing argument, the lead prosecutor elaborated on this theme more explicitly:

> All you have heard is that Mr. Rhoades had a somewhat privileged upbringing, that there was no reason for him to turn into a rotten egg, none whatsoever. And that's Robert Rhoades

> right there. Twelve felony convictions since 1984. That's who Robert is right there.
>
> As counsel said in his opening statement, he's correct. Mr. Rhoades is not a very nice person. But there's no reason that they presented to you why he turned out this way. I want you to keep that in mind. That's why the whole defense in this case is lingering doubt, is because they can't – they can't offer you anything good to say about this man. (41-RT 12356.)

This argument was disapproved in *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033, where this Court held that the prosecution acted improperly in arguing that evidence of the defendant's background and history -- evidence that did not relate to the circumstances of the crime -- showed "that he's had all the breaks" so the crime could not be blamed on childhood deprivation or hardship. This Court held that character evidence relevant only to factor (k), cannot be used affirmatively as a circumstance in aggravation. (*Ibid.*) The court's refusal to instruct the jury that appellant's background could only be considered as mitigating evidence compounded the error. (See Arg. XVI, B.; 15-CT 4402; 40-RT 12048-50.)

B. The Prosecutor's Argument That The Jury Could Not Consider Or Find "Lingering Doubt" Because Appellant Did Not Call Every Prosecution Witness And The Trial Court's Terse Instruction, Rather Than Appellant's Proposed Instruction, Deprived Him Of His Due Process Right To A Fair Trial

In its initial closing, the prosecutor argued: "It's not your function to redetermine the guilt." (40-RT 12226.) The prosecutor also argued that lingering doubt means you have to "set aside the conviction" and ignore the evidence. (40-RT 12227.) The prosecutor further argued: "You got to believe the defendant. And, in believing him, you are allowed to consider, this is a man who molests his grandchild. This is a man who puts a knife to a woman's throat to have sex." (40-RT 12228.)

In response, appellant argued:

> If there's some kind of lingering doubt, if you've got some doubt, that's a lingering doubt. That's all it is. . . . You know it used to be then in America there was this adage that it was better to let a guilty man go free than convict an innocent man. That's what it used to be. That's what I grew up hearing. . . . The adage now seems to be it's better to convict an innocent man than to let a guilty man go free. . . . The system is flawed. . . . We do let guilty people go free. We also convict innocent people. By and large the system works. It's whole lot better than any other system that I'm aware of. But you can't hide the fact that mistakes are made. That is why when we're trying to decide whether somebody should live or die lingering doubt is something that can be considered as a mitigating factor. As a reason not to execute Robert Rhoades. (40-RT 12269-70.)

Despite repeated objections based on constitutional due process, some of which the court sustained, the prosecutor denigrated lingering doubt as impossible to find unless the second penalty jury had heard the entire case the prosecutor presented to the first jury:

> He presented little bits and pieces, and there are huge gaps. And you can tell there's huge gaps just by listening to the way he presented it and what he presented.
>
> Now for you to have a lingering doubt, you have to hear the entire case I put on last year. (41-RT 12358.)

The court sustained appellant's objection and ambiguously admonished the jury to "disregard that statement." (41-RT 12358-59.) Yet, the prosecutor persisted with this theme:

> I'm going to read to you from counsel's opening statement. And remember, this is his opening statement.
>
> "So we're going to do -- what we're going to do is we're going to present the prosecution's case to you. They're going to present some, we're going to present the rest."
>
> So he's admitting that he has to put on the entire case. (41-RT 12359.)

The court sustained appellant's objection, but denied his motion for mistrial and denied appellant's request for another admonition. (41-RT 12359-12360.) Yet, the prosecutor persisted:

> I'll give you an example of what the defense did in this case when they tried to put on my case for me. They called Ray Clark. But they didn't put on Charlie Wilber. Okay. Why not? They're going to put on the whole case, counsel, right? Apparently not. They did not over and over and over again. (41-RT 12360.)

The court overruled appellant's objection to this argument and the prosecutor continued:

> Yes. I want you to remember two witnesses who were called early by me. I had them testify to very limited things. Counsel wanted to ask them questions beyond that. They weren't permitted to ask -- or go beyond that, and counsel specifically said he was going to call them back himself. That being Drost and Bentley.
>
> He did not call them back to testify about those other matters. So even though he called those witnesses, there is a large amount of stuff from those people that you never heard. So again he failed to -- (41-RT 12360.)

Appellant interrupted and objected that the prosecutor was presenting evidence outside the record. (41-RT 12361-62.) The court overruled appellant's objection with this explanation:

> In my judgment the prosecutor can refer -- if you had witness A or told the jury you were going to produce witness A, he can comment on the fact that you didn't. He may not comment on things that witness A did or didn't say in the prior trial. We're only going to talk about this trial. (41-RT 12362.)

In response, appellant requested a mistrial based on the prosecutorial misconduct in violation of appellant's state and federal constitutional rights and the fact it went beyond the scope of appellant's closing. (41-RT 12362.)

The prosecutor responded by stating that appellant had "talked about lingering doubt." (41-RT 12362.) The court denied the mistrial motion. (41-RT 12365.) Encouraged, the prosecutor persisted:

> I think if you go back, think of all the people who are logical witnesses the defense didn't present, it's a lot of people. . . .
>
> Okay. I just want you to count up the number of people mentioned in the evidence here who didn't testify. If you doesn't [sic] hear my whole case, how can you have a lingering doubt? (41-RT 12365.)

The court again sustained appellant's objection and ambiguously admonished the jury to "disregard the last sentence of the argument." (41-RT 12365-12366.) Yet, the prosecutor ignored the court's rulings and returned to this theme:

> Again, as I said before, they failed to call Charlie Wilber. He gives a little texture to Ray Clark's testimony, doesn't he? Because he placed it at 3:30 to 4 o'clock. Now counsel didn't bring that out. But that was part of the evidence I put on in front of the guilt jury -- (41-RT 12370.)

The court sustained an objection to that and agreed to admonish the jury once again. (41-RT 12372.) The court denied appellant's mistrial motion and refused to sanction the prosecutor. (41-RT 12373.) The court cautioned the jury as follows:

> All right. Ladies and gentlemen, the district attorney made a reference to evidence at the guilt phase of the trial, which of course you were not participants in, and the Court's sustained an objection to that question and will admonish you at this time to disregard that portion -- that matter insofar as it references the guilt phase of the trial. (41-RT 12372.)

Yet, despite defense objections, the prosecutor did not refrain from his argument that without redoing the entire guilt phase, the jury could not have a lingering doubt of appellant's guilt:

> Okay, counsel makes a big deal about the fingernail scrapings, and he's the one who brought this whole idea up.

Note what counsel did in this regard.

We only know that Bentley had those fingernail scrapings, I believe from Duda, because she said she got it for him. There's no other evidence I believe that it got from Michael's body to Bentley.

It's one of those holes in the cases I was talking about when counsel left.

Duda says she got it from Bentley. And she says,

"Can that sometimes be -- can that be of evidentiary value?"

She said, "Well, sometimes."

Okay. At that point, counsel stops asking questions. He doesn't ask her, Well, why didn't you do it in this case?

Why didn't he ask that question, okay?

Defense's own expert had it for almost three months. They didn't examine it either. Why didn't he present their expert to tell you why that wasn't done? (41-RT 12389.)

Appellant objected, stating the prosecutor knew that he asked for money to get this done. (41-RT 12390.)

The court admonished the jury again:

I think I should do this, without getting this -- again, ladies and gentlemen, any comment that counsel make is pursuant to the stipulation that the Court read to you during the course of the trial. It's not to go beyond that. And all the remarks by either counsel for the People or the defendant regarding testing prior to the resumption of the argument after this recess are stricken and you're admonished to disregard them. (41-RT 12403.)

The prosecutor, however, continued to argue that the defense could not prove lingering doubt without calling every witness from the guilt phase:

Okay. He's the one who wants to prove lingering doubt.

And as he told you, when somebody goes forward and tries to prove something, they bear the burden of showing it.

If there are unanswered questions with regard to the fingernail scrapings, that's where you look for the answer. He didn't provide it to you. (41-RT 12403.)

The court sustained another defense objection and confusingly told the jury to disregard the question to which the Court just sustained the objection. (41-RT 12403-04.)

The prosecutor capped his argument with respect to lingering doubt as follows:

> For you to even have that much of a lingering doubt, there's only one witness who could give it to you [appellant], and that's a liar. . . .
>
> The defendant has two main lines of defense in this case: One seems to be that "I'm guilty but because of my horrid upbringing you should have mercy on me." . . .
>
> The other line of defense is kind of inconsistent with it. It's, "I didn't do it." (41-RT 12415.)

The court refused to give appellant's requested instruction on lingering doubt,[41] but cursorily instructed as follows: "Lingering doubt may be considered as a factor in mitigation. If you have a lingering doubt as to the guilt of the defendant." (15-CT 4356; 41-RT 12495, 12059-62.)

Residual doubt about a defendant's guilt is something that juries may consider at the penalty phase under California law, and a trial court errs if it excludes evidence material to this issue. (*People v. Hawkins* (1995) 10 Cal.4th 920, 966-967; *People v. Terry* (1964) 61 Cal.2d 137, 147; *People v. Cox* (1991) 53 Cal.3d 618, 677-678.) Evidence of the circumstances of the offense, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial as a factor in mitigation under section

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[41] Appellant had requested the following lingering doubt instruction:

"The adjudication of guilt is not infallible and any lingering doubts you entertain on the questions of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered. It may be considered as a factor in mitigation if you have a lingering doubt as to the guilt of the defendant." (15-CT 4412.)

190.3 (*People v. Gay* (2008) 42 Cal.4th 1195, 1218--1220). "The 'circumstances of the crime' as used in section 190.3, factor (a), 'does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to "[t]hat which surrounds materially, morally, or logically" the crime.'" (*People v. Blair* (2005) 36 Cal.4th 686, 749.) 'The test for admissibility is not whether the evidence tends to prove the defendant did not commit the crime, but, whether it relates to the circumstances of the crime or the aggravating or mitigating circumstances.' The evidence must not be unreliable, incompetent, irrelevant, lack probative value, or solely attack the legality of the prior adjudication. (*People v. Hamilton* (2009) 45 Cal.4th 863, 911-912 [citations omitted.]) Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. (*Id.* at 917; *People v. Lancaster* (2007) 41 Cal.4th 50, 94.)

This Court has held that when the first penalty trial results in a hung jury and the case proceeds to a second penalty trial before a different jury, "it is proper for the jury to consider lingering doubt." (*People v. Slaughter* (2002) 27 Cal.3d 1187, 1219.) Lingering doubt is a mitigating factor that focuses on the weight of the evidence proving the defendant guilty. It encourages a juror to vote for a life sentence in cases where the defendant has been proven guilty beyond a reasonable doubt, but there nevertheless remains some possible doubt concerning his guilt.

This Court has stated on several occasions that there may be some cases where "a lingering doubt instruction of some type might be proper." (*People v. DeSantis* (1993) 2 Cal.4th 1198, 1239; see also *People v. Cox* (1991) 53 Cal.3d 618, 678 n. 20; *People v. Thompson* (1988) 45 Cal.3d 86, 134.) In the *Thompson* case, the defendant did not request a jury instruction in the penalty phase relating the concept of lingering doubt to the defendant's intent to kill as a

reason for not imposing the death penalty. Since intent to kill was a contested issue at the trial and was the most serious aggravating factor in the case, the Court stated that if a jury instruction on lingering doubt about the defendant's intent to kill had been requested and refused by the trial court, the Court "might seriously consider whether refusal to give such instruction was error." (*People v. Thompson, supra*, 45 Cal.3d at 134-135.) This Court has recognized that, in some capital cases, the trial courts have instructed the jury on lingering doubt. (*People v. Valdez* (2004) 32 Cal.4th 73, 129, fn. 28; *People v. Snow* (2003) 30 Cal.3d 43, 125.)

It is true that this Court has frequently stated that a trial court is not required as a matter of state or federal law to give a lingering doubt jury instruction in a capital case. (*People v. Brown* (2003) 31 Cal.4th 518, 567-568; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272; *People v. Price* (1991) 1 Cal.4th 324, 488.) This Court has relied on *Franklin v. Lynaugh* (1988) 487 U.S. 164, as authority for this proposition. (*People v. Valdez, supra*, 32 Cal.4th at 129, fn. 28; *People v. Musselwhite, supra*, 17 Cal.4th at 1272; *People v. Cox, supra*, 53 Cal.3rd at 676.) The *Franklin* decision, however, did not involve a case in which a defendant had requested a lingering doubt jury instruction. (*Franklin v. Lynaugh, supra*, 487 U.S. at 169-170.)

In *Franklin*, the defendant was charged with a capital murder in Texas state court. At the penalty trial, the only mitigating evidence presented was the defendant's good conduct while incarcerated. The jury was then instructed to decide "two special" issues: (1) whether the murder was committed deliberately, and (2) whether the defendant would pose a continuing threat to society. A "yes" answer to both questions would result in the defendant being sentenced to death.

The defendant requested five special jury instructions that told the jury that "any evidence considered by them to mitigate against the death penalty should

be taken into account in answering the Special Issues, and could alone be enough to return a negative answer to either one or both of the questions submitted to them – even if the jury otherwise believed that 'yes' answers to the Special Issues were warranted." (*Franklin v. Lynaugh, supra*, 487 U.S. at 169-170.)

In *Franklin*, the defendant submitted a jury instruction that advised the jury that it could answer "no" to the Special Issue of future dangerousness if the jury found "any aspect of the defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty." (*Id.* at 169 n. 4.) This was not technically a lingering doubt jury instruction, in which the jury is told it may consider whether there is some remote possibility that the defendant is innocent. The instruction in *Franklin* directed the jury to engage in proportionality review by considering whether "the circumstances of the offense" were less aggravating than other murder cases.

For the first time on appeal, *Franklin* argued that the jury instructions "did not provide sufficient opportunity for the jury, in the process of answering the two Special Issues, to consider whatever 'residual doubt' it may have had about petitioner's guilt." (*Id.* at 172.) The Court noted that, that during the trial the defendant "did not draw the jury's attention to the 'residual guilt' question" and "nothing in the defendant's mitigating presentation sought the jury's reconsideration of petitioner's guilt in committing the crime." (*Id.* at 175. fn. 7.)

The Court nevertheless, in a plurality option, decided the residual doubt jury instruction issue, even though it was not clearly raised by the facts of the case. The Court stated:

> Our edict that, in a capital case, "the sentencer . . . [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense," *Eddings v. Oklahoma*, 455 U.S.

> 104, 110 (1982) (quoting *Lockett,* 438 U.S., at 604), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor. (*Franklin v. Lynaugh, supra*, 487 U.S. at 174.)

Appellant takes issue with the *Franklin* Court's premise that lingering doubts about a defendant's guilt are not related to the circumstances of the offense. This Court reached the opposite conclusion in *People v. Terry* (1964) 61 Cal.2d 137, 146. In *Terry*, the Court noted that former Penal Code section 190.1 authorized the presentation of evidence concerning "the circumstances surrounding the crime . . . and of any facts in . . . mitigation of the penalty." Based on the statute, the Court reasoned that "This language can hardly exclude defendant's version of such circumstances surrounding the crime or of his contentions as to the principal events of the instant case in mitigation of the penalty." (*People v. Terry, supra,* 61 Cal.2d at 146.)

The Court in *Terry* recognized that lingering doubts about a defendant's guilt are based upon a jury's evaluation of the circumstances of the crime and the evidence connecting the defendant to that crime. The Court stated that:

> Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment. (*People v. Terry, supra*, 61 Cal.2d at 146.)

One federal Court has stated that: "Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty." (*Tarver v. Hopper* (11th Cir. 1999) 169 F.3d 710, 715.) In *Lockhart v. McCree* (1986) 476 U.S. 162, 181, the United States Supreme Court stated: "As several courts have observed, jurors who decide both guilt and penalty are likely to form residual

doubts or 'whimsical' doubts . . . about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases." In one study of the opinions of jurors in capital cases, the author concluded:

> "Residual doubt" over the defendant's guilt is the most powerful "mitigating" fact. [The study] suggests that the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt. (Stephen P. Garvey, *Aggravation And Mitigation In Capital Cases: What Do Jurors Think?,* 98 Colum.L.Rev. 1538, 1563 (1998).

In another study of jurors in capital cases, the authors concluded: "The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied." (William S. Geimer and Jonathan Amsterdam, *Why Jurors Vote Life Or Death: Operative Factors In Ten Florida Death Penalty Cases* (1988) 15 Am.J.Crim.L. 1, 28.) Another law review article suggested that juries in capital cases be instructed that "residual doubt" is having "some small amount of doubt as to the defendant's guilt that did not rise to the level of reasonable doubt" and that the jury is permitted "to weigh any residual doubt . . . against the aggravating circumstances of the offense, just like . . . with any other mitigating factor." (Jennifer Treadway, *Note, "Residual Doubt" In Capital Sentencing: No Doubt It Is An Appropriate Mitigating Factor* (1992) 43 Case W.Res.L.Rev. 215, 250.)

"Furthermore, the American Law Institute, in a proposed model penal code, similarly recognized the importance of residual doubt in sentencing by including residual doubt as a mitigating circumstance." (*Tarver v. Hopper, supra*, 169 F.3rd at 716.) Model Penal Code §210.6(1)(f) provides that a death sentence is precluded in the case of a person found guilty of murder "if it is

satisfied that: . . . although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." (ALI, *Model Penal Code and Commentaries* (1980) §210.6 (1)(f).)[42]

The concept of lingering doubt arises out of the concern that innocent people might be sentenced to death. A report released from the Death Penalty Information Center has stated that in the past four years, juries have imposed far fewer death sentences than they did on average over the previous decade. In the 1990's, an average of 290 people were sentenced to death each year. In the last four years, that number has dropped to an average of less than 130. (Death Penalty Info. Center: Fact Sheet (October 2009) www.deathpenaltyinfo.org.)

The report attributes the decline largely to growing public awareness of death row exonerations and concerns that innocent people might be sentenced to die. The report states that since 1973, 138 innocent people have been released from death row after being exonerated. (Innocence And The American Death Penalty (October 2009) www.deathpenaltyinfo.org.)

Thus, contrary to the Supreme Court's dictum in *Franklin*, lingering doubt is well recognized as a mitigating factor, perhaps the most important mitigating factor available to a defendant in a capital case. Since lingering doubt is a doubt relating to the defendant's guilt in the case, this mitigating factor is related to "the circumstances of the offense" within the meaning of *Eddings v. Oklahoma (*1982) 455 U.S. 104, 110 and *Lockett v. Ohio* (1978) 438 U.S. 586, 604. Both cases hold that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any mitigating factor related to any aspect of a

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42. This Court has considered the Model Penal Code provisions relating to capital cases. (*People v. Robertson* (1982) 33 Cal.3d 21, 59.) The United States Supreme Court has cited the Model Penal Code with approval. (*Gregg v. Georgia* (1976) 428 U.S. 153, 194, fn. 44.)

defendant's character or record and "any of the circumstances of the offense" that the defendant offers as a basis for a sentence less than death. (*Eddings v. Oklahoma, supra*, 455 U.S. at 110 [holding unconstitutional a barrier to considerations of youth and family background]; *Lockett v. Ohio, supra*, 438 U.S. at 604 [striking down an Ohio statute limiting mitigating factors to only three specific factors].)

The Eighth and Fourteenth Amendments not only guarantee the right of a capital defendant to offer any mitigating evidence, they also require appropriate jury instructions that allow the jury to give "effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 314-319; accord, *Penry v. Johnson* (2001) 532 U.S. 782, 797; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 395-399; *Belmontes v. Woodford* (9th Cir. 2003) 350 F.3d 861, 898.)

In *Penry*, the defendant in a capital murder case in Texas state court introduced evidence at trial showing his mental retardation and abused childhood. At the penalty phase of the trial, the jury was instructed to decide three special issues: (1) whether the murder was deliberate, (2) whether the defendant would be a continuing threat, and (3) whether the killing was an unreasonable response to any provocation by the deceased. A "yes" answer to all three special issues required the imposition of a death sentence. A "no" answer to any of the special issues required a sentence of life imprisonment.

The trial court in *Penry* rejected the defendant's request for jury instructions authorizing the jury to answer "no" to the special issues based upon the defendant's mitigation evidence. On appeal, *Penry* argued that "without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering

its sentencing decision." (*Penry v. Lynaugh, supra*, 491 U.S. at 318.) The Supreme Court agreed and reversed Penry's death sentence, stating:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S., at 605; *Eddings*, 455 U.S., at 119 (O'Connor, J., concurring). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett, supra,* at 605. (*Penry v. Lynaugh, supra*, 491 U.S. at 328.)

In appellant's case, the court's terse instruction and the prosecutor's argument denigrating lingering doubt failed to permit the jury to give full effect to the lingering doubt mitigation in this case. By permitting the prosecutor to tell the jury it could not find a lingering doubt without hearing the entire guilt phase evidence, the court left the jury with no guidance on this important factor in mitigation.

It was lack of guidance to the jury that resulted in the United States Supreme Court declaring the death penalty unconstitutional in *Furman v. Georgia* (1972) 408 U.S. 238. The Court later stated that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.) A constitutional death penalty statute is one that has the effect of "narrowing the categories of murderers for which a death sentence may ever be imposed." (*Jurek v. Texas* (1976) 428 U.S. 262, 270.) By narrowing the categories of murders for which the death penalty is

imposed, a constitutional death penalty statute prevents a jury from imposing the death penalty in a wonton and freakish manner. (*Gregg v. Georgia, supra*, 428 U.S. at 206-207.)

These goals can only be accomplished when the prosecutor is not permitted to argue lingering doubt is irrelevant. Lingering doubt was an important mitigating factor in appellant's case. It was a mitigating factor based upon the circumstances of the offenses. Appellant's death sentence should be reversed, because the prosecutor's argument subverted the lingering doubt theory. (*Penry v. Lynaugh, supra*, 491 U.S. at 326.)

People v. Hawkins (1995) 10 Cal.4th 920, 966-967, held that since defendant did not seek to introduce lingering doubt at the second penalty phase trial he could not complain of any state law violation. In *Hawkins,* the defendant argued that, under the principles set forth by the United Supreme Court in *Lockett v. Ohio* (1978) 438 U.S. 586, 604, a defendant facing the sentence of death has the right, under the Eighth Amendment of the United States Constitution, to introduce any evidence in mitigation, including evidence that would reinforce the jury's sense of lingering doubt as to the defendant's guilt. The *Hawkins* Court held that a capital defendant has no federal constitutional right to have the jury consider lingering doubt at the penalty phase of the trial, citing *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174, fn. 6.)

The *Hawkins* court also rejected the related claim that the defendant's right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution was violated by being tried by a penalty phase jury that did not hear all the guilt phase evidence; he was put in a worse position than a similarly situated, death-eligible defendant whose guilt and penalty were decided by the same jury, because he could not benefit from lingering doubt to the same degree as the latter defendant. This Court found that a bifurcated trial does not restrict a

defendant's ability to introduce guilt phase evidence designed to foster residual doubt, and found that it is not clear that a defendant whose penalty has been determined by a second jury is put at a disadvantage; he may also benefit from having a jury which has not focused on the details of his crimes.

Yet, by divorcing the penalty phase from the guilt phase and presenting appellant's guilt of Michael's murder as a given, appellant was deprived of the possible benefit of whatever lingering doubts the first jury may have possessed as to whether he was the one who murdered Michael. This "impossibility" for the jury to have a lingering doubt without hearing the entire trial, as the prosecutor repeatedly argued, allowed the second penalty phase jury to do what the first jury was unable to do: unanimously agree on a sentence of death. (See *Smith v. Balkcom* (5th Cir. 1981) 660 F.2d 573, 579-582 [empanelling a second jury for a penalty trial would deprive the accused of the benefits of whatever "whimsical doubt" as to guilt the jury might carry over into its penalty deliberations].)

In *People v. Davenport* (1995) 11 Cal.4th 1171, 1194, this Court distinguished the *Hawkins* case:

> Moreover, also unlike *Hawkins*, a significant portion of the guilt phase evidence was presented to the jury. Defendant strenuously litigated this evidence and sought to raise a lingering doubt in the penalty jurors' minds as to the torture-murder special circumstance, i.e., whether Lingle was alive when she was impaled by the stake. In addition, in an abundance of caution, the court instructed jurors to consider any lingering doubt as to whether the murder involved torture, and placed no limitation on counsel's argument regarding this theory. Defendant did in fact argue that the forensic evidence had failed to establish that Lingle died after she was impaled by the stake.

In *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238-1240, this Court approved of the prosecutor reminding the jury not to redetermine guilt, but it did not authorize a prosecutor's argument that the jury could not consider lingering doubt

unless they heard all the evidence, which is what the prosecutor argued in appellant's case:

> Relying on *People v. Terry* (1964) 61 Cal.2d 137, defendant contends he was entitled to have the jury consider, as a mitigating circumstance, lingering doubt about his guilt. As will be explained below, we agree. . . . Of course, guilt may be conclusively presumed as a matter of law and yet as a moral question the penalty phase jurors could personally retain some lingering doubt about whether defendant in fact killed Mr. Davies. . . . . Defendant cannot contend on appeal that he was denied the right to present evidence raising doubts about his guilt, nor does he do so: he concedes that "The defense presented Masse's testimony largely to establish a doubt about appellant's having been the person who shot Mr. and Mrs. Davies." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1238-1240.)

Here, despite the fact appellant presented some evidence, the due process violation was the prosecutors' egregious misconduct in not acceding to the court's repeated rulings that they could not argue that it was impossible for the jury to have a lingering doubt without hearing every witness that had testified at appellant's first trial, and the court's inadequate instruction on the issue.

C. The Prosecutor's Argument That Appellant Kidnapped Michael And Failed To Call Logical Witnesses Concerning Michael's Kidnapping Was Prejudicially Erroneous Because That Charge Was Dismissed After The Jury Failed To Convict Appellant Of Kidnapping And Kidnapping Special Circumstances

Even if the prosecutor's attack on lingering doubt was permissible, the prosecutor went too far in arguing that appellant failed to call logical witnesses concerning Michael's kidnapping, even though the prosecutor had dismissed the kidnapping and kidnapping special circumstances charges after the jury could not agree on a verdict.

As noted above, the prosecutor repeatedly faulted appellant for not presenting "a lot" of logical witnesses and asked the jury "to count up the number

of people mentioned in the evidence here who didn't testify." (41-RT 12365.) Among the witnesses the prosecutor faulted appellant for not calling to testify were witnesses who testified about appellant's possible kidnapping of Michael, a theory that appellant's first jury did not accept. Included among these irrelevant witnesses was Charlie Wilber, who "placed [the kidnapping] at 3:30 to 4 o'clock," which allegedly "was part of the evidence [the prosecutor] put on in front of the guilt jury." (41-RT 12370.)

The prosecutor also complained about appellant's failure to depose the ill Dixie Bell "who could theoretically corroborates [sic] that he did all these stops:"

> He could have presented evidence and he had the ability to put on the evidence. You can hold that against him. You can hold that against him. He failed to call logical witnesses. (41-RT 12378.)

The prosecutor's desperate argument was unfounded as it was improper to hold "against him" the fact that appellant did not *again* raise a reasonable doubt about his guilt of the crime of kidnapping and kidnapping special circumstances when those charges were dismissed after the jury could not agree on a verdict.

Appellant does not dispute that commenting on a defense failure to produce logical witnesses is permissible, even if the witness is ill. (*People v. Coleman* (1969) 71 Cal.2d 1159, 1167; *People v. Fitzgerald* (1936) 14 Cal.App.2d 180, 205; 14-CT 4251-4254.) Here, however, the prosecutors dismissed the charge of kidnapping against him. Thus, every single witness who could testify about appellant's alibi that he could not have kidnapped Michael could not reasonably be considered "logical witnesses" that appellant could be faulted for failing to call at the second penalty phase. The prosecutor had dismissed that charge.

D. The Prosecutor's Misleading Argument That The Defense Had Not Subjected The Fingernail Scrapings Under Michael's Fingernails To DNA Testing, Even Though The Court Had Denied Appellant Funds To Do Such Testing, Deprived Him Of His Due Process Right To A Fair Trial

In the preceding arguments, appellant has explained the facts relating to the court's refusal to fund DNA testing of Michael's fingernail scrapings. In short, the prosecutor unfairly used this ruling to argue that appellant had the evidence for almost three months, but did not do DNA testing either, despite the fact that appellant was not allowed to argue that the court had denied him funding to do such testing. (See Arg. XII.)

The prosecutor committed egregious misconduct by misleading the jury that appellant could have subjected the bloody shirt, the fingernail scrapings taken from Michael, and the pubic hairs found on the blanket to DNA testing, when in fact the prosecutor knew the court had denied appellant the funds to conduct such DNA testing of the evidence in this case.

The supreme court in *People v. Hill* (1998) 17 Cal.4th 800, 823, explained:

> Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. (*People v. Avena* (1996) 13 Cal.4th 394, 420; *People v. Lucas* (1995) 12 Cal.4th 415, 472 [failure to object forfeited claim of misconduct for misstating facts].) A prosecutor's "vigorous" presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." (*People v. Purvis* (1963) 60 Cal.2d 323, 343.)

Deliberate lying is prosecutorial misconduct. (*People v. Varona* (1983) 143 Cal.App.3d 566, 560.) In *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, the Ninth Circuit reversed a murder conviction on due process grounds because of the prosecutor's knowing introduction and reliance on false evidence suggesting the murder had occurred during the course of a robbery. Similarly, appellant's conviction should be reversed, because of the prosecutor's knowing introduction

and reliance on the false theory that appellant could have tested the evidence when the court had denied funding.

It is settled that due process proscribes a criminal conviction obtained through perjured testimony knowingly used by the prosecution against the accused. (*Pyle v. Kansas* (1942) 317 U.S. 213, 216; *Mooney v. Holohan* (1935) 294 U.S. 103, 112.) In *Mooney v. Holohan,* the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." (*Id.* at 112.)

In fact, outright falsity need not be shown if the testimony taken as a whole gave the jury a false impression. (*Alcorta v. Texas* (1957) 355 U.S. 28, 31.) In *Alcorta v. Texas*, the Court held that the prosecutor had a duty not to leave the jury with a false impression by informing a prosecution witness not to volunteer any information about a particular topic (his sexual relationship with the defendant's wife, whom he killed) but to answer truthfully, if specifically asked about it. The prosecutor's direct examination of the witness created the false impression that the witness was nothing more than a casual friend. (*Id.* at 30-31.) Thus, a denial of due process can result if the prosecution, although not soliciting false evidence, allows a misleading and false impression to go uncorrected when it appears; it matters little that the false impression goes only to the credibility of a prosecution witness or that the prosecutor's silence was not the result of guile or a desire to prejudice. (*Napue v. Illinois* (1959) 360 U.S. 264, 269-270 [the knowing use of false testimony to obtain a conviction violates due

process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared].)

The prosecutor's knowing misstatements cannot be deemed harmless beyond a reasonable doubt because the evidence against appellant was entirely circumstantial and there is no way to determine whether any of the jurors were influenced by the prosecutor's mischaracterization of appellant's role in not subjecting critical evidence to DNA testing. The standard of prejudice applicable to the knowing use of perjured testimony is equivalent to the *Chapman v. California* (1967) 386 U. S. 18, 24, harmless beyond a reasonable doubt standard. (*United States v. Bagley* (1985) 473 U.S. 667, 679-680 & fn. 9; see *People v. Ruthford* (1975) 14 Cal.3d 399, 408-409.) Under *United States v. Agurs* (1976) 427 U.S. 97, 104, the *Chapman* standard is justified because the knowing use of perjured testimony involves prosecutorial misconduct, and, more importantly, involves "a corruption of the truth-seeking function of the trial process."

Under the *Chapman* standard, the prosecutor's reprehensible lying was not harmless beyond a reasonable doubt. The evidence of appellant's guilt was entirely circumstantial and quite weak. The prosecutor obviously felt the case was weak enough against appellant that he had to resort to deliberately trying to mislead the jury about appellant's inability to subject critical evidence to DNA testing. It is nothing if not a "corruption of the truth-seeking function of the trial process" for the prosecutor to try to convince a jury to give appellant the death penalty because the state had refused to fund DNA testing. This reprehensible prosecutorial misconduct deprived appellant of his due process right to a fair trial. (See *Estes v. Texas* (1965) 381 U.S. 532, 540; *Berger v. United States* (1935) 295 U.S. 78, 88 ["The interest of the prosecution is not that it shall win the case,

but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done"].))

A prosecutor "has no obligation to win at all costs and serves no higher purpose by so attempting." (*Bruno v. Rushen* (9th Cir. 1983) 721 F.2d 1193, 1195.) The prosecutor cannot resort to "the use of deceptive or reprehensible means to influence the jury." (*People v. Wiley* (1976) 57 Cal. App. 3d 149, 162.) As Justice Douglas bluntly put it, "[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-649 [Douglas, J., dissenting].)

Here, the prosecutor tried to prejudice the jury by deliberately misleading them about appellant's inability, for lack of funding, to do the DNA testing of critical evidence.

E. The Prosecutor's Argument That The Jury Should Conduct Their Own Comparison Of Knife Wounds With A Microscope Was Unconstitutional

The court overruled appellant's objection to the prosecutor telling the jury to get a magnifying glass and make their own comparison of the knife wounds to conclude that Dr. Dibdin was wrong:

> Dr. Dibdin was wrong about one thing, and it's because he's not an expert in this one thing. He's not an expert in matching up marks with knives. There are experts that DOJ has to do such things. These marks right here, I want you to take a look at them, because Dr. Dibdin said that he did not look at the marks under a magnifying glass that were made by a knife on Michael's skin. Do yourself a favor. Have the bailiff get yourself a magnifying glass and look at the. . . . You will see if you closely examine those that what Dr. Dibdin thinks he's seeing, he's not seeing, because some of the -- some of the lines on there, there's no pattern to them at all. And other ones, you can literally see them veering out, okay? So he doesn't know what he's talking about with regards to this knife. (41-RT 12387-88.)

The prosecutor improperly asked the jury to second-guess the experts by becoming experts themselves and compare the photographs "under a magnifying glass" to decide for themselves whether they matched, even though the prosecutor did not present an expert to contradict Dr. Dibdin's opinion. (See *People v. Hogan* (1982) 31 Cal.3d 815, 852-853 & fn. 21 [criminalist, who had only read a book about blood splatter, was not qualified to testify as an expert on the subject]; *People v. Chambers* (1958) 162 Cal.App.2d 215, 219 [junior high school counselor, who had taken a criminology course in college, was not qualified as an expert on fingerprints]; cf. *People v. Guerra* (2006) 37 Cal.4th 1067, 1120 [the prosecutor properly encouraged the jury to test defendant's testimony by using the substitute hamper and other objects of the mock-up to determine whether defendant could have stood between the water cooler and hamper, adjacent to Powell's knee, when he purportedly lifted her up by her shoulders]; *People v. Baldine* (2001) 94 Cal.App.4th 773, 778 [jurors may use an exhibit according to its nature to aid them in weighing the evidence, but not to generate new evidence].)

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473.) When a jury considers extraneous facts not introduced in evidence, "'a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence.'" (*Hughes v. Borg* (9th Cir. 1990) 898 F.2d 695, 700, quoting *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 854.)

It is misconduct for jurors to conduct experiments or investigations that enable one or more jurors to receive evidence outside the presence and knowledge of the defendant going to a crucial element in the prosecution or defense case. (*Marino v. Vasquez* (9th Cir. 1987) 812 F.2d 499, 504 [juror's trigger pull experiment at home with different gun than that entered into evidence was reversible misconduct]; *People v. Castro* (1986) 184 Cal.App.3d 849, 853-854 [juror's use of binoculars not in evidence to determine if police officer's testimony was credible was reversible misconduct]; *People v. Conkling* (1896) 111 Cal. 616, 627-628 [jurors' experimentation with rifle not in evidence to determine the distance that powder marks would be deposited after firing a gun was reversible misconduct].

When one or more jurors are exposed to facts that have not been introduced into evidence, the accused is denied his right to confrontation and cross-examination and to effective assistance of counsel with respect to the extraneous information. (*Dickson v. Sullivan, supra*, 849 F.2d at 406; *Marino v. Vasquez, supra*, 812 F.2d at 505; *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 854.)

If the jurors were qualified to draw a conclusion from the photographs of the knife marks as intelligently as an expert, which of course they were not, then the opinion testimony of the expert would not have been admissible. (See *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 124.)

"The 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations." (*Donnelly v. DeChristoforo*, *supra,* 416 U.S. at 646-648 [isolated passages of a prosecutor's argument do not reach the same proportions].)

F. This Court Should Review The Misconduct Because An Admonition Would Not Have Cured The Harm

Appellant's claim that the prosecutor committed misconduct may be waived for failure to make a timely assignment of misconduct and request an admonition. (*People v. Prieto* (2003) 30 Cal.4th 226, 259; *People* v. *Green* (1980) 27 Cal.3d 1, 27.) Here, appellant objected numerous times. Any further objections would have been futile and thus the error is not waived. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821, 845-846.) In *People v. Hall* (2000) 82 Cal.App.4th 813, 817, the court, citing *People v. Hill* (1998) 17 Cal.4th 800, 820-821, found that a defendant is excused from trying to persuade a trial court to give a curative admonition after the court found the objection meritless: "The inherent impossibility of obtaining a curative admonition in such a situation has led to the rule that the failure to request the admonition does not forfeit the error." Moreover, the Court may reach the merits of a claim where, as here, "plain error" has been committed at the penalty phase. (See *People v. Wash* (1993) 6 Cal.4th 215, 276-277 [conc. & dis. opn. of Mosk, J.].)

It would be anomalous if, in order to preserve an objection to prosecutorial improprieties, defense counsel had to request an admonition that this Court recognized would only "compound" the prejudice. (*People v. Bandhauer* (1967) 66 Cal.2d 524, 530; see also *People* v. *Kirkes* (1952) 39 Cal.2d 719, 726-727; *People v. Coleman* (1992) 9 Cal.App.4th 493, 497.) The errors in appellant's case were particularly egregious because, despite any court admonition, the jury could not help but be influenced by the prosecutorial misconduct.

G. The Cumulative Effect Of The Prosecutor's Misconduct During Closing Argument Denied Appellant His Due Process Right To A Fair Trial, Thus Requiring Reversal

The prosecutor's repeated instances of improper argument materially damaged appellant's defense and likely poisoned the jury. "A prosecutor's

closing argument is an especially critical period of trial. Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.) In *People v. Hill* (1998) 17 Cal.4th 800, 845, this Court found numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial. (See also *People* v. *Fosselman* (1983) 33 Cal.3d 572, 580-581; *People* v. *Criscione* (1981) 125 Cal.App.3d 275, 293.) It is not appellant's fault the court failed to rein in the prosecutor. Moreover, if one or more of the errors is found by this court to be of federal constitutional magnitude, the cumulative prejudice analysis must necessarily be under the *Chapman* standard. Such cumulative review under this strict standard of course calls even more clearly for reversal of the death sentence.

Prosecutorial misconduct in closing argument can render a trial so fundamentally unfair as to deny defendant due process. (*Donnelly v. DeChristoforo*, *supra,* 416 U.S. at 642-645; *People v. Harris* (1989) 47 Cal.3d 1047, 1084.) Under the Eighth Amendment "the qualitative 'difference of death from all other punishments requires a correspondingly' greater degree of scrutiny of the capital sentencing determination," including scrutiny of the prosecutor's penalty phase arguments. (*California v. Ramos* (1983) 463 U.S. 992, 998-999; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-334, 337-341.) The misconduct denied appellant the right to a reliable penalty determination, and requires per se reversal of his death sentence under the Eighth Amendment. (See e.g., *Penry v. Lynaugh, supra*, 492 U.S. at 328; *Mills v. Maryland*, *supra,* 486 U.S. at 384.) The penalty phase is not suppose to be a lynch party; it is suppose to control and direct the base emotions, such as vengeance and hatred, that an ugly crime can induce.

To be compatible with principles of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, capital sentencing statutes 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." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [internal citations and quotation marks omitted].) Appeals to the passions and prejudice of the jury by the prosecution in a capital case violates "the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is considering." (*Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 776, citing *Godfrey v. Georgia, supra*.) The Eighth Amendment requires that a verdict of death must be a "reasoned moral response to the defendant's background, character, and crime," not "an unguided emotional response." (*Penry v. Lynaugh*, *supra,* 492 U.S. at 328.)

The prosecutor's improper actions violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and under Article I, sections 1, 7, 13, 15, 16 and 17 of the California Constitution to due process, to a fair trial, to trial by jury, to effective assistance of counsel, to confrontation and cross-examination, to rebut the evidence against him, to remain silent, to not incriminate himself, to be free from outrageous governmental conduct, to fundamental fairness, and a reliable determination of guilt and penalty. Moreover, the prosecutor's misconduct denied state law entitlements in violation of the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra,* 447 U.S. at 346.) The constitutional dimension of the prosecutorial misconduct requires reversal in appellant's case because it clearly was not harmless beyond a reasonable doubt under *Chapman* v. *California*, *supra,* 386 U.S. at 25-26. This is particularly true in this close case, where the first jury could not reach a verdict

on penalty, and the second jury deliberated more than five hours of deliberation over two days, and requested a readback of the testimony of Ray Clark and Nickie Duda-Shay, before returning a verdict of death. (See introduction.)

There is also a reasonable probability that had the prosecutor not engaged in the above-described misconduct, the jury's death verdict would have been different.

XIV. THE COURT VIOLATED APPELLANT'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS DUE PROCESS RIGHT TO A FAIR PENALTY DETERMINATION WHEN IT DENIED APPELLANT'S REQUEST FOR A CONTINUANCE TO INVESTIGATE NEWLY DISCOVERED EXONERATING EVIDENCE

A. The Relevant Facts

On September 10, 1999, appellant moved to continue his sentencing to investigate and to determine the ramifications of newly-discovered evidence. (42-RT 12646-47.) Appellant explained that a letter from Mr. Raymond Walton to the court indicated that the defendant did not kill Michael Lyons; but that he was set up by a man who did it named Timothy Clark who was currently incarcerated in Yolo County. Appellant further explained his reasons for his request:

> In addition, the motion to continue is based upon the request to examine evidence. Specifically, there are fingerprints of potential other individuals that were in and around the crime scene that have come to light to the defense that are needed to be examined to the fingerprints that are on the windshield in this case. Further, the defense is making a motion to continue based upon the need to make a motion for a new trial. (42-RT 12647-48.)
>
> The motion for new trial is based upon, number one, the newly-discovered evidence; that is, the letter from Mr. Raymond Walton regarding the defendant being set up by a Timothy Clark. Number two, it's based upon the request of the defendant to raise certain issues regarding the guilt phase of the trial. And

> that is to raise an issue regarding testimony regarding the prosecution's case in chief that tire tracks did not exist within the crime scene area when, in fact, they did exist within the crime scene area and that the attorneys on the guilt phase failed to challenge that testimony. In addition, it's based upon the fact that the attorneys in the guilt phase failed to present any evidence or challenge any evidence regarding the tire tracks at the scene. So it would be the request of the defense for that motion to continue to be granted to allow those items to occur. (42-RT 12647-48.)

The prosecutor argued that he did not believe the letter was credible. (42-RT 12649-52.)

Appellant disagreed:

> Number one, the Court has always maintained that the government or defense can renew any motion at any time if they believe there's a good faith basis of their facts. Number two, simply put, the fact that the government has exercised so much time and energy and money and effort into checking out the letter indicates that the government had some question and wanted to resolve some question about that letter. And it demonstrates that, the ability of the government to go forward and investigate whereas the defense does not have that immediate resource to carry on that type of investigation. And so I think that the reason that the government stated about the letter and what they have investigated bolster why the defense should prevail in this motion. (42-RT12652.)

The court summarily denied appellant's motion to continue. (42-RT 12653.)

B. The Relevant Law

This court reviews the trial court's denial of the motion for a continuance for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) A continuance may properly be denied when the request is based on allegedly new evidence of speculative value. (*People v. Beeler* (1995) 9 Cal.4th 953, 1004.)

In *People v. Snow* (2003) 30 Cal.4th 43, 76-77, this court upheld the trial court's denial of a continuance because it did not deprive the defense of a reasonable opportunity to prepare a new trial motion:

> As the prosecutor noted in opposing the continuance, the defense theory of a police scheme to plant evidence against defendant was of long standing (see *People v. Snow, supra*, 44 Cal.3d at p. 220), and counsel failed to explain why the records now under investigation had not been investigated in preparation for defendant's first trial or in the two and one-half years since Miller was reappointed to defend defendant in the retrial. Nor did counsel's explanation demonstrate that a continuance was likely to be useful (see *People v. Frye* (1998) 18 Cal.4th 894, 1013); it was far from clear, that is, that a reasonable continuance would allow the defense to obtain records tending to show that the police officers' testimony about finding the bubble shield was false and that the shield actually had been obtained from some accident scene. There was no good cause to continue the modification and sentencing hearing.

In contrast, in appellant's case, there was no dispute that the letter from Mr. Raymond Walton regarding the defendant being set up by Timothy Clark was newly-discovered evidence. Appellant was entitled to a reasonable continuance to investigate the matter and to prepare a new trial motion based on the allegations in the letter. This refusal violated appellant's due process right to a fair trial. (See *Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [denial of a continuance may be so arbitrary as to violate due process].)

XV. THE SENTENCES FOR BOTH LEWD ACT CONVICTIONS AND TORTURE MUST BE STAYED BECAUSE THE PROSECUTOR ARGUED THAT THEY WERE BASED ON THE SAME CONDUCT AS SODOMY, AND BECAUSE THE PROSECUTOR ARGUED THAT SODOMY WAS A TYPE OF TORTURE; AND THE USE OF IDENTICAL FACTS TO CONVICT APPELLANT OF SEPARATE CRIMES AND TO IMPOSE A DEATH SENTENCE VIOLATED THE FIFTH AND EIGHTH AMENDMENTS

On June 17, 1998, the jury found appellant guilty of among other things, one count of a lewd act upon a child under 14, one count of a forcible lewd act upon a child under 14, one count of torture, and one count of forcible sodomy. (9-CT 2474-2475, 2526-2546.)

On September 10, 1999, the court sentenced appellant to death for special-circumstances murder, plus three concurrent terms of 25 years to life for torture, a lewd act upon a child under 14, and a forcible lewd act upon a child under 14, and a concurrent term of 75 years to life for forcible sodomy on a child under 14 years old. (1-CT 14-15, 16-CT 4654-4659.)

Appellant did not object to the concurrent sentencing. Because the trial court imposed an unauthorized sentence for which no objection is required, however, this court can correct the error on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17 [trial court's erroneous failure to stay execution of a sentence under section 654 is an unauthorized sentence for which no objection is required].)

At trial the prosecution presented no substantial evidence of a lewd act apart from the evidence of a forcible lewd act and sodomy for which appellant was charged and convicted. The prosecution also presented no substantial evidence of a forcible lewd act, apart from the sodomy. In closing argument, the prosecutor argued that one "can't commit sodomy without committing a lewd act."

(18-RT 5690.) And in closing argument, the prosecutor also equated sodomy with torture: "Sodomy is a form of torture in and of itself." (18-RT 5695.)

Thus, the prosecutor presented and argued that all four crimes -- a lewd act upon a child, a forcible lewd act upon a child, torture, and sodomy -- arose out of the same course of conduct of sodomizing Michael. Penal Code section 654 precludes punishing appellant for his single act of sodomizing in four different ways, because the offenses were incident to one objective and intent. (*People v. Hopkins* (1975) 44 Cal.App.3d 669, 677.)

This Court in *People v. Pearson* (1986) 42 Cal.3d 351, 356-358, held that a defendant who committed an act of sodomy on a child could be convicted of both sodomy and of lewd conduct, but could not face additional punishment under Penal Code section 654. (See also *People v. Thompson* (1990) 50 Cal.3d 134, 172.)

In *People* v. *Siko* (1988) 45 Cal.3d 820, 825-826, this Court reiterated that double convictions were proper for the same conduct, but that Penal Code section 654 applied to prohibit a sentence for lewd conduct when the record, including the prosecutor's closing argument, indicated that the lewd conduct charge was based on either the charged rape or sodomy. The Court held it was immaterial that the evidence showed defendant may have committed one or more lewd acts other than the rape or sodomy, because there was "no showing that the lewd-conduct count was understood in this fashion at trial." (*Id.* at 826; see also *People* v. *Wells* (1970) 13 Cal.App.3d 265, 277 [sentencing on both child molesting and assault with intent to rape violates section 654].)

Similarly, in appellant's case, there was no showing that the prosecutor proved lewd acts on Michael other than the sodomy, or proved torture other than the sodomy. In fact, the jury could not reach a verdict on the oral copulation count and it was dismissed. (9-CT 2543-2546.) Moreover, the prosecutor

argued in closing argument that one "can't commit sodomy without committing a lewd act." (18-RT 5690.) The prosecutor also equated sodomy with torture: "Sodomy is a form of torture in and of itself." (18-RT 5695.) Thus, these four counts -- torture, a lewd and lascivious act upon a child under 14, a forcible lewd act upon a child under 14, and forcible sodomy on a child under 14 years old -- were not understood to be distinct and separate crimes at appellant's trial, and thus cannot be separately punished.

Appellant also urges this Court to reconsider the *Pearson* ruling, because having a sentence stayed under section 654 is not sufficient to protect a defendant in a capital case. It is simply unfair and unconstitutional under the Fifth and Eighth Amendments to permit a jury in a death penalty case to use the same identical facts to convict appellant of separate crimes, which they then are permitted to consider in deciding whether he should live or die.

At a minimum, however, the court's concurrent 25-year-to-life sentences for a lewd act and a forcible lewd act, and the concurrent 75-year-to-life sentence for torture, must be stayed under section 654, because the prosecutor argued that the lewd acts and torture were committed by the act of sodomy itself and there is no showing that the jury found the facts supporting the lewd acts and torture convictions were different than the facts sufficient to find appellant guilty of sodomy, particularly in light of the prosecutor's argument.

XVI. APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED PENALTY PHASE INSTRUCTIONS

A. Appellant's Constitutional Rights Were Violated By The Trial Court's Refusal To Give Appellant's Requested Penalty Phase Instruction About The Kind Of Mitigating Factors The Jury Could Consider

The trial court, acceding to the prosecutor's objection, refused appellant's requested instruction, explaining the scope and proof of mitigating factors. (15-CT 4406; 40-RT 12068-70.) The court found that appellant's proposed instruction was improper because it was adequately covered by the other instructions. (40-RT 12068-70.) Appellant begs to differ.

Appellant's requested instruction stated:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this cane. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors.
>
> A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.
>
> A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.
>
> Any mitigating circumstance may outweigh all the aggravating factors.
>
> A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor. (15-CT 4406.)

Instead, the court instructed the jury as follows:

> The trial court instructed the jury that "a mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (15-CT 4385; 41-RT 12521-22; CALJIC No. 8.88 [1989 Revision].)

The court further instructed:

> The weighing of aggravating and mitigating factors does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic weight or value you deem appropriate to each and all of the various factors you are permitted to consider. (15-CT 4385; 41-RT 12522; CALJIC No. 8.88 [1989 Revision].)

First, a substantially similar instruction to appellant's requested instruction was given at the defendant's request in *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23. In its original form the second sentence of paragraph 3 required a finding of "substantial evidence" for the jury to consider a mitigating factor. (*Ibid.*) In rejecting the defendant's claim on appeal that the "substantial evidence" language implicated the Eighth Amendment the court found that the challenged instruction generally favored the defendant and was consistent with Eighth Amendment guarantees. The court concluded that nothing in the instruction prevented the jury "from considering a mitigating circumstance no matter how strong or weak the evidence is." (*Id.* at 601.) Hence, the "substantial evidence" language has been replaced with the above language from the *Wharton* decision.

The above instruction implements the defendant's Eighth and Fourteenth Amendment guarantees to due process, equal protection and against cruel and unusual punishment by informing the jury that mitigation is not limited to the enumerated factors but includes any mitigating information that may convince it to impose a sentence less than death. (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308; *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306.) It also correctly

informs the jury that mercy, sympathy and sentiment are relevant in giving weight to the mitigating factors. (See *People v. Easley* (1983) 34 Cal.3d 858, 874-880.)

This Court has rejected similar claims before. (*People v. Smithey* (1999) 20 Cal.4th 936, 999-1000 [prosecutor did not commit misconduct in urging jury to ignore sympathy for defendant's family as a mitigating factor]; *People v. Ochoa* (1998) 19 Cal.4th 353, 456, [sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation].)

The court's refusal to give his requested instruction violated the federal Constitution and state law because it prohibited the sentencer from considering, as a mitigating factor, "any aspect of [his] character or record and any of the circumstances of the offense [offered] as a basis for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4, citing *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, and *Lockett v. Ohio* (1978) 418 U.S. 586, 604 [plur. opn. of Burger, C.J.]; see § 190.3, factor (k); *People v. Easley* (1983) 34 Cal.3d 858; 877-878 & fn. 10.) Appellant also insists that if the "impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty, should be imposed" (*Payne v. Tennessee* (1991) 501 U.S. 808, 827; see *People v. Edwards* (1991) 54 Cal.3d 787, 832-836), the jury should not be barred from considering the effect of a death verdict on the defendant's family.

In appellant's case, however, the court's refusal to give appellant's requested instruction violated his due process right to present all relevant mitigating evidence.

B. Appellant's Constitutional Rights Were Violated By The Trial Court's Refusal To Give Appellant's Requested Instruction That Appellant's Background Could Only Be Mitigating

The trial court, acceding to the prosecutor's objection, refused appellant's requested instruction that appellant's background could only be considered as

mitigating evidence, because it was covered. (15-CT 4402; 40-RT 12048-50.) Appellant's proposed instruction read as follows:

> The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence. (CT 4402.)

There was no comparable instruction given the jury. The prosecutor exploited the court's error in his final closing argument by arguing appellant's background was an aggravating factor and a reason to vote for death:

> All you have heard is that Mr. Rhoades had a somewhat privileged upbringing, that there was no reason for him to turn into a rotten egg, none whatsoever. And that's Robert Rhoades right there. Twelve felony convictions since 1984. That's who Robert is right there.
>
> As counsel said in his opening statement, he's correct. Mr. Rhoades is not a very nice person. But there's no reason that they presented to you why he turned out this way. I want you to keep that in mind. That's why the whole defense in this case is lingering doubt, is because they can't – they can't offer you anything good to say about this man. (41-RT 12356.)

This error improperly allowed the jury to use appellant's background as an aggravating factor and a reason to vote for death. (See Arg. XIII A; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033, [character evidence relevant only to factor (k), cannot be used affirmatively as a circumstance in aggravation].) Evidence of the defendant's background can only be a mitigating factor because the permissible aggravating factors are limited to those listed in section 190.3. (*People v. Hardy* (1992) 2 Cal.4th 86, 207 [even though no limiting instruction on the use of background evidence was requested, the Court assumed that the failure to limit the jury's consideration of background to mitigation was error, albeit harmless].) Accordingly, such an instruction should be given in every case where evidence of the defendant's background has been presented.

By promoting a reliable, non-arbitrary, and individualized sentencing determination and by protecting against jury consideration of matters which are constitutionally irrelevant, constitutionally protected, arbitrary, or discriminatory, this instruction would have protected appellant's federal constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. (8th and 14th Amendment; E.g., *Dawson v. Delaware* (1992) 503 U.S. 159; *Sochor v. Florida* (1992) 504 U.S. 527; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318.)

C. Appellant's Constitutional Rights Were Violated By The Trial Court's Refusal To Give Appellant's Requested Instruction That The Jury Should Assume That A Death Sentence Will Be Carried Out

The trial court, acceding to the prosecutor's objection, refused appellant's requested instruction that the jury should assume that a death sentence will be carried out. (15-CT 4409; 40-RT 12077-78.) Appellant's proposed instruction read as follows:

> If you sentence the defendant to death, you must assume that the sentence will be carried out. (15-CT 4409.)

People v. Kipp (1998) 18 Cal.4th 349, 377-379, approved of this instruction if requested and if there is a reason to believe it necessary:

> Although it is not improper to instruct the jury to assume that whatever penalty it selects will be carried out (*People v. Sanders,* [(1995)] 11 Cal.4th 475, 561-562), an instruction phrased in this qualified language may unnecessarily raise questions in the jurors' minds. Therefore, we have not required that trial courts so instruct the jury in every penalty phase. The trial court may give the instruction at the defendant's request and should give this or a comparable instruction if there is a reason to believe the jury may have some concerns or misunderstanding in this regard. (See *People v. Hines* (1997) 15 Cal.4th 997, 1073; *People v. Jackson, supra*, 13 Cal.4th 1164, 1234; *People v. Davis* (1995) 10 Cal.4th 463, 548.)

> This court has noted that brief references to commutation and similar possibilities during jury selection are generally insufficient to mandate clarifying instructions at the penalty phase. (*People v. Carpenter* (1997) 15 Cal.4th 312, 360-361; *People v. Pinholster* (1992) 1 Cal.4th 865, 918-919.) Because the record in this case does not demonstrate a plausible basis to infer jury concerns or misunderstanding about the consequences of its penalty verdict, the trial court was not required to instruct the jury on its own initiative to assume when deliberating on and selecting the penalty verdict that a verdict of death would inexorably result in defendant's execution.

In appellant's case, there was reasonable cause to caution the jury about this point, in light of the widespread public opinion that the death penalty is not carried out frequently. In *State v. Southerland* (S.C. 1994) 447 S.E.2d 862, 868, for example, the court held that the above instruction should be given, upon request, or juror inquiry as to the meaning of life imprisonment.

D. Appellant's Constitutional Rights Were Violated By The Trial Court's Refusal To Give Appellant's Requested Instruction That The Jury Could Decide That, Even In The Absence Of Mitigating Evidence, That The Aggravating Evidence Was Not Substantial Enough To Warrant Death

The trial court, acceding to the prosecutor's objection, refused appellant's requested instruction that the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death. (15-CT 4415; 40-RT 12077-78.) Appellant's proposed instruction read as follows:

> A jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death. (15-CT 4415.)

Instruction upon this principle is necessary to assure that the jury does not improperly impose the burden on the defendant to present affirmative evidence in mitigation to overcome the existence of the special circumstance and any other aggravating factors. (See *People v. Duncan* (1991) 53 Cal.3d 955, 978-979; see

People v. Nicolaus (91) 54 Cal.3d 551, 590-591.) Without a specific instruction on this principle, there is a danger that the jury will not understand from the standard CALJIC instructions that it may return a verdict of life even if no mitigation exists. The entire focus of the CALJIC instructions are upon a weighing and comparison of the aggravating circumstances with the mitigating circumstances. Without additional instruction, the jurors would conclude that if there is no mitigation then the existence of any aggravation at all would warrant imposition of death.

In *People v. Jones* (1998) 17 Cal.4th 279, 314, this Court concluded that this instruction was unnecessary because it is duplicative of CALJIC No. 8.85(k). However, the court's conclusion is erroneous for two reasons. First, factor "k" does not include the concept set forth in the proposed instruction. Factor "k" merely informs the jury as to other matters which it may consider to be mitigating. (*Jones, supra*, 17 Cal.4th at 314.) The proposed instruction, on the other hand, informs the jury that it may return a verdict of life even if there is no mitigating evidence at all. Because no other standard CALJIC instruction informs the jury of this rule, which is a correct construction of the California statute, the proposed instruction is necessary.

Second, the defendant has a federal constitutional right to have the jury instructed on his theory of the case. (*People v. Wharton* (1991) 53 Cal.3d 522, 570-72; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196; *Burger v. Kemp* (1987) 483 U.S. 776.) This rule should be equally, if not more, applicable when that theory of the case relates to the defendant's attempt to persuade the jury to return a verdict of life rather than death. (See *Beck v. Alabama* (1980) 447 U.S. 625 [8th Amendment requires heightened reliability and scrutiny].) Therefore, the defendant should be permitted to clarify and pinpoint legal principles upon which the theory of the defense is founded when

those principles, even though arguably included within a more general instruction, are not specifically stated to the jury in the instructions.

Third, it is now recognized that the jury may be given "unbridled" discretion in determining penalty under the federal constitution. (See *Buchanan v. Angelone* (1998) 522 U.S. 269, 276-278.) Obviously, such unbridled discretion would include the ability of the jury to reject death even in the absence of mitigation.

In *People v. Roybal* (1998) 19 Cal.4th 481, the court concluded that under the standard instructions no reasonable juror would assume that death could not be imposed unless there were mitigating circumstances. (See also *People v. Ray* (1996) 13 Cal.4th 313, 355-356.) However, because there is no question that the proposed instruction is a correct statement of the law, and because the point is not specifically covered in the standard instructions, the court erred in refusing this instruction.

By promoting a reliable, non-arbitrary, and individualized sentencing determination, these refused instructions protect the defendant's federal constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. (8th and 14th Amendments.) (E.g., *Sochor v. Florida* (1992) 504 U.S. 527; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Clemons v. Mississippi* (1990) 494 U.S. 738; *McCleskey v. Kemp* (1987) 481 U.S. 279.)

XVII. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED IN THIS CASE REQUIRES REVERSAL OF THE GUILT VERDICTS AND THE JUDGMENT OF DEATH AND DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND PENALTY PHASE

If the Court does not agree that any one error requires reversal when considered by itself, then it is necessary to assess their cumulative impact. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15 [reversing because "cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"].)

State law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286-288; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo, supra,* 416 U.S. at 642-644.)

The Ninth Circuit has repeatedly noted that while some errors standing alone may be harmless, in connection with other errors they may render a trial so unfair that reversal on the basis of cumulative error is required. (*McDowell v. Calderon* (9th Cir. 1997) 107 F.2d 1351, 1368 [although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial]; *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 [prejudice resulting from the cumulative effect of several errors required reversal even though individual errors evaluated alone might not have warranted reversal]; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 [while individual errors may not rise to level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622, *cert. denied* (1993)

507 U.S. 951 [cumulative effect of several errors, including deficient performance by counsel and faulty jury instruction, justified relief in habeas corpus death penalty case]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475 ["Although each of the above errors . . . may not rise to the level of reversible error, their cumulative effect many nevertheless be so prejudicial to the appellants that reversal is warranted."].) The cumulative effect of the multitude of errors in this case violated the due process guarantee of fundamental fairness and requires reversal of appellant's conviction. Where a court finds prejudice as the cumulative result of multiple errors, the court need not analyze the individual effect of each error. (See *Harris by and through Ramseyer v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1439; *Mak v. Blodgett, supra*, 970 F.2d at 622.)

In *People v. Hill* (1998) 17 Cal.4th 800, 845, this Court found numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial. That is, the combined, aggregate, prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone.

When a case is close, a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the appellant. (*People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v. Collins* (1968) 68 Cal.2d 319, 332.) Additionally, in a close case, the cumulative effect of errors may constitute a miscarriage of justice. (*People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Cruz* (1978) 83 Cal.App.3d 308, 334; see *United States v. McLister* (9th Cir. 1979) 608 F.2d 785.) The combined effect of instructional errors and/or evidentiary errors may create cumulative prejudice. (*People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520; *People v. Ford* (1964) 60 Cal.2d 772, 798.)

In appellant's case, there were cumulative errors that infected the trial with unfairness requiring reversal. (See *United States v. Frederick* (9th Cir. 1996) 78 F.3d 370, 381 [cumulative effect of various constitutional errors, including improper comments by prosecutor, prosecutorial vouching and the admission of prejudicial testimony, was prejudicial requiring reversal on appeal].)

In cases where multiple errors of the same type have occurred, the appropriate standard of review is, logically, the pertinent prejudice standard. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 421-422 [cumulative effect of exculpatory evidence suppressed by the government in violation of *Brady* raised a reasonable probability that the outcome of the trial would have been different and warranted habeas relief]; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1325 [cumulative effect of counsel's errors during the penalty phase created reasonable probability that, absent errors, result of penalty phase would have been different]; *Kelp v. Stone* (9th Cir. 1975) 514 F.2d 18, 19 [cumulative effect of instances of prosecutorial misconduct denied defendant a fair trial and justified granting habeas relief].)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, *all* errors should be reviewed under a *Chapman* standard. (*People v. Woods* (2006) 146 Cal.App.4th 106, 117 [because some of prosecutor's improper arguments were of federal constitutional magnitude, cumulative effect of misconduct is assessed under the *Chapman* standard; the state has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict]; see also *United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6 ["if any of the errors being aggregated are constitutional in nature, then the harmless-beyond-a-reasonable-doubt standard announced in *Chapman* should be used in determining whether the defendant's substantial rights were affected. Any lesser standard would potentially denigrate the

protection against constitutional error announced in *Chapman*"]; see also *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1283; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1220.)

Since appellant's case involves a number of constitutional errors, the appropriate standard for harmless error review here is the *Chapman* standard. Under *Chapman,* the state cannot establish that the cumulative effect of the multiple errors in the guilt and penalty phases was harmless beyond a reasonable doubt. Relief must be granted because the cumulative effect of all of the constitutional and nonconstitutional errors in this case clearly had a substantial and injurious effect or influence in determining the jury's verdicts in both phases of appellant's trial.

This was in fact a close case, as the first jury failed to reach verdicts on several counts and could not agree on a penalty. (See Introduction, *supra.*) Appellant has previously established that, in the absence of error, a juror in this case reasonably could have found that life without parole was the appropriate sentence in this case. In light of that fact, and in light of the nature and seriousness of the errors noted above, it is both reasonably possible (*Chapman v. California, supra*, 386 U.S. at 24) and reasonably probable (*Strickland v. Washington*, *supra*, 466 U.S. at 693-695) that any combination of those errors adversely influenced the guilt verdicts and the penalty determination of at least one juror. (See *Caldwell v. Mississippi, supra*, 472 U.S. at 341.)

XVIII. THE DECADE OF DELAY IN PROCESSING APPELLANT'S APPEAL VIOLATED THE EIGHTH AMENDMENT, HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION, AND INTERNATIONAL LAW

A. Violation Of The Eighth Amendment, Due Process And Equal Protection

It has been more than a decade since appellant was convicted and sentenced to death in September 1999. Through no fault of his own, appellant was without counsel for nearly five years until counsel was appointed in August 2004. Then, through no fault of his own, the correction of the record took another five years until 2009. Then, through no fault of his own, this opening brief was not filed until early 2010. Then, through no fault of his own, the Attorney General's response will probably not be filed until 2011 and appellant's reply brief will not be filed until 2012. Finally, this Court may take several more years to decide his appeal.

As the United States Supreme Court recognized more than a century ago, the suffering inherent in a prolonged and uncertain wait for execution is undeniable. (See *In re Medley* (1890) 134 U.S. 160, 172 ["when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it"].) It is a dehumanizing experience known to precipitate mental illness and even suicide. (See *Knight v. Florida* (1999) 528 U.S. 990, 993-998 [Breyer, J., mem. op. on denial of cert.]; *Lackey v. Texas* (1995) 514 U.S. 1045, 1045-1047, [Stevens, J., mem. op. on denial of cert.].) It is inconsistent with "the evolving standards of decency" which inform Eighth Amendment jurisprudence. (See *Trop v. Dulles* (1958) 356 U.S. 86, 101.)

Justice Breyer's cogent dissent from the denial of certiorari in *Knight v. Florida* (1999) 528 U.S. 990, 993-999, explained:

> It is difficult to deny the suffering inherent in a prolonged wait for execution -- a matter which courts and individual judges have long recognized. See *Lackey v. Texas*, 514 U.S. 1045, 1045-1047 (1995) (Stevens, J., respecting denial of certiorari). More than a century ago, this Court described as "horrible" the "feelings" that accompany uncertainty about whether, or when, the execution will take place. *In re Medley*, 134 U.S. 160, 172 (1890). The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." *People v Anderson*, 6 Cal.3d 628, 649, 493 P.2d 880, 894 (1972). In *Furman v Georgia, supra*, at 288-289, (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts "a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Solesbee v Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion). See Strafer, *Volunteering for Execution*, 74 J. Crim. L. & C. 860, 872, n 44 (1983) (a study of Florida inmates showed that 35% of those confined on death row attempted suicide; 42% seriously considered suicide). And death row conditions of special isolation may well aggravate that suffering. See Connolly, *Better Never Than Late*, 23 New Eng. J. on Crim. & Civ. Confinement 101, 121 (1997); Strafer, *supra*, at 870-871, n 37.
>
> At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes. *Lackey, supra*, at 1046. Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. (*Knight v. Florida, supra*, 528 U.S. at 994-995.)

In re Christopher S. (1992) 10 Cal.App.4th 1337, 1341-1343, recognized that a defendant has a due process right "to a speedy determination of his appeal." Several federal cases have also recognized that excessive delay in the appellate process may violate due process rights. "[W]hen a state provides a right to appeal, it must meet the requirements of due process and equal protection . . . [D]ue process can be denied by any substantial retardation of the

appellate process . . . ." (*Rheuark v. Shaw* (5th Cir. 1980) 628 F.2d 297, 302.) On the other hand, "not every delay in the appeal of a case, even an inordinate one, violates due process." (*Id.* at 303.) Such claims are tested in the federal courts by applying four factors set forth in *Barker v. Wingo* (1972) 407 U.S. 514, 530-532, for evaluating the right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the degree to which the defendant asserted his or her right; and (4) the degree of prejudice to the defendant. All four factors are to be considered together in light of the circumstances of the case, as part of a "difficult and sensitive balancing process." (*Id.* at 533; see also *Coe v. Thurman* (9th Cir. 1991) 922 F.2d 528, 530-532.)

The *Coe* court explained that where a state guarantees the right to a direct appeal, as California does, the state is required to make that appeal satisfy the Due Process Clause. (*Evitts v. Lucey* (1985) 469 U.S. 387.) While the Sixth Amendment guarantees the accused a speedy trial, excessive delay in the appellate process may also violate due process. (*United States v. Antoine* (9th Cir.1990) 906 F.2d 1379, 1382; see also *Burkett v. Cunningham* (3rd Cir.1987) 826 F.2d 1208, 1221; *DeLancy v. Caldwell* (10th Cir.1984) 741 F.2d 1246, 1247; *Rheuark v. Shaw*, *supra,* 628 F.2d at 302.)

Chief Justice Harrison dissenting in *People v. Simms* (Ill. 2000) 736 N.E.2d 1092, 1142-1145, explained:

> So long as double jeopardy principles are not violated, the State must normally be given the opportunity to correct its mistakes and retry a defendant whose trial was found to be flawed. There must be a point, however, at which the court steps in and says enough is enough. Beyond a certain number of years and a certain number of failed attempts by the State to secure a constitutionally valid sentence of death, the litigation becomes a form of torture in and of itself. It is as if the State were holding a defective pistol to the defendant's head day and night for years on end and the weapon kept misfiring. It may eventually go off,

> but then again, it may not, and the defendant has no way to be sure.
>
> With each attempt by the State to secure defendant's death, the integrity of the process degrades. The passage of time brings an ever-greater likelihood that witnesses will disappear, memories will fade, and evidence will be lost. Retribution and deterrence, the two principal social purposes of capital punishment, carry less and less force. See *Lackey*, 514 U.S. at 1045-46 (Stevens, J., mem. op. on denial of cert.).

Through no fault of appellant, this Court did not appoint appellate counsel for many years; the trial court did not provide a complete record for another several years; counsel did not file his opening brief until early 2010; and it will be several more years until this Court issues a decision after briefing is completed. This extraordinary delay violated appellant's due process right to judicial review and the Eighth Amendment.

B. Violation Of International Law

Because of the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR and arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.[43] This is especially so where appellant has been on death row more than ten years without having a brief filed on his behalf with this Court. (See *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

In *Pratt v. Attorney General for Jamaica* (P.C. 1993) 3 SLR 995, 2 AC 1, 4 All.E.R. 769, the Privy Council held that a delay of fourteen years between the

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[43] As explained in Argument XXX, *infra*, the United States is bound by the ICCPR.

time of conviction and the carrying out of a death sentence in the case of a Jamaican prisoner was "inhuman punishment." In *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), the European Court found that prisoners in Virginia spent an average of six to eight years on death row prior to execution. The court determined that "[h]owever well-intentioned and even potentially beneficial is the provision of the complex post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tensions of living in the ever-present shadow of death." (See also *Vatheeswaran v. State of Tamil Nadu*, 2 S.C.R. 348, 353 (India 1983) [criticizing the "dehumanizing character of the delay" in carrying out the death penalty].)

Finally, the Supreme Court of Canada recently considered evidence that death-sentenced inmates in Washington took on average 11.2 years to complete state and federal post-conviction review, in weighing the legality of extraditing two men to the United States to face capital charges. The court acknowledged a "widening acceptance" that "the finality of the death penalty, combined with the determination of the criminal justice system to satisfy itself fully that the conviction is not wrongful, seems inevitably to provide lengthy delays, and the associated psychological trauma." (*Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 March 2001) at para. 122.) Relying in part on this evidence, the court declined extradition, absent assurances the United States would not seek the death penalty.

Once again, however, appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) The death sentence here should be vacated.

XIX. THE COURT DENIED APPELLANT HIS DUE PROCESS RIGHT TO COMPLETE TRANSCRIPTS

Despite appellant's best efforts, he was unable to obtain transcripts or a settled statement of all the proceedings, because the court violated state law requiring that everything said in a capital case be on the record.

On September 25, 2006, the parties filed a stipulated settled statement on appeal. (54-CT 16088-92: Appellant's And Respondent's Stipulated Settled Statement On Appeal.) The following unreported conferences could not be settled, however, because none of the counsel had a recollection about the conferences, (or, in one instance, the recollections differed), and the trial judge had died.

1. Unreported conference on December 21, 1998, during juror voir dire. (27-RT 8293.)

2. Unreported conference on December 21, 1998, during juror voir dire. (28-RT 8467.) The prosecutor and defense counsel, Mr. Greiner, had completely different recollections and the parties agreed there was no basis to resolve this dispute. (54-CT 16091.)

3. Unreported conferences on December 23, 1998, during juror voir dire. (29-RT 8732, 8738.) On December 23, 1998, appellant requested funding for Gary Harmor to do PCR-DNA testing on fingernail scrapings, which the court has previously denied. (10-CT 2863-64; 43-RT 12780.)

4. Unreported conference on January 11, 1999, during juror voir dire. (30-RT 9068.)

5. Several "off-the-record" discussions on January 18, 2000, and on January 31, 2000, concerning the correction and certification of the record. (43-RT 12707, 12708, 12713, 12714, 12719, 12733, 12734.)

6. On December 5, 2007, Sutter County Clerk's made a sworn statement that the Penal Code section 987 confidential attorney fee petitions and court orders granting the attorney fee requests could not be located. (69-CT 20413-20415.) Despite the trial court's subsequent order of February 5, 2008, that all trial counsel for appellant "provide copies of their personal confidential 987.2 attorney fee requests and court orders granting or denying these requests UNDER SEAL to this court," the attorneys were not able to comply. (69-CT 20417-20418.) Appellant's first attorneys, Ron Peters and Roy Van Den Heuval provided no such documents or declarations, and appellant's second set of lawyers, Michael Bigelow and James Greiner, filed declarations that they were unable to locate copies of their personal confidential 987.2 attorney fee requests. (69-CT 20420-20425.) The section 987.9 documents were located, but did not include the attorney fee requests. (See 59-CT through 63-CT [987.9 documents]; see 58-CT 17139-17141.) On September 12, 2008, the court certified the record, after finding: "Apparently Sutter County has lost these [987.2 attorney fee] records and appellant's trial counsel no longer have their copies of said records. Said records are therefore unavailable." (68-CT 20120.)

The state must allow access by an appealing defendant in a criminal case to a record of sufficient completeness to permit proper consideration of the appeal. (*In re Armstrong* (1981) 126 Cal.App.3d 565.) A record of sufficient completeness depends on the contentions being urged in the appeal. (*March v. Municipal Court for San Francisco Judicial District* (1972) 7 Cal.3d 422.) Without a transcript of everything that counsel and the court talked about, appellant cannot assess the propriety of appellant's conviction. (See *People v. Gaston* (1978) 20 Cal.3d 476, 482-484; *People v. Silva* (1978) 20 Cal.3d 488, 493; *People v. Barton* (1978) 21 Cal.3d 513, 518-520.) Without these transcripts, it is

impossible for appellant to make an argument about any reversible error that may have occurred.

Under section 1181, subdivision 9, counsel must be diligent in attempting to obtain a transcript, or a functional equivalent, before seeking reversal on the basis that the missing transcripts affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal. (*People v. Moore* (1988) 201 Cal.App.3d 51, 56-57.) In light of counsel's attempts to settle the record, and find the 987.2 attorney fee requests and court orders, there is no question of lack of diligence.

The state's denial of transcripts to an indigent defendant violates due process. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227, 229.) In *Britt*, the Court identified two criteria relevant to the determination of need for transcripts: "(I) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." (*Id.* at 227 & fn.2.) As to the first criterion, the "value of the transcript to the defendant," the *Britt* court held that the defendant was not required to make a showing of need tailored to the facts of the specific case. (*Id.* at 228 & fn.3.) As to the second criterion, in *Mayer v. Chicago* (1971) 404 U.S. 189, 195, the Supreme Court suggested what alternatives to a verbatim transcript are "suitable:"

> Alternate methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant' s contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. (*Id.*; quoting *Draper v. Washington* (1963) 372 U.S. 487, 495-496.)

In *Britt*, the Court suggested that "trial notes might well provide an adequate substitute for a transcript." (*Britt v. North Carolina, supra*, 404 U.S. at 229, fn.4.) In appellant's case, it was not possible to settle the record with respect to the missing transcripts and the 987.2 attorney fee requests and orders.

In death penalty cases, where "the entire record" must be prepared (Cal. Rules of Court, rules 8.616, 8.619), appellants have asserted error in the record settlement proceedings as part of the direct appeal. (See, e.g., *People v. Beardslee* (1991) 53 Cal.3d 68,115; *People v. Mitchell* (1964) 61 Cal.2d 353, 371.) A defendant must utilize available methods of reconstructing the trial record before making a claim that an appellant is entitled to reversal because the lack of an adequate record deprives him of a meaningful appeal.. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 66.) Indeed, though the Rules of Court speak in terms of settlement of the record only of "oral proceedings," it is accepted that if exhibits or other significant documentary material become lost or missing, record settlement proceedings are necessary and appropriate to attempt to reconstruct them.

Often, the best possible outcome of the record settlement proceedings will be a finding that the lost exhibits cannot be reconstructed. For example, in *In re Roderick S.* (1981) 125 Cal.App.3d 48, 53, the court of appeal threw out a conviction for carrying a switchblade knife. The knife had been destroyed by the police, and no one had described it very clearly on the record. "Absent a testimonial description which would constitute evidence" the court held, "and now absent the device itself, this court is unable to ascertain whether the judge's view of the knife was in fact substantial evidence supporting the trial court's finding."

But a serious effort to settle the record is required before counsel can claim that a missing exhibit denies him meaningful appellate review. In *People v.*

Coley (1997) 52 Cal.App.4th 964, 972, the Third Appellate District held that, given the testimony in the record describing the lost buck knife, there is no chance that, once the exhibit is reconstructed . . . the court will find it is not a deadly weapon." Citing *People v. Osband* (1996) 13 Cal.4th 622, the court dismissed as "disingenuous" the appellant's attempt to bypass record settlement proceedings. (*People v. Coley*, *supra,* 52 Cal.App.4th at 972.)

In appellant's case, in contrast, counsel diligently attempted to settle the record without complete success. Thus, appellant's conviction must be reversed, because he has been prevented from securing a complete and correct transcript of his capital trial. It is impossible for appellant to argue the prejudice of these missing transcripts, as he has no way of knowing what they would reveal. The attorney fee petitions, for example, could bolster a claim of ineffective assistance of counsel.

XX. ANY DEPRIVATION OF A STATE LAW RIGHT CONSTITUTED A VIOLATION OF FEDERAL DUE PROCESS

Fourteenth Amendment due process principles may be implicated by the state's arbitrary denial of its own domestic rules. (*Hicks v. Oklahoma*, *supra,* 447 U.S. at 346; see also, *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716; *Ford v. Wainwright* (1986) 477 U.S. 399, 411-412; *Ross v. Oklahoma* (1988) 487 U.S. 81, 91-92.)

In *People v. Marshall* (1996) 13 Cal.4th 799, 850-851, this Court held that the failure to instruct on an element of a special circumstance is a violation of state law which implicates the defendant's federal due process rights under the doctrine of *Hicks.* Misapplication of a state law that leads to a deprivation of a liberty interest may violate the Due Process Clause of the Fourteenth

Amendment to the federal constitution. (*Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) A state's failure to follow its own death penalty procedures can raise a federal constitutional issue. (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295.) A state law error may render the trial so arbitrary and fundamentally unfair that it violates federal due process.'" (*Pennywell v. Rushen* (9th Cir. 1983) 705 F.2d 355, 357.)

Finally, state law errors significantly reduced the prosecutor's burden of proof and unduly reduced the reliability of the guilt and penalty determinations in this case, in violation of the Eighth and Fourteenth Amendments. (Cf. *Lockett v. Ohio* (1978) 438 U.S. 586, 602-603; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303.)

XXI. ANY FAILURE OF DEFENSE COUNSEL TO REQUEST OR OBJECT TO ANY OF THE JURY INSTRUCTIONS SHOULD BE EXCUSED

Because it is the trial court's duty to see that the jurors are adequately informed on the law, appellant's failure to request a clarifying instruction or object to an incorrect instruction does not forfeit the issue. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 490-491 [failure of the court to define "maintaining" and "opening," is reversible error in case charging a violation of Health and Safety Code section 11366].) The error is also not waived by appellant's failure to object, because the trial court has a "duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury." (*People v. Satchell* (1971) 6 Cal.3d 28, 33 fn. 10.)

Counsel's failure to object does not forfeit any instructional errors, because they all affected appellant's fundamental rights. (Pen. Code § 1259;

People v. Cleveland (2004) 32 Cal.4th 704, 749; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503, 505-506.) As observed in *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20: "the people make their oft-repeated, but only occasionally applicable, contention the issue was waived, or alternatively that any error was invited, because defendants failed to object to, or request a modification of, the challenged instruction. As appellate courts have explained time and again, merely acceding to an erroneous instruction does not constitute invited error. Nor must a defendant request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial court's fundamental instructional duty." (See also *People v. Hernandez* (1988) 47 Cal.3d 315, 353; *People v. Harris* (1981) 28 Cal.3d 935, 956; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 [if a defendant's substantial rights will be affected by the asserted instructional error, the court may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court].)

When a trial court's failure to give a jury instruction so infects the trial that a criminal defendant is deprived of a fair trial, the Due Process Clause of the Fourteenth Amendment is violated. (*Henderson v. Kibbe* (1977) 431 U.S. 145, 155.) When a jury instruction is omitted, "whether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions given to the jury." (*Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 745, *cert. denied* (1996) 517 U.S. 1158; *Henderson v. Kibbe, supra*, 431 U.S. at 156.) "[T]he death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585.) Thus, appellant's instructional claims should be considered by this Court, whether or not appellant's incompetent lawyer objected.

XXII. THIS COURT SHOULD REVIEW ALL ERRORS ON THE MERITS, RATHER THAN INVOKING PROCEDURAL BARS BECAUSE DEATH IS THE ULTIMATE PENALTY

Because of this Court's preference for procedural waivers, appellant will relegate nearly all issues with procedural problems to his habeas petition. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [ineffective assistance of counsel claims properly brought in a habeas corpus proceeding].)

Appellant respectfully requests this Court to follow the example of the Kentucky and Pennsylvania Supreme Courts and review all errors on the merits. It is a defective system that would kill someone simply because his court-appointed attorney was too stupid, stressed, preoccupied, or lazy to raise all possible issues in their proper contexts with appropriate citation to all relevant state and federal constitutional grounds. While the justice system may have some legitimate interests, in most criminal cases, to rely on trial counsel to object on all grounds to preserve the issue, it is unseemly to have the same rules apply to death cases. Capital case litigation should not be reduced to some kind of arcane game, where the omissions of appointed defense counsel seal the fate of the condemned. The state should not execute people before this Court reviews all errors on their merits.

In *Rogers v. Commonwealth* (Ky. 1999) 992 S.W.2d 183, 187, the Kentucky Supreme Court explained:

> [U]npreserved errors are reviewable in a case where the death penalty has been imposed. . . . The rationale for this rule is fairly straightforward. Death is unlike all other sanctions the Commonwealth is permitted to visit upon wrongdoers . . . . Accordingly, the invocation of the death penalty requires greater caution than is normally necessary in the criminal justice process.

In *Commonwealth v. O'Donnell* (1999) 746 A.2d 198, 204, the Pennsylvania Supreme Court explained:

> [I]t is the practice of this Court to relax our waiver rules in death penalty cases because of the irrevocable and final nature of the death penalty. . . . [S]ignificant issues perceived sua sponte by this Court, or raised by the parties, will be addressed and, *if possible from the record,* resolved."

Similarly, this Court should discontinue the "gotcha" nature of dismissing claims on the arcane and technical minutiae forfeiture "rules," particularly when appellant's life is at stake.

XXIII. CLAIMS RAISED IN THE HABEAS PETITION ARE INCORPORATED BY REFERENCE, BUT ONLY IF THIS COURT DETERMINES THAT SUCH CLAIMS SHOULD HAVE BEEN RAISED ON APPEAL

Appellant intends to file a habeas petition related to his conviction. If this Court determines that any habeas claims should have been raised in this appeal, however, appellant incorporates each and every allegation based on the trial and appellate record. Because of the large size of this opening brief, appellant does not wish to burden the Court with possibly unnecessary briefing that would be duplicative of his habeas petition.

SECTION 3 - PRESERVING FEDERAL CONSTITUTIONAL CLAIMS

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

Many features of California's capital sentencing scheme, 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 of each claim in the context of California's entire death penalty system. In addition, appellant must present the following issues that this Court has already rejected and are settled under state law to preserve the issues for United States Supreme Court review or federal habeas corpus review. (*Smith v. Murray* (1986) 477 U.S. 527, 536 [habeas review].)

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179 & fn. 6;[44] see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural

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[44] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Kansas v. Marsh*, *supra*, 548 U.S. at 178, 173-175.)

safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It 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 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.

XXV. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD.

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." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [citations omitted].) 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. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*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. (See 1978 Voter's Pamphlet, at 34, "Arguments in Favor of Proposition 7.") 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 32 special circumstances[45] 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 in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as

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[45] 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 33.

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 such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

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.[46] (See Arguments XXVII, XXVIII, and XXIX, *infra.*)

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[46] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

XXVI. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 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." This Court has never applied a limiting construction to factor (a) 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. (*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3; CALCRIM No. 763 (2009), par. 2.) The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10), or having had a "hatred of religion," (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582), or threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204), or disposed of the victim's body in a manner that precluded its recovery. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35.) It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime

was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 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), it has been used in ways so arbitrary as to violate both the federal 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. (*People v. Tuilaepa*, *supra*, 512 U.S. at 986-990 [dis. opn. of Blackmun, J].) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) 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.

In practice, section 190.3's broad "circumstances of the crime" provision 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.) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

XXVII. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL 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 does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 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 find 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 condemn a fellow human to death.

A. 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 this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [*Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there

was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring, supra,* 536 U.S. at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639), it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. (*Id.* at 609.) *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt. (*Id.* at 599-609.)

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220 (*Booker*), the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham supra*, 549 U.S. at 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (*Id.* at 282.)

1. In the Wake of *Apprendi, Ring, Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th at 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are

"moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[47] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "an 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.*" (15-CT 4385; 41-RT 12521-22; CALJIC No. 8.88 [1989 Revision] [emphasis added].)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[48] These factual determinations are essential

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[47] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[48] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, 460, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that

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.[49]

This Court has repeatedly rejected the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range."

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[50] In *Cunningham*, the principle that any fact which exposed a

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fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'"

[49] 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* (1985) 40 Cal.3d 512, 541.)

[50] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the

defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Cunningham, supra,* 549 U.S. at 276-279.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* 549 U.S. at 290-291.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at 293.)

The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. (See *Blakely, supra,* 542 U.S., at 307-308; but see *Black, supra,* 35 Cal.4th, at 1260 [stating, remarkably, that "[t]he high court precedents do not draw a bright line"]. (*Cunningham, supra,* 549 U.S.

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words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black, supra,* 35 Cal.4th at 1253; *Cunningham, supra,* 549 U.S. at 289.)

at 291.) In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at 263.)

This holding is simply wrong. As section 190(a)[51] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra,* 549 U.S. at 279.)

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[51] Section 190(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."

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. (*Ring*, *supra,* 536 U.S. at 604.)

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*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC No. 8.88; CALCRIM No. 766.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, *supra,* 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the

offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely, supra*, 542 U.S. at 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

2. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt

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. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[52]

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[52] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 [noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death].

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring, supra,* 536 U.S. at 609:

> 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 last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, 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 the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

B. 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 Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

1. 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. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. 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 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra,* 397 U.S. at 363-364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975)

14 Cal.3d 338 [commitment as mentally disordered sex offender]; *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.

In *Santosky*, *supra*, the U.S. 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." (*Santosky v. Kramer*, *supra,* 455 U.S. at 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at 763.) 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 363.)

Adoption of a reasonable doubt 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 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.

In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly applied the *Santosky* 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.'" (*Monge v. California*, *supra*, 524 U.S. at 732 [emphasis added], citing *Bullington v. Missouri*, *supra*, 451 U.S. at 441, quoting *Addington v. Texas*, *supra,* 441 U.S. at 423-424.)

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 true, but that death is the appropriate sentence. (*Ibid.*)

C. 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*, *supra*, 479 U.S. at 543; *Gregg v. Georgia*, *supra*, 428 U.S. a 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra,* 16 Cal.4th at 1255), there can be no meaningful appellate review without 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.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) 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.* at 269.)[53] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.)

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[53] 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.)

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, supra;* Section D, *infra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra,* 548 U.S. at 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) 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.

D. 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. 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, noted 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.*" (*Ibid.* [emphasis added].)

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just 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*, *supra,* 465 U.S. at 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that cannot be charged with a "special circumstance" a rarity.

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, *supra*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *supra*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *supra*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra,* 548 U.S. at 177-178), this absence renders that scheme unconstitutional.

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 proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at 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.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

E. 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 as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding forcible lewd acts allegedly committed by appellant against

Crystal T., while appellant had pleaded no contest solely to a nonforcible lewd act. (34-RT 10318-10356, 10482.)

The U.S. Supreme Court's recent decisions in *Booker*, *Blakely, Ring,* and *Apprendi*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. 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.

F. 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

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). 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 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court, however, has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188.) (*People v. Morrison* (2004) 34 Cal.4th 698, 730; [emphasis added].)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*People v. Morrison, supra,* 34 Cal.4th at 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important

state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is 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.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

XXVIII. 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 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. "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.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Kirkpatrick (1994)* 7 Cal.4th 988, 1025-1026; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees 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.

In *Prieto*,[54] as in *Snow*,[55] 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. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at 41.) However apt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.420, subd. (b) now provides: "In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing. California

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[54] "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." (*People v. Prieto, supra*, 30 Cal.4th at 275.)

[55] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*People v. Snow, supra*, 30 Cal.4th at 126, fn. 3.)

Rules of Court, rule 4.420, subd. (e) provides: "The reasons for selecting one of the three authorized prison terms referred to in section 1170(b) must be stated orally on the record."[56]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections A., B., *supra*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C., *supra*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws. (*Bush v. Gore* (2000) 531 U.S. 98.)

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 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring*, *supra,* 536 U.S. at 604.)

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[56] In light of the Supreme Court's decision in *Cunningham*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

XXIX. 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 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 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Due process is not a static concept, and neither is the Eighth Amendment. 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*, 536 U.S. at 316, fn. 21.)

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*, 536 U.S. at 316.) 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; see Argument XXXVIII.)

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.

XXX. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE

Appellant was denied his right to a fair trial by an impartial prosecutor and an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration).

While appellant's rights under state and federal constitutions have been violated, these violations are being alleged under international law as well, as the first step in exhausting administrative remedies in order to bring appellant's claim in front of the Inter-American Commission on Human Rights.

The two principle sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with federal statutes. (U.S. Const. Article VI, § 1, clause 2.)

Customary international law is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), p. 145, 1058; see also *Edye v. Robertson* (1884) 112 U.S. 580.) International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102.) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) The United States Constitution also authorizes Congress to "define and punish . . . offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, § 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252; see also *Oyama v. California* (1948) 332 U.S. 633.)

The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." (Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993.) By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. (78 U.N.T.S. 277, *entered into force* January 12, 1951

[hereinafter Genocide Convention].) The Universal Declaration is part of the International Bill of Human Rights, which also includes the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and the human rights provisions of the UN Charter. (See generally Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.) These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations.

Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty. Though the United States courts have not strictly applied Article 18, they have looked to signed, unratified treaties as evidence of customary international law. (See, e.g., *Inupiat Community of the Arctic Slope v. United States* (9th Cir. 1984) 746 F.2d 570 [citing the ICCPR].)

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation. (Restatement Third of the Foreign Relations Law of the United States, § 102.) The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. When the United States has signed or ratified a treaty, it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.

According to 22 U.S.C. § 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries." (22 U.S.C. § 2304(a)(1).) The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga v. Pena-Irala*, (2d Cir. 1980) 630 F.2d 876, 882, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights."

The ICCPR, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound." (Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L. Rev. 1241, 1242.)

The factual and legal issues presented in this brief demonstrate that appellant was denied his right to a fair and impartial trial and sentencing phase in violation of customary international law as evidenced by Articles 6 and 14 of the ICCPR as well as Articles 1 and 26 of the American Declaration.

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

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give

effect to those rights. Under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." (*Asakura v. Seattle* (1924) 265 U.S. 332, 341.) Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (S.D.Fla. 1992) 808 F.Supp. 791-798.) Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life . . . [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court." (ICCPR, *supra*, 999 U.N.T.S. 717.) Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law. (American Declaration of the Rights and Duties of Man, *supra*.)

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR. (*Report of the Human Rights Committee*, at 72, 49 UN GAOR Supp. (No. 40) at 72, UN Doc. A/49/40 (1994).)

The due process violations that appellant suffered throughout his trial and sentencing phase are prohibited by customary international law. The United States is bound by customary international law, as informed by such instruments as the ICCPR and the American Declaration. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable. Because international treaties ratified by the United States are binding on state courts, the death penalty here is invalid. Appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia*, *supra,* 536 U.S. 304, fn.21; *Stanford v. Kentucky*, *supra,* 492 U.S. at 389-390 [Brennan, J., dis. op.].)

CONCLUSION

Appellant respectfully requests this Court to reverse the judgment below and grant him a new trial, or, at a minimum, reverse the judgment of death and remand for a new penalty hearing.

Dated: March 26, 2010

Respectfully submitted,

RICHARD JAY MOLLER
Attorney for Appellant
By Appointment Of
The Supreme Court

PROOF OF SERVICE and WORD COUNT CERTIFICATION

I, RICHARD JAY MOLLER, declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is P.O. Box 1669, Redway, CA 95560-1669. I served the foregoing APPELLANT'S OPENING BRIEF on March 26, 2010, by depositing copies in the United States mail at Redway, California, with postage prepaid thereon, and addressed as follows:

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I declare under penalty of perjury that according to Microsoft Word Vista the word count on this brief is 101,880 words, that the foregoing is true and correct and that this declaration was executed on March 26, 2010, at Redway, California.

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