IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JOHNNY DUANE MILES, Appellant.	S086234 San Bernardino Case no. FSB09438

APPELLANT'S OPENING BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, San Bernardino County

Honorable James A. Edwards, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

On January 12, 1996, the state filed a felony complaint against Mr. Miles charging him with 37 offenses. (4 CT 918-942.) These 37 counts included crimes committed on seven separate days including:

- Crimes committed on January 6, 1992 against Paula Yenerall (4 CT 918-919);
- Crimes committed on January 21, 1992 against Janet Heynen (4 CT 920);
- Crimes committed on February 4, 1992 against Nancy Willem (4 CT 922-924);
- Crimes committed on February 19, 1992 against John Kendrick (4 CT 925);
- Crimes committed on February 21, 1992 against Arnold and Sharyn Andersen (4 CT 939-940);
- Crimes committed on February 25, 1992 against Christine Castellanos (4 CT 927-931); and
- Crimes committed on February 26, 1992 against Melvin Osborne and Carole Davis (4 CT 931-936).

The trial court held Mr Miles to answer on all 37 counts. (9 CT 2452.) Ultimately, the state filed a 35-count information, including the crimes committed on each of the seven dates listed above. (5 CT 1312-1338.)

Prior to trial, Mr. Miles moved to sever trial on the counts covering the January 6, January 21, February 19 and February 21 crimes. (10 CT 2948-2974.) The trial court granted this motion. (2 RT 515.) Accordingly, the state filed a 19-count amended information against Mr. Miles. (14 CT 4012-4024.) The amended information charged as follows:

The February 4, 1992 Charges.

1) Count one charged a February 4, 1992 murder in violation of Penal Code section 187. (14 CT 4014.) This count added robbery, rape and burglary special circumstance allegations in violation of Penal Code section 190.2(a)(17). (14 CT 4014.) In addition, this count alleged a torture-murder special circumstance in violation of section 190.2(a)(18). (14 CT 4014.)

2) Count two charged a February 4, 1992 rape in violation of section 261. (14 CT 4014.)

3) Count three charged a February 4, 1992 robbery in violation of Penal Code section 211. (14 CT 4015.)

4) Count four charged a February 4, 1992 burglary in violation of Penal Code section 459. (14 CT 4105.)

5) Count five charged a February 4, 1992 false imprisonment in violation of Penal Code section 236. (14 CT 4016.)

The February 25, 1992 Charges.

6) Count six charged a February 25, 1992 robbery in violation of section 211, along with a firearm use allegation in violation of section 12022.5(a). (14 CT 4016.)

7) Count seven charged a February 25, 1992 false imprisonment in violation of section 236, along with a firearm use allegation in violation of section 12022.5(a). (14 CT 4016-4017.)

8) Counts eight and ten each charged a February 25, 1992 rape in violation of section 261, and each count added a firearm/weapon use allegation in violation of section 12022.3(a). (14 CT 4017-4019.)

9) Count nine charged a February 25, 1992 genital penetration in violation of section 289, along with a firearm/weapon use allegation in violation of section 12022.3(a). (14 CT 4017-4019.)

10) Count 18 charged a February 25, 1992 possession of a weapon by an ex-felon in violation of section 12021(a)(1). (14 CT 4023.)

The February 26, 1992 Charges.

11) Counts 11 and 13 each charged a February 26, 1992, robbery in violation of section 211 and each count added a firearm use allegation in violation of section 12022.5(a). (14 CT 4019-4020.)

12) Counts 12 and 15 each charged a February 26, 1992, false imprisonment in violation of section 236, and each count added a firearm use allegation in violation of section 12022.5(a). (14 CT 4019, 4021.)

12) Count 14 charged a February 26, 1992 genital penetration in violation of section 289, along with a firearm/weapon use allegation in violation of section 12022.3(a). (14 CT 4020-4021.)

13) Counts 16 and 17 each charged a February 26, 1992 rape in violation of section 261, and each count added a firearm/weapon use allegation in violation of section 12022.3(a). (14 CT 4021-4022.)

14) Count nineteen charged a February 26, 1992 possession of a weapon by an ex-felon in violation of section 12021(a)(1). (14 CT 4023.)

The information added allegations that Mr. Miles had suffered a prior conviction within the meaning of section 667(a) and had served a prior prison term within the meaning of section 667.5(b). (14 CT 4023-4024.)

Opening statements in the guilt phase began on February 1, 1999. (14 CT 4025.) The state rested its case on March 8, 1999 and the defense case began that same day. (14 CT 4048.) Ultimately the jury found Mr. Miles guilty as charged in counts 1-9 and 11-16. (15 CT 4203-4217.) The jury found true all four special circumstance allegations associated with the count one murder conviction. (15 CT 4218-4221.) The jury also found true the personal use allegations of counts 6-9 and 11-16. (15 CT 4222-4231.) After several continuances, the penalty phase was scheduled to begin on April 21, 1999. (13 RT 4630-4631, 4644, 4705-4706.)

On April 19, 1999 the trial court declared a doubt as to Mr. Miles's competency to stand trial and suspended proceedings pursuant to Penal Code section 1368. (15 CT 4433.) The defense began presenting evidence in the section 1368 proceeding on July 22,

1999 and concluded on August 9, 1999. (14 RT 5029; 16 CT 4536.) The state concluded its case on August 12, 1999. (16 CT 4542.) On August 19, 1999 the jury found Mr. Miles competent to stand trial. (16 CT 4549.)

The penalty phase began on on August 30, 1999. (16 CT 4600.) The state rested its case in aggravation on September 1, 1999. (16 CT 4604, 4613.) The defense case in mitigation began on September 7, 1999 and went through September 27, 1999. (16 CT 4613-4638.) The jury ultimately sentenced Mr. Miles to death. (16 CT 4646, 4682.) On February 8, 2000, the trial court denied Mr. Miles's motion for a new trial or, in the alternative, to modify the sentence to life without parole. (16 CT 4717.) Instead, the trial court sentenced Mr. Miles to die. (16 CT 4718.)

This appeal is automatic.

STATEMENT OF FACTS

A. The Guilt Phase.

1. An overview of the three incidents.

The amended information charged Mr. Miles with crimes committed on three separate dates: February 4, 1992, February 25, 1992 and February 26, 1992.

a. **Counts 1-5: the February 4, 1992 robbery and killing of Nancy Willem by a man wearing glasses and a red dragon karate school hat.**

On February 4, 1992, Nancy Willem did not come home from work at Behavioral Health Services, a counseling clinic in Rialto. (8 RT 2327.) By 11:00 p.m. that evening her roommate, Kristen Schultz, became worried after she could not reach Ms. Willem at the office, so she drove to the clinic. (8 RT 2327-2328, 2339.) Upon arrival, Schultz found the back door ajar, and when she pushed it open, saw the offices ransacked with blood on the floor. (8 RT 2330-2332.) She then found Ms. Willem's naked body lying on her back, near a couch inside a psychologist's office. (8 RT 2332.) Schultz went to call police, but the telephone cord was disconnected; she reconnected it and called 911.

(8 RT 2333.)

Rialto police arrived 15 or 20 minutes later. (8 RT 2333.) Ms. Willem was declared dead at the scene. (8 RT 2344.) There was a note on her body which said, "Feed the poor. Down with the goverenment [sic]." (8 RT 2335.)

Ms. Willem and Schutz shared a checking account; each had an ATM card for the account. (8 RT 2335.) Willem's PIN number was written in her date book. (8 RT 2337.) A week after the crime, Schutz discovered that $300 had been withdrawn from their checking account without her knowledge. (9 RT 3375.) The bank determined that $1,340 had been withdrawn from the account between 8:34 p.m. and shortly after midnight on the evening Ms. Willem was killed. (9 RT 3603-3606.)

The bank's ATM surveillance photographs showed that the withdrawals were made by an individual wearing glasses and a "Red Dragon" karate school hat. (9 RT 3609-3610.) The photographs were too grainy to discern the individual's race or other features. (9 RT 3611.)

b. Counts 6-11: the February 25, 1992 robbery and rape of Christine Castellanos by a black man wearing a knit ski-mask who was over six feet tall, slim-build and weighed 150 pounds.

On February 25, 1992, at approximately 6:30 p.m., Christine Castellanos was working alone at the United Way office in Victorville. (9 RT 3445.) Castellanos heard a crash in her office, and a black man with a silver gun, and wearing a knit ski-mask, came through the door. (9 RT 3447.) The man was not wearing gloves. (9 RT 3470-3471.)

Castellanos told police her assailant was 6'1" tall, weighing 150 pounds. (3 RT 703.) At trial years later she could only say that the man was "over six foot" and of "slim build." (9 RT 3462.) He was in his 20s; he was no older than 30 years old. (9 RT 3468.) She did not describe the suspect having a scar on either arm.

The man asked her for money, pointing the gun at her face. (9 RT 3448, 3450.) She told the man the office had no money, and then gave him $10 from her purse. (9 RT 3449.) The man continued to ask Castellanos for money, then told her to lay down on the floor while he went to search other rooms in the building. (9 RT 3451.) When he returned, he dumped out her purse, and had her remove her jewelry and watch. (9 RT 3451-3452.) He also took her ATM card, but she told him she did not know the PIN because it belonged to her daughter. (9 RT 3461.) While rifling through the purse, he

told Castellanos that she was lying about the money, then took her into the conference room. (9 RT 3452.)

There, the man tied Castellanos's arms with a telephone cord. (9 RT 3452.) When she looked at him, he said, "Don't look at me." (9 RT 3452.) He had her lie on her stomach, then pulled her skirt up and pantyhose down. (9 RT 3455.) After several unsuccessful attempts at penetration, the man finally penetrated her vaginally with his penis and fingers. (9 RT 3458-3459, 3467.) After ejaculating on her thigh, he wiped her leg with a tissue. (9 RT 3459-3460.) He then tied her tighter to the table, and left. (9 RT 3461.) Castellanos freed herself and called police. (9 RT 3466.)

San Bernardino police officers arrived at 7:00 p.m. (9 RT 3473.) Police found telephone cords tied to the conference room table, and wet tissues underneath the table. (9 RT 3475, 3488.)

Castellanos was shown a photographic lineup that included Mr. Miles. (5 RT 1269) Although she said she would only be guessing (because her attacker had been wearing a mask), she identified someone other than Mr. Miles as her attacker. (5 RT 1269-1270.) Moreover, although Castellanos said that her assailant did not wear gloves, the state introduced no fingerprint evidence at all tying Mr. Miles to either the crime or

the crime scene.

c. Counts 12-19: the February 26, 1992 robbery of Melvin Osburn, and robbery and rape of Carole Davis, by a black man in knit ski-mask who was approximately 6' or 6'1" tall and weighed 150-160 pounds.

On February 26, 1992, at approximately 7:00 p.m., therapist Melvin Osburn was working at his counseling office in San Bernardino. (9 RT 3514-3515.) He was sitting behind the reception window playing on the computer and waiting for his 8:00 p.m. appointment, when he heard the front door open. (9 RT 3515.) A black man with a silver gun, wearing a knit ski-mask, came into the office. (9 RT 3515-3516.) Osburn said the man was at least 6'1" tall. (9 RT 3517.) The man was in his 20s; he was no older than 30 years old. (9 RT 3526.) Osburn did not describe the man as having a scar on either arm.

The man told him to take out his wallet, threatening, "Don't look at me or I'll kill you." (9 RT 3519.) After taking his wallet, the man had Osburn lie face down on the floor. (9 RT 3519.) The man tied his ankles to his hands, took money and credit cards from the wallet, and then for the next hour, asked about money and a safe in the office. (9 RT 3520-3521.) The man asked if clients were coming, and Osburn said no. (9 RT 3522.) The man took Osburn's jewelry and car keys, and a camcorder from the office. (9 RT 3524.)

The man was finally ready to leave, but then Osburn's client Carole Davis arrived. (9 RT 3523.) For the next fifteen minutes, he heard Davis in the other room, speaking to the man and crying. (9 RT 3523.) After the man left in Osburn's car, Osburn freed himself, and found Davis tied to the top of an ottoman, with her pants partly removed. (9 RT 3525, 3529.) He freed her, then triggered the burglar alarm because the telephones did not work. (9 RT 3525.) While waiting for police, Osburn's next client came into the office and called police. (9 RT 3525.)

When Davis arrived at 8:15 p.m. for her appointment with Osburn, she was met by a man in a knit ski-mask, pointing a silver gun at her. (9 RT 3536.) Davis told police later that same night that her assailant was 6' tall, weighing 150 to 160 pounds. (3 RT 705; 9 RT 3551.) She told an examining nurse that her assailant was 6' tall, weighing 150 pounds. (9 RT 3569.) At trial years later she recalled her assailant as "over six feet." (9 RT 3537.) She added that he was in his 20s; he was no older than 30 years old. (9 RT 3537.) She did not describe the man as having a scar on either arm.

The man took Davis into Osburn's office, and had her lie down on the floor. (9 RT 3538-3539.) He rummaged through the office and asked her for money, but she told him she had none. (9 RT 3539.) He asked for her ATM card, but when she told him she did not have one, he rummaged through her purse and took her wedding ring. (9 RT

3545-3546.) He tied her up with the purse strap and telephone cords, and placed her over an ottoman. (9 RT 3539, 3541.) He took down her pants and touched her private parts and breasts, digitally penetrated her then raped her, though he could not maintain an erection. (9 RT 3542-3543.) She did not know if he ejaculated, but she felt wetness and he wiped her off with a tissue. (9 RT 3544.) The man said he was going to Chicago that evening, and said he was angry about the court system and the way life was treating him. (9 RT 3547.) His voice remained calm, but he seemed angry. (9 RT 3547.) The man then got dressed and left. (9 RT 3545.) Osburn came into the office shortly afterwards, and released her. (9 RT 3525.)

As noted, when police arrived, Davis reported the man was 6' tall and weighed about 150 pounds, wearing a white t-shirt and jeans. (9 RT 3551.) The man was not wearing gloves. (9 RT 3551.) She was taken to the hospital for examination. (9 RT 3554-3555.) Davis gave the same physical description to her examining nurse. (9 RT 3568-3569.)

Osburn's car was later found at approximately 10:45 p.m., two and a half blocks away from the office. (9 RT 3577-3578.) No evidence was found in the car, but Osburn's cellphone was missing. (9 RT 3527, 3581.) Osburn later received his phone bill which showed calls that he had not made. (9 RT 3527.)

Osburn turned the bill over to police. (9 RT 3527.) The state presented no evidence about any of the numerous calls made by the suspect nor any evidence connecting any of these calls to Mr. Miles. Moreover, just as with the Castellanos crime, although Ms. Davis said her assailant did not wear gloves, the state introduced no fingerprint evidence at all tying Mr. Miles to either the crime or the crime scene.

2. Although witnesses described a suspect approximately 6' tall who weighed 150 pounds, and never described a scar on his arm, police arrest Johnny Miles who was 6'6"six tall, weighed 210 pounds and had a prominent scar on his arm.

As noted, Castellanos told police her attacker was 6'1" tall, and 150 pounds; she described him as having a "slim build." (3 RT 703.) Davis told police, and medical personnel at the hospital, that her attacker was 6' tall and weighed 150 to 160 pounds. (3 RT 704-705; 9 RT 3551.) Although police had a photograph of the person who used Willem's ATM card on the evening of her death, the state presented no photogrammetry evidence regarding the height of the person in the photo. Moreover, neither Castellanos, Davis or Osborne described a scar on the suspect's arm. Since the assailant in the Osburn/Davis crime wore a white t-shirt (9 RT 3551), the fact that neither Davis nor Osburn described a scar is noteworthy.

Nevertheless, ten weeks after Ms. Willem's death, on April 17, 1992, Rialto police

officers conducted a pedestrian check of appellant Johnny Miles, less than a mile from Willem's office. (9 RT 3629, 3535-3536.) In a field-identification card, the detaining officer wrote that Mr. Miles was 6'6" tall, weighed 210 pounds, and had a scar on his right forearm. (9 RT 3632-3633.) Two months later -- on June 16, 1992 -- Mr. Miles was driving in Torrance when officers made a lawful vehicle stop. (11 RT 4229.)

Mr. Miles was substantially taller, and weighed substantially more, than the assailant described by either Castellanos, Osburn or Davis. Nevertheless, Torrance police officers called Rialto police detective Chester Lore, telling him that the Torrance suspect tied up his victims with telephone cords, so Lore might want to consider Mr. Miles as a suspect in the Willem, Castellanos and Osburn/Davis cases. (16 CT 4743-4744.)

3. The physical evidence.

a. The Willem crime scene.

Willem died of blunt force trauma -- from repeated blows or kicks to the head and chest -- followed by manual strangulation. (9 RT 3662-3665, 3672-3674.) She sustained a broken jaw, multiple rib fractures and other internal injuries, bruising and lacerations, and a possible cigarette burn on her chest. (9 RT 3660-3665.) The coroner recovered two

hairs from Willem's stomach and left breast. (9 RT 3430, 3433.) There was also a telephone cord tied to her wrist. (9 RT 3657.)

Near the body, police collected tissues with apparent semen stains, Willem's tan pants with apparent blood and semen stains, and a cutting of a couch with apparent semen stains. (8 RT 2337; 9 RT 3394, 3430; 10 RT 3745-3768.) Police also collected a cutting of apparent blood stains from a briefcase. (10 RT 3746-3747.) Finally, police collected a vaginal swab from Willem's autopsy. (10 RT 3765.)

San Bernardino County Sheriff's Department Crime Lab ("Sheriff's Crime Lab") serologist David Stockwell performed serological testing on the tissues, two cuttings from Willem's tan pants, and cuttings from the couch and briefcase. (10 RT 3760-3762.) The tissues, pants and couch cuttings tested positive for semen. (10 RT 3764.) He also tested the vaginal swab and found semen, but in much lower concentrations than the semen stains collected at the scene. (10 RT 3765.)

In addition, the semen on all the stains collected at the scene showed the semen donor's blood type (AB), meaning that the semen donor was a secretor (a person whose bodily fluids other than blood will show his blood type). (10 RT 3767; Exhibit 143.) Testing of a blood sample from Willem revealed that she was not a secretor; her blood

was type A. (10 RT 3768; Exhibit 143.)

Stockwell tested the semen on the four stains collected at the scene for the PGM enzyme type. (10 RT 3771; Exhibit 143.) Willem was a PGM type 1+. (10 RT 3771-3772; Exhibit 143.) Three semen stains -- the two on the pants and the one on the tissue -- had a PGM type of 2+1+1-. (10 RT 3772; Exhibit 143.) The couch stain, however, had a 2+1-; Willem did not contribute to that stain. (10 RT 3772; Exhibit 143.) And when the four stains were tested for PepA enzyme type, the results were all type 2-1. (10 RT 3772.) Willem was a PepA type 1. (10 RT 3772.) According to Stockwell, the PepA type 2-1 "is an indicator of a person of black heritage;" the type is "found in approximately 10 percent frequency in individuals of African American ancestry." (10 RT 3773.)

Finally, the tan pants and couch stain was tested for Gm factors found in antibodies. (10 RT 3775-3776; Exhibit 143.) Willem had a Gm factor of f and b0. (10 RT 3777; Exhibit 143.) One pant stain had a factor of a, f and b0 and the other had a factor of a, g5, f, b0, c3 and c5; Willem could not have contributed the a, g5, c3 or c5 to either stain. (10 RT 3777; Exhibit 143.) The couch had a factor of a, g5, b0, c3 and c5; because no f was present, Willem could not have contributed to this stain. (10 RT 3777; Exhibit 143.) According to Stockwell, the Gm factor apparent in the semen profile was

found predominantly in African-Americans, would not be found in Caucasians, and would be found in only a small percentage of Hispanics. (10 RT 3787.) A frequency estimate of the semen donor's profile revealed that 3 in 1 million African-Americans shared this genetic profile. (10 RT 3787.)

Stockwell also performed serology tests on eight blood stain samples from the Willem crime scene. (10 RT 3779-3782; Exhibit 143.) Seven of them matched Willem's reference sample. (10 RT 3749; Exhibit 143.) The eighth did not. This eighth blood sample -- a dried stain taken off a briefcase -- contained a PGM factor of 2+1-, and Gm factors a, g5, b0, c3 and c5; because no PGM factor of 1+, and no Gm factor of f was present, Willem could not have contributed to the blood on the briefcase. (10 RT 3784; Exhibit 143.) According to Stockwell, the ABO blood type and secretor status of the eighth sample was inconclusive; Stockwell claimed that there was a "technical difficulty" which precluded a reportable result of ABO blood type, and secretor status could not be determined from dried blood stains. (Exhibit 143.)

b. The Castellanos scene.

Police collected seven white paper napkins at the Castellanos scene. (10 RT 3791.) Stockwell performed serology tests on only two semen samples from the napkins,

along with vaginal and blood samples taken during Castellanos's hospital examination. (10 RT 3792, 3794; Exhibit 143.) Castellanos was a secretor (blood type B); she had a 1+ PGM type, a type 1 PepA, and a Gm factor of a, x, f, b0, and g; Stockwell did not test for any other relevant factors. (Exhibit 143.) The first semen stain on one napkin had a 2+1- PGM type, a type 2-1 PepA, and a Gm factor of a, x, g5, b0, c3 and c5. (Exhibit 143.) The second semen stain on a different napkin had a 2+1+1- PGM type, a type 2-1 PepA, and a Gm factor of a, g5, b0, c3, and c5. (Exhibit 143.) According to Stockwell, the frequency of the semen profile was 3 in 1 million black males. (10 RT 3794.)

c. The Osburn/Davis scene.

During Davis's sexual assault examination, a pair of panties was collected and tested. (10 RT 3795.) Stockwell performed serological testing on semen found on the panties. (10 RT 3796.) Davis was a nonsecretor (blood type O); she had a 1+1- PGM type, a type 1 PepA, and a Gm factor of f and b0; Stockwell did not test for any other relevant factors. (Exhibit 143.) The semen had a 2+1- PGM type and a type 1 PepA; Stockwell discerned no results for Gm. (10 RT 3796; Exhibit 143.) According to Stockwell, the semen was "similar to" the semen profiles found in the Castellanos and Willem cases, but because a Gm factor could not be discerned, Stockwell was not certain that the Davis results were the same as the semen profiles in the Castellanos and Willem

cases. (10 RT 3795-3796.) The frequency of the semen profile from the Davis case was 1 in 8,500 black males. (10 RT 3797.)

d. Comparison of samples.

In June 1992, a vial of blood was taken by police from Mr. Miles. (10 RT 3798.) Stockwell determined that Mr. Miles was AB blood type and a secretor. (10 RT 3713, 3803; Exhibit 143.)

Dry blood swatches were also prepared from the vial. (10 RT 3802.) Stockwell performed serology tests on the swatches. Twelve of 14 genetic markers found in Mr. Miles's blood matched 12 genetic markers identified from the blood found on the briefcase at the Willem scene; as noted above, two of the genetic markers (ABO blood type and secretor status) could not be compared. (10 RT 3802-3803; Exhibit 143.) According to Stockwell, the 12 genetic markers found on both the briefcase from the Willem scene and in Mr. Miles's sample would be randomly found in 1 of 10 million black men. (10 RT 3804.)

e. DNA tests.

At the end of 1992, criminalist Donald Jones from the Sheriff's Crime Lab conducted RFLP DNA testing on different cuttings from the same samples examined by Stockwell. (11 RT 3989-3994, 3999, 4004.) Jones was new to DNA testing and analysis; he began working his first forensic DNA cases in April 1992, and the Willem, Castellano and Davis cases were only his sixth, seventh, and eighth cases of his career. (11 RT 3991.) Moreover, at the time Jones began conducting DNA testing and analysis, the Sheriff's Crime Lab did not perform regular proficiency testing of its examiners, which is now a requirement of all accredited labs. (11 RT 4068.) This is not surprising; in 1992, the National Research Council I (NRC I) had just issued its first report on guidelines for laboratories conducting DNA analysis. (11 RT 4064.) Even pioneers in this relatively new world of DNA forensic examination at the time -- such as examiners at the private laboratory Cellmark -- were reporting false-positive matches in their testing. (11 RT 4069-4070.)

The Sheriff's Crime Lab was not inspected for accreditation by the ASCLD until 1995. (Exhibit 148.) At that time, the written report was not good. The lab was cited for (1) not having "clearly written procedures that are adequate for initial processing of evidence by serologists/DNA examiner" and the necessity to augment the DNA and

Serology manuals with written protocols and procedures for RFLP DNA testing; (2) not having "[w]ritten procedures for maintenance and calibration of equipment and instruments are not available" and such procedures "must be prepared for the DNA/Serology Sections," (3) a lack of "updated" inventory and supplies for "the DNA/Serology Section;" (4) a lack of "a formal training program" for "both the serology and the DNA section," (5) a lack of "training record or logs" other than a memorandum citing "[c]ompletion of training" in a "mentor-base" system; (6) an inadequate "chain of custody record" which was "awkward" where signatures were not obtained when evidence was transferred within internal departments and/or external agencies; (7) evidence being stored in unlocked, non-secured refrigerators or freezers, autoradiographs were separated from cases files and kept in unsecured areas, and specimens prepared in the course of DNA analysis were not sealed when stored overnight in lab refrigerators; (8) having a quality manual which needed "considerable improvement," (9) a lack of a full-time quality control manager; (10) failure to conduct annual "external DNA Quality Assurance audit[s];" (11) improper and infrequent calibration of equipment in the DNA/Serology section; (12) improper oversight and review of examiner court testimony -- including the testimony of Stockwell, who testified as to his serology work in this case. (*See* Exhibit 148.)

According to Jones, with respect to the evidence samples taken from the Willem

scene -- the tan pants, the tissues and the couch -- the DNA banding pattern at each of the four genetic locations tested matched each other as well as the banding pattern resulting from the testing of Mr. Miles's reference sample. (11 RT 4026.) Similarly, the banding pattern resulting from DNA testing of the napkin from the Castellanos scene also matched the banding pattern obtained from the testing of Mr. Miles's reference sample. (11 RT 4026-4027.) And the DNA banding pattern obtained by testing the four genetic locations on the panties from the Davis crime scene were "similar to" the banding pattern obtained from testing of Mr. Miles's reference sample. (11 RT 4027.)[1]

Jones admitted that concluding banding patterns "matched" was somewhat of a misnomer. According to Jones, when banding patterns of evidentiary samples and reference samples were visually compared, the banding does not necessarily have to match. Although bands must be "exactly the same size" for there to be a match between two samples, examiners instead use "match windows" in which it is assumed that two

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[1] On cross-examination, Jones admitted that at one genetic location, (1) the Davis panties results showed a single band whereas (2) Mr. Miles's reference sample had a single strong band and a weak second band. (11 RT 4041, 4109-4110.) Jones admitted that if there were truly no second band on the Davis panties, Mr. Miles would be excluded as the semen donor on the panties. (11 RT 4109-4111.) But Jones did not exclude Mr. Miles; instead, he claimed that "in some profiles you can actually essentially dilute out a DNA sample such that the bands, maybe one's very strong, and one's very weak . . . to a point where you can only see the strong band. (11 RT 4110.) Jones concluded that notwithstanding his inability to see a second band on the Davis panties, he did not "know one way or the other" as to whether there actually was a diluted second band. (11 RT 4110-4111.)

bands "match" if their measurements are within a certain percentage of each other. (11 RT 4094.) The FBI uses a symmetrical match window of plus or minus 2.5%; thus if a reference band measures two and a half percent plus or minus of the evidential band's measurement, it is considered a "match." (11 RT 4096.)

The Sheriff's Crime Lab's match window tolerance was always far more liberal. For example, in contrast to the FBI protocol, in 1992 the sheriff's lab used asymmetrical match windows of plus 8% or minus 5% -- or a total 13% -- at a particular band's location. (11 RT 4102.) Jones admitted that his lab used "a rather large match window as compared to the 2.5 percent" -- or 5% total -- used by the FBI. (11 RT 4102.) The size of the match window changed depending on the location of the band. (11 RT 4103.) By the time of trial, the lab gave itself even more leeway; there were locations with match windows that ranged up to a total of 20%, i.e., if a reference band measured within 20% of the evidentiary band's measurement, it was called a "match." (11 RT 4103.) Jones knew of no other lab that used asymmetrical match windows. (11 RT 4105.)

Jones also calculated an estimate of the frequency that the profiles would be found in the general population. At the time of testing, the Sheriff's Crime Lab used its own database to calculate frequency of profiles in the general population. (11 RT 4087.) The database included only 1200 volunteers from Riverside and San Bernardino Counties;

volunteers were asked what they believed was their ethnic background, and what they believed was their parents' ethnic background, and were categorized based on their answers. (11 RT 4087-4088.) Jones believed that the database was "probably close to evenly distributed" among Caucasians, Hispanics and African-Americans" but "we did have more Hispanics in our set than of Blacks and Caucasians, but it's over 200" and "[p]robably over 300 for each one of them." (11 RT 4088.)

The Sheriff's Crime Lab also did not believe in error rates, and did not take them into account in its calculations. (11 RT 4067.) According to Jones, an error rate was a "nebulous term" which the lab did not try to define because "you can have different types of errors" and "the different errors may or may not have an affect on the final outcome or the final interpretation of the report." (11 RT 4067.) Instead, the lab's policy was "if you are concerned about the typing in an individual case or set of samples, retype them. Retest them." (11 RT 4067.) Jones admitted that "there is a way to come up with estimates of errors," but since retesting is available, "it's not necessary." (11 RT 4068.) He conceded that the 1992 NRC I report "strongly recommended" that "laboratory error rates be included as part of the information that is published," but he did not "feel it was necessary to address that issue" in his 1993 report. (11 RT 4075.)

In his 1993 report, Jones calculated that the profiles of the four chromosomes from

the Willem and Castellanos cases -- which he believed "matched" Mr. Miles's four chromosomes -- would be found in 1 in 40 million Caucasians, 1 in 43 million Hispanics, and 1 in 114 million African-Americans. (11 RT 4032.) Jones realized prior to trial, however, that he used the incorrect profile to make the calculation; he had calculated how frequently Mr. Miles's profile would be found in the general population, and not the frequency of the profiles of the evidentiary samples. (11 RT 4034.) Jones recalculated using profiles from the evidentiary samples and concluded that profiles of the four -- which matched Mr. Miles's DNA profile at those locations -- would be found in 1 in 78 million Caucasians, 1 in 38 million Hispanics, and 1 in 180 million African-Americans. (11 RT 4034-4035.)[2]

Jones also changed his calculation for the frequency of the profile from the Davis panties. In 1993, he estimated that the profile obtained from the four genetic sites tested on the Davis panties -- which were "similar to" Mr. Miles's profile -- would be found in 1 in 6,000 Caucasians, 1 in 10,000 Hispanics, and 1 in 11,000 African-Americans. (11 RT 4042.) Prior to trial, and using a "tolerance window" suggested by the National Research

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[2] Jones made the recalculation because he reported the frequency of Mr. Miles's profile in the population; he should have reported the frequency of the semen donor's profile in the population. (11 RT 4034.) Normally, he said, because the profiles "matched" the frequency calculations would not have changed; the calculations only changed because the match window criteria changed between calculations, and affected the ultimate frequency calculations. (11 RT 4035-4037.)

Council II ("NRC II") in 1996, Jones recalculated that the profile of the four chromosomes on the Davis panties would be found in 1 in 940 Caucasians, 1 in 1,300 Hispanics, and 1 in 920 African-Americans. (11 RT 4042, 4107-4109.)

4. Evidence the state never presented.

There were no eyewitnesses to the Willem murder. There were no eyewitnesses to the Castellanos robbery/rape and Osburn/Davis robberies/rape who described an assailant who matched Mr. Miles. Instead, the victims in the Castellanos and Osburn/Davis cases described an assailant that was 6' to 6'1" tall, weighing 150 to 160 pounds. (3 RT 703-705.) Mr. Miles was 6'6" tall and weighed 210 pounds; he was as much as six inches taller and 60 pounds bigger than the assailant. And although Mr. Miles had a prominent scar on his arm, *none* of the victims reported a scar on the arm of the man who assaulted them.

The suspect who used Willem's ATM card after her murder was wearing glasses and a Red Dragon hat; police did not find either in Miles's possession. Moreover, the state presented no scientific evidence -- photogrammetry or otherwise -- which established the height of the suspect who used Willem's ATM card. And although the assailant in both the Osburn/Davis and Castellanos crimes did not wear gloves, the state

presented no fingerprint evidence tying Mr. Miles to either offense.

In addition, and as noted above, Osburn testified that his cellphone was taken by the assailant, and he later discovered unauthorized telephone calls on his cellphone bill. He gave that bill to police. But the state presented no evidence at all about those calls -- much less evidence that Mr. Miles was connected to even a single one of these calls.

The state did not present any of this evidence. Instead, the state rested its case primarily on serological and DNA evidence tested by inexperienced examiners in a non-accredited laboratory which had been cited for multiple improprieties and inadequacies in lab testing and control by an independent review board.

B. The Competency Phase.

From the beginning of this case there was sound reason to doubt defendant's competency to stand trial. Trial began in February 1999. (14 CT 4025.) Six years earlier -- on May 14, 1993 when defendant was 26 years old (*see* 15 CT 4413) -- he was sentenced in an unrelated case to 75 years, eight months in jail. (2 RT 458; Prob. Rpt. at p. 1, 10.) The convictions and sentence in that case were affirmed in full on September 27, 1994, and this Court denied review on January 19, 1995.

As of November 1995, the parties recognized Mr. Miles would not even have an initial parole hearing until he was in his 60s. (2 RT 458.) Later, defense counsel made clear that in light of the rule requiring Mr. Miles to serve 80% of his sentence before a parole hearing, Mr. Miles would not have his initial parole hearing until he was in his 80s. (15 RT 5160.) In other words, before trial ever began in this case, it was unlikely defendant was ever going to get out of jail. Accordingly, the court itself suggested defense counsel present the prosecution with mitigating evidence prior to trial in an effort to settle the case. (2 RT 462.) Eventually, the prosecution stated it was willing to consider a deal: plead guilty in exchange for a life without parole term. (15 RT 5162.) In fact, the prosecutor had spoken to the families of the victims, and informed counsel that the state was no longer insisting on the death penalty; the prosecutor was simply asking for defendant to enter pleas of guilty, and then accept a sentence of LWOP -- a sentence for all intents and purposes that he was already serving. (15 RT 5162.) Although he had nothing to gain by going to trial -- and much to lose (exposure to a potential death sentence) -- Mr. Miles refused to even entertain a plea bargain. (15 RT 5164.)

As this course of conduct suggests, Mr. Miles's thinking was not always rational. Thus, early on in the case, defense counsel raised a concern about defendant's competency. (3 RT 731.) Counsel made clear Mr. Miles was unable to assist him in the plea negotiation process. (13 CT 3663-3664.)

Counsel submitted a medical evaluation from Dr. Joseph Lantz which concluded that defendant was not competent to stand trial. (3 RT 731; 13 CT 3665-3666.) According to Dr. Lantz, based on his "ongoing evaluation" of Mr. Miles, there has been a "very serious deterioration in his mental status . . . ." (13 CT 3665.) Dr. Lantz found Mr. Miles's "reality testing" to be "severed impaired," and he was "clearly psychotic at this time," suffering "[b]izarre and paranoid delusions." (13 CT 3665.) Mr. Miles (1) suffered a psychotic episode in custody, attacking another inmate because he believed the inmate was trying to poison him, (2) woke up feeling "violated" by other inmates, (3) believed a "camera" was put in his left eye and controlled by someone else, after he was "under the knife" several times, and (4) thought his parents' bodies had been taken over by spies or aliens. (13 CT 3665; 15 RT 5168-5169.) He also was "hearing voices which comment on his situations and offer advice" which he believed "may be coming from vents, electronic devises or satellites." (13 CT 3665.) In addition, he believed "a crime syndicate [was] involved in manipulating him." (13 CT 3666.) Finally, Mr. Miles thought that "there [was] a special purpose to his circumstance, that he has been chosen and challenged to convey some special information being revealed to him" by "a special presence in his life." (13 CT 3665-3666.)

The trial court suspended proceedings, appointing two experts for the state who ultimately concluded defendant was competent. (3 RT 739.) Mr. Miles waived his right

to a jury trial on competence and counsel submitted the matter on the conflicting medical reports. (3 RT 752-753.) The court found defendant competent. (3 RT 754.)

Defense counsel raised the competency issue again in February 1999 during the guilt phase proceedings. He explained that defendant was experiencing auditory hallucinations in which a spirit was advising him to ignore counsel's advice and testify. (9 RT 3495-1.)[3] Dr. Lantz testified that defendant's delusions were interfering with his ability to testify and cooperate with counsel. (9 RT 3499-3504.) The court refused to suspend proceedings, ruling there was insufficient doubt as to defendant's competency. (9 RT 3510-3511.)

In April of 1999 -- after the jury had found defendant guilty but before the penalty phase had started -- defense counsel raised the competency issue yet again. Counsel explained that defendant was ranting and raving, and was unable to assist him in preparing to present mitigation. (13 RT 4696-4704.)[4] Defendant was insisting that no mitigation be presented. (13 RT 4699.) He wanted to testify on his own behalf, but did not know what he wanted to say. (13 RT 4698.) Defense counsel asked for a

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[3] 9 RT 3495-1 is part of a short hearing which was sealed at trial. By separate motion, Mr. Miles has sought to unseal this portion of the Reporter's Transcript.

[4] 13 RT 4704 is part of a short hearing which was sealed at trial. By separate motion, Mr. Miles has sought to unseal this portion of the Reporter's Transcript.

continuance to obtain an evaluation of defendant. (13 RT 4705-4706.)

On April 19, 1999 -- and out of the jury's presence -- the defense presented testimony from Dr. Lantz who concluded that defendant was incompetent to stand trial. (13 RT 4709-4726.)[5] Dr. Lantz again noted that defendant was experiencing auditory hallucinations and delusions which were affecting his decision-making; in fact, defendant believed that a "particular entity Wilhemina" -- who defendant believed was the victim in the case -- was guiding him. (13 RT 4713.) According to Dr. Lantz, "it's a very primitive defense mechanism, which we very frequently see in a schizophrenic-type condition where a person essentially tries to undo what they have done by incorporating the person into themselves." (13 RT 4715.) Indeed, defendant indicated that "with respect to his decision-making" that "he's letting the spirits direct everything that's going on now." (13 RT 4715.) He also indicated there were "demons" haunting him in prison, and that "he would rather have the death penalty than to go to prison and be faced with this type of environment and the demons." (13 RT 4716.)

Defense investigator David Sandberg also testified as to his recent observations of

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[5] 13 RT 4709-4726 is part of a short hearing which was sealed at trial. The prosecutor obtained access to this hearing at trial. (14 RT 4876-4880.) In an excess of caution, and by separate motion, Mr. Miles has sought to unseal this portion of the Reporter's Transcript.

Mr. Miles. According to Sandberg, Mr. Miles "appears real spaced-out during certain times" and "it becomes impossible to really talk to him about anything of significance" because "he'll go off on some tangent" with "a run-on of words that doesn't really make any comprehensible sense." (13 RT 4731.)

The court declared a doubt as to Mr. Miles's competency to stand trial and suspended proceedings pursuant to Penal Code section 1368. (13 CT 4749.) The section 1368 hearing began on July 22, 1999. (14 RT 5029.)

Dr. Richard Dudley examined Mr. Miles on four separate occasions, interviewed his mother and sister, and reviewed medical records. (14 RT 5031-5032, 5035-5036.) Dr. Dudley related the onset of mental illness when Mr. Miles was a boy, including paranoid and delusional behavior as well as hallucinations, and forced treatment with anti-psychotic medicine. (14 RT 5037-5044.) His conclusion was that defendant had schizo-affective disorder which impacted his ability to cooperate with counsel. (14 RT 5070.) Dr. Joseph Wu performed a PET scan; the results were entirely consistent with the schizophrenia diagnosis. (15 RT 5207-5236.) Dr. Ernie Meth performed a SPECT scan on defendant; the scan showed that Mr. Miles had "several areas, specifically in the front of the brain, that have holes" and "are not getting sufficient blood flow." (15 RT 5281.) Moreover, Mr. Miles's frontal lobe had "two horns" which "were not perfused [supplied

with blood] normally." (15 RT 5282.) According to Dr. Meth, these results were "very consistent" with Dr. Wu's findings. (15 RT 5283.)

Finally, clinical psychologists Shoba Sreenivasan and Joseph Lantz each evaluated defendant and concluded that because of his psychotic and paranoid behavior, defendant could not cooperate with counsel and was not competent to stand trial. (15 RT 5310-5319; 5364-5391.) According to Dr. Sreenivasan, the PET and SPECT scans were consistent with brain trauma and decreased cognitive functioning. (15 RT 5316.) Mr. Miles believed "he was receiving some sort of message from the victim in this case," and "felt that the victim in this case would want him to go through the penalty phase" and "get death for the penalty phase." (15 RT 5311.) He also believed "he was a God and he could smell souls dying." (15 RT 5311.) Dr. Sreenivasan also noted that defendant's mother had a history of "exhibiting some psychiatric symptoms," and "the risk for the child developing some sort of psychiatric illness is higher than it would be just by chance or in the general population." (15 RT 5317.)

For his part, Dr. Lantz testified consistent with his earlier written evaluation of defendant. He concluded that Mr. Miles was schizophrenic and suffered "auditory hallucinations" where he "does truly hear voices" and suffers delusions, including "completely incorporat[ing] Wilhelmena into his life" who remains "alive in his mind;"

defendant now trusted Wilhelmena more than his own attorneys, and she was "the person that he listens to . . . ." (15 RT 5373.)

Mr. Miles's trial attorney also testified.[6] He testified to Mr. Miles's bizarre behavior, including (1) believing he (counsel) was working with the prosecutor's office, (2) believing evidence had been planted by Los Angeles police, (3) believing he (defendant) was being poisoned in jail, (4) asking if defense counsel had investigated a car which was not connected to the case, (5) suggesting defense counsel should investigate a dentist in one of the business parks where the crime occurred, (6) telling counsel that he (defendant) would "fix everything" because "there was some destiny involved in him taking the stand," and (7) changing his mind about testifying because Wilhemena told him (defendant) to apologize to counsel, and that he "shouldn't testify." (15 RT 5166-5170, 5173, 5179.)

The state called experts of its own. Forensic psychologist Lee Guerra concluded defendant was competent; the conclusions to the contrary were the result of defendant malingering. (16 RT 5431-5443.) Psychiatrist Jose Moral reached the same conclusion. (16 RT 5557-5576.) The state also introduced several videotapes made of defendant in

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[6] Because trial counsel was a witness at this proceeding, another lawyer from the public defender's office represented Mr. Miles at this hearing.

county jail, showing him acting rationally. (16 RT 5539-5543, 5737-5743.)

The jury found Mr. Miles competent to stand trial.

C. The Penalty Phase.

The penalty phase began on August 30, 2009. The state's case in aggravation had three general parts: (1) introduction of other crimes evidence involving violence, (2) introduction of prior convictions, and (3) victim impact testimony. The defense case in mitigation consisted of expert testimony regarding defendant's history of mental illness and organic brain dysfunction, as well as evidence regarding defendant's upbringing.

1. The prosecution's case.

First, the prosecution introduced evidence of five acts of violence it alleged were committed by Mr. Miles. Four of these five acts had originally been in the information, but had been severed prior to trial. The fives acts occurred on January 6, January 21, February 19, February 21, and June 16, 1992.

Paula Yenerall testified about the January 6, 1992 incident. (17 RT 5976.) On the

evening of January 6, 1992 she was working late at her accounting firm. A man broke into the office, demanded money at gunpoint, robbed her and tied her up. (17 RT 5977-5982.) In a photographic lineup prior to trial, Ms. Yenerall identified Orlando Boone as her assailant. (17 RT 5988-5990.)

Prior to trial, however, Ms. Yenerall changed her mind and identified Mr. Miles in a different photographic lineup and later a live lineup . (17 RT 5984-5988; 5 CT 1497-6 CT 1500.) Police destroyed this second photographic lineup (the one that changed Ms. Yenerall's mind) prior to trial, and Yenerall's identification of Mr. Miles was never challenged with this evidence. (6 CT 1498-1499.)

Janet Heyen testified about the January 21, 1992 incident. On the evening of January 21, 1992, a man with a gun came into the medical office where she was working and demanded money. (17 RT 5994-5996.) Heyen recalled that police showed her at least four different photographic lineups prior to trial. (6 CT 1543, 1548.) Police detective Lore showed Mr. Heyen (1) a lineup which contained a picture of someone named Steven Dyer, (2) a series of photographs of sex offender parolees, and (3) a lineup containing Orlando Boone. (7 CT 1986-1990.) Detective Lore's notes show that at the first photographic line-up, Ms. Heyen affirmatively identified Steven Dyer saying that "it could be him." (10 CT 2709, 2909; 2 RT 500.) And Lore testified at the preliminary

hearing that Ms. Heyen (1) picked Damon Cooper out of the parolees photographs and (2) picked out photograph five in the photographic lineup involving Orlando Boone. (7 CT 1987-1990.)

Just like Ms. Yenerall, however, Heyen changed her mind prior to trial. Thus, she told the jury that defendant was her assailant and she confirmed she had identified him at a live lineup in July 1992 and at the preliminary hearing. (17 RT 5994, 6000-6001, 6006.) Prior to trial, police destroyed both the Dyer lineup as well as photograph five from the Boone lineup, and Heyen's identification of Mr. Miles was never challenged with this evidence. (7 CT 1988; 10 CT 2710; 2 RT 481.)

John Kendrick testified as to the February 19, 1992 incident. On the evening of February 19, 1992, a man with a gun came into his office and demanded money. (18 RT 6030.) After the incident, police showed Mr. Kendrick a photographic lineup which included a man named Randy Winters. (2 RT 490-494; 7 CT 2021.) Mr. Kendricks identified Winters as his assailant with a degree of certainty at 8 out of 10. (2 RT 490; 7 CT 2021.)

Prior to trial, Kendricks -- like Yenerall and Heyen -- changed his mind. Thus, at trial, Kendrick testified that defendant was the man who robbed him and he confirmed

that he picked defendant out of a live lineup in July 1992. (18 RT 6031-6032, 6039.) Prior to trial police destroyed the lineup containing the Winters picture, and Kendrick's identification of Mr. Miles was never challenged with this evidence. (2 RT 494.)

Arnold Andersen and his wife Sharon testified about the February 21, 1992 incident; they were working late that night when a man with a gun broke into the office, demanded money and robbed them. (18 RT 6067-6072, 6081-6082.) After the incident, police showed Mr. Andersen a photographic lineup which included a picture of Roger Egans. (7 CT 2044-2046.) Mr. Andersen picked Roger Egans as his assailant saying he was "about eighty percent sure." (7 CT 2011, 2046; 10 CT 2910.)

Prior to trial, Mr. Andersen -- like Yenerall, Heyen, and Kendricks -- changed his mind. Thus, at trial Mr. Andersen (as well as his wife) identified Mr. Miles as the man who robbed them and confirmed picking him defendant out of a lineup in July 1992. (18 RT 6069, 6077, 6082, 6084-6086.) Prior to trial, police destroyed the lineup containing the Egans picture, and Andersen's identification of Mr. Miles was never challenged with this evidence. (4 RT 481.)

The final incident occurred on June 16, 1992. Bridget Emanuelson testified that she was working late that night with her boss, Mr. Honingsfeld, when a man with a gun,

wearing a bandana on his face, came into the office and demanded money. (18 RT 6046-6049.) She later identified this man as Mr. Miles. (18 RT 6048.) The man tied up Honingsfeld, forced her to orally copulate him (Honingsfeld), and then digitally penetrated and raped her. (18 RT 6053-6060.)

In addition to this other crimes evidence, the prosecutor also presented two types of victim impact testimony. First, he presented testimony from Nancy Willem's father, sister and mother who testified to the impact her murder had on their lives. (17 RT 6021-6024; 18 RT 6102-6105, 6107-6110.) Second, he presented victim impact testimony from Bridget Emanuelson regarding the impact of the June 16 crimes on her life. (18 RT 6065-6066.)

Finally, the state introduced evidence of two prior cases in which Mr. Miles suffered fourteen prior convictions. (18 RT 6100-6101.) Of these fourteen convictions, eight were for burglary and involved guilty pleas entered when Mr. Miles was less than 18 years old. (15 CT 4413; 18 RT 6100-6101.)

2. The defense case.

The defense case in mitigation consisted of expert testimony regarding defendant's

organic brain disorders, his intelligence and mental health. In addition, the defense presented testimony from friends and family about defendant's troubled background. But before the actual case in mitigation began, and against the advice of his lawyer, Mr. Miles insisted on testifying at the penalty phase.

As noted above, during competency hearings over the years, trial counsel along with numerous experts had told the court over and over again that defendant was experiencing auditory hallucinations which were influencing his decision-making. (*See* 9 RT 3495-1, 3499-3504; 13 RT 4713-4716, 15 RT 5311, 5373.) When Mr. Miles's lawyer refused to question him, Mr. Miles testified in narrative form to a bizarre story.

Mr. Miles first talked about problems early in his life; he had foot surgery when he was 15 years old, and explained his view that there was a problem with the anesthetic that was administered during the surgery; when he (Mr. Miles) woke up after surgery, he was "never the same" person. (18 RT 6131-6132.) He thought at first that he had "done something wrong to deserve what I'm going through," but then thought the doctor "didn't tell the truth about everything in the surgery." (18 RT 6131.) In any event, he thought he was "a totally different person" and "started hallucinating back then . . . ." (18 RT 6132.)

Mr. Miles explained that Ms. Willem's ghost had come to him and filled in the

gaps of what occurred that night. (18 RT 6131.) "[I]ll angels" or blood blobs had taken over his mind and body and forced him to do the crime. (18 RT 6131.) He explained "what Wilhelmena has revealed to me is at the time of the crime, is that when these things were happening, the voices inside my head actually came outside my head" and "appeared on her [Ms. Willem] like Miles or a ball, a blob of blood of Miles talking," and could see on her chest "this blob of voices, lips just talking," telling him what to do. (18 RT 6132-6136.) He hit Ms. Willem's chest "to stop them." (18 RT 6136.) When he heard her scream, he stopped, but "the voices had got louder" and "were yelling at me." (18 RT 6136.) His face felt "so much pain it got cold" and he "couldn't control the emotion," and there "was these voices on her face and her chest," so he repeatedly hit and kicked Ms. Willem "trying to get ride of the voices" on her face and chest. (18 RT 6137.) The left side of his body then took over, and although he was right-handed, his left hand wrote a note saying, "Wake up Goverenment [sic] feed the poor." (18 RT 6137.)

After Mr. Miles's testimony, the penalty phase began in earnest. As Mr. Miles's odd testimony suggested, mental illness was a central theme of the mitigation case.

Mr. Miles was born on December 12, 1966. (15 CT 4413.) Thus, he was 25 years old when these crimes occurred. But Mr. Miles had begun to experience mental health issues long before the crime, when he was just a boy. Family friend and former police

officer Sharon Mitchell knew defendant well when he was a child because her son Duane was defendant's best friend growing up; she recalled that Mr. Miles was a "good kid" and "nicer than everybody else." (19 RT 6581-6582.) Both Mitchell and her son recalled early incidents suggesting the onset of mental problems; when defendant was a child he would hear voices, suffer memory lapses and blackouts and sometimes engage in very odd behavior. (19 RT 6585, 6588, 6591, 6603, 6606, 6620.)

Mitchell recalled that Mr. Miles began talking about "people putting stuff in his food and drinks." (19 RT 6587.) On one occasion, he walked into her son's apartment, locking her son out. (19 RT 6588.) On another occasion, he wanted to jump out the window, and then calmed down and hid under a table, saying "They're trying to get me. And don't let them get me." (19 RT 6588.) On still another occasion, he again hid under a glass table, and when Mitchell bent down, telling him that he is not hiding if everyone can see him, Mr. Miles put his hands over his eyes, saying, "No, no, you can't see me. You can't see me." (19 RT 6589.) When Mitchell tried to get help, Mr. Miles's father pulled him out, took him into another room, beat him and threw him around the room. (19 RT 6590.) Mr. Miles eventually began saying that he was hearing voices "telling him to do something evil." (19 RT 6591.) Despite these obvious harbingers of abuse and mental illness, Mitchell recalled defendant as a gentle and quiet child. (19 RT 6582, 6599, 6613.) He was not violent. (19 RT 6582.)

The mental health issues defendant experienced as a boy followed him into adulthood. Defendant lived with Terry Sylvester and her three children. According to Ms. Sylvester, defendant helped support the family and had a very good relationship with Ms. Sylvester's three children. (19 RT 6536-6542.) But one day defendant went to work and never came home. (19 RT 6542.) Ms. Sylvester reported him missing. (19 RT 6543.) He had simply wandered off; one or two months later she heard from him again when he called and told her he was fine. (19 RT 6543.)

The wandering continued. Six years before the crimes in this case defendant sought help and was hospitalized for a psychotic episode occurring when he was only 19 years old. (18 RT 6418.) And just *months* before his arrest in this case defendant sought help from a Los Angeles mental health clinic. (19 RT 6464-6470.) Defendant had been wandering off to places, and did not know how he got there. (19 RT 6464.) Defendant's mother noted a marked decline in his functioning in the 6 to 12 months prior to his arrest. (19 RT 6471.) Defendant was disoriented, he did not know the correct date and he reported hallucinations and buzzing in his ears. (19 RT 6471.) Defendant stated his fears that a shadow was coming into his room to attack him. (19 RT 6471.)

Medical tests showed that defendant had a large brain tumor, which began growing in 1987 -- when he was 21 years old and fully five years before the crime. (18 RT 6371-

6377, 6422-6428.) According to Dr. Dudley, the tumor itself could have caused both lower cognitive functioning and personality changes. (*Ibid.*) The tumor was only partially removed after his arrest in Torrance and Mr. Miles's physical and psychological symptoms persisted; indeed, on the heels of the surgery, Mr. Miles had yet another psychotic episode and such episodes did not abate. (14 RT 5065-5066.)

Psychologist Joseph Lantz testified that Mr. Miles had an IQ ranging from 74 to 77 and suffered from schizophrenia. (18 RT 6198-6200, 6204-6218, 6227-6232, 6238-6252.) Based on the results of the Stroop Neuropsych Screening test, Dr. Lantz concluded there was a 95% chance Mr. Miles was suffering from some kind of brain impairment. (18 RT 6200-6204.) Dr. Dudley also examined defendant and found that he suffered from schizophrenia. (19 RT 6351-6356, 6390-6404.)

These diagnoses were confirmed by physical tests. Dr. Wu performed a PET scan of defendant's brain; his findings about what parts of the brain were active were entirely consistent with the schizophrenia diagnosis. (18 RT 6289-6233.) Dr. Meth performed a SPECT scan on defendant; the scan showed holes in the frontal lobe of the brain and insufficient blood flow to that area of the brain. (19 RT 6451-6458.) Dr. Meth noted that this kind of reduced blood flow is typically associated with patients showing a lack of impulse control. (19 RT 6449.)

ARGUMENT

JURY VOIR DIRE ISSUES

I. BECAUSE THE PROSECUTOR USED THREE OF HIS FIRST SIX PEREMPTORY CHALLENGES TO STRIKE THE THREE PROSPECTIVE AFRICAN-AMERICAN JURORS WHO HAD BEEN CALLED TO THE JURY BOX, AND BECAUSE HIS STATED REASONS FOR THE STRIKES WERE EQUALLY APPLICABLE TO WHITE JURORS WHO WERE NOT STRUCK, MR. MILES'S CONVICTION VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

Defendant Miles is African-American. In this case he was charged with the rape and murder of 35-year-old Nancy Willem, a white woman.

Voir dire began on November 18, 1998. (4 RT 970.) The trial court first addressed hardship requests. (4 RT 981.) After addressing the hardships, the court began *Hovey* voir dire directed at prospective jurors' views on the death penalty on December 9, 1998. (5 RT 1347.) More than 70 prospective jurors were deemed qualified to serve after *Hovey* voir dire. (6 RT 1668.)

The court explained the process it would use. From the pool of potentially qualified jurors who passed through *Hovey* voir dire, twelve names would be drawn at random. (6 RT 1684.) The court and counsel would then ask these twelve jurors questions about their general ability to serve as jurors. (6 RT 1684.)

Among the first twelve jurors picked were prospective jurors SG (seated as juror number 1) and KC (seated as juror number 5). (6 RT 1685.)[7] SG was a 24-year-old African-American. (21 CT JQ 5975.)[8] KC was a 32-year-old African-American. (24 CT JQ 6825.)

By all accounts, KC should have been a very good juror for the prosecution. He was a former marine. (24 CT JQ 6828, 6830.) His wife had been a correctional officer for 18 years. (24 CT JQ 6829.) When asked to describe the role of prosecutors in the criminal justice system, he explained they were trying "to protect the community . . . against those that would cause harm or have harmed." (24 CT JQ 6842.) He neither opposed nor favored the death penalty, was willing to consider both life and death as options at the penalty phase, and agreed that he could vote for death. (24 CT JQ 6849-6852.)

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[7] Mr. Miles will use initials instead of the jurors names.

[8] "21 CT JQ 5975" refers to volume 21 of the 25-volume Clerk's Transcript containing juror questionnaires of the non-seated jurors.

If anything, SG appeared to be an even better juror for the prosecution. His father worked as an agent for the Drug Enforcement Agency. (21 CT JQ 5983.) He himself had considered a career as a police office. (21 CT JQ 5995.) He agreed that if the crime was serious enough, the death penalty should be an option. (21 CT JQ 5999.) If the death penalty was put on the ballot, SG stated he would vote to keep the death penalty, and he believed it was used fairly in California. (21 CT JQ 6001.) He would not be reluctant to impose death, to sign the verdict form or face the condemned with his verdict. (21 CT JQ 6001.) Although SG said he would consider both aggravating and mitigating factors, he made quite clear that as a general matter he "favor[ed] the death penalty . . . ." (21 CT JQ 6002.)

With his second peremptory challenge, the prosecutor discharged KC and with his fourth peremptory challenge he discharged SG. (6 RT 1705, 1708.)

After several more peremptory challenges, another African American prospective juror was called to the jury box: IB. (6 RT 1717, 1720.) The prosecutor used his sixth challenge to discharge her. (6 RT 1718-1719.)

Out of the jury's presence, defense counsel made a *Wheeler/Batson* motion. (6 RT 1719.) Counsel noted that one black prospective juror had been discharged for cause

because he said he could not be fair; after that, the prosecutor had used three of his first six peremptory challenges to remove the only three remaining black prospective jurors from the jury. (6 RT 1719.) The court found that a prima facie case had been established:

> "MR. FERGUSON: Well, is the Court, is the Court making a prima facie finding?
>
> THE COURT: Yes.
>
> MR. FERGUSON: Well, I would, with respect to --
>
> THE COURT: I understand [IB] from her answers, discussion and conversation during the Hovey. I don't understand as to [KC] and as to [SG]. You'll have to explain those." (6 RT 1720.)

As to each prospective juror -- SG and KC -- the prosecutor gave three reasons for the discharge (discussed below). (6 RT 1720-1722.) The trial court stated that its role was limited to determining "whether or not there are valid, legitimate reasons for the District Attorney dismissing three of the four Blacks that were called to the box." (6 RT 1722.) The court denied defense counsel's motion to quash the panel, ruling that "I cannot say [the prosecutor's reason] is not legitimate." (6 RT 1722.)

Later, another African-American prospective juror was called to the box -- MB. (6 RT 1732; 24 CT JQ 6757.) The prosecutor discharged her as well; defense counsel

brought another *Batson* motion which was denied. (6 RT 1740-1741.) For the record, defense counsel made clear that at that point the prosecutor's discharges had resulted in an "all-white panel." (6 RT 1740.) Ultimately, there was not a single African-American juror among the 12 jurors seated to try the case; of the 6 jurors eventually seated as alternates, there was a single African-American. (5 CT JQ 1009 [alternate juror 2].)

Reversal is required. As discussed in Argument C below, under established law the prosecutor's stated reasons for discharging SG were a pretext for discrimination; these reasons were either not true or they were equally applicable to white jurors who were not struck. The discharge of SG requires reversal.

As discussed in Argument D below, the prosecutor's stated reasons for discharging KC were also a pretext for discrimination; these reasons were either equally applicable to white jurors who were not struck, unrelated to the case, or both. Separate and apart from the discharge of SG, the prosecutor's discharge of KC requires reversal.

Finally, as discussed in Argument E below, if the Court finds in connection with either juror that some but not all of the prosecutor's stated reasons were a pretext for discrimination, reversal is still required. Although this Court has not yet resolved this question, the weight of authority from state courts around the country is that *Batson* is

violated where the discharge of a juror is based even in part on reasons related to race.

B. The Three-Step Process Set Forth In *Batson v. Kentucky* (1986) 475 U.S. 79 For Challenging The Prosecution's Discharge Of A Juror, And The Factors Reviewing Courts Must Examine In Determining If A Prosecutor's Explanation For A Discharge Was Really A Pretext For Discrimination.

The United States Supreme Court has long recognized that a defendant's Sixth Amendment right to an impartial jury precludes prosecutors in criminal cases from excusing jurors because of their membership in a cognizable class such as race. (*See e.g.*, *Smith v. Texas* (1940) 311 U.S. 128; *Peters v. Kiff* (1972) 407 U.S. 493. *Cf. Glasser v. United States* (1942) 315 U.S. 60.) Similarly, the Court has noted the right of potential jurors, protected by the equal protection clause of the Fourteenth Amendment, not to be excluded from a jury panel on the basis of group bias. (*See, e.g., Powers v. Ohio* (1991) 499 U.S. 400; *Batson v. Kentucky* (1986) 476 U.S. 79.)

This Court has been equally zealous in guarding against discrimination in the seating of a criminal jury, repeatedly noting that prosecutors may not discharge a juror because of membership in a cognizable racial, ethnic or religious group. (*See, e.g.*, *People v. Crittenden* (1995) 9 Cal.4th 83, 114; *People v. Garceau* (1994) 6 Cal.4th 140, 170; *People v. Wheeler* (1978) 22 Cal.3d 258, 276.) The discriminatory striking of even a single member of a cognizable group requires reversal. (*See, e.g., United States v. Battle*

(8th Cir. 1987) 836 F.2d 1084, 1086; *United States v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1541.)

Challenging a prosecutor's dismissal of a potential juror for group bias, or making a so-called "*Batson* motion," involves a three-step process. (*Purkett v. Elem* (1995) 514 U.S. 765, 747-768.) First, a defendant must make a prima facie showing the prosecutor challenged the juror because of membership in a cognizable group. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97.) Second, if a prima facie case of purposeful discrimination has been established, the burden shifts to the prosecution to come forward with a group-neutral explanation for challenging the juror (step two). (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) At the third stage, the trial court must determine whether defendant has established purposeful discrimination; where the prosecutor proffers a facially neutral explanation at step two, this determination turns on an assessment of whether the prosecutor's explanation is bona fide or simply a pretext. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98, fn. 20.)

Generally, a reviewing court must show deference to a trial court's determination that facially neutral reasons are genuine. (*People v. Montiel* (1993) 5 Cal.4th 877, 909.) But deference is due "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva*

(2001) 25 Cal.4th 345, 385-386.) The trial court's obligation to make a "sincere and reasoned" evaluation of the prosecutor's stated reasons requires the trial judge to consider "the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . ." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.) "[W]hen the prosecutor's stated reasons are *either* [1] unsupported by the record, [2] inherently implausible, or [3] both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386, emphasis added.)

This case involves step three of the *Batson* inquiry. After a black juror was struck for cause, the prosecutor here used peremptory challenges to strike each of three black jurors called to the jury box. The trial court found that a prima facie case of discrimination had been established. (6 RT 1720.) The prosecutor then offered his justifications for discharging SG and KC. (6 RT 1720-1722.) In this situation, the Court must perform a *Batson* third-stage inquiry to determine whether the prosecutor's stated reasons were genuine race-neutral reasons or merely pretexts for discrimination.

In making this determination, there are several factors which the Court must examine. First, the Court must examine whether a prosecutor's stated reasons for

discharging "cognizable-class" jurors apply equally to jurors who are *not* members of the class (and who were *not* discharged). Where the prosecutor states reasons for discharging a minority juror which are equally applicable to white jurors who were not discharged, the prosecutor's reasons are a pretext for discrimination. As the Supreme Court has explicitly concluded, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317, 2325.) Since *Miller-El* was decided, this Court has consistently relied on this type of comparative-juror analysis in determining whether a prosecutor's stated reasons were pretexts for discrimination. (*See, e.g., People v. Lewis* (2006) 39 Cal.4th 970, 1017-1024; *People v. Ledesma* (2006) 39 Cal.4th 641, 688; *People v. Avila* (2006) 38 Cal.4th 491, 547-548; *People v. Huggins* (2006) 38 Cal.4th 175, 232; *People v. Jurado* (2006) 38 Cal.4th 72, 105-106; *People v. Schmeck* (2005) 37 Cal.4th 240, 270-273.)

Second, the Court should examine whether the prosecutor's stated reasons for a discharge are unrelated to the case itself. The law is clear that at stage three of the *Batson* inquiry, stated reasons which are implausible and unrelated to the case will *not* support a discharge even if they are race neutral. (*Purkett v. Elem, supra*, 514 U.S. at p. 768 ["[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts

for purposeful discrimination."]; *Batson v. Kentucky* (1986) 476 U.S. 79, 98 [holding that for reasons to be valid, they "must be related to the particular case to be tried."]; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 359.) Thus, as this Court has noted, when a prosecutor has stated reasons for a strike that are inherently implausible, the trial court "should be suspicious" and should make an inquiry by "point[ing] out inconsistencies" and asking "probing questions." (*People v. Silva, supra*, 25 Cal.4th at p. 385.)

Third, the Court should examine whether the prospective black jurors who were struck would otherwise have been favorable jurors for the prosecution. The Supreme Court, as well as other courts around the country have consistently recognized that where a prosecutor discharges a black prospective juror who would otherwise be considered a juror favorable to the prosecution, that too is an important factor in demonstrating pretext. (*See, e.g., Miller El, supra*, 545 U.S. at p. 232; *People v. Allen* (2004) 115 Cal.App.4th 542, 550; *Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 376; *Kesser v. Cambra, supra*, 465 F.3d at p. 371.)

Finally, the Court should examine the process which resulted in the juror's discharge. In *Miller-El*, the Supreme Court held that a prosecutor's failure to question a prospective juror on an area he later alleged was critical to the discharge decision is evidence of pretext. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 246.) Not surprisingly,

other courts have followed *Miller-El* and examined the prosecutor's questioning of the jurors. (*See Reed v. Quarterman, supra*, 555 F.3d at p. 376; *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1033.)

In this case, the prosecutor stated race neutral reasons for discharging SG and KC. The question then becomes whether the evidence shows these reasons were a pretext for discrimination. It is to that question Mr. Miles now turns.[9]

C. Because The Prosecutor's Stated Reasons For Discharging Prospective Juror SG Were Equally Applicable To White Jurors Who Were Not Struck, They Were Simply Pretexts For Discrimination And A New Trial Is Required.

SG was a 24-year-old African-American. (21 CT JQ 5975.) As noted above, SG was a juror the prosecution should have wanted on a capital case. His father worked as a DEA agent and he had considered a career as a police officer. (21 CT JQ 5983, 5995.) And with respect to the death penalty, it would be hard to find a better prosecution juror: SG was in favor of the death penalty, he believed that the death penalty should be an option for serious crimes, he would vote for the death penalty if it was on the ballot, he believed the death penalty was used fairly in California, and he would not be reluctant to

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[9] Mr. Miles is not challenging the prosecutor's stated reasons for dismissing either IB or MB.

impose death, sign the verdict form or face the condemned with his verdict. (21 CT JQ 6001-6002.)

SG was one of the initial 12 jurors called to the jury box for general voir dire after *Hovey* voir dire was completed. (6 RT 1685.) The trial court began this portion of the voir dire by providing general instructions on the process, reading a list of the witnesses to the prospective jurors and asking whether any of the prospective jurors knew any of the parties or witnesses. (6 RT 1685-1692.) The lawyers for both parties then asked the panel general questions. (6 RT 1692-1702.) Ultimately, the prosecutor used his fourth peremptory challenge to discharge SG. (6 RT 1708.) The trial court found a prima facie case of discrimination. (6 RT 1720.)

The prosecutor put his reasons for the discharge on the record. The prosecutor stated that one reason he discharged SG was that in his questionnaire, SG stated he was not upset at the O.J. Simpson verdict. (6 RT 1721; *see* 21 CT JQ 5993.) The prosecutor explained that he discharged all jurors -- "across the board" (i.e. regardless of color) -- if they were not upset by the O.J. Simpson verdict:

> "If you'll notice, across the board, I've excused jurors I believe of Hispanic origin and Caucasian origin, and the common denominator, essentially, is that they were not, were not upset by the O.J. Simpson verdict . . . ." (6 RT 1721.)

In addition, the prosecutor expressed concern that SG said that he "like[d] [his own] opinion over other people[']s." (6 RT 1720; *see* 21 CT JQ 5982.) Finally, the prosecutor referenced SG's statement that he could follow the presumption of innocence and, if he felt "that defendant might not have done it, he[']s innocent." (6 RT 1721; *see* 21 CT JQ 5994.)

The prosecutor's stated reasons do not hold up under even minimal scrutiny. As noted, the prosecutor expressed great concern that SG stated on his questionnaire that he was not upset by the verdict in the O.J. Simpson case. (6 RT 1721.) The prosecutor forcefully relied on this fact, explaining that this was a race-neutral reason because "across the board" he had struck all prospective jurors who were not upset with the O.J. Simpson verdict, regardless of their skin color. (6 RT 1721.)

But this is not what the record shows at all. *In fact, it is not even close to what the record shows.*

Alternate juror 5 was a white male. (4 CT JQ 1179.) Like SG, he too stated in his questionnaire that he was not upset with the verdict in the O.J. Simpson case. (4 CT JQ 1197.) Alternate juror 5 did not offer even a word of explanation as to his answer. (4 CT JQ 1197.) It is impossible to square the prosecutor's subsequently professed concern with

"jurors . . . [who] were not upset by the O.J. Simpson verdict" regardless of skin color when the prosecutor neither discharged white alternate juror 5 *nor asked him even a single question about the fact that he was not upset with that verdict.* (5 RT 1393-1396; 6 RT 1761-1762. *See Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246 [prosecutor's failure to question a prospective juror on an area he later alleged was critical to the discharge decision is evidence of pretext]; *United States v. Williamson* (5th Cir. 2008) 533 F.3d 269, 276-277 [when a prosecutor identifies a given area as a factor in his decision to strike a black juror, the prosecutor's failure to inquire into that same area with white jurors is a plain sign of pretext].)

Similarly, seated juror 6 stated in her questionnaire that she too was not upset with the verdict in the Simpson case. (5 CT JQ 1401.) She explained her answer, noting that the "evidence [was] not clear." (5 CT JQ 1401.) Once again, not only did the prosecutor elect *not* to discharge juror 6, he elected not to ask her even a single question about this subject despite later declaring this area critical to his decision to discharge SG, who was black. (6 RT 1552-1554, 1685-1702 [prosecutor does not question juror 6 about Simpson verdict].)

In addition to SG's view of the O.J. Simpson verdict, the prosecutor explained his discharge by noting that SG said that he "like[d] [his own] opinion over other peoples."

(6 RT 1720; *see* 21 CT JQ 5982.) The prosecutor was referring to SG's answer to question 35 on the jury questionnaire which asked prospective jurors if they viewed themselves as a leader or follower; SG stated he was a leader and that he "like[d] [his own] opinion over other peoples." (21 CT JQ 5982.) The prosecutor did not ask SG even a single question about this area during voir dire. (6 RT 1699-1702.)

But the prosecutor's expressed concern with potential jurors who viewed themselves as leaders and would give precedence to their own opinions was selective. Thus, juror 1 was a white female. (4 CT JQ 1145.) She too viewed herself as a leader, explaining that she "like[d] to make her own decisions." (4 CT JQ 1152.) The prosecutor did not ask juror 1 a single question about this area, and did not move to discharge her. (6 RT 1714-1715. *See Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246 [prosecutor's failure to question a prospective juror on an area he later alleged was critical to the discharge decision is evidence of pretext]; *United States v. Williamson*, *supra*, 533 F.3d at pp. 276-277 [same].)

Finally, the prosecutor explained that another reason he discharged SG was because of his answer to question 74 -- which advised jurors the court would instruct them on the presumption of innocence and asked if they could follow this instruction. In answering this question, SG said he could follow the instruction, agreeing that if he felt

"that defendant might not have done it, he[']s innocent." (6 RT 1721; *see* 21 CT JQ 5994.)

The prosecutor asked SG about this during voir dire. (6 RT 1699-1700.) SG explained that "if the evidence showed that there wasn't -- that there was some reasonable doubt, then I probably would not accuse him, because of the fact that, myself being in the same situation or anybody, I think that if the evidence didn't totally prove that I did it, then there is some doubt." (6 RT 1700.) SG confirmed that he would base his decision not on a "feeling," but on the evidence. (6 RT 1700.) The prosecutor recognized SG's oral explanation, but nevertheless stated he was discharging him because his answer on the questionnaire "led me to believe that he certainly wasn't going to base it on evidence." (6 RT 1721.)

Yet again the prosecutor's focus on SG's ability to follow an instruction on the presumption of innocence was selective. Thus, juror 5 was a white female. (5 CT JQ 1315.) When asked if she would follow the court's instruction on the presumption of innocence, all she would say is that she would "*try* to follow instructions." (5 CT JQ 1334, emphasis added.) The prosecutor asked no follow up questions at all to see what this white juror meant when she said she would "try" to follow the court's instruction on the presumption of innocence. (6 RT 1705-1706. *See Miller-El v. Dretke*, *supra*, 545

U.S. at p. 246; *United States v. Williamson*, *supra*, 533 F.3d at pp. 276-277.)[10]

Applying the factors discussed in the case law above compels a conclusion that the prosecutor's stated reasons for discharging SG were a pretext for discrimination. The prosecutor's stated concern that SG was not upset with the O.J. Simpson verdict applied to numerous non-African-American jurors who the prosecutor not only allowed to remain as jurors, but never even questioned about their views. Similarly, the prosecutor's other stated reasons also applied equally well to non-African-American jurors whom the prosecutor neither struck nor questioned in the particular area of concern. And as noted above, the prosecutor should have wanted SG on the jury: his father was a DEA agent, he had considered a career as a police officer, he favored the death penalty, believed it was a useful option for serious crimes, felt that the death penalty was used fairly in California, and he was not hesitant to impose death, sign the verdict form or face the condemned

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[10] Although it is not clear if this too was offered as a reason to discharge SG, the prosecutor noted that SG did not show up for court on time. (6 RT 1721.) Defense counsel pointed out there had simply been a misunderstanding about when SG was supposed to return to court. (6 RT 1722.) Counsel also noted that SG was present at all other times when he was supposed to be in court. (6 RT 1662.) And the record shows that when the trial court tried to contact SG by telephone, SG called in on his own, explaining that he thought was supposed to arrive the following day. (6 RT 1671.)

The record also shows that SG was not the only person confused by the schedule. Because defense counsel had been ill during the voir dire process, various groups of jurors were re-contacted and told to come back at different times. (5 RT 1310-1312, 1322, 1325-1326.) At one point, the trial judge himself noted that the schedule was "getting confusing." (4 RT 1110.)

with his verdict. (21 CT JQ 5983, 5995, 6001-6002.)

In this situation, the trial court was required to do something more than merely make a "global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.) But here, the trial court appears to have misunderstood its role; the court stated that in its view, the court's role was simply "to determine whether or not there are valid, legitimate reasons for the District Attorney dismissing three of the four Blacks that were called to the box." (6 RT 1722.) The court then denied the *Batson* motion by finding that "I cannot find say it is not legitimate." (6 RT 1721-1722.)

With all due respect, the trial court had an unduly restrictive view of its own role in the process. The trial court was not limited to assessing whether the prosecutor had stated valid race-neutral reasons for the discharges. While this accurately describes the trial court's role at the *second* stage of the *Batson* inquiry, this summary ignores the far more probing nature of the court's role at the *third* stage.

As this Court has noted, at the third stage "[t]he trial court has a duty to determine the credibility of the prosecutor's proffered explanations . . . and it should be suspicious when presented with reasons that are unsupported or otherwise implausible." (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.) Here, the trial court was presented with reasons that

were certainly suspicious.

As discussed above, the prosecutor told the court he discharged SG because SG was not upset with the O.J. Simpson verdict. He told the court that he had discharged all jurors -- of any color -- who also stated that they were not upset with the Simpson verdict. (6 RT 1721.) In fact, however, when non-African-American jurors such as alternate juror 5 or juror 6 said they were not upset with the Simpson verdict, the prosecutor allowed them to remain on the jury without asking them even a single question about their feelings. (5 RT 1393-1396; 6 RT 1761-1762.)

In this situation -- having been presented with at least one demonstrably false explanation -- the trial court was obligated to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation." (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.) Instead, the trial court here made no real inquiry at all, pointed out no inconsistencies and asked no probing questions. (6 RT 1721-1722.) Indeed, the trial court here not only failed to make *any* inquiry into the credibility of "the prosecutor's proffered explanations" but it made the precise "global finding that the reasons appear sufficient" condemned in *Silva*, simply concluding that "[a]s to . . . SG . . . I cannot say it is not legitimate." (6 RT 1722.) This conclusory ruling hardly constitutes a "reasoned and sincere attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then

known . . . and . . . the manner in which the prosecutor has . . . exercised challenges . . . ." (*People v. Hall, supra*, 35 Cal.3d at pp. 167-168.) The trial court did not consider either the "circumstances of the case" or "the manner in which the prosecutor has . . . exercised challenges . . . ."

The stated reasons for discharging SG were a pretext for discrimination. As this Court has noted -- in accord with cases from around the country -- the discriminatory striking of even a single member of a cognizable group is prohibited. (*People v. Silva, supra*, 25 Cal.4th at p. 386; *People v. Wheeler, supra*, 22 Cal.3d at p. 283. *See Harrison v. Ryan* (3rd Cir. 1990) 909 F.2d 84, 88 [holding that relief must be granted under *Batson* "when even one black person is excluded for racially motivated reasons"); *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902 [recognizing that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose"]; *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1086 [same]; *United States v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1541 [same].) Reversal is therefore required.

D. Because The Prosecutor's Stated Reasons For Discharging Prospective Juror KC Were Equally Applicable To White Jurors Who Were Not Struck, They Were Simply Pretexts For Discrimination And A New Trial Is Required.

When he was called for jury duty, prospective juror KC had lived in Rialto,

California for eight years. (24 CT JQ 6825.) He was a high school graduate, who had been employed full time since 1988. (24 CT JQ 6828.) He served four years in the United States Marines from 1984 through 1988. (24 CT JQ 6828.) He had been married and had three children. (24 CT JQ 6825.)

He received a summons to appear for jury duty. KC honored his summons, dutifully appearing at the courthouse to fulfill his civic responsibility. He arrived to answer questions on the morning of December 10, 1998. (6 RT 1556, 1630.)

As noted above, based his jury questionnaire, KC also was a juror that the prosecution would want to sit on this case. He was a former marine, his ex-wife had been a correctional officer for 18 years, he believed prosecutors were trying "to protect the community . . . against those that would cause harm or have harmed" and he agreed he could vote for a death sentence. (24 CT JQ 6828-6830, 6842, 6852.)

If anything, the record of *Hovey* voir dire confirmed that KC would be a good juror for the prosecution. During a short examination by the prosecutor, KC said he did not "have a problem" with voting for death if aggravation outweighed mitigation. (6 RT 1632.) Neither party challenged KC for cause and he was asked to return several days later for general voir dire. (6 RT 1634.)

KC did indeed return for general voir dire. He was among the first twelve jurors randomly selected to sit in the jury box for general voir dire. (6 RT 1685.) Ultimately, the prosecutor used his second peremptory challenge to discharge KC. (6 RT 1705.)

The prosecutor stated three reasons for discharging KC. First, the prosecutor relied on the fact that in his questionnaire, KC said that DNA evidence "was not a for sure thing." (6 RT 1720.) Second, the prosecutor stated that KC's statements in his questionnaire and during the *Hovey* voir dire about the death penalty "didn't rise to the level of cause" but nevertheless appeared "tentative." (6 RT 1720.) Finally, the prosecutor relied on the fact that in his questionnaire, KC was "very skeptical of the O.J. Simpson case. This is a DNA case very much like that. He [KC] stated biases created the circumstantial evidence in the O.J. Simpson case." (6 RT 1720.)

As with SG, the prosecutor's stated reasons for the discharge do not withstand scrutiny. Taking them one at a time, the prosecutor's first reason for discharging KC was that in his questionnaire he said that DNA evidence was "not a for sure thing." (6 RT 1720.) In fact, in his questionnaire, KC stated that DNA evidence was "like the polygraph not a for sure certain." (24 CT JQ 6842.) The prosecutor did not ask KC a single question about this subject before discharging him. (6 RT 1685-1705.)

As also noted above, there were 18 jurors -- 12 seated jurors and six alternates -- whom the prosecutor did not discharge. In contrast to KC, it is certainly true that several of these 18 jurors expressed a firm confidence in DNA evidence. (*See, e.g.*, 5 CT JQ 1264 [juror 2 states his view that DNA evidence "is accurate."]; 5 CT JQ 1366 [alternate juror 3 states her view that DNA evidence is "science at its best."].)

Of course, a prosecutor's concern with a juror's views as to DNA evidence is -- on its face -- race neutral. But as with some of the reasons given in connection with SG and discussed in Argument I-C, above, the prosecutor's expressed concern with KC's view of DNA evidence was extremely selective. Alternate juror 4 stated he had "no opinion" on the use of DNA evidence. (5 CT JQ 1536.) Here too it is difficult to square the prosecutor's subsequently professed concern with potential jurors' opinions about DNA evidence when the prosecutor did not ask alternate juror 4 even a single question about having "no opinion" on DNA evidence. (*See* 6 RT 1557 [parties agree that juror number 402 -- who became alternate juror 4 -- could return for general voir dire without *Hovey* questioning; 6 RT 1756-1757 [prosecutor asks no questions of alternate juror 4 during general voir dire]. *See Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246; *United States v. Williamson*, *supra*, 533 F.3d at pp. 276-277.)

Other jurors went beyond a mere expression of "no opinion," and expressed the

very same concerns expressed by KC -- that DNA evidence was not necessarily a "for sure" thing. Thus, juror 10 stated that DNA evidence "should be admitted if can show + prove accuracy." (4 CT JQ 1128.) Juror 11 stated that the use of DNA evidence was proper only "if its true evidence." (5 CT JQ 1298.) Alternate juror 5 stated that DNA evidence was "ok but shouldn't be only evidence used." (4 CT JQ 1196.) Alternate juror 1 said that DNA evidence should be treated like any other evidence -- "all evidence if more conclusive than not should be considered." (4 CT JQ 1094.) Yet the prosecutor discharged none of these other jurors because -- like juror KC -- they were willing to treat DNA evidence like any other evidence.[11]

The second reason the prosecutor gave for discharging KC was that the answers in his questionnaire and during the *Hovey* voir dire about the death penalty "didn't rise to the level of cause" but nevertheless appeared "tentative." (6 RT 1720.) This explanation too is race neutral on its face.

In his questionnaire, KC stated that he (1) was willing to consider aggravation and

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[11] Equally important, and just as with alternate juror 4, the prosecutor did not ask any of these white jurors even a single question about their views on DNA evidence. (5 RT 1354-1357 and 6 RT 1685-1702 [prosecutor does not question juror 10 on DNA evidence]; 5 RT 1594-1596, 1703-1704 [prosecutor does not question juror 11 on DNA evidence]; 5 RT 1393-1396 and 6 RT 1761-1762 [prosecutor does not question alternate juror 5 on DNA evidence]; 6 RT 1750-1754 [prosecutor does not question alternate juror 1 on DNA evidence].)

mitigation, (2) believed some people "do bad things and don't deserve to be here," and (3) believed some people "don't deserve life." (24 CT JQ 6489-6451.) KC advised the parties that he neither opposed nor favored the death penalty. (24 CT JQ 6852.) But KC also admitted he would be reluctant to face a defendant with a death verdict, and stated his moral objection to the death penalty was that "God should decide life or death." (24 CT JQ 6849.)

As noted, the prosecutor's explanation is certainly race neutral on its face. Yet again, however, the fact of the matter is that several white jurors who were not challenged actually and affirmatively stated that they had doubts about the death penalty in their questionnaire. (4 CT JQ 1104 [alternate juror 1]; 5 CT JQ 1274 [juror 2]; 5 CT JQ 1478 [juror 8].) Many of the white jurors who were not challenged -- just like KC -- stated that they neither opposed nor favored the death penalty. (*See, e.g.*, 4 CT JQ 1002 [juror 9]; 5 CT JQ 1342 [juror 5], 1546 [alternate juror 4].) One white seated juror made explicit his view that life without parole was a more suitable punishment than the death penalty. (5 CT JQ 1475 [juror 8].) And the white male juror ultimately seated as juror 2 explained (1) he was "not in favor of the death penalty," (2) he harbored philosophical objections to the death penalty, (3) he did not believe the death penalty deterred crime, (4) he believed the death penalty was used too often, (5) he believed the death penalty in California was "unfair," and (6) he would be reluctant to face a defendant with a death verdict. (5 CT JQ

1271-1274.) Yet the prosecutor did not discharge any of these white jurors whose questionnaires showed death penalty views that were either similar to those of KC or even more hostile to the state's position.

If anything, the actual *Hovey* voir dire raises even more substantial questions about the genuineness of the prosecutor's explanation. KC stated that since he lived in the community, he felt it was his responsibility to decide the penalty in this case. (6 RT 1631.) He was "of course . . . uncomfortable about life or death" but he did not "think [he would] have a very big problem, depending on evidence or what is in front of me." (6 RT 1632.) His views on the death penalty would not interfere with his ability to apply the law. (6 RT 1632.) In the final analysis, KC assured the prosecutor he could vote for death:

> "A: If the bad outweighs the good, then I don't have a problem doing my job.
>
> "Q: Which means you could, you could vote for a death verdict?
>
> "A: Yeah." (6 RT 1632.)

The *Hovey* voir dire of seated juror 6 was substantially less favorable to the state. Juror 6 said she was "not so sure" about voting for death. (6 RT 1553.) When asked if her views would prevent her from voting for death, she said, "I don't know whether I

could. I think I could . . . but I don't know whether I would in my heart feel -- I would feel really guilty about it." (6 RT 1553.) Juror 6 admitted she would be reluctant to vote for death. (6 RT 1553.) Ultimately, however, like KC, she assured the prosecutor she could vote for death. (6 RT 1554.)

The *Hovey* voir dire of seated juror 8 was similar. Juror 8 felt that death penalty was used too often. (6 RT 1588.) He stated that life without parole was a "more suitable" sentence; when asked if his views would cause him to favor life without parole as a sentence choice he could only say "not necessarily." (6 RT 1588.) The prosecutor posed a follow-up question, asking if juror 8's preference for life without parole would affect how he viewed aggravating and mitigating evidence, and juror 8 conceded "it might." (6 RT 1589.) Ultimately, just like KC and juror 6, juror 8 assured the prosecutor he could vote for death. (6 RT 1589.)

In short, these three prospective jurors were similar as far as the death penalty was concerned -- if anything, KC was a *better* juror that jurors 6 and 8 on this issue. KC, juror 6 and juror 8 all assured the prosecutor they could vote for death. The prosecutor struck KC -- who was black -- and permitted jurors 6 and 8 to remain on the panel.

The third and final reason the prosecutor gave for discharging KC was that in his

questionnaire, KC was "very skeptical of the O.J. Simpson case. This is a DNA case very much like that. He stated biases created the circumstantial evidence in the O.J. Simpson case." (6 RT 1720.)

As discussed above, question 68 of the jury questionnaire asked prospective jurors whether they were "upset with the jury's verdict in the O.J. Simpson case." (24 CT JQ 6877.) KC indicated that he was not upset with the verdict, explaining it was "hard to believe one man did it all, I believe biases created a lot of the circumstantial evidence." (24 CT JQ 6877.)

As an initial matter, the prosecutor's stated concern with KC's explanation is puzzling. In the context of the Simpson case, of course, KC's reference to "biases creat[ing]" the circumstantial evidence was a reference to evidence of racial bias by police introduced by the Simpson defense team to support its theory that police had planted the inculpatory DNA evidence.

The prosecutor's expressed concern that "this is a DNA cases very much like [the O.J. Simpson case]" makes little sense. The case against Mr. Miles involved *no* suggestion of racial bias on the part of police. The case against Mr. Miles involved *no* suggestion that the DNA evidence was somehow planted. The Simpson case involved an

allegation that defendant killed his wife in a fit of jealousy. This case involved an allegation that Mr. Miles killed a stranger during a rape and robbery. The prosecutor's suggestion that this case was a "DNA case very much like [the O.J. Simpson] case" is entirely implausible; if this case is "very much like" the Simpson case, then *every* case which happens to involve DNA evidence is "very much like" the Simpson case.

But even putting this aside, there still is a problem: the prosecutor's stated concern with jurors' reactions to the O.J. Simpson verdict was once again extremely selective. As discussed above, alternate juror 5 and juror 6 each answered question 68 by saying that, like KC, they were *not* upset with the verdict in the O.J. Simpson case. (4 CT JQ 1197; 5 CT JQ 1401.) As noted above, alternate juror 5 offered not a word of explanation, and juror 6 felt the Simpson "evidence [was] not clear." (4 CT JQ 1197; 5 CT JQ 1401.) Neither juror was discharged or even questioned. If the prosecutor had genuinely believed "this is a DNA case very much like [the O.J. Simpson case]," he would at the very least have questioned these two jurors on this critical subject before allowing them to be seated. (5 RT 1393-1396; 6 RT 1761-1762 [prosecutor does not question alternate juror 5; 6 RT 1552-1554, 1685-1702 [prosecutor does not question juror 6 about Simpson verdict]. *See Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246; *United States v. Williamson*, *supra*, 533 F.3d at pp. 276-277.) Instead, the prosecutor did not ask either of these jurors even a single question on this topic.

Here too applying the factors used to evaluate whether stated reasons are actually pretexts for discrimination compels a conclusion that the prosecutor's stated reasons for discharging KC were a pretext for discrimination. Each of the prosecutor's three stated reasons for discharging KC -- KC's views of DNA evidence, the death penalty and the O.J. Simpson verdict -- were equally applicable to non-black jurors whom the prosecutor elected not to strike. And the prosecutor's stated concern with KC's view that "biases created a lot of the circumstantial evidence" in the Simpson case had no rational connection to the facts of this case.

Moreover, the fact remains just like discharged juror SG, KC was a juror who the prosecution should have wanted on the case. KC was an ex-marine whose wife had been a correctional officer for 18 years, he believed that prosecutors in the criminal justice system were trying "to protect the community . . . against those that would cause harm or have harmed," he was willing to consider both life and death as options at the penalty phase, and agreed that he could vote for death. (24 CT JQ 6828-6830, 6842, 6849-6852.) Finally, although the prosecutor explained his concern with KC's views on DNA evidence and the Simpson verdict, the prosecutor never asked KC even a single question about either subject. And when numerous white jurors gave answers on these subjects that were similar to those given by KC, the prosecutor allowed them to be seated without asking them a single question on these subjects either.

Here too the trial court should have done more that merely make a "global finding that the reasons appear sufficient." (*People v. Silva*, *supra*, 25 Cal.4th at p. 386.) Here too the trial court should have been "suspicious when presented with reasons that are unsupported or otherwise implausible." (*Id.* at p. 385.) Rather than inquire into the credibility of the prosecutor's proffered explanations, the trial court here simply concluded that "[a]s to [KC] . . . I cannot say it is not legitimate." (6 RT 1722.) This conclusory ruling hardly constitutes a "reasoned and sincere attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known . . . and . . . the manner in which the prosecutor has . . . exercised challenges . . . ." (*People v. Hall*, *supra*, 35 Cal.3d at pp. 167-168.) Yet again the trial court did not consider either the "circumstances of the case" or "the manner in which the prosecutor has . . . exercised challenges . . . ."

The stated reasons for discharging KC were a pretext for discrimination. Because the discriminatory striking of even a single member of a cognizable group is prohibited, reversal is required. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283. *Accord Harrison v. Ryan*, *supra*, 909 F.2d at p. 88; *United States v. Vasquez-Lopez*, *supra*, 22 F.3d at p. 902; *United States v. Battle*, *supra*, 836 F.2d at p. 1086; *United States v. Gordon*, *supra*, 817 F.2d at p. 1541.)

E. Even If This Court Finds That Some But Not All Of The Prosecutor's Stated Reasons Are Invalid, Reversal Is Nevertheless Required.

In Argument C above, Mr. Miles contended that each of the prosecutor's stated reasons for discharging SG was a pretext for discrimination. In Argument D Mr. Miles contended that each of the prosecutor's stated reasons for discharging KC was a pretext for discrimination. Obviously, if the Court agrees that each of the stated reasons were indeed pretexts for discrimination as to either (or both) of these prospective jurors, then reversal is required.

Mr. Miles recognizes the possibility that the Court will find that as to either of these jurors, some of the prosecutor's stated reasons were invalid while others were valid. In that event, the Court must resolve whether the existence of valid reasons for a peremptory challenge is sufficient to overcome the existence of invalid reasons.

In dissenting from a denial of certiorari in *Wilkerson v. Texas* (1989) 423 U.S. 924, Justice Marshall addressed this very question. Justice Marshall concluded that *Batson*'s requirement of a race "neutral explanation for challenging an Afro–American juror means just what it says -- that the explanation must not be tainted by any impermissible factors."

Language from Supreme Court decisions subsequent to *Batson* is entirely

consistent with Justice Marshall's view of *Batson* that the decision to discharge a juror may not "be tainted by *any* impermissible factors." Thus, in describing *Batson* error a majority of the Court has noted that "[w]hen the government's choice of jurors *is tainted with racial bias*, that 'overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial.'" (*Miller–El v. Dretke*, *supra*, 545 U.S. at p. 238 [emphasis added].) Similarly, in describing its own attempts to eradicate jury discrimination from the criminal justice system, the Court has noted that "[d]espite the clarity of these commands *to eliminate the taint of racial discrimination* in the administration of justice, allegations of bias in the jury selection process persist." (*Powers v. Ohio* (1991) 499 U.S. 400, 402 [emphasis added].)[12]

This Court has not yet resolved this question. (*See, e.g., People v. Hamilton* (2009) 45 Cal.4th 863, 909 n.14 [noting that the question is open]; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 276-277 [finding it unnecessary to decide the question].)

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[12] In addition to these cases the Supreme Court in numerous other areas has refused to permit actors to base any part of a decision on race. (*See Arlington Heights v. Metropolitan Housing Development* (1977) 429 U.S. 252, 265 [in seeking to establish that zoning decision was motivated by racial bias in violation of the Equal Protection Clause, challenger need not establish "that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body . . . made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."]; *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 241, 258 [in action under title VII of the federal Civil Rights Act of 1964, plaintiff need not prove that unlawful discrimination was the sole factor motivating an employment decision in order to establish a violation of the act].)

However, other courts have had to address the question, and two approaches have been taken.

Several federal courts have concluded that where the prosecutor states both valid and invalid reasons for discharging a particular juror, "then the proponent [of the strike] bears the burden of demonstrating that the strike would have been exercised even in the absence of any discriminatory motivation." (*Wallace v. Morrison* (11th Cir. 1996) 87 F.3d 1271, 1274-1275. *Accord Gattis v. Snyder* (3rd Cir. 2002) 278 F.3d 222, 235; *Weaver v. Bowersox* (8th Cir. 2001) 241 F.3d 1024, 1032; *Jones v. Plaster* (4th Cir. 1995) 57 F.3d 417, 421.)

Most state courts to have addressed the issue have taken a different approach. These courts have explicitly adopted Justice Marshall's view and held that "[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process." (*Arizona v. Lucas* (Ariz. Ct. App. 2001) 18 P.3d 160, 163. *Accord Robinson v. United States* (D.C. Cir. 2005) 878 A.2d 1273, 1284; *McCormick v. State* (Ind. 2004) 803 N.E.2d 1108, 1113; *South Carolina v. Shuler* (S.C. 2001) 545 S.E.2d 805, 811 ["[A] racially discriminatory peremptory challenge in violation of *Batson* cannot be saved because the proponent of the strike puts forth a non-discriminatory

reason."]; *Wisconsin v. King* (Wisc. Ct. App. 1997) 572 N.W.2d 530, 535 ["[W]here the challenged party admits reliance on a prohibited discriminatory characteristic, we do not see how a response that other factors were also used is sufficient rebuttal under the second prong of *Batson*."]; *Rector v. Georgia* (Ga. 1994) 444 S.E.2d 862, 865 ["[T]he trial court erred in ruling that other purportedly race neutral explanations cured the element of the stereotypical reasoning employed by the State's attorney in exercising a peremptory strike."]; *Moore v. Texas* (Tex. Ct. App. 1991) 811 S.W.2d 197, 200 [finding a *Batson* violation where a juror would have a problem assessing punishment (valid) and was member of a minority club (invalid)].)

These state courts are entirely correct. The goal of *Batson* is to free the jury selection process from the taint of discrimination. A system which specifically *allows* prosecutors to discriminate in the jury selection process -- even in part -- can never accomplish this goal. Accordingly, this Court should finally resolve this issue under California law and join the state courts in Arizona, Indiana, South Carolina, Texas and Wisconsin. Under this approach, of course, reversal is required here.

Ultimately, however, even under the approach taken by some of the federal courts, reversal is required in this case. As noted, under that approach where both valid and invalid reasons are stated, "the proponent [of the strike] bears the burden of

demonstrating that the strike would have been exercised even in the absence of any discriminatory motivation." (*Wallace v. Morrison*, *supra*, 87 F.3d at pp. 1274-1275.) Here, because the trial court failed to find that *any* of the prosecutor's reasons were pretextual, the prosecutor did not even attempt to meet this burden and the trial court made no finding that this burden had been met. Accordingly, even under this test reversal is required.

II. BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED TWO PROSPECTIVE JURORS WHO WERE EQUIVOCAL ABOUT WHETHER THEIR ATTITUDES ABOUT THE DEATH PENALTY WOULD AFFECT THEIR PENALTY PHASE DELIBERATIONS, REVERSAL OF THE DEATH SENTENCE IS REQUIRED.

A. Introduction.

Prospective jurors 44 and 63 were called for jury service in this case. It is fair to say that each expressed some level of ambivalence about imposing death; both were discharged for cause at the prosecutor's request. As more fully discussed below, the trial court erred. Neither of these jurors stated with anything approaching the requisite degree of certitude that they would not consider death as an option under proper instructions from the trial court. Reversal is required.

B. Pursuant To *Adams v. Texas* (1980) 448 U.S. 38, A Prospective Juror In A Capital Case May Not Be Excused For Cause Based On Opposition To The Death Penalty Unless The State Affirmatively Establishes The Juror Will Not Follow The Law Or Consider Death As An Option.

In evaluating a trial court's decision to discharge jurors because of opposition to the death penalty, this Court has held that the substantive standard which reviewing courts must apply is set forth in the Supreme Court decisions of *Adams v. Texas* (1980) 448 U.S. 38 and *Wainwright v. Witt* (1985) 469 U.S 412. (*See, e.g., People v. Holt, supra,* 15

Cal.4th at pp. 650-51.) In *Adams* the Supreme Court held that a prospective juror who opposes capital punishment may be discharged for cause only where the record shows the juror is unable to follow the law as set forth by the court. (*Adams v. Texas*, *supra,* 448 U.S. at p. 48.) *Witt* established that if a juror is to be excluded under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

In applying these cases, however, and with all due respect, this Court has taken a wrong turn. In a series of cases, the Court has held that where the record shows a prospective juror is equivocal about his or her ability to vote for death: (1) a trial court may decide to discharge the juror and (2) that decision is binding on the reviewing court. (See, e.g., *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 262-263; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Breaux* (1991) 1 Cal.4th 281, 309-310; *People v. Frierson* (1991) 53 Cal.3d 730, 742; *People v. Cox* (1991) 53 Cal.3d 618, 646-47.) Ultimately, these cases all rely for this proposition on *People v. Ghent* (1987) 43 Cal.3d 739 at 768. In turn, *Ghent* relied on *People v. Fields* (1984) 35 Cal.3d 329 at 355-356 for this proposition, which itself relied on this Court's 1970 decision in *People v. Floyd* (1970) 1 Cal.3d 694 at 724.

What this history shows is that the rule from *Floyd* which the Court is applying

now -- holding that a trial court may rely on a prospective juror's equivocal responses to discharge that juror in a capital case -- is based on a 1970 precedent which pre-dates the *Adams* case by nearly a decade. In fact, an analysis of the actual voir dire in *Adams*, as well as in cases the Supreme Court has decided since *Adams*, shows that the United States Supreme Court embraces precisely the opposite rule.

In this regard, it is important to note that *Adams* itself actually applied the standard it articulated to several prospective jurors. Ultimately, *Adams* held that a number of these jurors had been improperly excused for cause in that case, precisely because the state had not carried its burden of proving that the jurors' views "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) An analysis of several of these jurors shows that this Court's rule deferring to a trial court's treatment of jurors who give equivocal responses is fundamentally contrary to *Adams*.

In fact, the voir dire in *Adams* involved several jurors who were equivocal about whether their penalty phase deliberations would be affected by the fact that death was an option. For example, prospective juror Francis Mahon was unable to state that her feelings about the death penalty would not impact her deliberations. Instead, she admitted that these feelings "could effect [sic] me and I really cannot say no, it will not effect [sic]

me, I'm sorry. I cannot, no." (*Adams v. Texas*, No. 79-5175, Brief for Petitioner, Appendix ("Adams App.") at p. 3, 8.)[13] Prospective juror Nelda Coyle expressed the same concern. She too was equivocal when asked if her feelings about imposing the death penalty would affect her deliberations. (Adams App. at p. 23-24.) She too admitted she was unable to say her deliberations "would not be influenced by the punishment . . . ." (Adams App. at p. 24.)

Similarly, prospective juror Mrs. Lloyd White was equivocal and stated that she "didn't think" she could vote for death. (Adams App. at pp. 27-28.) Prospective juror George Ferguson admitted that opposition to capital punishment "might" impact his deliberations, while prospective juror Forrest Jenson admitted that his views on the death penalty would "probably" affect his deliberations. (Adams App. at p. 12, 17.)

In connection with each of these five jurors expressing equivocal comments, the trial court -- applying a Texas rule equivalent to this Court's rule from *Floyd* -- resolved the ambiguity in the state's favor, concluded that all five prospective jurors could not impose death and discharged them all for cause. Significantly, the Supreme Court did *not* defer to any of these five conclusions; instead, the Court ruled that the record contained

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[13] The Appendix to Brief of Petitioner in *Adams* is a transcript of the voir dire examination of prospective jurors.

insufficient evidence to justify striking *any* of these jurors for cause. (448 U.S. at pp. 49-50.)

In assessing *Adams*, it is important to note that all five discharged jurors had given equivocal responses. Juror White had specifically stated she "didn't think" she could consider death as an option. The state trial judge had resolved all the ambiguities in favor of discharging the jurors. Nevertheless, the Supreme Court reversed, holding that jurors could not be discharged "because they were unable positively to state whether or not their deliberations would in any way be affected." (448 U.S. at pp. 49, 50.) In other words, when a juror gives conflicting or equivocal responses -- as did jurors Mahon, Coyle, White, Ferguson and Jenson in *Adams* -- the trial court is not free to simply assume the worst and discharge the jurors for cause. The reason is simple; when a prospective juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror . . . ." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

The treatment of equivocal jurors in *Adams* was compelled by developments in the Supreme Court's capital case/Eighth Amendment jurisprudence. In the years between the Court's landmark decision in *Furman v. Georgia* (1972) 408 U.S. 238 and its 1980 decision in *Adams*, the Court repeatedly recognized that death was a unique punishment,

qualitatively different from all others. (*See, e.g., Gregg v. Georgia* (1976) 428 U.S. 153, 181-188; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Relying on this fundamental premise, the Court held there was a corresponding need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida, supra*, 430 U.S. at p. 357.)

As the Court later recognized, the rule set forth in *Adams* "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to . . . great[] concern over the possible effects of an 'imbalanced' jury." (*Lockhart v. McCree* (1986) 476 U.S. 162, 182.) The rule in *Adams* -- precluding a for-cause challenge based on equivocal responses and specifically designed to minimize the risk of an "imbalanced jury" -- was appropriate precisely because of "the discretionary nature of the [sentencing] jury's task [in a capital case]." (*Id.* at p. 183.) In fact, the Court specifically noted that the *Adams* rule would not apply "outside the special context of capital sentencing." (*Ibid.*)

In other words, however the standard of proving a juror's inability to serve is properly applied in non-capital cases (where the jury is simply making a binary

determination of fact), the standard applied in capital cases is different. In the "special context of capital sentencing" -- where the jury is making a largely discretionary decision as to whether a defendant should live or die -- there is a greater concern over the impact of an "imbalanced jury" on the reliability of the judgment, as well as with ensuring that the state not seat juries predisposed to a death verdict. Accordingly, in *Adams* the Supreme Court made clear that in the context of a direct appeal, when a prospective capital-case juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

Seven years after *Adams* the Supreme Court addressed this same issue, again holding unconstitutional a trial court's exclusion of a juror who had been equivocal about her ability to serve. (*See Gray v. Mississippi* (1987) 481 U.S. 648.) There, defendant was charged with capital murder. During voir dire, prospective juror H.C. Bounds was questioned. According to the state supreme court, this voir dire was "lengthy and confusing" and resulted in responses from Ms. Bounds which were "equivocal." (*Gray v. State* (Miss. 1985) 472 So.2d 409, 422.) As the actual voir dire shows, the state supreme court's characterization was entirely correct.

When asked if she had any "conscientious scruples" against the death penalty, Ms.

Bounds replied, "I don't know." (*Gray v. Mississippi*, No. 85-5454, Joint Appendix at 16.) When asked if she would automatically vote against imposition of death, she first explained she would "try to listen to the case" and then responded that "I don't think I would." (*Id.* at p. 17, 18.) When directly asked by the prosecutor whether she could vote for death, she said "I don't think I could." (*Id.* at p. 19.) Just like the trial court in *Adams*, the trial court in *Gray* applied the Mississippi equivalent of this Court's *Floyd* rule and discharged the equivocal Ms. Bounds for cause.

Before the United States Supreme Court, the state "devoted a significant portion of its brief to an argument based on the deference this Court owes to findings of fact made by a trial court." (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, n.10.) In fact, the state explicitly made the very argument this Court has repeatedly embraced since *Floyd*, arguing that a conclusion Ms. Bounds was improperly excused for cause "refuse[s] to pay the deference due the trial court's finding that juror Bounds was not qualified to sit as a juror." (*Gray v. Mississippi*, No. 85-5454, Respondent's Brief at 15-16.) Noting that the trial court found Ms. Bounds to have given equivocal responses, and that "the trial judge was left with the definite impression that juror Bounds would be unable to faithfully and impartially apply the law," the state urged the Supreme Court to give the trial judge's conclusion "the deference that it was due . . . ." (*Id.* at pp. 22, 23.) In his reply, petitioner conceded that Ms. Bounds had "equivocated" in her responses, but argued that under this

circumstance "the prosecutor, the party that requested Mrs. Bounds's excusal, had not carried its burden." (*Gray v. Mississippi*, No. 85-5454, Petitioner's Reply Brief at 2.)

Of course, the state's position in *Gray* represents the precise view this Court adopted in 1970. (*People v. Floyd*, *supra*, 1 Cal.3d at p. 724.) As noted above, it is a view this Court has continued to follow since *Floyd*. (*People v. Mincey*, *supra*, 2 Cal.4th at p. 456; *People v. Breaux*, *supra*, 1 Cal.4th at pp. 309-310; *People v. Frierson*, *supra*, 53 Cal.3d at p. 742; *People v. Cox*, *supra,* 53 Cal.3d at pp. 646-47; *People v. Ghent*, *supra,* 43 Cal.3d at p. 768; *People v. Fields*, *supra*, 35 Cal.3d at pp. 355-356.)

Significantly, however, it is also the same position the Supreme Court rejected, not only in *Adams*, but in *Gray* as well. To the contrary, and just as it did in *Adams*, *Gray* rejected the state's arguments that (1) the trial court was free to discharge equivocal jurors for cause and (2) a reviewing court was required to pay deference to such a discharge. In fact, not only did the Supreme Court refuse to afford *any* deference to the trial court's finding in *Gray*, but it concluded that the discharge of juror Bounds violated the Constitution. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 661, n.10.) As the Court held, "the trial court was not authorized . . . to exclude venire member Bounds for cause."

(*Ibid.*)[14]

To be sure, in two cases the Supreme Court has also addressed capital-case equivocal jurors in the context of federal habeas review: *Wainwright v. Witt*, *supra*, 469 U.S. 412 and *Uttecht v. Brown, supra*, 551 U.S. 1. In both cases, the Supreme Court held that federal courts must defer to state court findings of juror bias. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 2, 6-7 [citing *Witt* and finding discharge proper where defense counsel stated he "ha[d] no objection" to the discharge and voir dire showed juror "had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of the case."]; *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-430.) The rationale for that deference was that both *Uttecht* and *Witt* were collateral attacks on the state court judgment. The Supreme Court has made clear, however, that this rule of deference is fundamentally inappropriate on direct appeal. (*Greene v. Georgia* (1996) 519 U.S. 145, 146 [holding that because *Witt* "was a case arising on federal habeas," the deference standard it announced does not apply to "state appellate courts reviewing trial court's rulings on jury selection."].)

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[14] In fact, in *Gray v. Mississippi*, *supra*, the defendant specifically relied on the "special context" of capital sentencing -- and the largely discretionary role of jurors deciding if a defendant should live or die -- in urging the Court to find improper the trial court's discharge of an equivocal juror in that case. (*Gray v. Mississippi,* No. 85-5454, Petitioner's Reply Brief at 12.)

Of course, this case is on direct review. In light of the actual voir dire in the Supreme Court's direct review cases -- *Gray* and *Adams* -- this Court must reconsider the 1970 *Floyd* rule which forms the basis for the rule currently applied in all California capital cases. The current California rule -- which permits the state to satisfy its burden of proof by eliciting equivocal answers from prospective jurors -- cannot be squared with (1) the rule actually applied in either *Adams* or *Gray*, (2) the Eighth Amendment developments on which they were based or (3) *Greene v. Georgia*, *supra*.

In making this argument Mr. Miles recognizes that on one occasion the Court has held -- without examining the actual voir dire in either *Adams* or *Gray* -- that the principle of deference to the trial court means that the state may indeed carry its burden of proof by establishing that a juror was equivocal. (*See People v. Schmeck*, *supra*, 37 Cal.4th at p. 263.) With all due respect, and precisely because *Schmeck* did not actually discuss the jury voir dire in either *Adams* or *Gray*, this aspect of *Schmeck* does not really resolve the issue presented here. Here is why.

In both *Adams* and *Gray* the voir dire of the prospective jurors who were struck showed they were equivocal about their ability to impose death. In both *Adams* and *Gray* the trial courts found that the death penalty views expressed by the prospective jurors would substantially impair their performance as jurors. In both *Adams* and *Gray* the

United States Supreme Court held *that even deferring to the trial court*, the state could *not* carry its burden of proving these jurors were impaired merely by proving they were equivocal. In light of the actual voir dire in *Adams* and *Gray*, the *Schmeck* court's reliance on the very same rule of deference applied in both *Adams* and *Gray* simply does not resolve whether the state may carry its burden of proving impairment by proving that certain jurors were equivocal. This identical question was resolved in both *Adams* and *Gray* applying the identical rule of deference referenced in *Schmeck* and the answer was clear: proof that a prospective juror is equivocal is simply not enough.

The difference between the rule adopted by this Court in *Floyd* (and applied in such cases as *Schmeck*), and the rule actually applied in *Adams* and *Gray*, is important in this case. Applying the actual *Adams/Gray* standard to the voir dire of jurors 44 and 63 compels a finding that the trial court in this case erred. Because these jurors merely gave equivocal responses about their ability to serve, under *Adams* and *Gray* they should not have been discharged for cause. Reversal is required.

C. Application Of The *Adams* Standard Requires Reversal Because Although Prospective Jurors 44 And 63 Gave Equivocal Responses, Neither Made Clear They Would Refuse To Consider Death As An Option.

1. The voir dire in this case.

a. Juror 44.

Juror 44 was a 39-year-old woman from New York. (8 CT JQ 1899.) In her questionnaire, she explained that she was willing to consider all aggravating and mitigating evidence before making her decision as to the proper penalty. (8 CT JQ 1923.) In response to a question asking her general feeling about the death penalty, she stated that she "didn't like it." (8 CT JQ 1923.) She did not know if she could vote for death, and made clear she would be reluctant to impose such a penalty. (8 CT JQ 1925.) She added, however, that her feelings about the death penalty would not preclude her from finding the defendant guilty, or the special circumstance true, so as to avoid having to impose death. (8 CT JQ 1926.) She also added that although she had doubts about the death penalty, she would not vote against it in every case. (8 CT JQ 1926.)

The court questioned juror 44 on December 10, 1998. (6 RT 1520.) Asked by the prosecutor to explain her answer that she was "uncomfortable" with the death penalty,

juror 44 explained that it made her sad to see on television "a bunch of people . . . cheering" when there was an execution scheduled. (6 RT 1522.) When asked if her feelings would impact "the way [she] would vote . . . in this particular case," juror 44 said, "I really apologize, but I have no idea." (6 RT 1522.) The prosecutor tried a different approach, asking juror 44 if she could vote for death if aggravating factors outweighed mitigating; she replied, "I just cannot tell you." (6 RT 1523.) Juror 44 stated that she was an "[o]bjective, logical and critical thinker" whose views would not sway how she evaluated the evidence. (6 RT 1524.) She "[didn't] think there[] [was] anything that would interfere with her ability" to follow the law; she just did not know if she could follow the law. (6 RT 1525-1526.)

After listening to juror 44, the trial court reached a finding of fact, concluding that juror 44 was "*not* saying her views are such that it would substantially interfere with her ability to follow the instructions and her duty . . . ." (6 RT 1526, emphasis added.) The court correctly noted that juror 44 "just says she doesn't know . . . ." (6 RT 1526.) Over defense objection, the court ruled that because this juror was "equivocal," that was a sufficient basis to discharge her. (6 RT 1659.)

b. Juror 63.

Juror 63 was a 56-year-old man from San Bernardino. (9 CT JQ 2161.) In his questionnaire, he stated that he had no "moral, philosophical, or religious objection to the death penalty." (9 CT JQ 2161.) He did not belong to any group that advocated abolition of the death penalty. (9 CT JQ 2162.) He felt that the California death penalty was fair, and explained that he would *not* be reluctant to "personally sign the verdict form for the sentence of death" or "stand up in court, facing the defendant, and state that [his] verdict is death." (9 CT JQ 2163.) He would not refuse to find the defendant guilty, or the special circumstance true, to avoid having to impose death. (9 CT JQ 2164.)

The court questioned this juror on December 9, 1998. (5 RT 1409.) When asked by the prosecutor if he had strong feelings about the death penalty, juror 63 said "nope." (5 RT 1410.) He added, however, that he would be reluctant to vote for death, and his feelings "might" impact how he viewed the trial court's penalty phase instructions. (5 RT 1410.) Asked if sitting on a capital case "might be . . . difficult," juror 63 replied "yep." (5 RT 1410.) And when asked by defense counsel if he could follow the court's instructions on aggravating and mitigating evidence, he said, "I don't know." (5 RT 1411.) Ultimately, when asked if he would want to vote for death, juror 63 stated, "I don't think so." (5 RT 1411.)

Juror 63 was never asked if he would be willing to set aside whatever personal views he had and follow the law given to him by the court. (5 RT 1410-1411.) The court discharged juror 63 for cause at the prosecutor's request. (5 RT 1412.)

2. Because prospective jurors 44 and 63 never made clear they would refuse to consider death as an option under proper instructions, they should not have been discharged for cause.

It is fair to say that prospective jurors 44 and 63 each expressed some level of ambivalence about their ability to select death as an option. As discussed above, however, the teaching of *Adams* and *Gray* is that a prospective juror's equivocal responses do *not* satisfy the state's burden of proving impairment. Absent an affirmative showing that a juror's views would either preclude death as an option under proper instructions, or otherwise prevent the juror from following the law, the juror may not be excluded for cause.

Indeed, a comparison of the responses of prospective jurors 44 and 63 with the jurors held to have been improperly excluded in *Adams* and *Gray* removes any doubt that the exclusions in this case were improper. The responses of these jurors mirrored those of prospective juror White in the *Adams* case. Just like White, jurors 44 and 63 both said they did not know if they could follow the court's instructions and consider death as an

option. (*Compare* 5 RT 1411, 6 RT 1526 *with* Adams App. at pp. 27-28 [juror White states that she "didn't think" she could vote for death].) This equivocal response was insufficient to justify discharging prospective juror White in *Adams*, and it should have been insufficient here as well.

Similarly, like juror Bounds in the *Gray* case -- who was discharged after she told the prosecutor that "I don't think I could" vote for death -- juror 63 was discharged after he told the prosecutor that "I don't think [I would]" want to vote for death. (*Compare Gray v. Mississippi*, No. 85-5454, Joint Appendix at p. 19 *with* 5 RT 1411.) Once again, this equivocal response was insufficient to justify discharging prospective juror Bounds in *Gray*, and it should have been insufficient here as well. And this applies with even greater force to juror 44 here, who did not even state she "didn't think" she would vote for death, but simply said she did not know. (6 RT 1526.)

The for-cause exclusions of these two jurors violated both the Sixth and Eighth Amendments. Indeed, as to juror 44 there should be little doubt; as noted above, the United States Supreme Court only permits the state to discharge prospective jurors for cause based on their views of capital punishment when the state carries its burden of showing that the juror's views "would prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath."

(*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Here, the trial court specifically found as to juror 44 that her voir dire showed she was "*not* saying her views are such that it would substantially interfere with her ability to follow the instructions and her duty . . . ." (6 RT 1526, emphasis added.) Having made this finding of fact, the trial court could not discharge this juror for cause.

As noted above, the erroneous granting of even a single for-cause challenge requires reversal. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 660.) The penalty phase judgment must be reversed.

III. THE "SUBSTANTIAL IMPAIRMENT" STANDARD FOR EXCLUDING JURORS IN CAPITAL CASES IS INCONSISTENT WITH BOTH THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL.

A. Introduction.

On December 7, 1998, voir dire began to examine jurors "about their views concerning the death penalty. (5 RT 1304.) During the course of this part of the voir dire process, the trial court made clear it would permit a challenge to jurors whose views on capital punishment would "substantially interfere with [their] ability to follow the instructions and [their] duty." (6 RT 1526.) Applying this standard, the trial court permitted the prosecution to strike numerous prospective jurors because of their views on capital punishment. (5 RT 1372, 1382, 1412, 1417, 1421, 1428, 1431, 1445; 6 RT 1601, 1610, 1616, 1624, 1657, 1659.)

As discussed in Argument II above, even accepting this standard as a correct application of the Sixth Amendment (and the parallel jury trial provisions of the state constitution), the trial court here applied this standard improperly as to two prospective jurors, requiring reversal of the penalty phase. As Mr. Miles explains below, however, the standard itself is inconsistent with both the state and federal constitutions. For these reasons too a new penalty phase is required.

The standard used by the trial court here was taken from the Sixth Amendment framework erected by a series of United States Supreme Court cases decided between 1968 and 1980. This standard reflected a then-common approach to the Sixth Amendment which did not examine the intent of the Framers in enacting the Sixth Amendment, but instead defined the scope of that amendment by identifying and balancing competing interests of the state and the defendant.

As more fully discussed below, however, in the past 13 years the Court has rejected this "competing interests" approach to the Sixth Amendment, reexamined its framework for analyzing the scope of the Sixth Amendment, and held that the contours of the Sixth Amendment are to be determined by the Framers' intent in enshrining the right to an "impartial jury" in the Constitution. As also discussed below, the test used by the trial court here is fundamentally inconsistent with the intent of the Framers in adopting the Sixth Amendment. Reversal of the penalty phase is required.

B. Development Of The *Adams* Test For Discharging Jurors Based On Their Views Of Capital Punishment.

In *Witherspoon v. Illinois* (1968), 391 U.S. 510, the Supreme Court first addressed whether the Sixth Amendment right to a jury trial permitted the state to exclude from jury service in a capital case jurors who opposed the death penalty. *Witherspoon* held that the

Sixth Amendment permitted the state to exclude jurors only if the record made "unmistakably clear" the jurors would (1) automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. (391 U.S. at p. 515, n.9, 522, n. 21.)

Twelve years later, in *Adams v. Texas*, *supra*, 448 U.S. 38, the Court revised this standard. As discussed in Argument II above, *Adams* held that the Sixth Amendment permitted the state to discharge any juror "based on his views about capital punishment [if] those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 45.) The Court stated that its conclusion was part of an effort "to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." (448 U.S. at pp. 43-44.)

The approach to the Sixth Amendment which resulted in the rule set forth in *Adams* -- an approach which considered the interests of the defendant and the interests of the state and then sought to reach a principled accommodation of the two -- was not unique to *Adams*. Indeed, on the very same day the Court decided *Adams* it issued

another decision applying the Sixth Amendment -- *Ohio v. Roberts* (1980) 448 U.S. 56. In *Roberts*, the Court addressed whether the Sixth Amendment confrontation right permitted the state to introduce preliminary hearing testimony against a defendant at trial. Ultimately, as it did in *Adams*, the Court's Sixth Amendment analysis in *Roberts* recognized "competing interests" between the goals of the Confrontation Clause itself and effective law enforcement, sought to accommodate these competing interests, and ruled the evidence admissible. (448 U.S. at p. 64, 77.)

The question presented here is whether the approach to the Sixth Amendment taken in *Adams* -- and the standard *Adams* set forth as a result -- is consistent with the Court's current approach to the Sixth Amendment, or the intent of the Framers who drafted the Sixth Amendment. As discussed below, the *Adams* standard is consistent with neither.

C. The Supreme Court's Modern Sixth Amendment Precedent Focuses Not On Identifying And Accommodating Competing Interests, But On The Historical Understanding Of The Rights Embraced By The Sixth Amendment And The Intent Of The Framers.

In a series of decisions issued over the last 13 years, the Supreme Court has reexamined much of its Sixth Amendment jurisprudence. In those decisions, the Court has consistently explained that the contours of the Sixth Amendment are no longer to be

determined by seeking to balance competing interested, but instead are to be determined by assessing the intent of the Framers. Indeed, the Court's decisions over the last decade show that the Court has not hesitated to overrule its prior Sixth Amendment precedents to incorporate into its Sixth Amendment jurisprudence a fidelity to the Framers' intent. (*See, e.g., Alleyne v. United States* (2013) ___ U.S. ___, 133 S.Ct. 2151 overruling *Harris v. United States* (2002) 536 U.S. 545; *Ring v. Arizona* (2002) 536 U.S. 584 overruling *Walton v. Arizona* (1990) 497 U.S. 639 (1990); *Crawford v. Washington* (2004) 541 U.S. 36 overruling *Ohio v. Roberts, supra*, 448 U.S. 56; .)

The starting point for this analysis is the Court's decision in *Jones v. United States* (1999) 526 U.S. 227. There, the Court addressed whether a particular factual finding was an element of the offense (which had to be proven to a jury under the Sixth Amendment) or merely a sentencing factor which could be decided by a judge. In making this assessment, the Court emphasized the Sixth Amendment implications based on the historical role of juries.

Thus, the Court explained that, historically, there had been "competition" between judge and jury over their respective roles. (526 U.S. at p. 245.) Juries had the power "to thwart Parliament and Crown" both in the form of "flat-out acquittals in the face of guilt" and also "what today we would call verdicts of guilty to lesser included offenses,

manifestations of what Blackstone described as 'pious perjury' on the jurors' part." (*Ibid.*, quoting 4 William Blackstone, Commentaries on the Laws of England at pp. 238-39.) The Court explained that "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." (*Ibid.*)

Of course, there is no more "sanguinary consequence" than capital punishment. Although *Jones* was not a capital case, the Court's concern with the "genuine Sixth Amendment issue" that would flow from diminishing the jury's significance applies to death qualified juries as well. (*Id.* at p. 248.) The Court echoed a crucial warning from Blackstone that was "well understood" by Americans of the time: there is a need "'to guard with the most jealous circumspection'" against erosions of the jury trial right flowing from a variety of plausible pretenses for limiting the right. (*Ibid.*) As the Court reiterated, "however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." (*Id.* at p. 246, quoting 4 Blackstone, *supra*, at pp. 342-44).

In capital cases, limiting juries to death-qualified juries is precisely the sort of convenience that Blackstone warned a free nation must guard against. That it may be more convenient to accommodate the Government's interest in only trying a capital case to a jury that has excluded from its ranks all of the individuals who might interfere with the Government's effort to impose a death sentence is no answer. The historical basis for the Sixth Amendment, as *Jones* emphasizes, is to interpose citizens between the government and an accused.

One year after *Jones*, the Court again invoked the Sixth Amendment's "historical foundation" as support for its conclusion that a jury must find a defendant guilty of every element of any charged crime beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.) Like *Jones*, *Apprendi* was not a capital case. It involved firearms charges and the potential for a sentencing enhancement under a New Jersey hate-crime statute. But in analyzing the question presented, the Court again focused on the jury's historical role as a "guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties . . . ." (*Ibid.*, quoting 2 Joseph Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)). These principles, important in a case where the consequence at stake for a defendant is imprisonment, are indispensable in the context of a capital case.

Two years later, the Court applied the Sixth Amendment principles set forth in *Jones* and *Apprendi* in the capital context. (*See Ring v. Arizona* (2002) 536 U.S. 584.) *Ring* involved the question whether it violated the Sixth Amendment for a trial judge to alone determine the presence or absence of aggravating factors required for imposition of the death penalty after a jury's guilty verdict on a first degree murder charge. In answering that question "yes," the Court reversed its earlier holding in *Walton v. Arizona* (1990) 497 U.S. 639 and recognized that "[a]lthough 'the doctrine of stare decisis is of fundamental importance to the rule of law[,] . . . [o]ur precedents are not sacrosanct." *Ring*, *supra*, 536 U.S. at p. 608.)

In *Ring*, the Court continued its focus on the historical right to a jury trial and discussed the juries of 1791, when the Sixth Amendment became law --just as Justice Stevens had done in his *Walton* dissent. (*See Walton*, *supra*, 497 U.S. at p. 711.) *Ring* unequivocally stressed that at the time the Bill of Rights was adopted, the jury's right to determine "which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind" was "unquestioned." (*Ring*, *supra*, 536 U.S. at p. 608.) In addition, the Court repeated that "the Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." (*Id.* at p. 607.) "The founders of the American Republic were not prepared to leave it to the State, which is why the

jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free." (*Ibid.*)

Two years after *Ring*, the Court again overturned one of its earlier Sixth Amendment decisions which had not relied on a historical understanding of the Sixth Amendment. In *Crawford v. Washington* (2004) 541 U.S. 36 the Court focused on an historical interpretation of the Sixth Amendment's Confrontation Clause and reversed its holding in *Ohio v. Roberts*, *supra*, 448 U.S. 56.

As noted above, in *Roberts* the Court had held that the Sixth Amendment permitted the state to introduce preliminary hearing testimony against a defendant at trial as a method of accommodating the "competing interests" between the goals of the Sixth Amendment and the Government's interest in effective law enforcement. (448 U.S. at p. 64, 77.) In *Crawford*, however, the Court took a very different approach, one that was consistent with the approach it took in *Jones*, *Apprendi* and *Ring*. The Court examined the "historical record" and concluded that under the common law in 1791, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial . . . ." (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-54.) The Court acknowledged that its contrary holding in *Roberts* had failed to honor the historical role of the jury and thereby created a framework that did not "provide meaningful protection

from even core confrontation violations." (*Id.* at p. 63.)

Only three months after *Crawford*, the Court applied its historical record model yet again in the Sixth Amendment context. In *Blakeley v. Washington* (2004) 542 U.S. 296, the Court held that it violated the Sixth Amendment for a judge to impose a longer sentence based on fact-finding not made by the jury. As the Court reiterated, again citing Blackstone, every accusation against a defendant should "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." (*Id.* at p. 301.) Once again the Court focused on the Framers' intent, stressing that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." (*Id.* at pp. 306-08, citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed., 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed., 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson, 282, 283 (J. Boyd ed., 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislature or Judiciary department, I would say it is better to leave them out of the Legislative."); *Jones*, *supra*, 526 U.S. at pp.

244-48.)

Finally, only weeks ago the Supreme Court again overruled a Sixth Amendment precedent which had not been connected to a historical understanding of the Sixth Amendment. In *Alleyne v. United States*, *supra*, 133 S.Ct. 2151, the Court held that the Sixth Amendment required a jury trial even for facts that served only to increase the mandatory minimum sentence for a crime. The Court overruled its contrary decision in *Harris v. United States*, *supra*, 536 U.S. 545 precisely because it was "inconsistent . . . with the original meaning of the Sixth Amendment." (133 S.Ct. at p. 2155.)

The clear and consistent line of cases from *Jones* and *Apprendi* to *Ring*, *Crawford*, *Blakeley* and *Alleyne* leaves no doubt that the Court has sought to connect Sixth Amendment jurisprudence to the historical role of juries and the intent of the Framers in adopting the Sixth Amendment. The approach to the death qualification of capital juries -- based on the 1980 *Adams* decision -- is utterly incompatible with the Court's current approach to the Sixth Amendment. Unlike these recent cases -- *which specifically consider the Framers' intent when interpreting the Sixth Amendment's protections* -- the Court's earlier death-qualification decisions did not consider the Framers' intent *at all* in deciding whether the practice of death qualification violates the Sixth Amendment. Instead, the Court's death qualification decisions imported into the Sixth Amendment a

balancing test which sought to accommodate the State's interest in implementing its death penalty system while trying to avoid unduly stacking the deck against a defendant. While this balancing approach may be a perfectly valid approach to drafting legislation, it is plainly inconsistent with the Court's recent approach to interpreting the Sixth Amendment by tethering the scope and protections of that amendment to a historical understanding of what it meant to guarantee a defendant an impartial jury.

It is worth noting that in the years since *Adams* was was decided -- and while the Court has refined much of its Sixth Amendment jurisprudence to ensure that it aligns with the Framers' understandings -- the Court has never examined whether there is any historical support for the *Adams* death qualification standard. (*See, e.g., Lockhart v. McCree* (1986) 476 U.S. 162; *Uttecht v. Brown* (2007) 551 U.S. 1.) Indeed, in *Uttecht* the Court explicitly noted that the relevant "principles" established in the case law create a standard that seeks to "balance" the interests of the defendant against the interest of the state -- without even contemplating whether the "impartial jury" guarantee actually permits such "balancing." (551 U.S. at p 9.)[15]

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[15] Whether the *Adams* standard actually does result in a jury that is "balanced" in terms of attitudes towards the death penalty is very much an open question. Justice Stevens recognized that, in fact, the *Adams* test does not result in a balanced jury at all, but results in a jury "biased in favor of conviction." (*Baze v. Rees* (2008) 553 U.S. 35, 84, Stevens, J., dissenting).

Ultimately, as the Court's more recent pronouncements make clear, the propriety of death qualifying under the *Adams* standard in light of the Sixth Amendment depends not on whether that standard accommodates competing interests, but whether it violates the historical understanding of an impartial jury codified in the Sixth Amendment. As discussed below, it plainly does.

D. The Framers Intended The "Impartial Jury" Guarantee To Prohibit Jurors From Being Struck Based On Their Views Of The Death Penalty.

Permitting jurors to be struck for cause because of their views toward the death penalty is antithetical to the Framers' understanding of an "impartial jury." When the Sixth Amendment was adopted, neither prosecutors nor defense counsel were permitted to exclude a juror based on that individual's attitude toward the death penalty. Jurors were permitted to consult their conscience and, in this limited way, "find the law" in addition to "finding the facts."

Indeed, this was -- and should continue to be -- a critical component of the Sixth Amendment's "impartial jury" protection. Steeped in the experience of overreaching criminal laws (such as libel laws that were used to punish political dissidents), the Framers considered a jury to be the conscience of the community, serving as an important bulwark against the machinery of the judiciary. The jury was free to use its verdict to

reject the application of a law that it deemed unjust -- indeed, it was its duty to do so -- and this was (and should again be) at the heart of the "impartial jury" guaranteed to all criminal defendants under the Sixth Amendment.[16]

At common law, striking a juror on the basis of bias, or "propter affectum," was limited to circumstances in which the jury had a bias toward a party (relational bias); it did not include striking a juror on the basis of her opinion of the law or the range of punishment for breaking the law. As Blackstone cogently articulated:

> "Jurors may be challenged propter affectum, for suspicion of bias or partiality. This may either be a principal challenge, or to the favour. A principal challenge is such where the cause assigned carries with it prima facie evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge;

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[16] A juror could of course still be struck for cause if the juror refused to deliberate at all. Consistent with the Framers' understanding, however, the Sixth Amendment's "impartial jury" guarantee ensures that a criminal defendant's case is tried before a jury that, upon deliberating, can consult their consciences and consider the fairness and justice of the law and punishment the jury is asked to apply.

> which, if true, cannot be overruled for jurors must be omni exceptione majores." (3 William Blackstone, Commentaries on the Laws of England 363.)[17]

Chief Justice Marshall acknowledged this exact understanding of the propter affectum challenge, and its connection to the Sixth Amendment, in *United States v. Burr* (C.C.Va. 1807) 25 F. Cas.49, 50, noting that "[t]he end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality." And the limited understanding of "bias" or "partiality" is not some historical footnote: at the time of the Framers, bias as to the law was both welcomed and expected from jurors. The colonial and early American experience teaches that the right to reject the law as instructed was crucial to the role the jury played in its check against the judiciary and executive. For example, when England made the stealing or killing of deer in the Royal forests an offense punishable by death, English juries responded by committing "pious perjury," i.e., rejecting these politically motivated laws by acquitting the defendant of the charged offense. (John Hostettler, Criminal Jury Old and New: Jury Power from Early Times to the Present Day 82 (2004); *see also Sparf v. United States* (1895) 156 U.S. 51, 143 [Gray, J., and Shiras, J.,

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[17] Blackstone specified three other grounds that justified the exclusion of a juror: propter honoris respectum, which allowed challenges on the basis of nobility; propter delictum, which allowed challenges based on prior convictions; and propter defectum, which allowed challenges for defects, such as if the juror was an alien or slave. (*Id.* at pp. 361-364.)

dissenting] [observing that juries in England and America returned general verdicts of acquittal in order to save a defendant prosecuted under an unjust law].)

One well known example of such "pious perjury" is the 1734 trial of John Peter Zenger. The Royal Governor of New York, in an effort to punish Zenger for his criticism of the colonial administration, prosecuted Zenger for criminal libel. Andrew Hamilton, representing Zenger at trial, argued that jurors "have the right beyond all dispute to determine both the law and the fact" and thus could acquit Zenger on the basis he was telling the truth, even though the libel laws at the time did not provide that truth was a defense. (James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 78-79 (Stanley N. Katz ed., 2d ed. 1972).) Zenger was acquitted on a general verdict. This trial, and others like it, provides necessary context for understanding what animated the Framers' intent in guaranteeing a defendant the constitutional right to an impartial jury.

Reinforcing how the Framers themselves viewed the issue, a different (and even more famous) Hamilton successfully made a similar argument seventy years later on behalf of a man accused of libeling John Adams and Thomas Jefferson. In that case Founding Father Alexander Hamilton argued:

> "It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. *But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions.* It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent." (*People v. Croswell* (N.Y. Sup. 1804) 3 Johns. Cas. 337, 346, emphasis added.)

At base, the notion of striking a juror because of his opinion on the propriety of the law was entirely foreign to the nation's founders. In fact, it was expected that the jurors would follow their conscience and render a verdict that was against a law they deemed unjust -- this was at the heart of the impartial jury as understood by the Framers. As John Adams wrote in 1771:

> "And whenever a general Verdict is found, it assuredly determines both the Fact and the Law. It was never yet disputed, or doubted, that a general Verdict, given under the Direction of the Court in Point of Law, was a legal Determination of the Issue. Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And, if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience[?]" (1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

See also Akhil Reed Amar, America's Constitution 238 (2005) ("Alongside their right

and power to acquit against the evidence, eighteenth century jurors also claimed the right and power to determining legal as well as factual issues -- to judge both law and fact 'completely' -- when rendering any general verdict.").

This principle was echoed in the instructions given by Chief Judge Jay who, at the end of a trial before the Supreme Court, charged the jurors with the "good old rule" that:

> "on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. *But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.* On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. *But still both objects are lawfully, within your power of decision.*" (*Georgia v. Brailsford* (1794) 3 U.S. 1, 4, emphases added).

Indeed, the importance of this right was widely shared by those attending the Constitutional Convention. (*See* Federalist 83 (Hamilton), reprinted in The Federalist Papers 491, 499 (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of

free government.").

The current death-qualification "substantial impairment" standard reflects none of this -- and conflicts with all of it. To the Founding Fathers, it was the solemn duty of a jury to issue a verdict reflecting the jury's conscience. There was no exception to this rule carved out for cases where the State sought a sentence of death. Thus, the substantial impairment test announced in *Adams* in 1980 -- designed as a way to accommodate the interests of the state -- contradicts the intent and understanding of the Framers of the Sixth Amendment and erodes the Sixth Amendment's guarantee of an impartial jury where it is needed most. Application of that test in this case violated Mr. Miles's Sixth Amendment rights and requires that the penalty judgment be reversed.

It is true, of course, that in contrast to some of the Court's Sixth Amendment cases such as *Walton* and *Roberts* -- where the Court's historical approach has already resulted in these decisions being overruled -- the Supreme Court has not yet been asked to revisit *Adams* based on this identical approach. But this should not change the result here.

Article I, section 16 of the California Constitution, originally enacted in 1850, provides that "[t]rial by jury is an inviolate right and shall be secured to all . . . ." This Court has long recognized that the state right to a jury trial "is the right as it existed at

common law, when the state Constitution was first adopted." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75-76. *Accord Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173-1274; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8-9; *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 287.) As this Court has noted, in assessing the scope of the state jury trial guarantee, "[i]t is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution." (*People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 287.)

Thus, in order to determine if the *Adams* "substantial impairment" test violated Mr. Miles's right to a jury trial under the state constitution, this Court must examine the common law. And as the above analysis of the common law shows, the substantial impairment test is simply irreconcilable with the common law. As such, the trial court's use of that test to permit juror discharges not only violated the Sixth Amendment, but it violated the state constitution as well.

Of course, in making this argument Mr. Miles recognizes the similarity between the state and federal constitutional jury trial guarantees. But as Article 1, Section 24 of

the California Constitution establishes, the "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." And as numerous justices of this Court have made clear over the years, in assessing the independent force of the state constitution, the Court "should disabuse [itself] of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court's Fred Astaire -- always following, never leading." (*People v. Cahill* (1993) 5 Cal.4th 478, 557–558 [Kennard, J., dissenting]. *Accord People v. Flood* (1998) 18 Cal.4th 470, 547 [Mosk, J., dissenting].)

It is time to lead. The historical evidence is clear. The substantial impairment test violates both state and federal law. Someone should finally say so; reversal of the penalty phase is required.

GUILT PHASE AND SPECIAL CIRCUMSTANCE ISSUES

IV. BECAUSE DETECTIVE LORE ADMITTED TO MAKING UP KEY PARTS OF THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT, AND MISREPRESENTED OTHER FACTS THROUGHOUT THE AFFIDAVIT, AND BECAUSE THERE WAS NO PROBABLE CAUSE ABSENT THESE FALSE STATEMENTS, THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING MR. MILES'S MOTION TO SUPPRESS THE BLOOD AND HANDWRITING EVIDENCE.

A. Introduction.

As discussed in detail in the statement of facts above, Nancy Willem was killed in Rialto on February 4, 1992. Rialto Police Detective Chester Lore was lead investigator on the case. (3 RT 582, 614.)

On June 16, 1992, Torrance police "made a lawful vehicle stop of [Mr. Miles] in his truck." (11 RT 4229.) According to the officers involved in the stop, they stopped Mr. Miles "because he was a black male wearing a white t-shirt" who was driving in "close proximity" to where someone had reported a robbery by a man meeting this general description. (3 RT 800-803.)

Two days after the stop, officer Lore sought a search warrant in connection with

the Willem case to obtain, among other things, "a blood sample taken from the body of suspect Johnny Duane Miles" and evidence expected to be found in Mr. Miles's "1988 Mitsubishi pick up." (16 CT 4748.) The search warrant was supported by an affidavit of probable cause prepared by Lore. (16 CT 4739-4749.) After reviewing the affidavit, Judge Gunn found probable cause and issued the warrant. (16 CT 4751-4754; 3 RT 583.)

A return prepared in connection with this search warrant shows that pursuant to the warrant, police seized "[b]lood from [the left] arm of Johnny Miles." (16 CT 4772.) As the trial court later noted, the purpose of this request was "to obtain blood samples to be used in comparisons." (5 RT 1219.) Ultimately, the state did just that, performing serology and DNA analysis on the blood and introducing the devastating results at trial. (10 RT 3717-3810; 11 RT 3915-4042.)

Another return to the same warrant indicated that police seized paperwork from Mr. Miles's Mitsubishi. (16 CT 4769.) One paper -- People's Exhibit 131 ("PE 131") -- was a note which incorrectly spelled the word government as "Governement." (14 CT 4044.) The note found at the Willem scene -- People's Exhibit 130 ("PE 130") -- contained the warning, "Wake up Goverenment [sic], Feed the Poor." (14 CT 4044.)

In other words, both notes misspelled the word "government," although the two

notes contained different misspellings. The trial court later noted, "there are similarities in style between the questioned document" -- PE 131 -- "and the note found at the crime scene" -- PE 130; according to the court, "[t]he word 'government' is misspelled in both documents." (12 RT 4224.) Thus, there was a link between a note found in Mr. Miles's possession and a note found at the Willem murder scene.[18]

Defense counsel moved to suppress evidence obtained pursuant to this warrant, including the blood seized and the note found in the Mitsubishi. (10 CT 2831-2838; 13 CT 3698-3733.) Counsel contended that the probable cause affidavit on which the search warrant was based was "factually incorrect and [was] the product of misrepresentation[s] . . . of material fact . . . ." (10 CT 2836.) The trial court denied the motion ruling that (1) although there may have been "negligent mistake[s]" made, there was no knowing use of false information and (2) even if the errors were reckless, there was enough other information to support the probable cause determination. (5 RT 1236-1237.) Because the

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[18] Handwriting expert Glen Owens testified that a comparison of known samples of Mr. Miles's handwriting -- inmate grievance forms -- with PE 130 indicated "similarities" but Owens could conclude neither that Mr. Miles wrote PE 130, or that Mr. Miles could be excluded as the author. (11 RT 4179-4184.) But as detailed below, in closing argument the prosecutor urged the jury to conduct its own comparison of the note found at the Willem scene, and the note found in Mr. Miles's truck, and find that the similarities noted by Mr. Owens between the note found at the Willem scene and Mr. Miles's grievance forms could apply equally between the note found at the Willem scene and the note found in Mr. Miles's Mitsubishi. The jury followed the prosecutor's prompt, asking in deliberations for the note found in the Mitsubishi. (14 CT 4058; 12 RT 4500, 4502.)

trial court found no intent by the office to deceive, it also ruled in the alternative that the officer had a good faith belief that the warrant was valid. (5 RT 1240.)

Reversal is required. As more fully discussed below, Lore's affidavit maintained that the Willem, Castellanos and Davis/Osburn crimes were very similar to a series of other robberies which had been committed, including the Torrance crimes. Lore then went on to provide key facts showing that Mr. Miles was responsible for these other crimes. If these facts had been true, they would have justified a search in connection with the very similar Willem, Castellanos and Osburn/Davis crimes.

But as the record shows -- and as detective Lore admitted in part at the hearing -- these facts were not only proven to be false, but they were facts which Lore admitted making up out of whole cloth. The trial court's finding that this was mere negligence cannot rationally be squared with Lore's actual testimony. And because the search warrant was based on intentionally false and misleading information, the court's alternative finding of good faith cannot be sustained. In short, both the blood sample, and the note found in the Mitsubishi, taken pursuant to the warrant should have been suppressed. Because the serological and DNA analyses of that blood sample, and the note found in the Mitsubishi, were the state's key evidence against Mr. Miles, reversal is required.

B. The Relevant Facts.

On June 16, 1992, Lore swore out an affidavit in support of a search warrant from San Bernardino County Judge Mike Gunn. (3 RT 582-583.) According to Lore, the purpose of the affidavit was to obtain a warrant to search Mr. Miles. (16 CT 4747.) Mr. Miles is repeatedly described as "the suspect." (16 CT 4744, 4745.)

Lore first described the Willem homicide as well as the Castellanos and Osburn Davis rape/robberies. (16 CT 4740-4741.) Lore advised Judge Gunn that testing of material found at these crime scenes showed that the person who committed these three crimes was a black male who had blood type AB and was a secretor. (16 CT 4741.)

Lore then noted that "inquiries to the local crime analysis units revealed there were a series of armed robberies" which he believed were committed by the same person who committed the Willem, Castellanos and Osburn/Davis crimes. (16 CT 4742.) Lore described these other crimes, including a robbery of Arnold and Sharon Anderson. (16 CT 4742-4743.) Lore also described being contacted by Torrance police on June 17, 1992, and learning that Mr. Miles had been arrested in Torrance for robbery, rape, kidnaping and evasion of a police officer on June 16, 1992. (16 CT 4743-4744.)

It is fair to say that the other crimes Lore described (including the Torrance crimes) shared a number of similarities with the Willem, Castellanos and Osburn/Davis crimes for which the search warrant was sought. For example, they all involved (1) robberies at professional offices after hours, (2) a black man as the suspect, and (3) use of a small handgun. In addition, in several of the robberies the victims were tied up with telephone receiver cords. (16 CT 4742.) Lore noted these similarities, stating in his affidavit that these "M.O. traits are consistent with the crimes in the Inland Empire from January through March 1992." (16 CT 4744.)

But there was a problem. The fact that the Willem, Castellanos and Osburn/Davis crimes were similar to a series of other crimes did not in any way justify searching *Mr. Miles*. After all, Mr. Miles had not yet been connected to *any* of the crimes -- police admitted his June 16, 1992 arrest was based *not* on any evidentiary connection to any of the prior crimes, but because he was "a black man wearing a white t-shirt" in the area of one of the crimes. (3 RT 803.) Accordingly, Lore needed to provide facts showing that it was probable Mr. Miles committed one or more of these similar crimes. If he could show that, then the similarity of these other crimes to the Willem, Castellanos and Osburn/ Davis crime would logically justify a search warrant.

And this is where the problem comes in. Trying to forge a connection between

Mr. Miles and at least one of the prior crimes -- and thereby justify the search warrant -- Lore simply made up facts. He lied. Plain and simple.

Lore told Judge Gunn in his affidavit that in one of the similar crimes -- the Anderson robbery -- the suspect bled onto a Kleenex box. (16 CT 4742.) According to Lore, "[t]he Kleenex box was collected and linked to the suspect." (16 CT 4742.)

If true, of course, this scientific evidence directly connected Mr. Miles to commission of one of the similar prior crimes, and both logically and legally justified a search warrant in this case. And at the hearing on the motion to suppress, Lore admitted that this was the precise reason he made this statement:

> "Q: [by defense counsel] The purpose of that statement [about the Kleenex box] was to assert to the Magistrate . . . that somehow or another there was a scientific link that had been made between the substance on that box and Mr. Miles?
>
> "A: [by detective Lore] Yes, sir." (3 RT 640-641.)

But as it turns out, Lore's assertion was patently *false*. At the hearing, Lore himself admitted he lied:

> "Q: [by defense counsel] And that [assertion regarding the box of

Kleenex] wasn't true, was it?

"A: [by detective Lore] No, sir." (3 RT 641.)

Lore admitted the Kleenex box had been "sent to the San Bernardino Crime Lab, but unfortunately the box had been wiped off, and there was nothing of use taken from the box." (3 RT 640.) Thus, the Kleenex box was *never* "linked" to Mr. Miles, scientifically or otherwise. Lore had manufactured this fact out of whole cloth.

But the Kleenex box was not the only misrepresentation Lore made in the affidavit in trying to tie Mr. Miles to the other crimes and justify a search warrant. Lore told Judge Gunn that when Ms. Heynen -- the victim of a January 21, 1992 robbery in Upland -- was shown a photographic lineup, she pointed to Mr. Miles's photograph, stating, "It could be him." (16 CT 4745.) Yet again, if this were accurate (and credible) it could connect Mr. Miles to commission of one of the similar prior crimes, and both logically and legally justify a search warrant here.

But as it turns out, Lore's statement to Judge Gunn was only a half truth. It turns out that the full truth -- which Lore knew -- never made it into the affidavit. It turns out that Lore had previously shown Heynen a photographic lineup which included a different suspect in the case -- Steven Dyer -- and Heynen pointed to Dyer and said, "It could be

him." (3 RT 643.) Lore never told Judge Gunn that Heynen had previously identified Dyer with the exact same words, and that Dyer had ultimately been excluded through blood tests as a possible suspect. (3 RT 643-644, 646.) In other words, there was significant evidence seriously undermining Heynen's ability to accurately identify a suspect in the Upland robbery, but Lore never told this to Judge Gunn.[19]

There is still more. In his affidavit, Lore recognized that Mr. Miles was 6'6" tall, and weighed 210 pounds. (16 CT 4744.) Lore told Judge Gunn that "Mr. Miles displays the physical characteristics as described by the majority of the victims in these cases." (16 CT 4745.) In his affidavit, he characterized the descriptions of the victims in a way which suggested they matched Mr. Miles.

Thus, according to Lore, the victim in the Castellanos robbery/rape in Victorville described the suspect as a "tall black male adult." (16 CT 4741.) According to Lore, the Andersons described the suspect in their robbery as "tall Black male adult." (16 CT

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[19] Similarly, in connection with a Rialto robbery of Paula Yenerall, and the Willem murder, Lore previously sought an affidavit against a different suspect -- Orlando Boone. (3 RT 647.) Lore thought the same person who committed the Yenerall robbery also committed the Willem murder. (3 RT 646.) In his affidavit in support of a warrant against Boone, Mr. Miles relied on Yenerall's positive identification of Boone in a photographic lineup, and the fact that Yenerall heard an older car drive away after the robbery, and Boone owned an older car. (16 CT 4778.) In his affidavit against Mr. Miles, however, Lore said not one word about Boone being a suspect in the same crimes or Yenerall's identification of Boone as her assailant. (16 CT 4740-4746; 3 RT 646-547.)

4742.) Lore noted "a series of armed robberies" (16 CT 4742) and later summarized for Judge Gunn that "[b]ased on my experience as being a policeman for approximately 20 years, Mr. Miles displays physical characteristics as described by the majority of the victims in these cases." (16 CT 4745.) Other than *characterizations* of what the "victims in these cases" said, and his summary, Lore provided no specific details on the actual descriptions given by the victims. (16 CT 4743.)

It turns out there was good reason for characterizing -- rather than quoting -- the physical descriptions given by the victims, and then summarizing those descriptions for Judge Gunn. It turns out there was a fairly striking distinction between the *actual* descriptions given by the victims and Mr. Miles's actual appearance. Mr. Miles is 6'6" tall and weighs 210 pounds. (9 RT 3632-3633.)

- In fact, the victim of the Castellanos case described her assailant as 6'1" tall and weighing 150 pounds. (3 RT 703.)
- In fact, the victims in the Osburn/Davis case actually described their assailant "as 6 feet [tall] . . . 150 to 160 pounds." (3 RT 704-705.)
- In fact, the victims in the Anderson case described their assailant as "male black. 20s. 6 feet. 170." (3 RT 702.)
- In fact, with respect to the "series of armed robberies" which Lore referenced (and later summarized), the suspect in the Yenerall case in Rialto was actually described as 6' tall, medium weight. (3 RT 704.) The suspect in the Upland case was described as 6'1" tall and weighing 180 pounds. (3 RT 704.) And the suspect in the Ontario

case was described as 6'4" tall, weighing 180 pounds. (3 RT 705.)

Lore did not give any of these specific descriptions to Judge Gunn; instead, as noted, he summarized based on his "experience" and advised the judge that "Mr. Miles displays the physical characteristics as described by the majority of the victims in these cases." *In fact, most of the descriptions were off by as much as 6 inches in height and 60 pounds in weight, and not a single description came even within 2 inches or 30 pounds of Mr. Miles's actual height and weight.*[20]

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[20] When confronted with the fact that he did not provide any of these details to the magistrate, Lore claimed he did. Lore relied on the concluding paragraph of his declaration in which he stated, "[w]ith the exception of the homicide, the suspect in each crime is described as articulate and soft spoken. Witnesses to the robberies described the suspect as being Black male adult, 25-35 years, 6'-6'4", thin build, large dark eyes, dark hair, wearing dark blue or black watch cap, dark blue or black Levi type pants, an [sic] at times was described as having a thin mustache." (16 RT 4745.)

Perhaps recognizing that this paragraph was starkly inconsistent with his summary, Lore claimed for the first time at the hearing that Anderson actually described the suspect as 6'6". (3 RT 710.) According to Lore, Anderson told him that "he [Anderson] was 6'4", and told Lore that he had to "look up the suspect," and claimed the suspect was "around 6'6"." (3 RT 656.)

In fact, as noted above, Anderson actually reported that the suspect was 6 feet tall. (17 CT 4830.) When confronted with this report, Lore's recollection changed yet again and he claimed to have spoken with Anderson a week after the robbery. (3 RT 656-657.) He could not recall if there was a written report memorializing this conversation, but Lore claimed he was "sure it's in my notebook." (3 RT 656-657.) When defense counsel asked for discovery of the notebook, Lore retreated, claiming "I don't know whether it's written down, but I distinctly remember him saying that." (3 RT 657.)

At the hearing, Lore explained his decision to characterize. Lore claimed that he thought they did match Mr. Miles "[w]ithin a couple of inches and a couple of pounds . . . ." (3 RT 638.) When asked if he thought someone who is "6 feet 6 and 210 pounds matches a person who 6 feet 150 pounds," Lore dismissed the question, replying "[a]fter 25 years of law enforcement, you begin to realize that people are not very good with heights and weights." (3 RT 639.)[21]

C. Absent Lore's Misstatements And Falsehoods, The Remaining Content Of The Affidavit Was Insufficient To Establish Probable Cause, Especially When Combined With The Facts Intentionally Omitted By Lore.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

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[21] Lore's faith in eyewitness descriptions appeared to hinge on whose ox was being gored. When Davis gave a description of the suspect being "5'10", 6 feet," and weighing 150 to 160 pounds, Lore asked her "if the guy could have been taller, and could have weighed more," because he "didn't think that the description she gave was correct;" after all, her description did not match "the person that we are looking at or for." (3 RT 654.)

But when he wrote affidavits to support warrants in connection with initial suspect Orlando Boone -- a six foot tall man, weighing 175 pounds -- Lore fully relied on an eyewitness's statement that the suspect was six feet tall, medium build. (13 CT 3719; 16 CT 4777, 4782.) And, according to defense counsel, when Lore wrote an affidavit to support a warrant in connection with initial suspect Steven Dyer, Lore claimed the suspect was described as 6 feet to 6 feet, 2 inches, tall, weighing 150 to 165 pounds which enabled him to further claim that "[t]he descriptions matched this same individual [Stephen Dyer]." (13 CT 3719.)

be violated, and no warrants shall issue, but upon probable cause . . . ." When a reviewing court is asked to determine if probable cause supported issuance of a warrant, the court determines "whether the magistrate had a substantial basis for concluding a fair probability existed . . . that contraband or evidence of a crime will be found in a particular place." (*People v. Kraft* (2000) 23 Cal.4th 978, 1040–1041.)

But a different rule applies where a defendant can show that the affidavit on which the search warrant was based contained false or misleading information. In *Franks v. Delaware* (1978) 438 U.S. 154, the Supreme Court held that if a defendant establishes by a preponderance of the evidence that a search warrant affidavit contained intentionally or recklessly false information, then the reviewing court must determine whether the remaining content of the affidavit is sufficient to establish probable cause. Under *Franks*, "the critical question is whether an intentional or reckless misrepresentation in a search warrant affidavit was material in the issuing magistrate's determination of probable cause." (*People v. Maestas* (1988) 204 Cal.App.3d 1208, 1216.)

If a defendant establishes that the affiant intentionally or recklessly included false material in the search warrant affidavit, the reviewing court "must excise that information and determine if the information remaining in the affidavit still supports a finding of probable cause." (*People v. Maestas*, *supra*, 204 Cal.App.3d at p. 1216, citing *Franks v.*

Delaware, *supra*, 438 U.S. at pp. 155-156.) Similarly, the reviewing court must add to the affidavit intentional or reckless omissions and reevaluate the determination of probable cause in light of this new information. (*Ibid. Accord United States v. Scott* (8th Cir.2010) 610 F.3d 1009, 1013 [*Franks* applies to material that has been "'deliberately or recklessly omitted from a search-warrant affidavit.'"].) If after excising the falsehoods and misleading facts, and adding the intentionally omitted facts, probable cause is lacking, then "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." (*Franks v. Delaware*, *supra*, 438 U.S. at p. 156.) Review of probable cause supporting a search warrant is a question of law subject to this Court's independent review. (*People v. Camarella* (1991) 54 Cal.3d 592, 601-602.)

There is no need to detail Lore's falsehoods and omissions about the Kleenex box, the Heynen identification or the height and weight descriptions of the many other victims. Suffice it to say here that in his affidavit Lore effectively established a connection between the Willem, Castellanos and Osburn/Davis crimes on the one hand and a series of other crimes by virtue of similarities in how they were all committed. But that alone did not provide sufficient evidence to justify searching Mr. Miles, even when considering the fact that all crimes concededly involved a black man.

Lore addressed this issue by a series of misstatements and omissions which suggested to Judge Gunn that Mr. Miles had been either scientifically tied, or identified, as the suspect in connection with the other crimes. Of course, as noted above, if this connection to the other crimes had been established then a search warrant would have been justified here given the similarity between the crimes. But Lore admitted that his false statement about the Kleenex box was made with the specific intention of suggesting "there was a scientific link that had been made between the substance on that box and Mr. Miles" even though he knew "there was nothing of use taken from the box." (3 RT 640-641) He told Judge Gunn that Ms. Heynen had identified Mr. Miles as the suspect in one of the crimes (16 CT 4745), knowing full well (but failing to say) that she had also identified someone else with the same level of certainty. (3 RT 643-646.) And he told Judge Gunn that Mr. Miles's description "matched" or was "similar to" the descriptions given by "a majority of the victims" in all the cases (16 CT 4745), knowing full well (but failing to say) that Mr. Miles was 6'6" tall and weighed 210 pounds and that -- in fact -- *none* of the victims had reported a suspect matching this description.

It certainly seems unlikely that Lore simply made unintentional mistake after mistake, each one pointing to Mr Miles as the suspect. After all, he was a 20-year veteran detective who not only trained new officers on police procedures, but specifically trained

all officers on search and seizure procedure and law. (16 CT 4739; 3 RT 582, 614.)[22]

Moreover, the record shows that in violation of sound police practice, Lore asked a witness to reconsider a suspect's description when it did not suit him. When Carole Davis described her assailant in the San Bernardino robbery/rape as "5'10", 6 feet," and weighing 150 to 160 pounds, Lore asked her "if the guy could have been taller, and could have weighed more," because he "didn't think that the description she gave was correct;" after all, her description did not match "the person that we are looking at or for," i.e. Mr. Miles. (3 RT 654.)

On this record, there was nothing merely negligent about the misstatements in Lore's affidavit. If they were not intentional, they were -- at least -- recklessly made. Under *Franks*, the question then becomes whether -- if Lore's misleading statements and falsehoods are excised and Lore's factual omissions are added to the affidavits -- there

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[22] Unfortunately, nothing in Lore's conduct in connection with other warrants in this case provides any basis to believe the mistakes made in connection with this warrant were inadvertent. To the contrary, in seeking various search warrants in this case, Lore's sworn testimony as to the height of the suspect varied according to the suspect he wanted to search. (*See* 13 CT 3719; 16 CT 4777, 4779, 4782 [in swearing out an affidavit to obtain a search warrant for 6' tall Orlando Boone for the Rialto and Upland robberies and the Willem murder, Lore told the magistrate that the suspect was 6' tall]; 13 CT 3719 [in swearing out an affidavit to obtain a search warrant for 6', 2" tall Steven Dyer for the Rialto, Upland, Anderson, Castellanos robberies and the Willem murder, Lore told the magistrate that "[t]he descriptions of all four robberies matched this same individual."].)

would have been sufficient facts to justify issuing a search warrant as to Mr. Miles.

The answer is no. Absent the misleading and false material, the affidavit would consist of Lore's recitation of the names of victims, the dates and locations of the crimes, and the summaries of the crimes themselves. (16 CT 4740-4743.) In addition, the affidavit would include a discussion of Mr. Miles being arrested for the Torrance crime. (16 CT 4743.) As noted above, the affidavit would also contain ample legitimate evidence showing that the Willem, Castellanos and Osburn/Davis crimes were similar to a series of other crimes in other locations. But absent the falsehoods there is nothing to suggest a probability that Mr. Miles committed those crimes other than the fact he is black. And that is not enough. On this record, the trial court erred failing to grant Mr. Miles's motion to suppress under *Franks*.

Mr. Miles recognizes, of course, that as a factual matter, the trial court here found that although Lore may have made "negligent mistake[s]," there was no knowing or reckless use of false information. (5 RT 1236-1237.) The court used this finding for two related purposes: since the mistakes were merely negligent (1) there was no need under *Franks* to excise the information from the affidavit in assessing probable cause and, in any event, (2) Lore had a good faith belief that the warrant was valid, which was enough. (5 RT 1236-1240. *See United States v. Leon* (1984) 468 U.S. 897, 900 [holding that the

exclusionary rule will not be used to exclude evidence "obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."].) But a warrant will not satisfy the good faith exception if the trial court properly finds, pursuant to *Franks*, that the judge issuing the warrant "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." (*United States v. Leon*, *supra*, 468 U.S. at p. 923.)

Mr. Miles also recognizes that as a legal matter, a trial court's factual findings are entitled to deference when supported by substantial evidence. (*See People v. Troyer* (2011) 51 Cal.4th 599, 605.) But here, the court's finding that there was no reckless or intentional mistakes -- whether relied on to avoid the *Franks* inquiry or justify the search under *Leon*'s good faith exception -- is not supported by the record at all.

As an initial matter, the sheer number of "mistakes" in the affidavit -- each one adverse to Mr. Miles's interests -- speaks volumes about whether they were merely negligent or, at a minimum, reckless. While isolated errors or misstatements might be excused given the number of crimes and witnesses, the volume of misstatements coupled with the fact that they consistently favored the state suggests at least a reckless disregard for the truth.

But putting this aside, the trial court excused as negligence Lore's arguably most significant "mistake" -- his statement to Judge Gunn that a Kleenex box recovered from a robbery scene was "linked to the suspect." According to the trial court, Lore "did not mean to suggest that the analysis had been done and that the blood on the box was that of Mr. Miles," but rather only meant that "there was a Kleenex box with blood on it, possibly the suspect's blood." (5 RT 1236.)

But this finding is flatly contradicted by what Lore actually said. Under oath, Lore himself admitted that the reason he made this false claim was "to assert to the Magistrate . . . *that there was a scientific link that had been made between the substance on that box and Mr. Miles.*" (3 RT 640-641, emphasis added.) This Court cannot defer to the trial court's finding of mere negligence where Lore himself admitted his lie was intentional.

D. Because Of The Significance Placed By The Prosecutor On Evidence Seized Pursuant To The Search Warrant, Reversal Is Required.

Lore's deceptions, and Judge Gunn's resultant issuance of an improper search warrant, violated both the Fourth and Fourteenth Amendments. Accordingly, the trial court's refusal to suppress the evidence obtained in that search requires reversal unless the state proves they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The state will be unable to meet its burden in this case.

The search of appellant's prior residences produced no incriminating evidence, and thus, did not harm appellant. The seizure of Mr. Miles's blood sample and the note from his Mitsubishi, however, was manifestly important to the prosecution.

After all, the state's theory was that Mr. Miles committed the Willem murder, the Castellanos robbery/rape and the Osburn/Davis robbery/rape. There were no eyewitnesses to the Willem murder. And the descriptions given by the victims in both the Castellanos and Osburn/Davis crimes did not match Mr. Miles. Mr. Miles was 6'6" tall and weighed 210 pounds; even the prosecutor was forced to concede in closing argument that "defendant is a big man." (9 RT 3632-3633; 12 RT 4496.) But Castellanos described her assailant to police as "6 feet 1. 150." (3 RT 703.) And the victims in the Osburn/Davis case described their assailant to police as "6 feet. 150 to 160 pounds." (3 RT 704-705.) Thus, the victims in both the Castellanos and Osburn/Davis cases consistently described their assailant as someone who was five to six inches *shorter* than Mr. Miles, and weighed 50 to 60 pounds *less* than Mr. Miles.

It is not surprising then that the prosecutor dismissed the eyewitness accounts in closing argument. According to the prosecutor, "[e]veryone remember, don't get hung up on the fact that he may, in actuality, be well over six feet, and they all described him as over six feet" because "each of them had very limited opportunity to stand next to him

and judge the height." (12 RT 4492.)

Instead, the prosecutor heavily relied on the two remaining key pieces of evidence -- both of which were obtained pursuant to the search warrant. First, the state introduced the testimony of expert Donald Jones regarding his DNA analysis of Mr. Miles's blood sample, and his comparison of Mr. Miles's DNA and samples taken from the crime scenes. Second, the state introduced evidence that (1) a note was found at the Willem scene which misspelled the word government and (2) a note was found in Mr. Miles's truck which misspelled the same word.

Thus, in closing argument, the prosecutor had an effective one-two punch. First, the prosecutor heavily relied on the blood sample. The prosecutor told the jury that the biological evidence from the Willem murder, the Castellanos robbery/rape and the Osburn/Davis robbery/rape "match between crimes" and "match with [Mr. Miles's] genetic markers," and thus, "[e]verything that can be analyzed where there is a result it matches the defendant across the board." (12 RT 4499.) According to the prosecutor, "clearly, that evidence is very, very convincing" and "there's been nothing presented by which you could reasonably doubt the validity of those numbers and the validity of that science." (12 RT 4499.)

Then the prosecutor relied on the note found in Mr. Miles's Mitsubishi. The prosecutor told the jury "we know there was some handwriting obtained from the defendant's truck" and "[w]e have a note from the [Willem] scene." (12 RT 4500.) According to the prosecutor, "Mr. Owens described certain factors he looked at in the note that was left at the murder scene;" (1) a "very distinctive 'G'" which was "one piece, and then a separate piece that goes around the right side," (2) a "rocking back of the small 'e,'" (3) the "intermixing of capital letters with small letters," (4) "the word 'the' where the 't' goes over the 'h,'" (5) "the 'v'" and "how on the right side it goes higher," and finally, (6) "an additional 'e' in the word government." (12 RT 4500, 4502.) The prosecutor then urged the jury to "review these two notes" -- the note found at the Willem scene and the note found in Mr. Miles's Mitsubishi -- "and you can see there's very, very significant similarities in this writing" and "[v]ery telltale things, and that's not even talking about the same word that's misspelled by virtue of an extra 'e' that doesn't belong there." (12 RT 4502.)

Put simply, the evidence obtained as a result of Lore's affidavit was devastating. Indeed, the objective record of deliberations reveals that -- in this case involving three separate crimes, 19 counts, four special circumstance allegations, and evidence, including expert testimony involving complicated serological and DNA evidence, which took one and a half months to present -- the jury reached its verdict in less than six hours, and only

after requesting and receiving the note found in Mr. Miles's Mitsubishi. (14 CT 4054-4055, 4058-4060; 15 RT 4323.) On this record, where the prosecutor heavily relied on the evidence resultant from Lore's false and misleading affidavit, and where the objective record of deliberations reveals that the jury necessarily relied on this evidence in reaching its quick verdict, it cannot be said that the trial court's error in denying the motion to suppress the blood and handwriting evidence can be deemed harmless beyond a reasonable doubt. The judgment must be reversed.

V. BECAUSE THE TORTURE THEORY OF MURDER REQUIRED THE JURY TO DECIDE WHY MR. MILES COMMITTED THE CRIMES ALLEGED, THE COURT'S INSTRUCTION TELLING THE JURY THE STATE DID NOT NEED TO PROVE MOTIVE FUNDAMENTALLY UNDERCUT THE STATE'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT.

A. The Relevant Facts.

Count one of the information charged Mr. Miles with murder. (14 CT 4014.) At the conclusion of trial, the jury was instructed that it could find this murder was first degree if it found the murder was committed "by torture." (14 CT 4083.) The trial court went on to properly instruct the jury that in order to find murder by torture, it must find that defendant harbored a "wilful, deliberate and premeditated intent to inflict extreme and prolonged pain . . . for the purpose of revenge, extortion, persuasion or for any sadistic purpose . . . ." (14 CT 4083.) Thus, the jury was plainly required to determine *why* this crime was committed. Nevertheless, although the motive for the crime was a critical issue for the jury in connection with the count one murder charge, the trial court gave CALJIC 2.51:

"Motive is not an element of the crime charged and need not be shown." (2 CT 503.)[23]

As discussed more fully below, because motive was effectively an element of the state's case in connection with the first degree murder theory, telling the jury that the state did not have to prove motive was fundamentally improper and undercut the state's burden of proof beyond a reasonable doubt. Reversal is required.

B. The Motive Instruction Impermissibly Lowered The State's Burden Of Proof And Requires Reversal Of The Conviction On The First-Degree Murder Count.

The Due Process Clause of the Fifth Amendment requires the state to prove each element of a crime beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 539 U.S. 466; *United States v. Jones*, *supra*, 526 U.S. at p. 243, n. 6.) And the Sixth Amendment requires that a jury -- not the court -- decide whether the state has met its burden. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Jury instructions violate these

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[23] In full, the instruction provided:

"Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." (2 CT 503.)

principles if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof" less than beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6, 22.)

That is what happened here. Like any other criminal charge, the elements of the torture murder charge which elevated the crime to first degree murder were subject to the mandates of the Fifth and Sixth Amendments. Thus, the state was required to prove beyond a reasonable doubt that Mr. Miles's intended to "inflict extreme and prolonged pain . . . for the purpose of revenge, extortion, persuasion or for any sadistic purpose . . . ."

To be sure, Mr. Miles recognizes that the instructions referred to this element as part of the "intent" element of the offense. (14 CT 4083.) And respondent will undoubtedly make the relatively simple argument that telling the jury the state did not have to prove "motive" for the offense would not have undercut the state's obligation to prove "intent."

This argument is entirely sound as applied to some, indeed many, intent elements. For example, one element necessary for a murder conviction is that the state prove an intent to kill. In no sense could a jury reasonably confuse this intent requirement with the

motive for the killing.

But as applied to this case, the question under *Victor v. Nebraska*, *supra*, is whether "there is a reasonable likelihood" the jury would have applied the motive instruction to the intent element of the torture charge. In making that common sense determination, and before ascribing talismanic significance to the distinction between "intent" and "motive," the real-world meaning of the word "motive" must be considered.

As this Court has itself concluded on this exact point, "[m]otive describes the reason a person chooses to commit a crime." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) And the Court has gone on to recognize that there are some criminal charges where the intent requirement really requires the jury to decide why the crime was committed, and is therefore synonymous with motive.

The Court has addressed this issue most frequently in connection with the murder for financial gain special circumstances set forth in Penal Code section 190.2, subdivision (a)(1). That special circumstance requires the state to prove beyond a reasonable doubt that the murder was "carried out for financial gain." This is the intent requirement of the charge. (*See, e.g.*, *People v. Noguera* (1992) 4 Cal.4th 599, 636; *People v. Howard* (1988) 44 Cal.3d 375, 413 [noting that the financial gain special circumstance requires

proof that defendant harbored "the intent to thereby obtain some financial gain."].)

But although this element is the "intent" element of the charge, the Court has frequently noted that it is just as correctly characterized as the motive for the murder. These cases recognize that where an intent element requires the jury to find the reason a defendant performs an act, intent and motive are one and the same. In other words, a defendant's motive to gain financially from a murder is no different from an intent to do so. Thus, the Court has used the terms intent and motive interchangeably in connection with the intent element of the financial gain special circumstance. (*See People v. Carasi* (2008) 44 Cal.4th 1263, 1308-1309 [financial gain special circumstances applies to "murders *motivated* by financial gain" described as "financial *motive* for murder"]; *People v. Staten* (2000) 24 Cal.4th 434, 461 ["evidence of a financial *motive*" sufficient for special circumstances finding]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1026 [evidence sufficient to sustain financial gain special circumstance allegation where "defendant was *motivated* by a belief that [the victim's] death would permit him to avoid his obligations" and "financial gain was a primary *motive* for the murder."].)

The torture murder charges here are analogous to the financial gain special circumstance in one key respect. Both have a specific intent element that requires the jury to determine not only mental state but "the reason a person chooses to commit a crime."

(*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 504.) Given the hybrid nature of an intent requirement that requires an inquiry into *why* an act is performed, the financial gain cases recognize that such an element can properly be characterized as either an intent requirement or a motive requirement.

Mr. Miles recognizes that in the financial gain special circumstance context, the Court has repeatedly rejected a claim that the identical motive instruction given here could undercut the state's burden of proving the motive/intent element of the charge. (*See, e.g.*, *People v. Edelbacher, supra*, 47 Cal.3d at pp. 1026-1027. *See also, People v. Riggs* (2008) 44 Cal.4th 248, 314; *People v. Crew* (2003) 31 Cal.4th 822, 845; *People v. Noguera*, *supra*, 4 Cal.4th at p. 637.) But for purposes of the issue here, it is critical to examine the Court's rationale.

In each of these cases, like the case here, the jury received an instruction telling it that the state need not prove motive "for the crimes charged." In each case, defendants argued that this instruction undercut the need to prove the intent requirement for the financial gain special circumstance allegation since that requirement required the state to prove why the defendant had committed the murder. Although the Court rejected the argument in each case, it did *not* do so by drawing a technical distinction between intent and motive. Instead, in each case the Court explained that because the instruction simply

told the jurors that the state did not have to prove motive in connection with the "crimes charged," jurors would not also have applied the instruction to the separate enhancement allegations. (*See, e.g., People v. Edelbacher, supra*, 47 Cal.3d at p. 1027 [noting the "'crime charged' was murder and any reasonable juror would have understood the instruction as referring to this substantive offense only and not to any special circumstance allegation.]; *see also, People v. Riggs, supra*, 44 Cal.4th at p. 314 [jury could not have improperly found robbery-murder special circumstances where motive instruction plainly referenced only the substantive "crimes charged"]; *People v. Crew, supra*, 31 Cal.4th at p. 845 ["no reasonable likelihood that the jury would have applied the motive instruction to the special circumstance allegation"]; *People v. Noguera, supra*, 4 Cal.4th at p. 637.)

But the rationale of these cases does not apply to the definition of torture murder given in connection with the charged crime of murder. This is a substantive "crime[] charged" as opposed to a special circumstance allegation or a sentencing enhancement. Therefore, the jury would have plainly understood that the motive instruction applied to this charge. And as such, there is certainly a reasonable likelihood the jury applied the instruction to the question of Mr. Miles's motive for the infliction of injury.

The only remaining question is prejudice. Where specific intent is at issue, a

juror's erroneous understanding of the burden of proof applied to the intent question requires reversal. (*Cf. Sullivan v. Louisiana, supra*, 508 U.S. at p. 280 [where there is a "reasonable likelihood" the jury has applied a reasonable doubt instruction incorrectly, the error is deemed structural and reversal is required without a showing of prejudice.].) Reversal of the finding of first-degree murder is required.

In making this argument Mr. Miles recognizes that this Court has reached a different result on this issue in one case several years ago. (*See People v. Wisenhunt* (2008) 44 Cal.4th 174 [rejecting a challenge to the motive instruction in the context of a first degree murder by torture charge by relying on *People v. Hillhouse, supra.*].)

But for significant reasons, the rationale of *Hillhouse* does not apply to the torture murder allegation at issue in this case. In *Hillhouse*, this Court considered a defense claim that the trial court erred in reading an instruction that "motive" is not an element of the crime of kidnaping for the purpose of robbery because that crime, as defined in Penal Code section 209, required that the kidnaping be "for the purpose of robbery." The defense argued that since the kidnaping had to be "for the purpose of robbery" it had to be motivated by robbery and so it was a mistake to tell the jury that motive was not an element of the crime. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 503.) The Court rejected the claim, pointing out that the jury was instructed that for the defendant to be

guilty the jury had to find that he had the "intent to steal" and that "intent or purpose to steal [was an] element of the offenses, [but] motive was not." (*Ibid.*; *see* CALJIC No. 9.54 [defining kidnaping to commit robbery, including element of specific intent to steal].) According to *Hillhouse*, in the case of a kidnaping for the purpose of robbery there is no difference between kidnaping for the purpose of a robbery and kidnaping with the intent to steal. But motive is very different from an intent to steal. (*Ibid.*) Thus, there was no error in telling the jury that motive was not an element of the crime.

This holding makes sense in terms of the ordinary use of the word "motive" and "intent." A perpetrator who kidnaps with the intent to steal, or, equivalently, for the purpose of robbery, could be motivated by all kinds of things -- poverty, greed, rage, etc. It does not matter: so long as the defendant had the intent to steal, he or she would have the required mental state for the crime of kidnaping for the purpose of robbery. As the Court held ". . . motive is the 'reason a person chooses to commit a crime,' but it is not equivalent to the 'mental state such as intent' required to commit the crime." (*Id.* at p. 504.) So long as the perpetrator has the requisite intent -- the intent to steal -- it does not matter what the motivation was.

But the same cannot be said for torture in the context of torture murder. In this respect, torture murder is an unusual crime -- with an unusual mental state. It consists

both of an "intent," i.e., the intent to cause extreme pain, and a "purpose," i.e., to cause the pain for "the purpose of revenge, extortion, persuasion or for any sadistic purpose." (14 CT 4083; *see People v. Proctor* (1992) 4 Cal.4th 499, 530.) The purpose of the crime is analytically distinct from the "intent to cause extreme pain" component. A person who intends to cause extreme pain without having the requisite "sadistic purpose" is not guilty of torture murder. The element that makes torture the more serious crime it is (as opposed to simply a battery involving the infliction of pain) is the reason, or purpose, for which the pain is inflicted.

Thus, torture is fundamentally unlike the crime in *Hillhouse*, kidnaping for the purpose of robbery. In *Hillhouse*, the only intent required for conviction was not a true motive at all, but simply an intent to steal. In contrast, in a case involving torture, the requisite intent to cause pain is *not* the only mental state element that must be shown; instead to obtain a torture conviction the state must also prove that the defendant acted with an additional sadistic or other defined purpose. In this very different kind of case, the "reason" or "motivation" for which the crime is done is part of the crime. In this situation, in contrast to *Hillhouse*, the state must prove motive to show all elements of the crime.

The crime of torture murder is much more like the crime considered in *People v.*

Mauer (1995) 32 Cal.App.4th 1121. There the appellate court considered the crime of misdemeanor child annoyance, where under the language of the statute, Penal Code section 647.6, the act had to be motivated by an "unnatural or abnormal sexual interest." (Cal. Pen. Code, § 647.6, subd. (a)(2) ["Every person who, motivated by an unnatural or abnormal sexual interest in children, engages in conduct with an adult whom he or she believes to be a child under 18 years of age, which conduct, if directed toward a child under 18 years of age, would be a violation of this section, shall be punished by a fine . . ."].) Hence, one could well intend to annoy or molest a child, but unless the perpetrator does so with an unnatural sexual interest that person is not guilty of a violation of section 647.6. This statute is analytically indistinguishable from the crime of torture. One can kill with an intent to cause "extreme pain," but unless the crime is done with a certain purpose, then the perpetrator is not guilty of torture murder.

Accordingly, reliance by *Wisenhunt* on the rationale of *Hillhouse* to reject an attack on the motive instruction in the context of torture murder was misplaced. *Wisenhunt* should be reconsidered. Reversal of the finding of first-degree murder is

required.[24]

C. The Motive Instruction Impermissibly Lowered The State's Burden Of Proof And Requires Reversal Of The Sexual Penetration Convictions In Counts Nine And Fourteen.

For identical reasons, reversal of the sexual penetration charges in counts 9 and 14 is also required. (14 CT 4018, 4020.) Both charges required the jury to find that the acts occurred for a particular purpose. (14 CT 4125.) As to these charges, too, telling the jury that the state did not have to prove this element of the charge undercut the burden of proof and requires reversal.

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[24] To the extent this Court views *Wisenhunt* and *Hamlin* as controlling, Mr. Miles makes this argument to preserve the issues for federal review. (*See Smith v. Murray* (1986) 477 U.S. 527, 533 [holding that even issues settled under state law must be re-raised to preserve the issue for federal habeas corpus review].)

VI. THE TORTURE MURDER SPECIAL CIRCUMSTANCE FINDING MUST BE REVERSED BECAUSE THE JURY WAS NEVER INSTRUCTED THAT IT HAD TO FIND AN INTENT TO KILL.

Count one charged Mr. Miles with murder. (14 CT 4014.) In connection with count 1, the state added a torture murder special circumstance allegation. (14 CT 4014.)

As discussed more fully below, for more than 25 years this Court has held that the torture murder special circumstance requires the state to prove that defendant intended to kill. (*See, e.g., People v. Jennings* (2010) 50 Cal.4th 616, 647; *People v. Beemore* (2000) 22 Cal.4th 809, 839; *People v. Davenport, supra*, 41 Cal.3d at p. 271.) In plain English, standard CALCRIM instruction 733 conveys this exact requirement, explicitly telling the jury that the state must prove the defendant intended to kill:

> "The defendant is charged with the special circumstance of murder involving the infliction of torture [in violation of Penal Code section 190.2(a)(18)].
>
> "To prove that this special circumstance is true, the People must prove that:
>
> "1. The defendant intended to kill . . . ."

But here, because trial was in 1999, the jury was *not* instructed in accord with the standard CALCRIM instructions. Instead, the trial court first instructed the jury on the

state's various theories of murder. (12 RT 4445-4446 [malice murder]; 4448 [felony murder]; 4449 [torture murder].) The court then explained that if the jury found defendant guilty of first degree murder, it then had to "determine if . . . the murder was intentional and involved the intent to inflict torture." (14 CT 4110.) The court told the jury that unless an "intent to kill" was required, the jury did *not* have to find an intent to kill if it believed that defendant was the actual killer:

> "Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true." (14 CT 4110.)

Turning to the actual torture murder special circumstance, the court did not advise the jury that an intent to kill was required. Instead, the court instructed as follows:

> "To find that the special circumstance referred to in these instructions as murder involving infliction of torture is true, each of the following facts must be proved:
>
> "1. The murder was intentional; and;
>
> "2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose.
>
> "Awareness of pain by the deceased is not a necessary element of torture." (14 CT 4112.)

The jury ultimately found the torture special circumstance allegation true. (15 CT 4221.) As more fully discussed below, and as this Court has recently held, because the trial court's instructions failed to convey to the jury the requirement that defendant personally intend to kill, the jury's true finding on this allegation violates both state and federal law and must be reversed.

The starting point for this analysis is the Fifth and Sixth Amendment requirement that in criminal cases, the state must prove every fact necessary to establish its case to a jury beyond a reasonable doubt. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 697-698; *In re Winship* (1979) 397 U.S. 358, 364.) Under the federal constitution "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490; *United States v. Jones*, *supra*, 526 U.S. at p. 243, n.6.)

Under California law, to convict a defendant of murder on a torture theory -- and expose the defendant to a sentence of 25 years-to-life -- the state need *not* prove the defendant intended to kill. (Penal Code section 189; *People v. Cole* (2004) 33 Cal.4th 1158, 1226; *People v. Davenport* (1985) 41 Cal.3d 247, 271.) As noted above, to prove a torture murder special circumstance however -- and expose defendant to an enhanced sentence of either life without parole or death -- the state must prove the defendant

intended to kill. (*See, e.g., People v. Jennings, supra*, 50 Cal.4th at p. 647; *People v. Beemore, supra*, 22 Cal.4th at p. 839; *People v. Davenport, supra*, 41 Cal.3d at p. 271.) "The special circumstance [of torture murder] is distinguished from murder by torture . . . because . . . the defendant must have acted with the intent to kill." (*People v. Davenport, supra*, 41 Cal.3d at p. 271. *Accord People v. Cole, supra*, 33 Cal.4th at p. 1226; *People v. Proctor* (1992) 4 Cal.4th 499, 534-535.) Because the finding of an intent to kill required in the torture murder special circumstance allegation exposes defendants to an enhanced sentence, the finding is an element of the offense which must be proven to a jury beyond a reasonable doubt. (*See People v. Prieto* (2003) 30 Cal.4th 226, 256 [concluding that the Sixth Amendment right to a jury trial applies to elements of special circumstance allegations].)

This Court has recently applied these precepts to an almost identical case. In *People v. Pearson* (2012) 53 Cal.4th 306, the jury found true a torture murder special circumstance allegation. Ultimately, the Court held that the trial court's failure to instruct on the requirement of a personal intent to kill in connection with that allegation required reversal of the jury's finding.

The facts of *Pearson* are very similar to this case. There, defendant was charged with capital murder. The state alleged a torture murder special circumstance allegation,

as well as several felony murder special circumstance allegations. Because defendant may only have been an accomplice, in connection with the felony murder special circumstances the trial court properly told the jury it could find defendant guilty if it found he acted with a "reckless indifference to human life." (53 Cal.4th at p. 323.) But the court inadvertently included the torture murder special circumstance in this instruction as well; under this instruction the jury could find the torture special circumstance allegation true without finding that defendant intended to kill. (*Id.* at pp. 322-323.) The Court held this improperly removed the intent-to-kill element from the jury's consideration. (*Ibid.*)

Significantly, the trial court in *Pearson* gave the very same instruction that was given here -- CALJIC 8.81.18. (53 Cal.4th at p. 323.) Just as it did here, this instruction specifically told the jury that it could not find the torture special circumstance allegation true unless it found that "the murder was intentional." (*Ibid.*) The state contended that under this instruction, the jury would have made the requisite finding of an intent to kill. (*Ibid.*) This Court rejected the argument, noting that "CALJIC No. 8.81.18[] required the jury to find '[t]he murder was intentional,' but not necessarily to find defendant personally harbored the intent to kill." (*Ibid.*) Accordingly, the Court reversed the true finding on the torture special circumstance allegation.

Pearson controls this case. Here too the defendant was charged with a torture special circumstance allegation. Here too this required the jury to find that defendant personally intended to kill. Of course, standard CALCRIM instruction 733 would have directly conveyed this requirement, but just as in *Pearson*, that instruction was not given here. Instead, the trial court here simply told the jury that (1) "unless an intent to kill is an element of a special circumstance . . . you need not find that the defendant intended to kill in order to find the special circumstance to be true" and (2) the intent element required of the torture special circumstance was not an "intent to kill" but merely that "[t]he murder was intentional." (14 CT 4110, 4112.)

Mr. Miles concedes that in some cases, telling the jury that it must find the "murder was intentional" may be the functional equivalent of requiring an intent to kill. After all, in first degree murder cases where the only theory of murder is express malice murder (which by definition involves an intent to kill), telling the jury to find that the "murder was intentional" effectively requires the jury to find that the defendant intended to kill. But as this Court recognized in *Pearson*, when the jury is presented with an alternate theory of felony-murder -- which does *not* require an intent to kill -- telling the jury that it must find that "the murder was intentional" does "not necessarily [require the jury] to find defendant personally harbored the intent to kill." (*People v. Pearson*, *supra*, 53 Cal.4th at p. 323.)

And that is exactly what this case involves. Here, the jury was instructed on malice murder, felony murder and torture murder. (12 RT 4445-4446, 4448, 4449.) With respect to express malice murder, the prosecutor told the jury that this required an intent to kill. (12 RT 4475.) With respect to felony murder, however, the prosecutor told the jury it could convict of murder without finding an intent to kill; an intent to commit the underlying felony was enough for murder under this theory. (12 RT 4481.) Similarly, with respect to torture murder the prosecutor again told the jury it could convict of murder without finding an intent to kill. (12 RT 4484.) In this circumstance, as in *Pearson*, telling the jury that it can find the torture murder special circumstance true by finding that the "*murder* was intentional" does not necessarily require the jury to find defendant personally intended to kill; it simply requires the jury to find that the predicate act for the felony murder (the underlying felony) or the torture murder was intentional.
Error has occurred.

Because the error is of constitutional dimension, reversal of the special circumstance finding is required unless the state can prove the error harmless beyond a reasonable doubt. (*People v. Pearson*, *supra*, 53 Cal.4th at p. 323.) The factors relevant to this inquiry are whether the instructional error involves an issue which was undisputed at trial, peripheral to the case or which did not involve conflicting evidence. (*See Neder v. United States* (1999) 527 U.S. 1, 18; *People v. Flood* (1999) 18 Cal.4th 470, 489-490.)

Here, while defendant contended he was not the rapist and assailant, once the jury rejected that defense and convicted defendant of murder, the question of the special circumstances was critical to the case. Moreover, given that the state's evidence suggested defendant was involved in other sexual assault cases as well where the victims were not killed, the jury could have had a legitimate question as to whether defendant intended to kill in this case. On this record, the state will be unable to prove this error harmless beyond a reasonable doubt. The torture murder special circumstance must be reversed.

VII. THE THREE FELONY-MURDER SPECIAL CIRCUMSTANCE ALLEGATIONS IN THIS CASE VIOLATE THE EIGHTH AMENDMENT BECAUSE THEY PERMITTED THE JURY TO IMPOSE DEATH WITHOUT FINDING A CULPABLE MENTAL STATE.

Mr. Miles was convicted of first degree murder. He was eligible for a death sentence because the jury found true four special circumstance allegations: (1) killing during the commission of a robbery, (2) killing during the commission of a rape, (3) killing during the commission of a burglary and (4) killing involving torture. (15 CT 4218-4221; *see* Penal Code sections 190.2, subdivision (a)(17, (18).)

As discussed in Argument VI above, the torture special circumstance allegation cannot be sustained because the jury was improperly instructed on the mental state requirements to find that allegation true. The only remaining special circumstance allegations which rendered Mr. Miles death-eligible were the three felony-murder special circumstance allegations. As to each of these allegations, however, the jury was told that if it found defendant was the actual killer, it could find the allegations true without ever finding an intent to kill. (14 CT 4110.)

As more fully discussed below, to the extent the the death-eligibility finding in this case was premised on the felony-murder special circumstance allegations, it was unconstitutional and the death sentence must be reversed. Where a defendant is the actual

killer in a felony-murder case, California law does not require the state to prove any culpable mental state at all in order to render the defendant death-eligible under the state's felony-murder special circumstance allegations. To the contrary, under California law a felony-murder defendant who is the actual killer can be death-eligible even if the killing is accidental or unforeseeable. Pursuant to binding authority from the United States Supreme Court, and persuasive authority from other courts throughout the country, this is unconstitutional. The death eligibility finding in this case -- premised solely on felony-murder special circumstance allegations -- must be reversed.

A. Under California Law, A Defendant Can Be Convicted Of First-Degree Felony Murder, And Found Death-Eligible Under California's Felony-Murder Special Circumstance Allegations, If The Killing Is Negligent, Accidental Or Even Wholly Unforeseeable.

Under California law, the state cannot generally obtain a first degree murder conviction without proving that the defendant both premeditated and had the subjective mental state of malice. However, in the case of a killing committed during any felony listed in Penal Code section 189, the state can convict a defendant of first degree felony murder without proof of any *mens rea* with regard to the murder. California's first degree felony-murder rule "includes not only [premeditated murders], but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or

under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon* (1983) 34 Cal.3d 441, 477.) This rule is reflected in the standard jury instructions for felony murder, given in this case. (CALJIC 8.21; 14 CT 4100.)

Under California law, however, this strict rule of culpability applies not only to the question of guilt, but to the question of whether the defendant is subject to death or a life without the possibility of parole term as well. Thus, a defendant who is the actual killer in a felony murder is subject to death or a life without the possibility parole term even if the state does not prove that he had any distinct *mens rea* as to the killing. (*See, e.g.*, *People v. Smithy* (1999) 20 Cal.4th 936 [rejecting defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life]; *People v. Earp* (1999) 20 Cal.4th 826, 905, n.15 [rejecting defendant's argument that the felony-murder special circumstance could not be applied to one who killed accidentally]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264 [rejecting the defendant's argument that to prove a felony-murder special circumstance, the prosecution was required to prove malice].) As this Court has long made clear, if a defendant is the actual killer in a felony murder, he is also death-eligible or subject to a life without the possibility of parole term under the felony-murder special circumstance. (*See People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the special

circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'"].)[25]

In other words, where the defendant is the actual killer, California's felony-murder rule permits a jury to find him guilty of murder even if the killing was negligent, accidental, unintentional or even wholly unforeseeable. California's felony-murder special circumstance then permits the jury to go further, and make a finding that subjects the defendant to death or a life without the possibility parole term, *without proof that defendant harbored any culpable mental state as to the murder itself.* As Justice Broussard has noted, under the California scheme "a person can be executed for an accidental or negligent killing." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1152 [Broussard, J., dissenting].)

This lack of any *mens rea* requirement stands in sharp contrast to the rule applied where the defendant is *not* the actual killer, but is an aider and abettor. In that situation, California law is now clear that a defendant is not subject to the more severe punishments associated with a special circumstance allegation unless the state proves and the jury finds

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[25] The only exception to this rule is when the felony is only incidental to the murder. In that situation, the felony-murder rule will apply though the felony-murder special circumstance may not. (*See People v. Green* (1980) 27 Cal.3d 1.)

a culpable mental state as to the murder -- either an intent to kill or, at least, a reckless indifference to human life. (*See, e.g., People v. Anderson, supra*, 43 Cal.3d at p. 1147; § 190.2, subd. (d).)

The question then becomes whether such a broad special circumstance -- exposing defendants to significantly more severe punishment even where there has been no finding of a culpable mental state as to the actual killing -- violates the Eighth Amendment. It is to that question Mr. Miles now turns.

B. As Applied To An Actual Killer, The Felony-Murder Special Circumstance Allegations Violate the Eighth Amendment Because They Permit Imposition Of Significantly Enhanced Punishment Without Proof Of Any Culpable *Mens Rea* As To The Actual Killing.

In a series of cases beginning with *Gregg v. Georgia* (1976) 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle which can result in a punishment being unconstitutional. The Court first assessed the proportionality of the death penalty for felony murders in two cases: *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred imposition of the death penalty on an aider and abettor -- the "getaway driver" to an armed robbery murder -- because he neither took life, attempted to take life, nor intended to take life. (458 U.S. at

pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty in connection with an aider and abettor to felony-murder. The Court held that it was not, and that the Eighth Amendment would be satisfied by proof that such a defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (481 U.S. at p. 158.)

Both *Tison* and *Enmund* involved felony-murder defendants who were not actual killers, but only aiders and abettors. The question here is whether *Tison* established a minimum *mens rea* solely for aiders and abettors, or whether it also established a minimum *mens rea* requirement also applicable to actual killers. That question was decided in *Hopkins v. Reeves* (1998) 524 U.S. 88.

In *Reeves* defendant was the actual killer in a felony murder. He contended that the state court had erred in refusing to instruct on lesser offenses which focused on his mental state: second degree murder and manslaughter. In defending the trial court's refusal to provide such instructions, the state argued that the lesser offenses were inapplicable because felony murder under Nebraska law did not require any culpable mental state as to the murder itself. In response, defendant relied on *Enmund* and *Tison* for the proposition that because proof of a more culpable mental state was required by the

federal constitution, the lesser instructions were required. Although *Hopkins* involved an actual killer (as opposed to an aider and abettor), the Supreme Court made quite clear that the state still had to establish that defendant satisfied the minimum *mens rea* required under *Enmund/Tison* at some point in the case. (524 U.S. at pp. 99-100. *See also Graham v. Collins* (1993) 506 U.S. 461, 501 [Stevens, J., concurring][stating that an accidental homicide (like the one in *Furman*) may no longer support a death sentence.].)

Lower federal courts to consider the issue -- both before and after *Reeves* -- have uniformly read *Tison* to establish a minimum *mens rea* applicable to *all* defendants. (*See, e.g., Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-85, rev'd on other grounds, 524 U.S. 88 (1998); *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329 (9th Cir. 1996); *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439. *See also State v. Middlebrooks* (Tenn 1992) 840 S.W.2d 317, 345.)

Even if it were not clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for assessing claims under the Eighth Amendment would itself dictate such a conclusion. As noted above, in *Gregg v. Georgia, supra*, 428 U.S. 153, the Court recognized that the

Eighth Amendment embodied a proportionality principle which could be applied to hold certain punishments, such as the death penalty or life without parole, unconstitutional in two general circumstances. First, the Court has held death disproportionate for a particular type of crime. (*See Coker v. Georgia* (1977) 433 U.S. 584 [death penalty disproportionate for rape of an adult woman]; *Enmund v. Florida, supra*, 458 U.S. 782 [death penalty disproportionate for aider and abettor to felony-murder]; *Graham v. Florida* (2010) 560 U.S. ___, 130 S.Ct. 2011 [life without parole disproportionate for non-homicide offenses involving juveniles].) Second, the Court has held these punishments disproportionate for a particular type of defendant. (*See, e.g., Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty disproportionate for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty disproportionate for defendant under 18 years old]; *Graham v. Florida, supra*, 130 S.Ct. 2011 [life without parole disproportionate for juvenile committing a nonhomicide offense].)

In evaluating whether these penalties are disproportionate for a particular crime or criminal, the Court has applied a two-part test. This test asks (1) whether the penalty comports with contemporary values and (2) whether in the court's independent judgment the penalty is commensurate with the crime and the defendant and whether the punishment serves valid penological goals. (*See, e.g., Graham v. Florida*, 130 S.Ct at p. 2026; *Kennedy v. Louisiana* (2008) 554 U.S. 407, 441; *Roper v. Simmons, supra*, 543

U.S. at pp. 568, 571-572; *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318-320.)

Application of this test here requires a conclusion that imposing a substantially more severe sentence on a defendant by virtue of a felony-murder special circumstance finding where that defendant did not intent to kill, and no finding of enhanced intent has been made, is disproportionate to the crime. In *Atkins*, the Court emphasized, that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (536 U.S. at p. 312.) An analysis of legislation in the felony-murder area suggests that a scheme which permits enhanced sentences for felony murder without any culpable intent as to the murder itself is disproportionate.

One scholar has recently summarized the legislation nicely. "Of the thirty-nine death penalty jurisdictions (thirty-seven states, the United States, and the United States military), there are at most five jurisdictions other than California -- Florida, Georgia, Idaho, Maryland, and Mississippi -- where a defendant may be death-eligible for felony-murder simpliciter." (Shatz, The Eighth Amendment, the Death Penalty, and Ordinary Robbery-BurglaryMurderers: a California Case Study (2007) 59 Fla. L. Rev. 719, 761 (hereafter "Shatz"). *See* Fla. Stat. Ann. §§ 782.04(1)(a)(2)-(3), 921.141(5)(d) (West Supp. 1997); Ga. Code Ann. § 16-5-1(c) (1996); *id.* § 17-10-30(b)(2) (1997); Idaho Code Ann. §§ 18-4003(d), 19-2515(9)(g); Md. Ann. Code art. 27, §§ 408-10, 412(b),

413(d)(4), (10) (1996); Miss. Code Ann. §§ 97-3-19(2)(e), (f), 99-19-101(5)(d) (1994).) Thus, 44 states (31 death penalty states and 13 non-death penalty states), the federal government (*see* 18 U.S.C. § 3591(a)(2)) and the United States military (*see* Manual for Courts-Martial United States (2005) R.C.M. 1004(c)), reject felony-murder *simpliciter* as a basis to subject a defendant to death as an enhanced punishment -- an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).[26]

Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values," in both *Atkins* and *Simmons*, the Court has also considered other evidence of contemporary values: professional opinion within this

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[26] The numbers may actually be even more favorable. Although as noted above both Florida and Mississippi have statutes which appear to authorize the death penalty for felony-murder absent a finding of some more culpable mental state, case law in these states has called this reading of the statutes into question.

Thus, the Florida Supreme Court has applied the *Enmund-Tison* principle requiring some kind of more-culpable mental state to actual killers. (*See Stephens v. State* (Fla. 2001) 787 So. 2d 747, 759-761.) Moreover, as Professor Shatz has noted, that court has "apparently never upheld a death sentence on the basis of a felony-murder aggravator alone. Hon. O.H. Eaton, Jr., Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact the Death Penalty in Florida, 34 Stetson L. Rev. 9, 50 (2004)." (Shatz at p. 761, n. 247.) Similarly, in a case involving an actual killer the Mississippi Supreme Court has observed that "to the extent that the capital murder statute allows the execution of felony murderers, they must be found to have intended that the killing take place or that lethal force be employed before they can become eligible for the death penalty . . . ." (*West v. State* (Miss. 1998) 725 So. 2d 872, 895.)

country and international practice. (*See Roper v. Simmons, supra*, 543 U.S. at pp. 569-578; *Atkins v. Virginia, supra*, 536 U.S. at p. 316 n.21.) These factors too support the position that imposition of death absent a finding beyond mere felony murder violates the Eighth Amendment.

With regard to professional opinion, several studies have rejected felony murder as a basis for death eligibility absent a finding of an intent to kill. For example, in Massachusetts, the Report of the Governor's Council on Capital Punishment, proposed a "model" death penalty law. In the course of that proposal, the council recommended that death-eligibility be limited to defendants who "committed the murder with deliberately premeditated malice aforethought, with respect to the victim's death." (Symposium, Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report (2005) 80 Ind. L.J. 1, 5.) Similarly, in Illinois, the Report of the Governor's Commission on Capital Punishment recommended elimination of Illinois's "course of a felony" eligibility factor -- even though that factor was far narrower than California's special circumstance because it required an intent to kill. (Report of the Governor's Commission on Capital Punishment (2002) at p. 72.)

International opinion also supports this view. For at least half a century the Court has held cases from other jurisdictions are relevant in evaluating the evolving meaning of

the Eighth Amendment. (*See, e.g., Trop v. Dulles* (1958) 356 U.S. 86, 102-103; *Roper v. Simmons, supra*, 543 U.S. at pp. 575-576; *Atkins v. Virginia, supra*, 536 U.S. at p. 317, n. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830-831, and n. 31; *Coker v. Georgia* (1977) 433 U.S. 584, 596, n. 10.)

Article 6 (2) of the International Covenant on Civil and Political Rights (to which the United States is a party) provides that the death penalty may be imposed only for the "most serious crimes." (International Covenant on Civil and Political Rights, art. 6(2), adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Jan. 3, 1976); *see also* American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 4(2), 1144 U.N.T.S. 123 (entered into force July 18, 1978).) In 1984, the Economic and Social Council of the United Nations, interpreted this restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. Res. 1984/50, U.N. ESCOR, 1984 Sess., Supp. No. 1, U.N. Doc. E/1984/84 (1984).) The council stated that the death penalty should be imposed only for intentional crimes. (*Ibid.*) These safeguards were subsequently endorsed by the General Assembly. (G.A. Res. 39/118, 2, U.N. Doc.

A/RES/39/118 (Dec. 14, 1984).)[27] And the United Nations Special Rapporteur considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Mr. Bacre Waly Ndiaye, Submitted Pursuant to Commission Resolution 1997/61 21, U.N. Doc., E/CN.4/1998/68/ Add.3 (Jan. 22, 1998).)

Not only is imposing death on a defendant who has killed in the absence of a finding of intent to kill contrary to evolving standards of decency in this country and internationally, it fails to serve either of the penological purposes -- retribution and deterrence -- identified by the Supreme Court. With respect to retribution, the Court has made clear that retribution must be calibrated to the defendant's culpability, which in turn depends on his mental state with regard to the crime. "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund v. Arizona*, *supra*, 458 U.S. at pp. 798-799. *See also Tison v.*

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[27] The safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. Although the safeguards are not binding, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (Restatement (Third) of the Foreign Relations Law of the United States (1986) § 103.)

Arizona, *supra*, 481 U.S. at 156 ["the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished."].)

Nor does enhancing punishment for killings absent an intent to kill or other culpable mental state serve any deterrent purpose. As the Supreme Court has recognized, enhanced punishment "can serve as a deterrent only when murder is the result of premeditation and deliberation." (*Enmund v. Arizona*, *supra*, 458 U.S. at pp. 798-99. *Accord Atkins v. Virginia*, *supra*, 536 U.S. at p. 319.) "Fundamental principles of criminal responsibility dictate that the defendant be subject to a greater penalty only when he has demonstrated a greater degree of culpability [and] [t]o ignore that rule is at best to frustrate the deterrent purpose of punishment, and at worst to risk constitutional invalidation on the ground of invidious discrimination." (*See People v. Taylor* (1970) 3 Cal.3d 578, 593 [Mosk, J., dissenting], overruled on other grounds in *People v. Antick* (1975) 15 Cal.3d 79, 92, n.12.) Put simply, the law simply cannot deter a person from causing a result he never intended.

In short, imposing a death sentence for felony murder -- as opposed to a 25 year-to-life sentence -- absent a finding that the defendant harbored a more culpable mental state does not comport with contemporary values and serves no genuine penological

purpose. To the extent Mr. Miles's death sentence rests on the felony-murder special circumstances here, that sentence is unconstitutional and must be reversed.

COMPETENCY PHASE ISSUES

VIII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AT THE COMPETENCY HEARING IN PERMITTING THE PROSECUTOR TO CROSS-EXAMINE MR. MILES'S TRIAL ATTORNEY ABOUT HIS STRATEGIES AND TACTICS.

A. The Relevant Facts.

On April 14, 1999, after the jury returned its guilt phase verdict, defense counsel Canty informed the trial court that Mr. Miles was ranting and raving, and was unable to assist him in preparing to present mitigation. (13 RT 4696-4704.) Mr. Canty asked to continue the case to obtain a competency evaluation. (13 RT 4705-4706.) On April 19, 1999, the trial court heard testimony from psychologist Dr. Joseph Lantz who evaluated

Mr. Miles and concluded that he (Mr. Miles) was schizophrenic and incompetent to stand trial. (13 RT 4709-4726.)[28]

The trial court declared a doubt as to Mr. Miles's competency and suspended proceedings pursuant to Penal Code section 1368. (13 CT 4749.) On July 22, 1999, a competency hearing began in front of a separate jury. (14 RT 5029.)

A different attorney from the public defender's office -- David Negus -- was appointed to represent Mr. Miles. Defense counsel presented the testimony of five doctors. Each examined and evaluated Mr. Miles, and all concluded that Mr. Miles suffered a schizophrenic disorder which affected his ability to participate and cooperate in his own defense. (14 RT 5031-5032, 5035-5044, 5070 [after examining defendant four

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[28] As discussed in the Statement of Facts, this was not the first time Mr. Miles's competency was in serious question. Defense counsel first raised the issue during the plea negotiation proceedings. (3 RT 731; 13 CT 3663-3664.) Counsel submitted a medical evaluation from Dr. Lantz explaining that Mr. Miles had experienced a "very serious deterioration in his mental status" and was "clearly psychotic at this time" suffering "[b]izarre and paranoid delusions," (13 CT 3665.) The trial court suspended proceedings but ultimately found Mr. Miles competent. (3 RT 752-754.)

Defense counsel raised the competency issue again during the guilt phase. Counsel explained that Mr. Miles was experiencing auditory hallucinations in which a spirit was advising him to ignore counsel's advice and testify. (9 RT 3495-1.) Dr. Lantz again testified, stating that defendant's delusions were interfering with his ability to testify and cooperate with counsel. (9 RT 3499-3504.) The court refused to suspend proceedings. (9 RT 3510-3511.)

times, Dr. Richard Dudley concludes that Mr. Miles suffered schizo-affective disorder since he was a boy, which now detrimentally impacted his ability to cooperate with counsel]; 15 RT 5207-5236 [Dr. Joseph Wu's concludes Mr. Miles's PET scan was consistent with the schizophrenia diagnosis]; 15 RT 5281-5283 [Dr. Ernie Meth concludes Mr. Miles's SPECT scan which showed Mr. Miles had "several areas, specifically in the front of the brain, that have holes" and "two horns" which "are not getting sufficient blood flow" were "very consistent" with Dr. Wu's findings]; 15 RT 5310-5319; 5364-5391 [Dr. Shoba Sreenivasan concludes the PET and SPECT scans were consistent with brain trauma and decreased cognitive functioning, and because of his psychotic and paranoid behavior, Mr. Miles was not competent to stand trial]; 15 RT 5373 [Dr. Lantz concludes Mr. Miles was schizophrenic, and suffered "auditory hallucinations" where he "does truly hear voices" and suffers delusions, including "completely incorporat[ed] Wilhelmena into his life" who remains "alive in his mind;" defendant now trusted Wilhelmena more than his own attorneys, and she was "the person that he listens to . . . ."].)

The state was having none of it, theorizing that Mr. Miles was malingering. The state presented two experts who concluded that Mr. Miles was competent, and opined that the expert conclusions to the contrary were the result of Mr. Miles's malingering. (16 RT 5431-5443 [Lee Guerra]; 16 RT 5557-5576 [Jose Moral].) The state also presented

videotapes of Mr. Miles in county jail, showing moments of him acting rationally. (16 RT 5539-5543, 5737-5743.) But the state then went one step further.

During the defense case, defense counsel sought to call Mr. Canty to testify about his observations of Mr. Miles. After all, Mr. Canty was in a prime position to explain how Mr. Miles was cooperating in his own defense. Without Mr. Canty's testimony, the jury would be forced to decide the competency issue based primarily on the testimony of competing experts.[29]

Prior to Mr. Canty's testimony, the prosecutor warned that his cross-examination of Mr. Canty would not be limited to Mr. Canty's observations of and discussions with Mr. Miles. The prosecutor informed the trial court, "I think there are strategic advantages to a finding of incompetency at this stage of the proceedings, and I think I should be permitted to pursue those advantages, question him about those as an expert, in

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[29] This was no enviable task on the jury's part. A "certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think, and give more credence to the testimony . . . ." (*United States v. Hines* (D. Mass.1999) 55 F.Supp.2d 62, 64; *United States v. Hebshie* (D.Mass.2010) 754 F.Supp.2d 89, 113 [same]. *See also People v. Bledsoe* (1984) 36 Cal.3d 236, 251 [noting that expert testimony creates an "aura of special reliability and trustworthiness"]; *Michigan Millers Mut. Ins. Corp. v. Benfield* (11th Cir.1998) 140 F.3d 915, 920 ["The use of 'science' to explain how something occurred has the potential to carry great weight with a jury."].) Where these presumably reliable, credible and trustworthy experts themselves disagree in their conclusions, the jury is forced to resolve a difference that the experts themselves could not do.

questioning his motives and alike [sic]." (15 RT 5127.) According to the prosecutor, "tactics involving death penalty litigation in general, the advantages of having a separate panel impaneled for a new penalty phase that hasn't heard the guilt phase" are "all fair game." (15 RT 5128.)

Defense counsel objected. According to counsel, Mr. Canty's "strategic reasons for wanting a second penalty phase, or not wanting a second penalty phase jury" was "tangential information" and a "peripheral issue" to the jury's determination of "the ultimate issue of Mr. Miles's competence." (15 RT 5131.) The trial court agreed, ruling, "I don't think I can say Mr. Canty's free game," and although the prosecutor "could cross-examine on [conversations with Mr. Miles] and the circumstances surrounding those conversations" if the prosecutor's examination crossed "a fine line" into privileged material or "into an area of what we call strategy, motive, trial tactics, then let's address it before out of the presence of the jury so I can make a ruling on it." (15 RT 5128, 5132.)

With this understanding, defense counsel called Mr. Canty to the stand. Mr. Canty testified that Mr. Miles believed (counsel) was working with the prosecutor's office, he believed evidence had been planted by Los Angeles police, he believed he was being poisoned in jail, he suggested counsel should investigate a dentist in one of the business parks where the crime occurred, he told counsel that he (defendant) would "fix

everything" because "there was some destiny involved in him taking the stand," and he changed his mind about testifying because the ghost of the victim told him to apologize to counsel and that he "shouldn't testify." (15 RT 5166-5170, 5173, 5179.)

On cross-examination, and despite the trial court's earlier ruling, the prosecutor took the questioning straight into Mr. Canty's tactical strategy behind the competency hearing. The prosecutor established that there were two phases of a death penalty case -- "the so-called guilt phase, which we've already concluded, and then there's a second phase, which is a penalty phase" -- and then established that Mr. Miles's "penalty phase jury" was "sort of in limbo right now waiting for the outcome of this case." (15 RT 5201.)

The prosecutor then asked counsel about whether "the effect of a finding of incompetency in this particular trial would mean that that jury [the penalty phase jury] would be discharged" under section 1368. (15 RT 5201.) Counsel replied he did not know nor did he know how "the Judge will feel about keeping the jury." (15 RT 5201.) And then, without seeking a ruling from the trial court as agreed, the prosecutor asked Mr. Canty if "there's a tactical advantage in death penalty cases to have a second, separate jury impaneled for the penalty phase that did not hear the guilty phase." (15 RT 5132, 5202.)

Defense counsel immediately interrupted, and at a bench discussion, requested an offer of proof because "[i]t sounds like we're getting into Mr. Canty's tactical decisions." (15 RT 5202-5203.) The prosecutor again confirmed that "one of [his] arguments is going to be that this [the competency trial] is the result of a tactical decision to try to get the jury -- have a different jury decide the issue of penalty." (15 RT 5203.) Counsel objected because "there's the problem of it having very slight probative value, and lots of prejudicial effect in requiring Mr. Canty to explain to [the prosecutor] his trial tactics." (15 RT 5303.) The trial court took the matter under submission. (15 RT 5203.)

The following morning, the prosecutor again confirmed that he "want[ed] to make the argument, or suggestion to the jury, that a motive for the competency hearing was to have Mr. Miles found not competent, and consequently the present penalty phase jury would have to, more than likely, would have to be excused" and "a new jury determine the issue of penalty." (15 RT 5254.) Over objection, the trial court ruled that "whether that is [Mr. Canty's] motive or not, and I'm certainly not trying to make any judgment on that, I suppose that it certainly would be relevant for [the prosecutor] to argue that if he chooses to do that." (15 RT 5254.) According to the court, "while it does deal with the subject of the strategy that we were concerned about before, it's basically strategy or motive for this proceeding, as opposed to overall strategy in the penalty phase, and I think directly would be relevant on this, on this issue." (15 RT 5254-5255.) The court ruled

that "I'm allowing you to bring before the jury this question of motivation to bring this action, bring this competency hearing." (15 RT 5259.)

Back in the presence of the jury, the prosecutor asked Mr. Canty if it "frequently" was "a defense tactic in capital cases to seek a new jury for the penalty phase, a separate jury that hasn't heard the guilt phase evidence." (15 RT 5260.) Mr. Canty replied, "I would think that depending upon the status of the case and a given case, I could conceive that counsel might wish to have another jury handle the penalty phase, and there would be a variety of reasons for that." (15 RT 5260.) Upon further questioning, Mr. Canty admitted that he made this tactical decision when he represented Joseph Cook in 1994, and filed a motion for a separate jury to decide the penalty phase in that case. (15 RT 5262.) Finally, Mr. Canty admitted that if Mr. Miles were found incompetent, the criminal proceedings would be suspended and the current penalty phase jury would be discharged pursuant to section 1368. (15 RT 5293.)

The prosecutor took full advantage of the trial court's admission of this evidence. In closing argument, the prosecutor urged the jury to find the state's two experts more credible than the defense experts because the defense experts were hired guns, paid thousands of dollars while the state's experts were only paid a few hundred, and "the economic lesson here is that if you come to a decision that is going to benefit the

prosecution you're not going to get very much money." (17 RT 5832.) Instead, according to the prosecutor, "what is really going on here" is that Mr. Canty's "role is to use every legal means to insure that Miles escapes the death penalty" and "make no mistake that the competency is played as a tactic." (17 RT 5844.)

The prosecutor reminded the jury that the guilt phase jury quickly convicted Mr. Miles of "every felony count, every special circumstance, every enhancement" and the defense "knew they [the guilt phase jurors] were going to be deciding his fate" in the penalty phase." (17 RT 5843-5844.) According the prosecutor, Mr. Canty had tactically filed for a separate jury penalty phase jury in the past, and knew a "finding the incompetence in this phase guarantees the same result." (17 RT 5845.) The prosecutor urged the jury to see through the "tactic that [Mr. Canty's] used in this case" and concluded, "let the penalty phase jury proceed, the jury that's heard the evidence, that's dedicated a large part of this year to this case and let them decide what should properly be decided by them." (17 RT 5846, 5851.) Ultimately, the jury found Mr. Miles competent.

Of course, the competency hearing was not supposed to be about whether the guilt phase jury remained on the case to decide Mr. Miles's penalty. Instead, it was supposed to be about whether Mr. Miles was competent and able to cooperate with Mr. Canty. As more fully discussed below, the trial court erred in admitting evidence about Mr. Canty's

trial tactics and motive for seeking a competency hearing. The evidence was entirely irrelevant to the determination of whether Mr. Miles was actually competent and could cooperate with Mr. Canty in his own defense. Moreover, the evidence was precluded from disclosure by the attorney-client privilege and work-product doctrine, and should never have been admitted. Because the prosecutor relied heavily on the evidence in closing argument, the error cannot be deemed harmless.

B. Evidence Of Mr. Canty's Strategy And Tactics Was Irrelevant To The Jury's Determination Of Competency And Was Protected From Forced Disclosure By The Attorney-Client and Work-Product Privileges.

1. The inflammatory evidence of Mr. Canty's strategy and tactics was irrelevant to the jury's determination of Mr. Miles's competency.

"[T]he criminal trial of an incompetent defendant violates due process." (*Medina v. California* (1992) 505 U.S. 437, 453.) The test under the federal Constitution "is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." (*People v. Taylor* (2009) 47 Cal.4th 850, 861, citations omitted.)

California statutes similarly forbid a person from being "tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) Although the wording of the federal and state tests is not identical, the tests are the same. (*People v. Jablonski* (2006) 37 Cal.4th 774, 808.)[30]

Here, the issue before the jury was Mr. Miles's competence. To this end, "[o]nly relevant evidence is admissible [citations], and, except as otherwise provided by statute, all relevant evidence is admissible [citations]." (*People v. Crittenden* (1994) 9 Cal.4th 83, 132; Evid.Code, §§ 350, 351.) While a trial court has "broad discretion" in determining the relevance of evidence, it lacks discretion to admit irrelevant evidence. (*People v. Crittenden, supra*, 9 Cal.4th at p. 132.) Indeed, the Supreme Court has long held that "[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States* (1968) 391 U.S. 123, 131, n.6.)

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[30] Of course, the burden of proof is not the same in a competency proceeding as in a criminal trial, and its allocation may also be different. A defendant is presumed to be mentally competent, and it is the defendant who must prove -- by a preponderance of the evidence -- that he is mentally incompetent. (§ 1369, subd. (f).) Thus, in the present case, the burden of proof was on Mr. Miles.

"Relevant evidence" is defined as evidence "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.) "'While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury.' [Citation.]" (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) Evidence is irrelevant, however, when it leads only to speculative inferences. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Here, both defense counsel and the trial court were very aware of the dangers of introducing irrelevant evidence on the issue of Mr. Miles's competency. As counsel put it, Mr. Canty's "strategic reasons for wanting a second penalty phase, or not wanting a second penalty phase jury" was "tangential information" and a "peripheral issue" to the jury's determination of "the ultimate issue of Mr. Miles's competence." (15 RT 5131.) The court ruled, "if it's getting into an area of what we call strategy, motive, trial tactics, then let's address it before out of the presence of the jury so I can make a ruling on it." (15 RT 5132.)

But that is not what happened. To the contrary, the prosecutor ignored the trial court's ruling, and without asking leave of the trial court, cross-examined Mr. Canty about the "frequently" used defense tactic of obtaining a finding of incompetency after the guilt phase jury has reached its verdict, in order to stall proceedings while a defendant's competency was restored, necessitating the discharge of the guilt phase jury and the impaneling of a second jury for the penalty phase. (15 RT 5201-5202.) On defense counsel's immediate objection the prosecutor confirmed that "one of [his] arguments is going to be that this [the competency trial] is the result of a tactical decision to try to get the jury -- have a different jury decide the issue of penalty." (15 RT 5203.) As noted above, the trial court admitted the evidence, ruling that evidence of Mr. Canty's motive to seek an incompetence finding had "some, certainly some relevance more than just a minimum amount of relevance . . . ." (15 RT 5254.)

The trial court was wrong. Whether Mr. Canty perceived a tactical advantage of having a second penalty phase jury, and was motivated to seek a finding of incompetence to secure discharge of the guilt phase jury, was hardly relevant to the jury's determination of whether Mr. Miles was indeed, incompetent.

In making this argument, Mr. Miles recognizes that in many cases, evidence of a testifying witness's motivation might be useful to assessing the credibility of the witness.

But here, Mr. Canty was a sworn officer of the court. He was testifying under penalty of perjury about his observations and conversations with Mr. Miles. Whether or not Mr. Canty believed that a verdict finding Mr. Miles incompetent would ultimately benefit his client said nothing about Mr. Miles's competency. As defense counsel aptly put it, Mr. Canty's tactical decisions was "tangential information" and a "peripheral issue" to the jury's determination of "the ultimate issue of Mr. Miles's competence." (15 RT 5131.) Indeed, the prosecutor's theory that Mr. Canty's state of mind would shed light on Mr. Miles's mental health required the exact type of speculative inference condemned by this Court as irrelevant. (*See Morrison, supra,* 34 Cal.4th at p. 711.)

But even if the trial court was correct -- and the evidence had some marginal relevance -- the evidence was inadmissible under section 352. Evidence Code section 352 limits the admission of relevant evidence. When an objection is raised under this statute, "the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled. [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)[31]

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[31] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court enjoys "broad discretion" in assessing probative value versus prejudicial effect. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The reviewing court must review for abuse of discretion a trial court's overruling of a defendant's objection on relevance or Evidence Code section 352 grounds. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.) In determining whether a trial court has abused its discretion, this Court has noted that "[d]iscretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) Other courts have written that discretion is abused only when the trial court's ruling was "arbitrary, whimsical or capricious." (*See, e.g., People v. Linkenauger* (1995) 32 Cal.App.4d 1603, 1614.)

With respect, neither of these phrasings is particularly helpful or, indeed, even accurate. While "exceed[ing] the bounds of reason," or making an "arbitrary, whimsical or capricious" ruling will certainly be sufficient for a reviewing court to conclude a trial court has abused its discretion, these are certainly not the necessary requirements for a conclusion that discretion has been abused. Indeed, some courts have criticized these colorful descriptions of the abuse of discretion standard in search of principles that can actually be used in practice. (*See People v. Jacobs* (2007) 156 Cal.App.4th 728, 736; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 [criticizing the "arbitrary, whimsical or capricious" test as "pejorative boilerplate"].) Putting aside colorful

descriptions and "pejorative boilerplate," the ultimate question is whether the trial court's decision was unreasonable in light of the governing law and the facts presented. (*People v. Jacobs*, *supra*, 156 Cal.App.4th at pp. 737-738.)

Here it plainly was. Evidence is prejudicial within the meaning of Evidence Code section 352 if it " 'tends to evoke an emotional bias against the defendant.' [Citation.]" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.) Stated another way, evidence is prejudicial "if it encourages the jury to prejudge defendant's case based upon extraneous or irrelevant considerations. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 863.) "Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

Here, defense counsel objected to evidence of Mr. Canty's tactics under section 352. (15 RT 5253.) Counsel argued, "I felt that what little probative value there is in that area -- I mean, other than the fact that Mr. Canty's already testified that he is totally committed to Mr. Miles' [sic] defense, which shows his bias, going into that particular detail I thought was just extremely inflammatory . . . ." (15 RT 5253.) According to counsel, the prosecutor "is basically arguing to them, hey, it's your job to protect your fellow jurors in the other jury." (15 RT 5254.)

In fact, defense counsel's fears were well-founded. The prosecutor ultimately told the competency-phase jury in closing argument that it should not fall for Mr. Canty's manipulative tactic and instead, should "let the penalty phase jury proceed, the jury that's heard the evidence, that's dedicated a large part of this year to this case and let them decide what should properly be decided by them." (17 RT 5846, 5851.) Thus, the prosecutor never claimed that the evidence undermined the credibility of Mr. Canty's testimony about what he saw and heard when representing Mr. Miles, but instead used this evidence for the prejudicial and inflammatory purpose of telling the jury that the entire competency hearing was a ruse, and it should not rob the guilt phase jury of its entitlement to decide Mr. Miles's penalty. On this record, the trial court's ruling cannot stand.

2. The evidence of Mr. Canty's strategy and tactics was protected from disclosure under the attorney-client privilege.

Even if the evidence was relevant, and its probative value outweighed its prejudicial effect such that the trial court did not err in overruling defense counsel's objections on these bases, there is still another problem. The evidence was inadmissible because Mr. Canty's trial tactics were protected from disclosure under the attorney-client privilege.

"[T]he fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client [citation], and the primary harm in the discovery of privileged material is the disruption of that relationship. . . ." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740-741.) To effectuate this purpose, the attorney-client privilege, codified at Evidence Code section 954, gives a client the right "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer[.]" Evidence Code section 952 broadly defines "confidential communication between client and lawyer" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted,

and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."[32]

While most instances in which an assertion of the privilege is upheld involve communications between an attorney and client, the statutory language is not so narrow. As noted above, the definition of a protected "confidential communication" includes "a legal opinion formed." "In 1967, Evidence Code section 952 was amended to include within the definition of a confidential communication 'a legal opinion formed and the advice given by the lawyer in the course of that relationship.' The comment of the Law Revision Commission to the 1967 amendment makes clear the scope of the amendment. 'The express inclusion of "a legal opinion" in the last clause will preclude a possible construction of this section that would leave the attorney's uncommunicated legal opinion -- which includes his impressions and conclusions -- unprotected by the privilege. Such a construction would virtually destroy the privilege.'" (*Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 99.) Thus, legal opinions formed by counsel during representation of the client are protected "confidential communication[s]," even if the opinions have not

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[32] Evidence Code, section 954 provides: "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: [¶] (a) The holder of the privilege; (b) A person who is authorized to claim the privilege by the holder of the privilege; or (c) The person who was the lawyer at the time of the confidential communication . . . ."

been transmitted to the client. (*Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273.)

Here, in seeking to admit the evidence, the prosecutor argued, "I think there are strategic advantages to a finding of incompetency at this stage of the proceedings, and I think I should be permitted to pursue those advantages, question him about those as an expert, in questioning his motives and alike [sic]." (15 RT 5127.) According to prosecutor, "tactics involving death penalty litigation in general, the advantages of having a separate panel impaneled for a new penalty phase that hasn't heard the guilt phase" are "all fair game." (15 RT 5128.) But Mr. Canty's tactical decisions -- whether or not communicated to Mr. Miles -- were protected from disclosure under the attorney-client privilege, and Mr. Canty should never have been asked or compelled to answer these questions. Error has occurred.

3. The evidence of Mr. Canty's strategy and tactics was protected from disclosure under the work-product doctrine.

There is yet another error here. Mr. Canty's tactical decisions were protected from disclosure under the work-produce doctrine.

Section 2018.030 of the Code of Civil Procedure codifies the work product privilege. Subdivision (a) of that section provides an absolute privilege for "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories," and subdivision (b) provides a qualified privilege for all attorney work product "other than a writing described in subdivision (a)."

For ease of reference, an attorney's "impressions, conclusions, opinions, or legal research and theories" has been referred to by the shorthand phrase "opinion work product." (*See Fireman's Fund Ins. Co. v. Superior Court*, *supra*, 196 Cal.App.4th at p. 1275.) Thus, the statutory language of section 2018.030 indicates that writings encompassing opinion work product are protected by the absolute privilege, but the opinion work product itself, if not reduced to writing, is protected by only a qualified privilege.

In fact, however, despite the arguably contrary language of California's absolute work product statute, the privilege also applies to non-written work product. (*Fireman's Fund Ins. Co. v. Superior Court*, *supra*, 196 Cal.App.4th at pp. 1275, 1278 [holding that a contrary interpretation would create absurd results and contradict both the statute's legislative history and the historical development of the work product privilege on the state and national levels].) Indeed, the United States Supreme Court itself -- when first

adopting the work product doctrine -- made perfectly clear that an attorney's thoughts are "inviolate." According to the Court, an attorney's work "is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed . . . the 'Work product of the lawyer.'" (*Hickman v. Taylor* (1947) 329 US 495, 511.) "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." (*Id.*) Put simply, the Court extended protection to written opinion work product because unwritten opinion work product was already inviolate. (*Accord Fireman's Fund Ins. Co. v. Superior Court*, *supra*, 196 Cal.App.4th at p. 1276.)

Here, as discussed above, the prosecutor sought disclosure of Mr. Canty's strategies and tactics. As such, while the questions invaded the attorney-client privilege, the questions also sought unwritten opinion work product of Mr. Canty, and therefore ran afoul of the absolute work product privilege. Error has occurred.

C. Reversal Of The Jury's Competency Finding Is Required, And Remand For A New Competency Hearing Is Required.

The question then becomes one of prejudice. To the extent that the error that occurred here was merely the erroneous admission of evidence, it is subject to review under *People v. Watson* (1956) 46 Cal.2d 818 to determine whether there is a reasonable probability that defendant would have been found incompetent absent the evidence. To the extent the error was of constitutional dimension, the standard under *Chapman v. California* (1967) 386 U.S. 18, 24 applies, requiring the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Accord People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1277-1278 [in reviewing error in competency proceeding, error implicated the defendant's fundamental right not to stand trial while incompetent and therefore must be reviewed under the *Chapman* standard].) In this case, it does not matter which standard is applied. Even under the more lenient *Watson* standard, reversal of the competency finding is required.

Mr. Miles has fully discussed the conclusions of the five different doctors who examined him. There is no need to repeat that discussion here. Suffice it to say that the jury learned that Mr. Miles was a mentally-ill man, who suffered paranoia, delusions and hallucinations since he was a child. (14 RT 5031-5032, 5035-5044.) Medical tests confirmed that Mr. Miles had a very large brain tumor which increased pressure in the

brain, and now had "holes" and "horns" in his frontal lobe causing a lack of blood flow necessary for cognitive brain function. (15 RT 5207-5236; 5281-5283.) Mr. Miles's delusions and hallucinations persisted through trial. He hallucinated about receiving messages from the Willem murder victim, who he now trusted more than his own attorneys, and she was "the person that he listens to . . . ." (15 RT 5373.) Put simply, all medical and psychologic testing led inexorably to the conclusion that Mr. Miles suffered severe brain damage and a schizophrenic disorder which directly impacted his ability to cooperate with counsel. (14 RT 5070.)

Of course, the state called its own experts to opine that Mr. Miles was malingering. (16 RT 5431-5443, 5557-5576.) But in face of the overwhelming and undisputed evidence that Mr. Miles showed symptoms of mental illness since he was a child, along with the sheer number of defense experts willing to come forward and testify that Mr. Miles suffered a schizophrenic disorder and cognitive brain dysfunction, the state experts' testimony that Mr. Miles was lying about his symptoms could well have fallen flat. Indeed, given Mr. Miles had an IQ ranging from 74 to 77, it is difficult to believe that a jury of 12 would unanimously find that Mr. Miles could manipulate the expert and medical findings into a conclusion of incompetency.

But Mr. Canty was another story. He was a well-seasoned defense attorney who admittedly would do anything legal to save his client from the death penalty. The erroneous admission of Mr. Canty's thought process on the benefits of an incompetency verdict allowed the prosecutor to paint a picture of an expert conspiracy concocted by Mr. Canty to (1) persuade the competency-phase jury into an incompetency finding, (2) have the guilt-phase jury discharged, and (3) obtain a second penalty-phase jury. The prosecutor was then able to urge the jury not to be fooled by this tactic, and instead, "let the penalty phase jury proceed, the jury that's heard the evidence, that's dedicated a large part of this year to this case and let them decide what should properly be decided by them." (17 RT 5846, 5851.) On this record, it cannot be said that the erroneous admission of evidence was harmless. This Court should reverse the competency finding and remand for a new competency hearing.

PENALTY PHASE ISSUES

IX. THE PROSECUTOR VIOLATED THE EIGHTH AMENDMENT IN ASKING THE JURY TO SENTENCE MR. MILES TO DIE BASED, IN PART, ON PRIOR FELONY CONVICTIONS COMMITTED WHEN MR. MILES WAS A JUVENILE.

Penal Code section 190.3, subdivision (c) provides that at a capital penalty phase, the state is authorized to introduce evidence showing "[t]he presence . . . of any prior felony conviction." As this Court has observed on numerous occasions, the "purpose of [section 190.3,] factor (c) is to show the capital offense was the culmination of the defendant's habitual criminality -- that it was undeterred by the community's previous criminal sanctions." (*People v. Malone* (1988) 47 Cal.3d 1, 46. *Accord People v. Gurule* (2002) 28 Cal.4th 557, 636; *People v. Melton* (1988) 44 Cal.3d 713, 764; *People v. Balderas* (1985) 41 Cal.3d 144, 202.)

Of course, to serve this purpose it does not matter if the prior felony was committed by the defendant when he was a child or an adult; in either case, the evidence shows he was undeterred by the prior sanctions. Accordingly, there has been no bar on the use of juvenile convictions under subdivision (c). And the prosecutor here took full advantage of this rule, introducing eight prior felony convictions which Mr. Miles suffered as a juvenile, and urged the jury to rely on this evidence in sentencing him to die.

(18 RT 6100; 15 CT 4413 and n. 1.) Defense counsel objected to these convictions on numerous grounds. (15 CT 4411-4424.) The court overruled these objections and admitted the prior conviction allegations. (18 RT 6100-6101.)[33]

The rule permitting the use of juvenile convictions in aggravation of a capital sentence must change in light of a trio of cases from the United States Supreme Court addressing application of the Eighth Amendment to harsh penalties imposed on children: *Roper v. Simmons* (2005) 543 U.S. 551, *Graham v. Florida* (2010) ___ U.S. ___, 130 S.Ct. 2011 and *Miller v. Alabama* (2012) ___ U.S. ___, 132 S.Ct. 2455. In each case, the Court has recognized that there are substantial differences between children and adults, differences which preclude applying traditional concepts of deterrence to juveniles.

In *Roper v. Simmons, supra*, 543 U.S. 551, the Court held that the death penalty could not be imposed on defendants who were under the age of eighteen at the time of the crime. In reaching this result, the Court noted that as compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more

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[33] There should be no dispute that, in fact, eight of the burglary convictions on which the state relied in asking the jury to sentence Mr. Miles to death occurred before defendant turned 18 years old. Defendant's birthday was December 12, 1966. (15 CT 4413.) In June of 1985, defendant pled guilty to eight counts of burglary, all alleged to have occurred before December 12, 1984. (18 RT 6100-6101; 15 CT 4413.) All of these priors were introduced at the penalty phase. (18 RT 6100-6101.)

vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." (*Id.* at pp. 569-70.) Based on these basic differences, the Court concluded that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . ." (*Id.* at p. 571.) This was "of special concern" the Court precisely because "the same characteristics that render juveniles less culpable than adults suggest as well the juveniles will be less susceptible to deterrence." (*Ibid.*) The Court noted what every parent knows -- "the likelihood that the teenage offender has made . . . [a] cost-benefit analysis . . . is so remote as to be virtually nonexistent." (*Id.* at p. 572.)

In *Graham v. Florida*, *supra*, 130 S. Ct. 2011, the Court again recognized that traditional concepts of deterrence do not apply to juveniles. There, the Court addressed the question of whether juveniles could receive a life without parole term for a non-homicide offense. The Court cited scientific studies of adolescent brain structure and functioning which again confirmed the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. Because "their characters are 'not as well formed,'" the Court found that "it would be misguided to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.) The Court

held that deterrence did not justify a life without parole sentence because -- in contrast to adults -- "juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions . . . .'" (*Id.* at p. 2028.)

Finally, in *Miller v. Alabama* (2012) 132 S.Ct. 2455 the Court again addressed the concept of deterrence in connection with juveniles. There, the Supreme Court addressed the question of whether a life without parole term imposed on a juvenile constituted cruel and unusual punishment even for a homicide. Ultimately, the Court "[did] not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . ." (132 S.Ct. at p. 2469.) Instead, the Court reversed the life without parole terms imposed in both of the cases before it by finding that the schemes under which they were imposed were improperly mandatory. (*Id.* at p. 2460.)

But in reaching this more limited decision, it is important to note that the Court fully embraced the view of deterrence expressed in both *Roper* and *Graham*. As it had in both *Roper* and *Graham*, the Court again recognized that because of the the "immaturity, recklessness and impetuosity" with which juveniles act, they are less likely than adult to consider consequences and, as such, deterrence cannot justify imposing a life with parole term on a juvenile. (*Id.* at p. 2465.)

The Court's rationale in these cases directly undercuts the use of juvenile convictions to aggravate penalty in a capital case. As noted above, the reason prior felony convictions are permitted in aggravation at a penalty phase is to show "the capital offense was . . . undeterred by the community's previous criminal sanctions." This is entirely sensible when the prior conviction was committed by an adult. But the opinions in *Roper*, *Graham* and *Miller* establish that juveniles and adults should not be treated the same when it comes to assumptions about deterrence.

To the contrary, in light of what the Supreme Court has said regarding children and deterrence, there are two reasons the traditional rationale for admission of prior felony convictions at a capital penalty phase makes little sense when applied to juvenile convictions. First, in connection with a juvenile conviction, the decision to commit the prior crime itself was made by a juvenile who was not deterred by the criminal sanction applicable to that crime precisely because of a "lack of maturity and underdeveloped sense of responsibility." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2028.) Second, *Roper*, *Graham* and *Miller* all recognize that expecting deterrence from a conviction imposed on a juvenile -- as the state may legitimately expect from an adult -- is a "misguided [attempt] to equate the failings of a minor with those of an adult." (*Graham v. Florida*, *supra*, 130 S. Ct. at p. 2026.)

It is true, of course, that the current crime in this case was committed by defendant when he was an adult. But that does not change the equation in any constitutionally significant way. Aggravating the capital murder here by relying on the fact that when he was a child, defendant was not deterred from committing crimes by the criminal sanction available for that crime, or by conviction for those crimes, implicates the precise concerns about ignoring the impact of youth on the "lack of maturity and . . . underdeveloped sense of responsibility" which juveniles possess and which renders them "less culpable than adults . . . [and] less susceptible to deterrence." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569-572.)

In assessing an Eighth Amendment challenge to a practice, the Supreme Court "looks beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2021. *Accord Roper v. Simmons*, *supra*, 543 U.S. at p. 561; *Trop v. Dulles* (1958) 356 U.S. 86, 101.) In making this assessment, a reviewing court must look to "objective indicia of society's standards, as expressed in legislative enactments . . . ." (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2022. *Accord Roper v. Simmons*, *supra*, 543 U.S. at p. 563.) With these objective indicia in mind, the court must then bring its independent judgment to bear on the constitutional question. (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2022; *Roper v. Simmons*, *supra*, 543 U.S. at p. 563.)

The objective criteria consistently point in the same direction. Legislation from around the country establishes a clear nationwide consensus recognizing that because of their more limited decision-making capabilities in weighing future consequence, juveniles must be protected from making decisions that can adversely impact the rest of their life.

There are many examples. As the Supreme Court noted in *Roper* itself, "[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569.) Every state precludes juveniles under the age of 18 from drinking alcohol. (*See*, *e.g.*, *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 589 [noting that "every state prohibits the sale of alcohol to those under 21 . . . . "].) Every state precludes juveniles from using tobacco products. (*See Clay v. American Tobacco Co.* (S.D. Ill. 1999) 188 F.R.D. 483, 486 [noting that every state prohibits sale of tobacco products to minors].) Similarly, the vast majority of states do not even permit juveniles under 18 to decide whether to get a

tattoo.[34]

There is a basic, common strand -- a national consensus -- reflected by these consistent legislative judgments. Legislatures throughout the country recognize that as a class, juveniles are simply not developed enough to make the kinds of decisions which can impact the remainder of their life -- such as the decision to take up smoking, to drink, to marry, or even to get a tattoo. In turn, *Roper* and *Graham* recognized that the common concerns about maturity which animated these otherwise diverse legislative enactments are a key factor in assessing the constitutionality of a practice that involves juveniles.

Significantly, *Roper* and *Graham* do not stand alone in recognizing the special fragility of juveniles and the implication of this recognition in assessing the protection

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[34] *See* Ala. Code § 22-17A-2; Alaska Stat. Ann. §08.13.217; Ariz. Rev. Stat. Ann. § 13-3721; Ark. Stat. Ann. § 5-27-228; Cal. Penal Code § 653; Col. Rev. Stat. Ann. § 25-4-2103; Conn. Gen. Stat. § 19a-92g; Del. Code Ann. Title 11, Ch 5 § 1114(a); Fla. Stat. § 877.04; Ga. Code §16-5-71; Hawaii Rev. Stat. § 321-379; Idaho Code § 18-1523; Ill. Pub. Act 094-0684; Ind. Code Ann. § 35-42-2-7; Iowa Code § 135.37; Kan. Stat. Ann. § 65-1953; Ky. Rev. Stat. § 211.760; La. Rev. Stat. Ann. § 14:93.2; Me. Rev. Stat. Ann. Title 32, Ch. 63 § 4203; Mich. Comp. Laws Ann. § 333.13102; Minn. Stat. § 609.2246; Miss. Laws § 73-61-1; Mo. Rev. Stat. § 324.520; Mont. Code Ann. § 45-5-623; Neb. Rev. Stat. § Sec. 427 71-3; N.J. Stat. Ann. § 2C:40-21; N.C. Gen. Stat. § 14-400; N.D. Cent. Code § 12.1-31; Ohio Rev. Code Ann. § 3730.06; Okla. Stat. Title 21 § 842.1, 842.2; Pa. Cons. Stat. Title 18 § 6311; RI General Laws § 11-9-15; S.C. Code Ann. § 44-34-60; S.D. Codified Laws Ann. § 26-10-19; Tenn. Code Ann. § 62-38-207; Texas Health and Safety Code Ann. § 146.012; Utah Code Ann. § 76-10-2201; Vt. Stat. Ann. Title 26 § 4102; Va. Code § 18.2-371.3; Wash. Rev. Code § 26.28.085; W. Va. Code § 16-38-3; Wis. Stat. § 948.70; Wyo. Stat. § 14-3-107.

juveniles should be given. (*See, e.g., J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2403 ["[T]he common law has reflected the reality that children are not adults" and has erected safeguards to "secure them from hurting themselves by their own improvident acts."]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 ["Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults."].)

In sum, allowing the state to aggravate a capital sentence by relying on actions the defendant took as a juvenile violates not only the principles animating the Court's decisions in *Miller*, *Graham*, and *Roper*, but a national consensus recognizing that juveniles are simply not mature enough to make decisions which impact the rest of their lives. The practice cannot be squared with the Eighth Amendment.

Because the erroneous admission of this evidence at the penalty phase violated defendant's Eighth Amendment rights, reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional errors require reversal unless the state can proven the error harmless beyond a reasonable doubt].) The state will be unable to carry its burden here for three reasons.

First, although the circumstance of this capital crime were undeniably tragic (as in all capital murders), the case does not present the type of unusually heinous crime the Court often sees giving rise to a death sentence. (*See, e.g., In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for murdering five people]; *People v. Bittaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnaping, raping, sodomizing and murdering five teenage girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after murdering ten people].) In contrast to these egregious cases, this case involves a single homicide committed during a rape and robbery.

Nor does this case involve the type of particularly heinous defendant the Court often sees in death penalty cases. (*See, e.g., People v. Ray* (1996) 13 Cal.4th 313, 330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant convicted of murder in 1985 had killed his three children in 1964 and had been on death row for these prior homicides]; *People v. Hendricks* (1987) 43 Cal.3d 584, 588-589 [defendant had two prior murder convictions].) Here, while it is certainly true that prior to the charged crimes, defendant had been convicted of other offenses, his history does not match up to the truly worst of the worst.

Most important, this was not a case bereft of mitigation. Plainly this was a defendant who had serious and debilitating mental impairments which started some time

before the crime itself. Defendant was hospitalized for a psychotic episode when he was 19 years old. (18 RT 6418.) And according to clinical social worker David Mallon, in April of 1992 -- months *before* his arrest in this case -- defendant came into a Los Angeles mental health clinic with his mother seeking help. (19 RT 6464-6470.) Mallon knew defendant's mother because she had been a patient at the clinic for schizophrenia. (19 RT 6464, 6471.)

Defendant had been wandering off to places, and did not know how he got there. (19 RT 6464.) Defendant's mother noted a marked decline in his functioning in the prior 6 to 12 months. (19 RT 6471.) Defendant was disoriented, he did not know the correct date and he reported hallucinations and buzzing in his ears. (19 RT 6471.) Defendant stated his fears that a shadow was coming into his room to attack him. (19 RT 6471.)

Later, medical records showed that defendant had a brain tumor, which began growing in 1987. (18 RT 6371-6377, 6422-6428.) According to Dr. Richard Dudley, the tumor itself could have caused both lower cognitive functioning and personality changes. (*Ibid.*) Of course, the tumor had not been removed at the time of the crime itself; it was not removed until 1993.

Prior to trial, numerous mental health experts confirmed that defendant was indeed mentally ill. Psychologist Joseph Lantz examined defendant and testified that defendant had an IQ ranging from 74 to 77 and suffered from schizophrenia. (18 RT 6198-6200, 6204-6218, 6227-6232, 6238-6252.) Dr. Lantz administered the Stroop Neuropsych Screening test to look for brain impairment; based on the results, Dr. Lantz concluded there was a 95% chance that defendant was suffering from some kind of brain impairment. (18 RT 6200-6204.) Dr. Dudley also examined defendant and found that he suffered from schizophrenia. (19 RT 6351-6356, 6390-6404.)

Available physical tests confirmed these diagnoses. Thus, Dr. Joseph Wu performed a PET scan of defendant's brain; his findings about what parts of the brain were active were entirely consistent with the schizophrenia diagnosis. (18 RT 6289-6233.) Dr. Ernie Meth performed a SPECT scan on defendant; the scan showed holes the frontal lobe of the brain and insufficient blood flow to that area of the brain. (19 RT 6451-6458.) Dr. Meth noted that this kind of reduced blood flow is typically associated with patients showing a lack of impulse control. (19 RT 6449.)

Moreover, in addition to this medical evidence, the jury heard evidence in mitigation about defendant's background, both before and after the onset of his mental illness. Thus, family friend and former police officer Sharon Mitchell -- who knew

defendant well when he was a child -- testified that as defendant was gentle and quiet as a child and not good in school. (19 RT 6582, 6599, 6613.) He was not violent. (19 RT 6582.) Mitchell recalled defendant's father as abusive. (19 RT 6585.) Mitchell and her son Dwayne Washington (who was defendant's best friend growing up) testified to early incidents suggesting the onset of mental problems, where defendant would complain of hearing voices, memory lapses and blackouts and sometimes engage in very odd behavior. (19 RT 6585, 6588, 6591, 6603, 6606, 6620.)

In assessing all this evidence in mitigation, and in determining if the state can prove the error here harmless beyond a reasonable doubt, it is important to recall that the question is not whether the jury would have unanimously imposed a life sentence absent the error. Instead, it is whether on this record a single juror could reasonably have imposed a life sentence. (*See People v. Soojian* (2010) 190 Cal.App.4th 491, 521; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736; *People v. Brown* (1988) 46 Cal.3d 432, 471 n.1 [conc. on. of Brossard, J.] [noting that a "hung jury is a more favorable verdict" then a guilty verdict].) On this record, the state will be unable to prove beyond a reasonable doubt that not a single juror would have imposed a life verdict in the absence of the error. A new penalty phase is required.

X. THE TRIAL COURT VIOLATED DEFENDANT'S FIFTH, SIXTH AND EIGHTH AMENDMENT RIGHTS WHEN IT ADMITTED EYEWITNESS TESTIMONY AS TO UNCHARGED CRIMES, TESTIMONY WHICH DEFENSE COUNSEL COULD NOT PROPERLY CONFRONT PRECISELY BECAUSE THE STATE HAD DESTROYED EVIDENCE WHICH COULD HAVE BEEN USED TO REBUT THAT TESTIMONY.

A. Introduction.

On January 12, 1996, the state filed a felony complaint against Mr. Miles charging him with 37 offenses. (4 CT 918-942.) These 37 counts included crimes committed on at least seven separate days including:

- Crimes committed on January 6, 1992 against Paula Yenerall (4 CT 918-919);
- Crimes committed on January 21, 1992 against Janet Heynen (4 CT 920);
- Crimes committed on February 4, 1992 against Nancy Willem (4 CT 922-924);
- Crimes committed on February 19, 1992 against John Kendrick (4 CT 925);
- Crimes committed on February 21, 1992 against Arnold and Sharyn Andersen (4 CT 939-940);
- Crimes committed on February 25, 1992 against Christine Castellanos (4 CT 927-931); and

- Crimes committed on February 26, 1992 against Melvin Osborne and Carole Davis (4 CT 931-936).

The trial court held Mr Miles to answer on all 37 counts. (9 CT 2452.) Ultimately, the state filed a 35-count information, including the crimes committed on each of the seven dates listed above. (5 CT 1312-1338.)

Prior to trial, Mr. Miles moved to sever trial on the counts covering the January 6, January 21, February 19 and February 21 crimes (hereafter the "Group 1 charges") from the counts covering the February 4, February 25 and February 26 crimes (hereafter the "Group 2 charges"). (10 CT 2948-2974.) This severance motion had an unusual, but simple, thesis.

According to defense counsel, the Group 1 charges were based entirely on eyewitness testimony from the victims, without supporting physical evidence. (10 CT 2951, 2969.) In contrast, the Group 2 charges had no eyewitness testimony, but were supported by physical evidence. (10 CT 2951.) During the preliminary hearing, it became apparent that the state had lost or destroyed evidence relating to the credibility of each of the eyewitnesses to the Group 1 charges. (10 CT 2953-2965; 2 RT 514.) In his motion to sever, defense counsel contended that because the state had lost significant exculpatory evidence as to the Group 1 charges, severance was an appropriate sanction,

so that the jury could evaluate the Group 1 charges without being influenced by the physical evidence in connection with the Group 2 charges. (2 RT 473-474.) The prosecution conceded that favorable evidence had been destroyed, but nevertheless argued against severance. (2 RT 475.)

The trial court held a hearing in connection with the severance motion. (2 RT 471-517.) After hearing argument from both parties, the court found that "as to each of those identifications [in the Group 1 charges], there is some evidence which would at least create a[n] argument that the identification should be viewed with some caution or suspicion, either some uncertainly expressed by the victim as to the identification made, or identifying other persons from photo-lineups provided to them . . . ." (2 RT 514.) The court agreed that in light of the state's destruction of that evidence, severance was proper so that the Group 1 charges would be "isolate[d]" from the Group 2 charges supported by physical evidence. (2 RT 515.)

In order to ensure this sanction was meaningful, defense counsel asked the court to require that the state try the Group 1 charges first. (2 RT 517.) After all, the entire purpose of granting severance in the first place was to have the Group 1 cases "tried on their own merits and decided." (2 RT 518.) Defense counsel predicted that unless such an order were entered, the state would perform an end-run around any severance ruling by

(1) trying the Group 2 charges first and (2) introducing the as-yet unadjudicated Group 1 charges in the penalty phase to the jury which had already heard the physical evidence associated with the Group 2 charges. (2 RT 517.) The court asked counsel to brief this issue. (2 RT 519-520.)

Defense counsel's prediction turned out to be accurate. The state did indeed indicate that it was going to try the Group 2 cases first -- including the capital charges. (3 RT 570.) Defense counsel then filed a separate motion to require trial on the Group 1 charges first. (13 CT 3621-3624.) The trial court denied that motion, and permitted the prosecution to try the Group 2 cases first. (3 RT 572.)

After the jury found Mr. Miles guilty of capital murder in the Group 2 trial, the case proceeded to a penalty phase. Prior to the penalty phase, defense counsel raised the issue yet again, moving in the alternative for (1) for a continuance of the penalty phase to permit a separate jury trial on the Group 1 charges first or, in the alternative, (2) to exclude all evidence of the uncharged offenses from the penalty phase or (3) to exclude the identification testimony which could not be properly confronted because of the state's negligence. (14 CT 4344-4353; 10 CT 2993; 11 CT 3025-3026.) The trial court denied the motion, ruling that it would not "strike evidence of the eyewitness identifications" as a "sanction for not preserving the photo line-ups." (13 RT 4667.)

The state took full advantage of the trial court's ruling, introducing substantial eyewitness testimony identifying Mr. Miles as the perpetrator of other crimes on January 6, 1992, January 21, 1992, February 19, 1992 and February 21, 1992. The prosecutor urged the jury to rely on this eyewitness testimony in deciding whether Mr. Miles should live or die.

Yet as to each of these identifications, the record shows that defense counsel's ability to confront the state's case was significantly impaired. Indeed, as the trial court itself had already concluded, severance was proper precisely because the state had lost or destroyed evidence as to each of the identifications which could have been used to confront the state's case. (2 RT 514.)

As discussed more fully below, allowing the state to rely on evidence at the penalty phase of a capital trial -- where the state's own conduct has prevented full and effective confrontation of the evidence -- violated Mr. Miles Eighth Amendment right to a reliable penalty phase, as well as his state and federal constitutional rights to due process, a fair trial, confrontation and present a defense. Reversal of the penalty phase is required.

B. The Relevant Facts.

As presented at the penalty phase, the relevant Group 1 charges included offenses which occurred on (1) January 6, 1992 against Paula Yenerall (17 RT 5976-5991), (2) January 21, 1992 against Janet Heynen (17 RT 5993-6009), (3) February 19, 1992 against John Kendrick (18 RT 6029-6043) and (4) February 21, 1992 against Arnold and Sharyn Andersen. (18 RT 6067-6101.) At the penalty phase, the state introduced eyewitness testimony as to each of these uncharged crimes. And as noted above, the trial court found that as to each of these identifications, the state had lost evidence on which the defense could have relied to call the identification into question. (2 RT 514.) The trial court was correct.

1. The January 6, 1992 robbery.

Paula Yenerall testified that in January 1992 she was an office manager for an accounting firm. (17 RT 5976.) On the evening of January 6, 1992 she was working late and there was a loud crash in the front window. (17 RT 5977.) A man broke into the office, put a gun to her head, and demanded money. (17 RT 5979-5980.) He forced her to get her purse, stole her money and jewelry and then tied her up. (17 RT 5981-5982.) Although this was fully four weeks *before* the Willem homicide, Yenerall recalled the man saying "[d]on't look at me bitch. I'm a murderer and I'll kill you too." (17 RT 5981.) Yenerall told the jury that she recognized defendant as her assailant at a live

lineup in July 1992, and she identified him at the preliminary hearing as well. (17 RT 5984-5988.)

On cross-examination at trial, defense counsel elicited the fact that in a photographic lineup held prior to the live lineup, Ms. Yenerall had identified someone named Orlando Boone as her assailant. (17 RT 5988-5990.) Given Ms. Yenerall's very different trial testimony, it could have been extremely useful for defense counsel to explain exactly how it was that she ended up identifying Mr. Miles.

In fact, well after Ms. Yenerall positively identified Boone as her assailant, and only weeks before the line lineup in which she identified defendant Miles, police showed her another photographic lineup, this one with a picture of Mr. Miles. (5 CT 1497 - 6 CT 1500.) She selected Mr. Miles as her assailant. (5 CT 1498-1499.) In addition, she testified that she had been shown a sketch which she said "resembled" the assailant. (6 CT 1509-1511.) Neither the photographic lineup which apparently changed Ms. Yenerall's mind from her identification of Orlando Boone, nor the composite sketch, were preserved or disclosed to defense counsel. (6 CT 2707-2708.) Because all this evidence had been destroyed, none of it was available for defense counsel's use at trial to confront Ms. Yenerall's current identification of Mr. Miles.

2. The January 21, 1992 robbery.

In January 1992 Janet Heyen was a receptionist at a medical office. (17 RT 5993.) On the evening of January 21, 1992, a man came into the reception area with a gun. (17 RT 5994-5995.) He pointed the gun at her face and demanded money. (17 RT 5996.) Heyen told the jury that defendant was her assailant; she confirmed that she had identified him at a live lineup in July 1992 and at the preliminary hearing. (17 RT 5994, 6000-6001, 6006.)

In fact, however, Ms. Heyen recalled that police showed her at least four different photographic lineups prior to trial. (6 CT 1543, 1548.) Police detective Lore testified that he showed Mr. Heyen (1) a lineup containing a picture of Steven Dyer, (2) a series of photographs of sex offender parolees, and (3) a lineup containing Orlando Boone. (7 CT 1986-1990.) In addition, Ms. Heyen participated with a police artist in preparing a sketch of her assailant. (7 CT 1994, 2038.)

At the preliminary hearing, Ms. Heyen did not recall if she made an identification from any of the first three photographic lineups and believed she did make an identification at the fourth. (6 CT 1544-1548.) Detective Lore testified that Ms. Heyen (1) made no identification at the first lineup, (2) picked Damon Cooper out of the

parolees photographs, and (3) picked out photograph five in the photographic lineup involving Orlando Boone. (7 CT 1987-1990.) As related by defense counsel, however, Lore's contemporaneous notes show that at the first photographic line-up, Ms. Heyen affirmatively identified Steven Dyer saying that "it could be him." (10 CT 2709, 2909; 2 RT 500.)

Immediately after Ms. Heyen's testimony, defense counsel requested a copy of all the lineups which had been shown to her. (6 CT 1566.) The prosecutor assured the court generally that everything he had had already been provided to the defense and specifically that "they were given a copy . . . of the Dyer lineup." (6 CT 1568.) The evidence would later show, however, and the prosecutor would specifically concede that in fact the Dyer lineup had *not* been disclosed but had been destroyed. (7 CT 1988; 10 CT 2710; 2 RT 481.) In addition, the identity and photograph of the person Ms. Heyen identified in the Orlando Boone lineup was also destroyed. (10 CT 2710.) Nor was the sketch ever disclosed. (10 CT 2710.) Because all this evidence had been destroyed, on cross-examination, defense counsel could only elicit from Ms. Heyen that in two photographic lineups she was shown before the live lineup, she selected a photograph of someone who could be the person, although she was not sure. (17 RT 6004.) Defense counsel could not use either the Dyer lineup, the Boone lineup or the sketch to confront Ms. Heyen's current identification of Mr. Miles.

3. The February 19, 1992 robbery.

In February 1992 Mr. Kendrick was an accountant. (18 RT 6029.) On the evening of February 19, 1992, he was with several clients preparing a tax return. (18 RT 6030.) A man appeared in his office with a gun and demanded money. (18 RT 6034.) Kendrick told the jury that defendant was the man who robbed him; Mr. Kendrick also confirmed that he picked defendant out of a live lineup in July 1992. (18 RT 6031-6032, 6039.) He testified that in two photographic lineups he was shown prior to the live lineup, he made no identification. (18 RT 6041-6042.)

In fact, however, prior to trial police had shown Mr. Kendrick a photographic lineup which included a man named Randy Winters. (2 RT 490-494; 7 CT 2021.) Mr. Kendricks affirmatively selected Mr. Winters as his assailant, with a degree of certainty at 8 out of 10. (2 RT 490; 7 CT 2021.) The prosecutor conceded that the lineup containing the Winters picture had been destroyed. (2 RT 494.) As a result, defense counsel could not use the Winters lineup to confront Mr. Kendricks's current identification of Mr. Miles.

4. The February 21, 1992 robbery.

In February 1992 Arnold Andersen owned his own investment business. (18 RT 6067.) On the evening of February 21, 1992, he was working late in the office along with his wife Sharon. (18 RT 6067, 6081-6082.) The glass window in the front of the office was shattered and a man appeared in the office pointing a gun at them and demanding money (18 RT 6069, 6071, 6081-6082.) He took money from both Mr. and Mrs. Andersen. (18 RT 6071, 6072.) Both Mr. and Mrs. Andersen told the jury that defendant was the man who robbed them they confirmed that he picked defendant out of a lineup in July 1992. (18 RT 6069, 6077, 6082, 6084-6086.) Like Mr. Kendrick, Mr. Anderson also admitted that in two photographic lineups he was shown prior to the live lineup, he made no identification. (18 RT 6079.)

In fact, however, police sergeant Woods said that he showed Arnold Andersen a photographic lineup including a picture of Roger Egans. (7 CT 2044-2046.) Mr. Andersen picked out Roger Egans as his assailant saying he was "about eighty percent sure." (7 CT 2011, 2046; 10 CT 2910.) Sergeant Woods obtained a warrant to search Mr. Egans based on this identification. (10 CT 2910.) The prosecutor later conceded that the Egans lineup had been destroyed. (4 RT 481.) As a result, defense counsel could not use the Egans lineup to confront Mr. Andersen's current identification of Mr. Miles.

5. The prosecutor's closing argument.

The prosecutor spent the initial portion of his closing argument focusing on the circumstances of the homicide itself. (20 RT 6767-6778.) He then turned to the other crimes evidence. (20 RT 6778.)

He began by urging the jury to consider the January 6 incident involving Ms. Yenerall. (20 RT 6779.) He continued, urging the jury to rely on the Janet Heynen incident because she "pick[ed] him out of the live line-up. She identifies him in court." (20 RT 6779.) He then relied on both the Andersen and the Kendrick incidents. (20 RT 6779-6780.) He came back to these crimes repeatedly throughout his argument. (20 RT 6789, 6792-6793, 6794, 6795.) The jury imposed death.

6. The prosecutor himself concedes that the missing evidence was exculpatory, and Judges McArville and Edwards each independently conclude that the state's destruction of evidence, though perhaps inadvertent, nevertheless undercut defense counsel's ability to confront the state's eyewitness evidence.

Defense counsel was very much aware his ability to confront the state's case had been impeded. Indeed, it is fair to say that he brought his concerns about the process to the court's attention at every reasonable opportunity. Equally important, the judges which heard the evidence, and even the prosecutor himself, expressed concern about Mr. Miles's ability to fully confront the state's case absent the destroyed evidence.

The state initially proceeded by grand jury, filing a 37-count indictment against Mr. Miles. (1 CT 1-21.) This indictment contained the same Group 1 and Group 2 charges which eventually were filed in the information.

On October 13, 1995, defendant moved to quash the indictment precisely because the prosecutor had failed to present the grand jury with exculpatory evidence involving the Group 1 eyewitness identification charges. (3 CT 714-716 [the Paula Yenerall offense], 716-717 [the Janet Heynan offense], 718 [the John Kendrick offense] and 718-719 [the Arnold Andersen incident].) At this point, defense counsel did not know the evidence had been destroyed; he only knew that exculpatory evidence had not been

presented to the grand jury and, as such, required that the indictment be quashed. (3 CT 723 *citing Johnson v. Superior Court* (1975) 15 Cal.3d 248.)

The prosecutor agreed there was "no question" that the state had failed to present this exculpatory evidence to the grand jury. (2 RT 407.) The prosecutor explained he had disclosed the exculpatory information of which he had been aware, but "when we sat down with the defense . . . and went through [the discovery] . . . we realized what identifications might have been made with regard to other people . . . ." (2 RT 408.) The prosecutor conceded that the failure to present this evidence to the grand jury required "quashing of the indictment." (2 RT 421.) The prosecutor was candid; the evidence "needed to be presented as exculpatory evidence to the Grand Jury." (2 RT 430.)

The trial court granted the motion to quash. (2 RT 430.) Ultimately, as noted above, the prosecution proceeded by way of a preliminary hearing and filed a 35-count information against Mr. Miles which contained both the Group 1 and Group 2 charges. (5 CT 1312-1338.)

After the information was filed, defense counsel brought a section 995 motion to dismiss the Group 1 counts because of the destroyed evidence. (9 CT 2656.) This motion was heard by Judge Brian McCarville. (Pre-trial RT 138.) Although Judge McCarville

denied this motion, he made clear that he agreed with the defense as to the importance of the missing evidence:

> "With respect to the missing evidence, what I'll characterize generally as the lost either photographs, composites or photo spreads, I tend to agree with defense counsel and their characterization, so to speak, of the importance of that evidence." (Pre-trial RT 184.)

Judge McCarville found that although the state's destruction of the evidence may have evinced "lax conduct" on the state's part, there was no "willful or malicious conduct." (Pre-trial RT 185.) Because he agreed that the missing evidence went to factual innocence, however, Judge McCarville noted that a sanction on the state *was* appropriate, but he left that sanction to the trial court:

> "[C]ertainly some sanction is appropriate. That is best left, however, for the trial court prior to commencement of the trial. *Defense counsel is correct that the evidence that is gone to some extent is evidence of factual innocence, which is certainly important evidence, and it is gone or maybe gone in some instances.*" (Pre-trial RT 185, emphasis added.)

Judge McCarville's comment about the propriety of sanctions was not a surprise. As noted above, when this matter was litigated in the context of the grand jury indictment, the prosecution had repeatedly conceded that much of this evidence was exculpatory. (2 RT 407, 408, 421, 430.) Although the prosecutor now contended that granting the section

995 motion was too severe a sanction, when asked if he believed some kind of sanction was proper even he conceded -- albeit somewhat grudgingly -- that "[a]n appropriate sanction might be an instruction to the jury at some point." (Pre-trial RT 169.)

Finally, as noted above, this matter was addressed again by the trial judge -- Judge Edwards -- shortly before trial when defense counsel moved to sever trial on the Group 1 charges. (2 RT 470-514.) After hearing from both parties, and in light of his concern about the state's destruction of evidence, Judge Edwards granted the defense motion to sever (2 RT 515), noting that as to each of the positive identifications, the state had lost evidence which undercut the state's case:

> "In each case or each incident, there's at least one victim who has picked Mr. Miles out of a live lineup. But as to each of those identifications, there is some evidence which would at least create a[n] argument that the identification should be viewed with some caution or suspicion, either some uncertainty expressed by the victim as to the identification made, or identifying other persons from photo line-ups provided to them prior to the live line-up." (2 RT 513-514.)

In light of the concerns expressed by Judges McCarville and Edwards about the state's loss of evidence of "factual innocence" as to the Group 1 charges -- evidence which could have been used to create doubt "as to each of those [eyewitness] identifications" on which the state planned to rely -- the Eighth Amendment question at

the heart of his case is stark. At the penalty phase here the state introduced eyewitness testimony against Mr. Miles regarding his commission of uncharged crimes. The state had -- through its own negligence -- lost evidence which Mr. Miles could have used to confront that eyewitness testimony. The question is whether the subsequent death sentence reached by the jury based on evidence which defendant could not properly confront meets the special reliability concerns of the Eighth Amendment. Or, put another way, does the Eighth Amendment permit a death sentence to stand when defendant's ability to confront evidence on which the state relied to obtain that death sentence is compromised *because of the state's own conduct*. It is to that legal question Mr. Miles now turns. As discussed below, the Eighth Amendment does not permit such a sentence to stand.

C. The Trial Court's Admission Of Identification Testimony As To The Yenerall, Heynan, Kendrick And Andersen Charges Violated The Eighth Amendment As Well As Defendant's Rights To Confront The State's Case Against Him, A Fair Penalty Phase And To Present A Defense.

The Supreme Court has recognized that the death penalty is a qualitatively different punishment than any other. (*See, e.g., Beck v. Alabama* (1980) 447 U.S. 625, 638, n.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases.

(*See, e.g., Caldwell v. Mississippi* (1985) 472 U.S. 320, 323; *Beck v. Alabama, supra*, 447 U.S. at p. 638, n.13.)

Procedures which risk undercutting this heightened need for reliability violate the Eighth Amendment. (*See, e.g., Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118-119 (O'Connor, J., concurring); *Lockett v. Ohio* (1978) 438 U.S. 586; *Gardner v. Florida* (1977) 430 U.S. 349, 362.) This so even when those same procedures do not violate the Due Process clause. (*See, e.g., Beck v. Alabama, supra,* 447 U.S. at pp. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]. *See Sawyer v. Smith* (1990) 497 U.S. 227, 235 [Court distinguishes between the protections of the due process clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."].)

There are a myriad of ways that the special reliability concerns of the Eighth Amendment can be violated in any case. For example, the reliability of a death judgment can be undercut when a state's capital punishment scheme itself precludes a defendant from presenting mitigating evidence which could call for a sentence less than death. (*Lockett v. Ohio, supra*, 438 U.S. 586.) Even where all mitigating evidence is admitted, a trial court's refusal to instruct the jury properly on how it can consider that mitigating

evidence may also result in a death judgment too unreliable for Eighth Amendment purposes. (*See Penry v. Lynaugh* (1989) 492 U.S. 302; *Eddings v. Oklahoma*, *supra*, 455 U.S. 104.) A prosecutor's misleading closing argument at the penalty phase may also undercut the reliability concerns at the heart of the Eighth Amendment. (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320.)

So too can state action which prevents a capital defendant from properly confronting aggravating evidence introduced against him. (*Gardner v. Florida*, *supra*, 430 U.S. 349.) Indeed, *Gardner* provides a very close analogy to this case.

In that case, a Florida defendant was convicted of capital murder. Under the Florida scheme at the time, sentence in a capital case was imposed by a judge. The judge in that case imposed death, stating that he was relying in part on information from a confidential pre-sentence report which had not been disclosed to defense counsel. (430 U.S. at p. 351.) Obviously, since defense counsel was not privy to that information, the defense was unable to properly confront that evidence.

The Supreme Court first noted that the trial judge's findings "do not indicate that there was anything of special importance in the undisclosed portion [of the pre-sentence report]." (430 U.S. at p. 353.) Nevertheless, a three-judge plurality reversed noting that

due process was violated because defense counsel had no fair opportunity to "deny or explain" the evidence. (430 U.S. at p. 362.) Justice White concurred on a narrower ground, noting that "a procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the 'character and record of the individual offender' . . . fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which . . . [is] required . . . . This conclusion stems solely from the Eighth Amendment." (430 U.S. at p. 364.) A majority of the Supreme Court has since recognized that Justice White's Eighth Amendment rationale in *Gardner* represented the core holding of *Gardner*. (*O'Dell v. Netherland* (1997) 521 U.S. 151, 160, 162.)

This case is just like *Gardner*. In both cases, state action prevented defense counsel from properly confronting evidence which the state relied on to obtain a death sentence. In this case, as in *Gardner*, a death sentence obtained even in part on the basis of information that the defendant -- through no fault of his own -- was unable to fully confront "fails to meet the 'need for reliability in the determination that death is the appropriate punishment'" which the Eighth Amendment requires. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 364.)

Mr. Miles recognizes, of course, that this case is different from *Gardner* in one respect. Defense counsel in *Gardner* had no opportunity at all to confront the evidence. Here, defense counsel was at least provided an *opportunity* to cross-examine the witnesses. Thus, unlike *Gardner*, counsel here was unable to fully confront the state's evidence *not* because he had never been told of it, but because the state had destroyed evidence which defense counsel could have used.

The fact that it was a different kind of state action which prevented proper confrontation is irrelevant. In both cases the vice is the same -- there is a genuine risk that death was imposed because defense counsel was unable to confront aggravating evidence on which the sentencer may have relied.

Indeed, on this point the current case presented a stronger case for finding an Eighth Amendment violation than *Gardner* itself. There, the Court reversed because of defendant's inability to confront certain aggravating evidence even though there was nothing in the sentencer's findings which "indicate[d] that there was anything of special importance in the undisclosed portion [of the pre-sentence report]." (430 U.S. at p. 353.) Here, we know to a certainty that the prosecutor placed great reliance on the eyewitness identification testimony which could not be properly confronted. (20 RT 6779-6780, 6789, 6792-6793, 6794, 6795.) And as this Court has long noted, the prosecutor's

reliance on this evidence during his closing argument is a strong indication of how important the evidence was to the jury. (*People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in closing argument shows how important the prosecutor "and so presumably the jury" treated the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868.)

Of course, as this Court has also recognized, evidence of prior crimes "may have a particularly damaging impact on the jury's determination whether the defendant should be executed . . . ." (*People v. Polk* (1965) 63 Cal.2d 443, 450, cert. denied, 384 U.S. 1010. *Accord People v. McClellan* (1969) 71 Cal.2d 793, 804 n.2.) In light of the often crucial role uncharged acts evidence can play in a penalty phase, and the prosecutor's specific reliance on that evidence here, the fact that the defendant's inability to fully confront the evidence in this case was caused by the state's destruction of evidence rather than concealment should not matter. The destruction of evidence -- even if inadvertent -- can be as effective as concealment in frustrating the right to effective confrontation which is at the heart of ensuring a reliable result in an adversary system. The fact that defense counsel here had an arid opportunity to cross-examine the eyewitnesses does not satisfy the reliability concerns of the Eighth Amendment.

Established law recognizes this exact principle. Capital defendants must be afforded a meaningful opportunity to defend against the prosecution's penalty phase case. As the Supreme Court noted more than a century ago "[c]ommon justice requires that no man shall be condemned in his person or property without . . . an opportunity to make his defence." (*Baldwin v. Hale* (1864) 1 Wall. 223, 233.) And under the constitution, the opportunity to be heard must be "at a meaningful time and in a meaningful manner." (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552.) The right to defend against capital charges would be a hollow one indeed if the process provided by the state -- such as even inadvertent destruction of favorable evidence -- could make the right ineffectual. (*See Powell v. Alabama* (1932) 287 U.S. 45, 58 [defense counsel appointed the morning of trial could not satisfy the constitution because counsel lacked opportunity to investigate the case; Court observed that "[t]o decide otherwise, would simply be to ignore actualities"]; *Morgan v. United States* (1938) 304 U.S. 1, 18; *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 315 ["process which is a mere gesture is not due process"].)

It is important to note the narrow argument which Mr. Miles is making here. This is *not* a Due Process argument that separate prosecution was precluded in connection with the Group 1 charges. It is *not* a claim that the trial court abused its discretion in refusing to require the state to try the Group 1 charges first. It is not even a broad attack on

evidence of the Group 1 charges coming in at the penalty phase. Instead, the narrow argument presented here is that because the state -- by its own admission -- lost or destroyed evidence which could have rebutted the eyewitness testimony made by these four witnesses and relied upon by the prosecution, that eyewitness testimony itself should have been excluded from the penalty phase.

Judge McCarville concluded that the state had destroyed "evidence of factual innocence [as to the Group 1 charges], which is certainly important evidence, and it is gone or maybe gone in some instances." (Pre-trial RT 185.) Judge Edwards concluded that as to each of the Group 1 identifications the state had destroyed evidence which would have permitted an argument "that the identification should be viewed with some caution or suspicion, either some uncertainty expressed by the victim as to the identification made, or identifying other persons from photo line-ups provided to them prior to the live line-up." (2 RT 514.) And the prosecution itself conceded that much of this evidence was exculpatory and the failure to present it to the grand jury required quashing of the indictment. (2 RT 407-408, 421, 430.) Under all these circumstances, the Eighth Amendment requirement of enhanced reliability in capital cases was violated when the state was permitted to (1) destroy evidence which defendant could have used to confront the eyewitness identifications of Yenerall, Heynan, Kendricks, and Andersen while at the same time (2) introduce those same (and now largely unconfronted)

eyewitness identifications at the penalty phase as a reason for the jury to impose death. Just as in *Gardner*, because the state's own actions prevented the defense from properly confronting the state's case in aggravation, the resulting death sentence cannot stand. A new penalty phase is required under the Eighth Amendment.

But the Eighth Amendment is not the only basis for a new penalty phase here. At the penalty phase the state relied on eyewitness testimony. Entirely because of the state's own conduct, defendant was unable to fully confront this testimony so he could present the defense side of the story. Under these stark circumstances, the state's reliance on this eyewitness testimony to obtain a death judgment not only violated the Eighth Amendment, but Mr. Miles's state and federal constitutional rights to due process, a fair trial, confrontation and to present a defense.

In this regard, the United States Supreme Court has made clear that in evaluating the scope of procedural protections in a capital sentencing phase "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Based on this fundamental rationale the Court has recognized and applied a number of procedural protection in the circumstances of a capital sentencing hearing. (*See*, *e.g.*, *Estelle v. Smith* (1980) 451 U.S. 454, 463 [Fifth Amendment privilege against self-incrimination applies in a capital sentencing hearing];

Bullington v. Missouri (1981) 451 U.S. 429, 446-447 [Fifth Amendment proscription on double jeopardy applies to capital sentencing hearing]; *Presnell v. Georgia* (1978) 439 U.S. 14, 16 ["fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial."].) This Court has taken the same course, recognizing that certain fundamental rights -- such as the right to confrontation -- apply at capital penalty phases. (*See, e.g., People v. Gamache* (2010) 48 Cal.4th 347, 396; *People v. Valencia* (2008) 43 Cal.4th 268, 291.)

Here, as discussed above, the state introduced at the penalty phase -- and asked the jury to impose death -- at least in part on the basis of eyewitness testimony as to other crimes. But entirely because of the state's loss of evidence, Mr. Miles was unable to fully confront this evidence or present his version of events. Even putting aside the enhanced reliability required in capital sentencing phases required by the Eighth Amendment, this course of conduct violated Mr. Miles's right to a fair penalty phase, his right to confrontation and his right to present a defense. The penalty phase must be reversed for this separate reason as well.

XI. THE TRIAL COURT VIOLATED STATE LAW AS WELL AS THE FIFTH AND EIGHTH AMENDMENTS IN PERMITTING THE STATE TO INTRODUCE VICTIM IMPACT EVIDENCE RELATING TO AN UNRELATED JUNE 1992 NON-CAPITAL CRIME.

A. Introduction.

Mr. Miles was charged with the February 1992 murder of Nancy Willem. At the penalty phase, the state introduced victim impact evidence from Ms. Willem's sister and parents about the impact of the crime. (17 RT 6021-6024; 18 RT 6102-6105; 18 RT 6107-6110.)

But this was not the only victim impact evidence the state was permitted to introduce. Pursuant to Penal Code section 190.3, subdivision (b) -- which permits introduction of evidence relating to "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence" -- the state introduced evidence about other criminal activity committed by defendant involving the use of force, including a June 16, 1992 rape of Bridgit Emanuelson. (18 RT 6046-6062.) Over objection, the state went further and introduced evidence which had nothing to do with establishing "the presence or absence" of the June 16, 1992 crime, but which directly constituted victim impact testimony from Ms. Emanuelson about the impact of that non-capital crime on her life. (18 RT 6065-6066.)

There is a split of authority around the country as to whether admission of this type of evidence is improper. State courts in Texas, Nevada, Illinois, Tennessee and Colorado have uniformly held such evidence is inadmissible. This Court has reached squarely inconsistent results as to whether such evidence is admissible.

In *People v. Boyde* (1988) 46 Cal.3d 212, 247, the Court reached a decision in full agreement with the rule applied in these other states, holding such evidence *inadmissible* under state law. As a consequence of ruling such evidence inadmissible under state law, *Boyde* did not reach the question of whether admission of such evidence violated the federal constitution. However, in *People v. Benson* (1990) 52 Cal.3d 754, 797 the Court reached precisely the opposite rule, holding that state law *permitted* introduction of such evidence, and that such admission did not violate the federal constitution. *Benson* did not discuss *Boyde*.

The trial court here admitted this evidence, citing *Benson*. (17 RT 5941-5942.) As more fully discussed below, the Court should resolve this conflict in the case law. Based on the very different language used in section 190.3, subdivision (a) -- which authorizes victim impact evidence -- and section 190.3, subdivision (b), there is no need to reach the constitutional question here. As a straightforward matter of statutory construction, this Court should reiterate *Boyde* and reconsider those decisions holding that section 190.3,

subdivision (b) reflected an intent to admit this kind of tangential victim impact evidence. But even assuming this Court does not reiterate *Boyde* on the question of the legislative intent behind section 190.3, subdivision (b), the Court should reconsider its decision in *Benson* that this evidence does not violate the federal constitution. Because the erroneous admission of this evidence is prejudicial under any legitimate standard of prejudice, a new penalty phase is required.

B. Admission Of Other-Crimes Victim Impact Testimony Violated States Law Because Fundamental Principles Of Statutory Construction Show That The Electorate Never Intended To Permit Victim Impact Testimony As To Crimes Unrelated To The Homicide Itself.

Section 190.3 controls admission of aggravating evidence at a capital penalty phase. Passed by the Legislature in 1977, section 190.3, subdivision (b) provided that in deciding whether a defendant should live or die, the jury could consider in aggravation "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence." In 1978, the electorate repealed the Legislature's 1977 law and replaced it with current section 190.3.

Under the 1978 law, the jury is authorized to consider three categories of evidence in aggravation. Section 190.3, subdivision (a) authorizes the state to introduce evidence

showing "the circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." Subdivision (b) of the 1978 law is identical to subdivision (b) of the 1977 law and authorizes the state to introduce evidence showing "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . . ." Finally, subdivision (c) authorizes the state to introduce evidence showing "the presence . . . of any prior felony conviction." This Court has long made clear that evidence which does not fall into these three specific categories cannot be considered in aggravation at the penalty phase of a capital trial. (*See, e.g., People v. Wright* (1991) 52 Cal.3d 367, 425; *People v. Burton* (1989) 48 Cal.3d 843, 859; *People v. Boyd* (1985) 38 Cal.3d 762, 774.)

The question to be resolved here is whether the electorate intended that section 190.3 authorize admission of victim impact testimony about the impact of a defendant's *prior* crime -- a crime totally *unrelated* to the homicide for which the defendant is death eligible. Obviously, evidence regarding the impact of a crime unrelated to the homicide does not come within section 190.3, subdivision (a) as evidence about "the circumstances of the crime *of which the defendant was convicted in the present proceeding*." Nor does such evidence come within subdivision (c) as evidence showing "the presence . . . of any prior felony conviction." Instead, the only possible basis for admission of such testimony under state law is section 190.3, subdivision (b), authorizing admission of evidence

showing "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . . ."

But application of accepted cannons of statutory construction to the language of subdivision (b) compels a conclusion that the electorate intended no such result. In this regard, the fundamental purpose of statutory construction is to ascertain the intent of the lawmakers. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 937.) Of course, this basic principle applies with equal force to statutes passed by the electorate through the initiative process. (*See, e.g., People v. Jones* (1993) 5 Cal.4th 1142, 1146; *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538.)

In trying to determine the intent of a statute, the Court should look first to the words of the statute, "as these are usually the best indicator of the [lawmakers'] intent." (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 152.) If the statutory language is clear, the plain meaning of the words is determinative and there is no need to look beyond the statute itself. (*People v. Benson* (1998) 18 Cal.4th 24, 30.) In that situation, there is no need even to undertake a judicial construction of the statute. (*In re Lance W.* (1985) 37 Cal.3d 873, 886.) If, on the other hand, the language is ambiguous and reasonably susceptible to two interpretations, then a reviewing court must construe the statute and adopt the

interpretation more favorable to the defendant. (*People v. Davis* (1981) 29 Cal.3d 814, 828.)

Here, the language of section 190.3, subdivision (b) is clear and unambiguous. It authorizes evidence relating to "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence." Nothing in the actual language of section 190.3, subdivision (b) even remotely authorizes evidence relating *not* to the "presence or absence" of prior violent criminal activity, but to the impact of such activity on the life of the victim. And that is exactly the conclusion this Court reached in *People v. Boyde*, *supra*, 46 Cal.3d 212.

In *Boyde*, defendant was convicted of capital murder. At his penalty phase, the state introduced evidence showing that defendant had committed prior offenses involving violence, including a robbery and two assaults. (46 Cal.3d at p. 247.) In addition, however, the state also presented "testimony by victims of other offenses about the impact that the event had on their lives." (46 Cal.3d at p. 249.) The Court specifically held this evidence did not come with the meaning of section 190.3, subdivision (b). (*Ibid.*)

The Court was entirely correct in *Boyde*. Indeed, the Court's sensible and straightforward conclusion in *Boyde* is directly supported by developments in the victim

impact area. Prior to 1991, of course, the United States Supreme Court held that victim impact evidence was barred by the Eighth Amendment. (*Booth v. Maryland* (1987) 482 U.S. 49.) In *Payne v. Tennessee* (1991) 501 U.S. 808, 827 the Court overruled *Booth* and held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar."

After *Payne*, the question became whether the California electorate had chosen to "permit the admission of victim impact evidence . . . ." This Court answered the question in *People v. Edwards* (1991) 54 Cal.3d 787, holding that the electorate expressed its intent to allow victim impact testimony by authorizing admission of evidence concerning "the circumstance of the crime of which the defendant was convicted in the present proceeding." (*Id.* at p. 833-836.)

Significantly, however, the specific language which this Court held reflected the electorate's intent to authorize admission of victim impact evidence -- use of the phrase "circumstances of the crime" in subdivision (a) -- does *not* appear in subdivision (b) describing the evidence admissible in connection with prior crimes of violence. Had the electorate provided in subdivision (b) for admission of evidence showing "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence *and the circumstances of that criminal activity*," under *Edwards* it

would be clear the electorate intended to permit victim impact testimony in connection with the prior crimes. But the electorate used very different language in describing the evidence admissible under subdivision (b). As this Court has often made clear, when drafters of legislation use very different language in similar statutes, "the normal inference is that the [drafters] intended a difference in meaning." (*People v. Trevino* (2001) 26 Cal.4th 237, 242. *Accord People v. Drake* (1977) 19 Cal.3d 749, 755.)

Given the clarity of the language which the electorate elected to use in subdivision (b), and the sharp difference between that language and the language of subdivision (a) (which *Edwards* had held reflected the electorate's intent to authorize victim impact evidence), there should be little doubt that the electorate did not intend subdivision (b) to also authorize admission of victim impact evidence. But to the extent there is some lingering doubt -- and subdivision (b) could also reasonably be subject to a construction which authorized other-crimes victim impact evidence despite its use of language so different from subdivision (a) -- two additional principles of statutory construction require a conclusion that subdivision (b) should not be construed to authorize admission of other-crimes victim impact evidence. First, "[w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to

the true interpretation of words or the construction of a statute." (*People v. Snyder* (2000) 22 Cal.4th 304, 314. *Accord People v. Overstreet* (1986) 42 Cal.3d 891, 896.)

Separate and apart from the reasonable doubt principle, there is a "familiar jurisprudential principle that statutes should be interpreted, if reasonably possible, to avoid constitutional questions." (*People v. Sutton* (2010) 48 Cal.4th 533, 559. *Accord Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.) Here, in *Tuilaepa v. California* (1994) 512 U.S. 967, section 190.3, subdivision (b) was challenged as unconstitutionally vague under the Eighth and Fourteenth Amendments. The Supreme Court rejected this challenge precisely because "factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact." (*Id.* at p. 976.) If factor (b) is now construed to permit evidence plainly outside the scope of its "conventional and understandable terms" -- permitting evidence which does not involve "matters of historical fact" -- then there is a serious question whether subdivision (b) is vague either (1) under the standards of the Eighth Amendment as a guide for exercising discretion in determining capital penalty (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362) or (2) under the standards of the Fourteenth Amendment in providing adequate notice to the defendant to prepare for such arcane evidence. (*See Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1238.) Because

statutes should be interpreted to avoid constitutional questions, section 190.3, subdivision (b) should not now be interpreted to raise either of these constitutional issues.

In sum, the plain language of section 190.3, subdivision (b) simply does not support a conclusion that the electorate intended to authorize admission of victim impact testimony as to other crimes unrelated to the capital homicide. The Court reached this precise conclusion in *Boyde*. But even if there were some ambiguity, and the Court was to therefore engage in judicial construction of the statute, subdivision (b) could not reasonably be construed to reflect an intent to permit victim impact testimony as to other crimes. The fact of the matter is that (1) the electorate used very different language in subdivisions (a) and (b) and (2) the language which has been held to authorize victim impact testimony in subdivision (a) is entirely absent from subdivision (b). Applying "the normal inference . . . that the [electorate] intended a difference in meaning," nothing in subdivision (b) suggests that it was intended to permit other-crimes victim impact testimony.

In making this argument, Mr. Miles is aware that several years after *Boyde*, the Court reached a result squarely at odds with *Boyde*. As noted above, in *People v. Benson*, *supra*, 52 Cal.3d 754 the Court held -- without citing *Boyde* -- that "[the Supreme Court decisions precluding victim impact evidence and argument in] *Booth* and *Gathers* do not

extend to evidence or argument relating to the nature and circumstances of other criminal activity involving the use or threat of force or violence or the effect of such criminal activity on the victims." (*Id.* at p. 797.) In the years since *Benson*, the Court has on several occasions cited it for the proposition -- rejected in *Boyde* -- that '[a]t the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts." (*People v. Price* (1991) 1 Cal.4th 324, 479; *see People v. Taylor* (1990) 52 Cal.3d 719, 741.)[35]

Boyde and *Benson* are starkly inconsistent; both cannot be right. In *Boyde*, the Court held that "testimony by victims of other offenses about the impact that the event had on their lives" was *inadmissible* under section 190.3, subdivision (b). (*Boyde*, *supra*, 46

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[35] Of course, in a literal sense the *Price* court's reliance on *Benson* for the proposition that '[a]t the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts" is simply wrong. By its own terms, *Benson* held simply that neither *Booth* nor *Gaithers* applied to other-crimes victim impact evidence. (*Benson*, *supra*, 52 Cal.3d at p. 797.) Contrary to the reading given *Benson* in *Price*, a holding that the Eighth Amendment does not bar certain evidence (the precise holding of *Benson*) is *not* the same as a holding that state law affirmatively authorizes admission of such evidence. Even assuming *Benson* was correct that the Eighth Amendment permits other-crimes victim impact evidence, the question still remains whether the electorate intended to authorize admission of such evidence under state law. (*See Payne v. Tennessee*, *supra*, 501 U.S. at p. 821 ["We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, 'the Eighth Amendment erects no per se bar.'"][O'Connor, J., concurring].)

Cal.3d at p. 249.) In *Benson* (and the cases that follow it), the Court held that such testimony is entirely admissible.

Significantly, it does not appear that either *Benson* -- or any of the cases which rely on it to reach a similar result -- either resolved or were presented with the statutory construction argument Mr. Miles is raising here. It does not appear that *Benson* or its progeny considered any of the principles of statutory construction discussed above. Of course, as this Court has often made clear, "cases are not authority for propositions not considered." (*See, e.g., People v. Williams* (2004) 34 Cal.4th 397, 405; *People v. Barragan* (2004) 32 Cal.4th 236, 243.) In any event, in light of the statutory construction argument raised above, ths Court should follow *Boyde* and reiterate the clear rule set forth in that case: section 190.3, subdivision (b) does not authorize admission of "testimony by victims of other offenses about the impact that the event had on their lives."

C. Admission Of Other-Crimes Victim Impact Testimony Was Irrelevant To Defendant's Moral Blameworthiness For This Murder, And Violated His Due Process And Eighth Amendment Rights To A Fair And Reliable Sentencing Hearing.

In *Booth v. Maryland, supra*, 482 U.S. 496 the Supreme Court held that the Eighth Amendment created a *per se* bar to victim-impact evidence at the penalty phase of a capital trial. The rationale was that evidence of the personal characteristics of the victim

and the impact of the victim's death on his family and friends was not constitutionally relevant to the decision on penalty which must focus on matters for which the defendant is morally culpable. These matters went beyond such moral culpability since the defendant does not contemplate in his act, necessarily, the quality of the victim or the impact on his family.

The Court overruled *Booth* in *Payne v. Tennessee* (1991) 501 U.S. 808. In reaching a different result, *Payne* noted that moral culpability in the criminal law, in a sentencing context, depended not only on the defendant's subjective state of mind, but on the extent of objective harm he caused. (*Id.* at pp. 819-823.) Moreover, in a capital sentencing context, in which the defendant has a constitutional right to present himself in his individualized uniqueness, the state must have the right to remind the sentencer that the victim is also "an individual whose death represents a unique loss to society and in particular to his family." (*Id.* at p. 825.) As the Court noted, "[b]y turning the victim into a 'faceless stranger at the penalty phase of a capital trial,' [citation], *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." (*Ibid.*)

Booth, *Gathers*, and *Payne* all concern victim-impact evidence for the capital crime itself in which, by definition, the victim will be dead. But unless the subdivision (b) evidence in a capital trial in California is itself a murder or some sort of criminal homicide, there is no danger that the victim will be a "faceless stranger" at trial. That victim, like Bridgit Emanuelson here, will be before the jurors, testifying under the percipient scrutiny of the jurors who can read in the witness's face the feelings she is experiencing as she relives and recounts the violence she has suffered. The rationale for victim-impact evidence set forth in *Payne* simply does not justify permitting victim impact testimony as to other crimes.

State courts around the country have reached this precise result, ruling in capital cases that admission of victim impact evidence as to other crimes is not justified by *Payne* and is irrelevant to the life or death decision which the jury is called upon to make. (*See*, *e.g.*, *People v. Dunlap* (Colo. 1999) 975 P.2d 723, 745 [such evidence is "not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced. . . . [and] not sufficiently tied to the jury's inquiry concerning the character, background, and history of the defendant, or to any of the aggravating or mitigating factors . . . ."]; *People v. Hope* (Ill. 1998) 702 N.E.2d 1282, 1286-1289 [noting that the fact that victims of other crimes unrelated to the murder may have suffered "does not make defendant more morally blameworthy in the murder . . . ."];

Sherman v. State (Nev. 1998) 965 P.2d 903, 914 [other-crimes victim impact testimony "is not relevant to the sentencing decision in a current case and is therefore inadmissible during the penalty phase."]; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891, n. 11 [noting that victim impact evidence of other crimes -- even another homicide -- "is not admissible."]; *Cantu v. State* (Tex. Cr. App. 1997) 939 S.W.2d 627, 637 [other-crimes victim impact evidence "serves no purpose other than to inflame the jury" and "*Payne* does not contemplate admission of such evidence as permissible under the Eighth Amendment."].)

These cases are on sound footing. As noted above, the Supreme Court has repeatedly recognized that death is a unique punishment, qualitatively different from all others. (*See, e.g., Woodson v. North Carolina, supra*, 428 U.S. at p. 305; *Gardner v. Florida, supra*, 430 U.S. at p. 357; *Lockett v. Ohio, supra*, 438 U.S. at p. 604; *Beck v. Alabama, supra*, 447 U.S. at p. 638.) Thus, as discussed above, the Court has held there is a corresponding need for procedures in death penalty cases which increase the reliability of both the guilt and penalty phase processes. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida, supra*, 430 U.S. at p. 357.) As the state courts in Texas, Nevada, Illinois, Tennessee and Colorado have held, a procedure which permits irrelevant testimony, serving no purpose other than to inflame the jury, and which is unrelated the

actual harm defendant has caused in the charged case or his moral blameworthiness for the current crime, can do nothing but decrease the reliability of the sentencing hearing.

Mr. Miles recognizes that this Court has reached a contrary conclusion, finding no constitutional violation in the admission of such evidence. (*See, e.g., People v. Garceau* (1993) 6 Cal.4th 140, 201-202; *People v. Benson, supra*, 52 Cal.3d at p. 797.) For all the reasons set forth above, however, this holding should be reconsidered.

D. The Trial Court's Admission Of Other-Crimes Victim Impact Evidence Requires Reversal.

To the extent the erroneous admission of this evidence violates the Eighth Amendment, reversal of the penalty phase is required unless the state can prove the error harmless beyond a reasonable doubt. (*See Chapman v. California* (1967) 386 U.S. 18, 24.) To the extent the erroneous admission of this evidence at the penalty phase violated only state law, reversal is required if there is a "reasonable possibility that [the] error affected the verdict." (*People v. Allen* (1986) 42 Cal.3d 1222, 1281. *Accord People v. Silva* (1988) 45 Cal.3d 604, 632.) This Court has noted that despite the difference in phrasing, this state law standard for errors at the penalty phase is identical to the *Chapman* test. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, n.11; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.)

The state will be unable to prove the error harmless here. As discussed in Argument IX above, although the circumstances of this murder were tragic, the fact of the matter is that this was a single homicide, committed by a defendant who had no prior convictions for murder, was borderline mentally retarded with an IQ of between 74 and 77, had a long history of mental illness beginning when he was a child and had a brain tumor at the time of the crime which was altering his behavior. On this record, the state will be unable to prove that the erroneous placement of inadmissible victim impact testimony on death's side of the scale made no difference to even a single juror. (*See People v. Brown*, *supra*, 46 Cal.3d at p. 471 n.1 [conc. on. of Brossard, J.] [noting that a "hung jury is a more favorable verdict" then a guilty verdict]. *Accord Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1054; *People v. Soojian*, *supra*, 190 Cal.App.4th at p. 521; *People v. Bowers*, *supra*, 87 Cal.App.4th at pp. 735-736.)

XII. THE TRIAL COURT'S ADMISSION OF POWERFUL VICTIM IMPACT EVIDENCE VIOLATED FEDERAL AND STATE LAW AND REQUIRES A NEW PENALTY PHASE.

A. Background.

In 1987, the United States Supreme Court held that the Eighth Amendment barred the state from introducing "victim impact" evidence in capital cases -- evidence concerning such matters as the victim's personal characteristics, the emotional impact of the crime on his family and the opinions of family members about the crime and the criminal. (*Booth v. Maryland*, *supra*, 482 U.S. at pp. 502-509.) California law was in accord. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267.)

In 1991, the Supreme Court overruled its decision in *Booth* and ruled that the Eighth Amendment did *not* bar evidence relating to the victim's personal characteristics or the emotional impact of the crime on the victim's family. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 829.) Instead, the Court ruled that states were free to permit victim impact evidence if they wished. (*Id.* at p. 827.)

After *Payne* was decided, this Court held in *People v. Edwards*, *supra*, 54 Cal.3d 787, that the California electorate had done just that when it enacted Penal Code section

190.3. Specifically, *Edwards* held that victim impact evidence was admissible as "circumstances of the crime" within the meaning of Penal Code section 190.3, subdivision (a). Pursuant to *Edwards*, the prosecution in this case offered (and the trial court here admitted) victim impact testimony from Philip Willem (Ms. Willem's father), Patricia Soto (Ms. Willem's younger sister) and -- as his final witness in the penalty phase -- Doris Willem (Mr. Willem's mother). (17 RT 6021-6024, 18 RT 6102-6105, 6107-6110.) The prosecutor played a tape of a recent family wedding featuring Ms. Willem. (18 RT 6110.)

As more fully discussed below, pursuant to fundamental principles of statutory construction which were never argued in *Edwards*, the conclusion *Edwards* drew about the electorate's intent in enacting section 190.3 was simply wrong. In fact, prior to the 1978 initiative which passed section 190.3, the phrase "circumstances of the crime" had a well-established meaning which *prohibited* introduction of victim impact evidence. By using this same phrase in section 190.3, the electorate did not reflect an intent to *permit* victim impact evidence, but an intent to *preclude* such evidence.

As the United States Supreme Court has noted on many occasions, "[a]lthough the doctrine of *stare decisis* is of fundamental importance to the rule of law, our precedents are not sacrosanct." (*Ring v. Arizona, supra*, 536 U.S. at p. 609. *Accord Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 172; *Welch v. Texas Dept. of Highways and*

Public Transp. (1987) 483 U.S. 468, 494.) Prior decisions should be overruled "where the necessity and propriety of doing so has been established." (*Patterson*, *supra*, 491 U.S. at p. 172.) This Court has agreed, noting that "[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction." (*People v. Cuevas* (1995) 12 Cal.4th 252, 269. *Accord People v. Latimer* (1993) 5 Cal.4th 1203, 1212–1213; *Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.) Here, it is time to reconsider *Edwards* in light of clear evidence that it misapprehended the intent behind the 1978 death penalty law.

B. Because The Term "Circumstances Of The Present Offense" Used By The Electorate In Section 190.3 Had A Then-Recognized Meaning Precluding Consideration Of Victim Impact Evidence, The Electorate Is Presumed To Have Intended The Same Meaning In Section 190.3.

Penal Code section 190.3 was enacted by voter initiative in November of 1978. Section 190.3 provides that a jury deciding whether a defendant will live or die must consider the "circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." (§ 190.3, factor (a).)

But the phrase "circumstances of the crime" did not originate with section 190.3 in 1978. Instead, this phrase was taken directly from earlier versions of the death penalty statute, and had been interpreted by cases prior to the 1978 election. Under well-accepted

principles of statutory construction, the electorate is deemed to have intended "circumstances of the crime" as used in section 190.3 to have the same meaning it had in the pre-1978 statutes. And that meaning was clear: victim impact evidence could not be introduced absent a showing that defendant intended the particular harm sought to be introduced.

The starting point for this analysis is the recognition that the primary goal of statutory construction is to determine the Legislature's intent and so effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 832, 387.) In determining the intent behind any particular statute, a court looks first to the language of the statute. (*Ibid.*) Where the language of a statute includes terms that already have a recognized meaning in the law, "the presumption is almost irresistible" that the terms were intended "to have the same 'precise and technical' meanings given by the courts." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046. *Accord Richardson v. Superior Court, supra*, 43 Cal.4th at p. 1050; *People v. Lawrence* (2000) 24 Cal.4th 219, 231; *People v. Tufunga* (1999) 21 Cal.4th 935, 947; *In re Jeanice D.* (1980) 28 Cal.3d 210, 216.) This logical principle applies to legislation adopted through the initiative process. (*In re Jeanice D., supra*, 28 Cal.3d at p. 216.)

Here, as noted, the 1978 death penalty statute provided that the parties may introduce -- and the trier of fact must consider -- "circumstances of the crime." As noted, however, the phrase "circumstances of the crime" as used in the 1978 statute was not new. Prior to 1978, virtually the same term had been used in the statute's predecessor capital statutes.

The language of current section 190.3 was taken directly from identical language in section 190.3 of the 1977 statute. In turn, section 190.3 of the 1977 statute had its genesis in section 190.1 of the 1958 death penalty statute. Under the 1958 statute, in determining whether a defendant would live or die, the jury could consider "the *circumstances surrounding the crime*, . . . the defendant's background and history, and . . . any facts in aggravation or mitigation of the penalty." (Former § 190.1, added by Stats.1957, c. 1968, p. 3509, § 2, amended by Stats.1959, c. 738, p. 2727, § 1 [emphasis added].)

The 1958 statute did not expressly define the phrase "circumstances surrounding the crime." In several cases, however, this Court made clear that victim impact evidence and argument was improper under the 1958 law.

For example, in *People v. Love* (1960) 53 Cal.2d 843, the Court directly held that under the 1958 law, the harm caused to victims could not be admitted absent evidence

showing that the defendant intended to inflict that harm. There, defendant was convicted of shooting and killing his wife. At the penalty phase, the state sought to introduce photographs of the victim at the hospital, and a tape recording of the victim made in the hospital shortly before her death, to show that she suffered great pain before she died. On appeal, defendant argued that the evidence was inadmissible. The state argued that the evidence was admissible under state law "to demonstrate the enormity of the crime that defendant had committed." (53 Cal.2d at p. 856.)

The Court noted that "[t]he prosecution did not suggest that defendant intended to cause such pain . . . ." (53 Cal.2d at p. 855.) Absent such a showing, the Court ruled that such victim evidence was inadmissible. (53 Cal.2d at pp. 856-857 and n.3.) According to the Court, such victim impact evidence was inadmissible under the 1958 law "unless it was intentionally inflicted." (53 Cal.2d at p. 856.) Evidence showing the consequences of a murder was of "doubtful" relevance to choosing between life and death unless the defendant intended those consequences. (53 Cal.2d at p. 857, n.3.)

Several years later, this Court relied on *Love* to hold improper a prosecutor's victim impact argument. (*People v. Floyd* (1970) 1 Cal.3d 694.) In *Floyd*, defendants were convicted of robbery and murder. During the penalty phase closing arguments, the prosecutor argued that the jury should consider the effect of the victim's murder on the

victim's family. (*Id.* at p. 721.) The jury sentenced defendants to death. (*Id.* at p. 702.) On appeal, defendants argued that the prosecutor committed misconduct. (*Id.* at p. 722.) In light of the prosecutor's closing argument as a whole, which properly discussed other factors the jury was to consider in selecting the punishment, the Court found no prejudicial misconduct. (*Ibid.*) Nevertheless, citing *Love*, the Court noted the

impropriety of references to victim impact "without reference to the [defendant's] intent." (*Ibid.*)[36]

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[36] In addition to cases which explained what the phrase "circumstances surrounding the crime" did *not* include, the Court also had addressed what the phrase *did* include. Uniformly, these cases showed that the phrase included facts which were part of the crime itself. (*See, e.g., People v. Nye* (1969) 71 Cal.2d 356, 366-367 [evidence that defendant committed crimes of rape, burglary and robbery in the perpetration of killing the victim was admissible as "circumstances of the crime"]; *People v. Morse* (1969) 70 Cal.2d 711, 729 ["victim garrotted against the bars of defendant's cell with a cord from defendant's own mattress, defendant's full and clear acknowledgment of the act, the non-involvement of any other participant" were the "circumstances of the crime"].)

This Court's interpretation of "circumstances of the crime" was consistent with the meaning long given to the term by the United States Supreme Court. For example, in *Gregg v. Georgia* (1976) 428 U.S. 153, 189, the plurality opinion of Justices Stewart, Powell, and Stevens quoted from *Pennsylvania v. Ashe* (1937) 302 U.S. 51, 55, to hold that "'[f]or the determination of sentences, justice generally requires . . . that there be taken into account the *circumstances of the offense* together with the character and propensities of the offender.'" (Emphasis added.) Neither *Gregg* nor *Ashe* explicitly defined "circumstances of the offense" or otherwise indicated what evidence would be included in the phrase.

Yet cases preceding *Ashe* inform the meaning of the term. (*See* Note (1990) 56 Brooklyn L.Rev. 1045, 1073-1076.) In these cases, the Court used "circumstances" of the crime to describe facts of the crime itself. (*See, e.g., Pico v. United States* (1913) 228 U.S. 225, 229 [defendant "charged with the crime of murder, with the qualifying circumstance of alevosia (treachery) . . . ."]; *Hale v. Henkel* (1906) 201 U.S. 43, 62 ["the facts and circumstances which constitute the offense"]; *Carver v. United States* (1896) 160 U.S. 553, 556 ["[w]hether the homicide was committed under such circumstances as to reduce the grade of the crime from murder to manslaughter . . . ."]; *Moore v. Missouri* (1895) 159 U.S. 673, 679 ["but under such circumstances as shall not constitute the offence"]; *Gourko v. United States* (1894) 153 U.S. 183, 192 ["his crime was that of manslaughter or murder, as the circumstances, on the occasion of the killing, make it the one or the other."]; *United States v. Hess* (1888) 124 U.S. 483, 486 ["the material facts and circumstances embraced into the definition of the offence"]; *Coleman v. Tennessee* (1878) 97 U.S. 509, 519 ["a murder committed . . . under circumstances of great atrocity"]; *United States v. Cook* (1872) 84 U.S. 168, 180 [desertion is a "circumstance [that] entered into the very description of the offense . . . ."].)

Thus, prior to the 1978 election, the phrase "circumstances surrounding the crime" as used in the 1958 statute had a clear meaning. The phrase did *not* include victim impact evidence and arguments absent an affirmative showing that defendant intended to cause the specific harm referenced in that evidence of argument.

Pursuant to the principles of statutory construction discussed above, "the presumption is almost irresistible" that the phrase "circumstances of the crime" as used in section 190.3 was intended to have the same meaning as the virtually identical term had in the 1958 death penalty law and prior case law interpreting that term. (See *Hughes v. Pair*, *supra*, 46 Cal.4th at p. 1046.) Because the term "circumstances of the crime" did not include victim impact evidence prior to 1978, it should be given the same meaning in

section 190.3.[37]

To be sure, as Mr. Miles has noted above, he recognizes that in *People v. Edwards*, *supra*, 54 Cal.3d 787, this Court held that victim impact evidence was admissible as "circumstances of the crime." But as also discussed above, *stare decisis* should "not

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[37] Indeed, as the late Justice Mosk recognized, "by 1978, the victim's personal characteristics, the emotional impact of the crime on the victim's family and others, and the opinions about the crime and the criminal held by such persons had not yet received acceptance as penalty factors." (*People v. Edwards* (1992) 54 Cal.3d 787, 854 [Mosk, J., dissenting]. Justice Mosk was entirely correct.

In fact, the former California Rules of Court did not even include such evidence as "circumstances in aggravation." (*See, e.g.*, Cal. Rules of Court, former Div. I-A, Sentencing Rules for the Superior Courts, adopted eff. July 1, 1977, former rule 421(a)(1). As one court of appeal later recognized:

> "We think it obvious that a defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he had control. . . . *All* of the factors of rule 421 are based upon such choices which the defendant makes of his own will. In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case." (*People v. Levitt* (1984) 156 Cal.App.3d 500, 516.)

Indeed, victim impact evidence did not receive significant recognition until the early 1980s. (*See, e.g.*, Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change* (1984) 11 Pepperdine L.Rev., 23, 51-53. *Accord Payne v. Tennessee*, *supra*, 501 U.S. at p. 820 ["the admission of this particular kind of evidence . . . is of recent origin"].) It can hardly be said that by using virtually the same statutory phrase in effect when the *Love* court held victim impact evidence *inadmissible* absent a showing of defendant's intent, the electorate intended the opposite result.

shield court-created error from correction." (*People v. Cuevas*, *supra*, 12 Cal.4th at p. 269.) Moreover, cases are not authority for propositions neither presented nor considered. (*See People v. Williams*, *supra*, 34 Cal.4th at p. 405; *People v. Barragan*, *supra*, 32 Cal.4th at p. 243.)

It is clear from *Edwards* that this Court was not presented with, nor did it resolve, the statutory construction argument presented here. As discussed above, applying well-established principles of statutory construction to section 190.3 leads inexorably to the conclusion that the electorate did not intend to permit victim impact evidence in capital cases. The trial court's ruling was error.[38]

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[38] Trial counsel in this case made exactly the same argument below, objecting to victim impact testimony and contending that *Edwards* failed to consider the "Legislative intent of Section 190.3." (15 CT 4329.) In accord with the principles of both *Love* and *Floyd*, defense counsel argued that under state law, victim impact testimony must be limited to facts about the victim of which the defendant was aware. (15 CT 4329-4330.) The prosecution opposed this reading of the statute. (15 CT 4377-4378.) The trial court ultimately rejected the limitation proposed by the defense and ruled that the state could present victim impact evidence from family members about "the effect that this has had on them [and] what kind of person Nancy was . . . ." (13 RT 4676.)

C. The Trial Court's Admission Of The Victim Impact Evidence Requires Reversal.

The only remaining question becomes whether admission of this evidence is harmless. This Court has stated that the admission of aggravating evidence unauthorized by state law requires a new penalty trial where there is a reasonable probability of a different result absent the error. (*See, e.g., People v. Brown* (1988) 46 Cal.3d 432, 449.) But the admission of this evidence also violated federal law. As the Supreme Court has long held, "[a]n important element of a fair trial is that [the trier of fact] consider only relevant and competent evidence . . . ." (*Bruton v. United States* (1968) 391 U.S. 123, 131, n.6.) Admission of irrelevant evidence violates federal due process and requires reversal if the evidence is "of such a quality as necessarily prevents a fair trial." (*Lisenba v. California* (1941) 314 U.S. 219, 236.)

Ultimately, however, on the facts of this case it does not matter what standard of prejudice is applied. A new penalty trial is required under either standard.

For obvious reasons, victim impact testimony is considered to be among the most powerful types of evidence which can be presented at a capital penalty phase. Here, the state introduced victim impact testimony from three different family members of the victim: her father, her mother and her younger sister. Moreover, as discussed above, this

was a single homicide involving a defendant with serious long term and debilitating mental illness beginning years before the crime when he was a child. Under these circumstances, absent improper admission of this recognized powerful aggravating evidence, it is reasonably probable at least one juror could reasonably have imposed a life sentence. (*See People v. Soojian, supra*, 190 Cal.App.4th at p. 521; *People v. Bowers, supra*, 87 Cal.App.4th at pp. 735-736.) A new penalty phase is required.

XIII. BECAUSE MR. MILES'S PENALTY PHASE DEFENSE DEPENDED ALMOST ENTIRELY ON MENTAL HEALTH EVIDENCE, THE TRIAL COURT ERRED IN REFUSING TO REPLACE JUROR 12 PRIOR TO THE PENALTY PHASE AFTER JUROR 12 ADMITTED READING IN A NEWSPAPER THAT A PRIOR JURY HAD JUST FOUND MR. MILES COMPETENT.

A. The Relevant Facts.

On March 18, 1999, the jury convicted Mr. Miles of murder. (13 RT 4618-4627.) After several continuances, the penalty phase was scheduled to begin on April 21, 1999. (13 RT 4630-4631, 4644, 4705-4706.)

On Monday, April 19, 1999, and outside the presence of the jury, the court declared a doubt about Mr. Miles's competency. (13 RT 4749.) It therefore suspended proceedings pursuant to Penal Code section 1368 and ordered a jury trial on competency. (13 RT 4749.) In terms of scheduling, the court advised each of the jurors with language to the effect that "[u]nfortunately, there's been a recent development that will require an additional delay of a substantial nature" and advised them that the penalty phase would start in the summer. (*See, e.g.*, 13 RT 4783.) Ultimately, the court excused the jury and advised it that the penalty phase would start in July or August. (13 RT 4802.)

In discussing the competency trial with the court and the prosecutor, and no doubt thinking of the mental health issues which would be presented in the penalty phase, defense counsel made clear his preliminary "thinking that [the competency trial] might involve a good part of the penalty phase evidence." (13 RT 4798.) Defense counsel's preliminary thoughts turned out to be entirely correct.

The trial court seated a new jury to hear the competency phase, which began on July 22, 1999. (14 RT 5004.) In fact, just as defense counsel had predicted, a substantial amount of the competency hearing involved the presentation of mental health evidence regarding Mr. Miles that would mirror the mental health testimony presented at the subsequent penalty phase. (*Compare e.g.*, 14 RT 5029-5070 [testimony of Dr. Richard Dudley at competency hearing] *with* 19 RT 6334-6404 [testimony of Dr. Dudley at penalty phase]; 14 RT 5277-5283 [testimony of Dr. Ernie Meth at competency hearing] *with* 19 RT 6449-6458 [testimony of Dr. Ernie Meth at penalty phase]; 15 RT 5364-5391 [testimony of psychologist Joseph Lantz at competency hearing] *with* 18 RT 6191-6252 [testimony of Lantz at penalty phase].) Ultimately, the competency jury found Mr. Miles competent. (17 RT 5919-5921.)

When the guilt phase jurors were called back for the penalty phase, the trial court learned that one juror -- juror 12 -- had seen headlines about the case. (17 RT 5960.)

Juror 12 stated that he saw two or three headlines about the case, and once he realized the headlines were about the case on which he had served, he read no further. (17 RT 5960.) He admitted, however, that he learned from the headlines that (1) there had been a competency trial, (2) the competency jury had found Mr. Miles competent and (3) as a result of the competency finding, he (juror 12) knew he would be coming back for the penalty phase because the competency verdict "was a part of the sentencing or whatever." (17 RT 5961-5962.) Juror 12 had not yet mentioned the competency verdict to other jurors. (17 RT 5962.)

Out of the jury's presence, defense counsel asked the court to discharge juror 12 and replace him with an alternate. (17 RT 5965.) The trial court denied the request. (17 RT 5966-5967.) The trial court did not admonish juror 12 (1) to disregard the competency verdict in evaluating defendant's penalty phase evidence and (2) not to discuss the competency verdict with other jurors.

As more fully discussed below, the penalty phase must be reversed. The penalty phase jury -- including juror 12 -- was going to be asked to consider substantial amounts of mitigating testimony about Mr. Miles's impaired mental state. Permitting even one juror to consider this evidence having already learned that a jury of 12 people had just considered defendant's mental state and found him competent undercut the reliability of

the jury's decision that aggravation in this case outweighed mitigation and death was appropriate. A new penalty phase is required.

B. The Trial Court Violated The Eighth Amendment As Well As The State Constitution In Refusing To Replace Juror 12 With An Alternate After Juror 12 Learned That A Jury Had Heard Mr. Miles's Mental Health Evidence And Found Him Competent.

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." (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) Thus, as noted above, the Supreme Court's death penalty jurisprudence has consistently reflected a concern that the sentencing process ensure a reliable and responsible exercise of sentencing discretion. (*Lankford v. Idaho*, *supra*, 500 U.S. 110; *Maynard v. Cartwright* (1988) 486 U.S. 356; *Eddings v. Oklahoma*, *supra*, 455 U.S. 104.)

Among the fundamental premises which lead to a reliable exercise of sentencing discretion is the right of a capital defendant to present to the sentencer any mitigating evidence demonstrating the appropriateness of a penalty less than death. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 5; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) But under the Eighth Amendment, "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer." (*Penry v. Lynaugh* (1989) 492 U.S. 3023,

319.) Instead, capital defendants have a corollary right to have the sentencer give a "reasoned, moral response" to the mitigating evidence. (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 319. *Accord Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 113-114; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) When jurors are impeded from giving a "reasoned moral response" to a defendant's mitigating evidence, the Eighth Amendment has been violated and a resulting death sentence may not stand. (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.)

There are many ways the jury's ability to give a reasoned moral response to mitigating evidence may be compromised. Thus, jury instructions which preclude the jury as a whole from considering mitigating aspects of penalty phase evidence violate the Eighth Amendment. (*See*, *e.g.*, *Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.) Similarly, a state scheme which precludes individual jurors from relying on mitigating evidence unless all 12 jurors unanimously find the evidence mitigating also violates the Eighth Amendment. (*Mills v. Maryland* (1988) 486 U.S. 367, 384.) And where penalty phase jurors in the process of evaluating a defendant's mitigating evidence are given information which diminishes their sense of responsibility in evaluating that mitigating evidence, the Eighth Amendment is also violated. (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320.)

Caldwell is instructive. There, defendant was convicted of capital murder. At his penalty phase he presented mitigating evidence of his youth, family background and poverty and asked the jury for mercy. The prosecutor responded, in part, by telling the jury that any decision it made would be reviewed by the Mississippi Supreme Court. The jury imposed death. The Supreme Court reversed, at least in part by focusing on the fact that provision of information about the appellate review process undercut the reliability of the jury's task of evaluating defendant's mitigating evidence and request for mercy. (472 U.S. at pp. 330-331, 341.)

The same is true here. Under the Eighth Amendment, each penalty phase juror here was independently charged with evaluating defendant's mental health mitigating evidence and making an assessment of whether death was appropriate in light of this evidence. The record shows that -- at the very least -- juror 12 was aware that a jury of 12 other citizens had just heard a competency trial in connection with Mr. Miles's case, had presumably heard the same mental health evidence and had unanimously found him competent. Allowing juror 12 to deliberate in the penalty phase -- which required him to consider and evaluate the same evidence he knew had just been rejected by another jury -- undermined juror 12's ability to make a reasoned and reliable response to the mental health evidence. And as noted above, when jurors are impeded from giving a "reasoned moral response" to a defendant's mitigating evidence, the resulting death sentence may not stand. (*Penry v.*

Lynaugh, *supra*, 492 U.S. at p. 328.) Similarly, like the information about the appellate review process in *Caldwell*, the information to which juror 12 was privy "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously'. . . ." (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 343 [O'Connor, J., concurring].) In this situation too reversal of the death sentence is required. (*Ibid.*) Accordingly, the death penalty imposed in this case must be reversed.[39]

It is true, of course, that the record itself does not show that juror 12 knew the same mental health evidence was (or would be) presented in both the competency and penalty phase trials. But jurors are presumed to be intelligent people. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028; *People v. Carey* (2007) 41 Cal.4th 109, 130; *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1115.) It certainly does not take a rocket scientist to understand that in a trial about competency, the defense will present mental health testimony about the defendant suggesting he is in some way impaired. And that, of course, is exactly the same type of evidence which juror 12 was asked to evaluate in connection with the penalty phase.

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[39] It is certainly worth noting that the trial court here neither admonished juror 12 to disregard the competency verdict in evaluating defendant's penalty phase evidence, nor did it admonish him not to discuss the competency verdict with other jurors. (*Compare People v. Purvis* (1963) 60 Cal.2d 323, 333, 339 [trial court erred when it failed to admonish jurors to disregard information obtained from newspapers].)

There is, of course, another way to look at this error. This Court has recognized that "a juror's inadvertent receipt of information that [has] not been presented in court falls within the general category of 'juror misconduct.'" (*People v. Nesler* (1997) 16 Cal.4th 561, 579. *Accord People v. Zapien* (1993) 4 cal.4th 929, 994.) "Although inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term 'misconduct,' it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (*People v. Nesler*, *supra*, 16 Cal.4th at p. 579.)

Here, assuming juror 12's review of the headlines was inadvertent, it still constituted misconduct and violated Mr. Miles's right to a fair trial by 12 unbiased jurors. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 578.) The misconduct "leads to a presumption that the defendant was prejudiced" which requires reversal if the information juror 12 learned "is inherently and substantially likely to have influenced a juror." (*Ibid.*)

Here, for many of the same reasons as discussed above, this standard too requires a new penalty phase. After all, as noted above, juror 8 was gong to be asked to assess defendant's mental health mitigating evidence and decide whether death was appropriate. Yet juror 12 knew that a jury of fellow citizens who had heard this mental health evidence

had unanimously rejected is "inherently and substantially likely" to influence a juror. A new penalty phase is required for this reason as well.

XIV. THE TRIAL COURT VIOLATED MR. MILES'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS AND A RELIABLE DETERMINATION OF PENALTY, BY INSTRUCTING THE TWO ALTERNATES SEATED TO DELIBERATE AT THE PENALTY PHASE THAT THEY WERE REQUIRED TO ACCEPT THAT GUILT WAS PROVEN BEYOND A REASONABLE DOUBT.

The penalty phase jury which decided whether Mr. Miles would live or die was not the same jury that decided his guilt. Instead, the trial court seated two new jurors who had not been a part of the guilt phase jury. Prior to penalty phase deliberations the trial court instructed the two new jurors that "[f]or purposes of this penalty phase of the trial, the alternate jurors must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilty phase of this trial." (20 RT 6766.) The trial court went on to advise the jury that all members of the jury were required to "participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial." (20 RT 6766-6767.)

As more fully discussed below, provision of this instruction requires a new penalty phase. This Court has correctly noted that the connection between the guilt and penalty bases of a capital trial is "substantial and not merely formal." (*People v. Hamilton* (1988) 45 C.3d 351, 369.) Viewed conceptually, "the decision-making process of a death penalty case is a coherent whole" that "reflects the legislative preference for a single unitary jury to both phases." (*People v. Fields* (1983) 35 Cal.3d 329, 351-352.) Accordingly, if an

alternate juror replaces an original juror at the commencement of the penalty phase "the jury must be instructed to disregard all past deliberations and begin anew." (*Id.* at p. 351, quoting *People v. Collins* (1976) 17 Cal.3d 687, 694.)

The reason is simple. The constitutional right to a trial by jury includes the requirement that each juror engage in all of the jury's deliberations. All 12 jurors must deliberate together:

> "The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual jurors attempts to persuade others to accept his or her viewpoint." (*People v. Collins*, *supra*, 17 Cal.3d at p. 693.)

As this Court has recognized, an alternate who takes his place in the jury box only at the commencement of the penalty phase joins a group "which has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty." (*People v. Fields*, *supra*, 35 Ca1.3d at p. 351.) Placing restrictions on the scope of the deliberations -- effectively making certain findings

or conclusions reached in earlier phases of the trial off-limits for the penalty jury (as was done in this case) -- violates the principle that the decision of the jury in this unitary proceeding must be the product of the total interaction of 12 minds on all matters having any bearing on the penalty verdict. Unless the reconstituted jury, with its new member, is instructed to begin its deliberations anew and to disregard all earlier deliberations, but with no precondition as to what conclusions or findings must be accepted as part of the penalty phase deliberations, Mr. Miles's constitutional rights to a fair penalty trial and a reliable capital sentencing decision under the Eighth and Fourteenth Amendment have been denied.

In the final analysis, the error here was a basic one. This Court has correctly noted that an alternate juror seated for the penalty phase is entitled under state law "to vote against the death penalty if she disagreed with the guilt phase verdict . . . ." (*People v. Kaurish* (1990) 52 cal.3d 648, 708.) But the instruction given here -- telling the alternates that they were *required* to "accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial" -- suggested just the opposite and substantially undercut this fundamental principle.

In making this argument, Mr. Miles is certainly aware that courts have approved substitution of an alternate juror into the penalty phase jury in the event of "unforeseen"

circumstances. (*People v. Fields*, *supra*, 35 Cal.3d at 351, fn. 9.) He has no quibble with this. Instead, his position here is much narrower; when such a substitution occurs, the jury should be instructed strictly in accord with the principles enunciated in the *Collins*, *Fields* and *Hamilton* cases, without the restricting language employed by the trial court here.

The two alternate jurors seated at the penalty phase here had no participation at all in the deliberations which resulted in the guilt phase verdicts. As a consequence, they were totally in the dark as to the discussions among the original jurors during the deliberation relating to guilt, including the special circumstance allegations. Nevertheless, the new alternates were expressly instructed that they had to blindly accept all the findings of the original jury.

On the facts of this case, there was nothing theoretical about the trial court's error. In his penalty phase closing argument, defense counsel asked the jury to reconsider its finding on the torture murder special circumstance, and to exclude the finding in its calculus in deciding whether Mr. Miles would live or die. (20 RT 6823-6824.) Defense counsel was explicit:

> "And now I'm going to make a very bold statement. Johnny Miles did not torture Nancy Willem. And I know that's a bold statement, because I know you've already found the special circumstance of torture to be true. Hear me out.

> "I'm not saying that Nancy Willem did not feel pain. Torture under the law, as you may recall from your previous instructions, requires, once again, that we look at the offender. What was his mental state? In the absence of any other evidence, you found that Johnny Miles must have intended to inflict extreme, cruel pain, the requirement for torture. You did not know then what you know now about Johnny Miles. The law permits you to disregard your finding of torture if you have a doubt about the truth of that allegation. It's called lingering doubt. You may have once found beyond a reasonable doubt that it was true, but if now, because you know of the mental illness of Johnny Miles you feel differently, you may disregard it.
>
> "Remember Dr. Rogers, the autopsy pathologist that I called, testified that the circumstances of the injuries were just as consistent with an explosion of rage or psychotic frenzy as with torture based on his experience. I ask you know to reconsider your finding in this regard in light of the new evidence that you have."

Under the precedents discussed above, Mr. Miles was entitled to the same kind of wide-ranging deliberations as occurs in capital juries that do not have an alternate juror substituted in after the guilt phase. Such juries are *not* instructed they may not reconsider the defendant's guilt. To the contrary, they are allowed to consider anything that "lessens the gravity of the crime." (Cal. Pen. Code, §190.3, subd. (k).) Such disparate treatment violates fundamental principles of equal protection of the law and due process, and impermissibly promotes the imposition of an arbitrary and unreliable death sentence in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments and the parallel provisions of the state constitution as well. And in this case -- where defense counsel was specifically asking jurors to reconsider one of the guilt phase findings -- it also undercut Mr. Miles's state and federal right to the effective assistance of trial counsel.

Mr. Miles will be clear. His argument is not that the guilt phase had to be retried simply because alternate jurors were seated for the penalty phase. Instead, as a matter of statutory and constitutional law, at the penalty phase of his trial Mr. Miles was entitled to have the two new jurors participate in a renewed and full discussion with the other 10 members as to all of the issues raised and determined in the guilt phase of the trial. A new penalty phase is required.

Mr. Miles also recognizes that the Court has addressed, and rejected, this same argument on one prior occasion. (*See People v. Cain* (1995) 10 Cal.4th 1, 66.) But the fact of the matter is that *Cain* is in substantial tension with the principle the Court recognized in *Kaurish* permitting alternate jurors seated for the penalty phase "to vote against the death penalty if [they] disagreed with the guilt phase verdict . . . ." (*People v. Kaurish* (1990) 52 cal.3d 648, 708.) For all the reasons discussed above, *Cain* should be reconsidered.

XV. EMPIRICAL EVIDENCE INTRODUCED BELOW ESTABLISHES THAT THE CALIFORNIA CAPITAL SENTENCING SCHEME VIOLATES THE EIGHTH AMENDMENT.

A. The Relevant Facts.

On many, many occasions since the death penalty was reinstated in California, capital defendants have mounted facial attacks on the death penalty, contending that it fails to adequately narrow the class of death eligible defendants in violation of the Eighth Amendment. This Court has rejected these facial attacks on the constitutionality of California's capital punishment statute every time they have been raised. (*See, e.g.*, *People v. Jones* (1997) 15 Cal.4th 119, 196; *People v. Ray* (1996) 13 Cal.4th 313, 356-357; *People v. Arias* (1996) 13 Cal.4th 92, 186-187.) In several cases, the Court has accurately noted that the defendants making these arguments have failed to empirically demonstrate that the state scheme fails to sufficiently narrow the class of death eligible defendants. (*See, e.g.*, *People v. Crittenden* (1994) 9 Cal.4th 83, 155; *People v. Wader* (1993) 5 Cal.4th 610, 669.)

In this case, trial counsel for Mr. Miles presented the precise empirical evidence called for in both *Crittenden* and *Wader*. Rather than simply argue that the statute on its face failed to narrow, defendant presented substantial empirical evidence as to exactly how

the death penalty statute was being applied. In support of his motion to bar imposition of death, defendant introduced empirical evidence in the form of a 37-page declaration from Professor Steven Shatz as to a detailed study he conducted. (13 CT 3753-3790.) This study was ultimately published in the New York University Law Review. (*See* Shatz and Rivkind, The California Death Penalty Scheme, Requiem for Furman? (1997) 72 N.Y.U.L.Rev. 1283.)

Professor Shatz reviewed appellate decisions in murder cases in California during the five year period 1988 -1992. The goal was to determine the degree to which the special circumstances listed in California Penal Code § 190.2 limit death eligibility for persons convicted of first degree murder, and to determine what percentage of persons convicted of first degree murder who are statutorily eligible for death are actually sentenced to death.

In this study, Professor Shatz initially gathered and reviewed (1) all published first degree murder cases in the California Supreme Court and the California Courts of Appeal, along with (2) all unpublished first degree murder cases in the First District Court of Appeal. As to the published death penalty appeals, the data showed one case resulted in a finding that the evidence in support of the special circumstance was insufficient, thus 157 of 158 of the cases were special circumstance cases. (13 CT 3761.) As to the published non-death judgment cases, the data showed that 91% were factually special circumstance

cases. (13 CT 3763.) As to the unpublished cases from the First District, the data showed that 85% were factually special circumstance cases. (13 CT 3764.)

Professor Shatz combined the three categories of first degree murder cases "according to their respective proportion each represents of total first degree murder cases." (13 CT 3769.) Studying the fact patterns set forth in the opinions, Professor Shatz found that 87% of the first degree murder convictions were factually special circumstance cases. (13 CT 3769.) Adjusting for the fact that juvenile defendants are eligible to be convicted of first degree murder, but not eligible for the death penalty, Professor Shatz concluded that "84% of convicted first degree murderers were statutorily death-eligible" under the California scheme. (13 CT 3769.)

During the five years from which Professor Shatz drew his sample, 1,729 persons were committed to the Department of Corrections on new first degree murder convictions, and 166 first degree murderers were sentenced to death, a rate of approximately 9.6%. (13 CT 3756.) Professor Shatz concluded that "[i]f 84 % of convicted first degree murderers were death-eligible and only 9.6 % of convicted first degree murderers were actually sentenced to death . . . California's death sentence ratio was approximately 11.4%." (13 CT 3770.) Put another way, from a statistical perspective, 11.4 of every 100 defendants

convicted of first degree murder with proved or provable special circumstances will be sentenced to death.

The state did not introduce any evidence to rebut any of Professor Shatz's factual contentions. Despite the fact that defendant had presented the very empirical evidence this Court found lacking in *Wader* and *Crittenden*, the state cited this Court's decisions in those cases rejecting *non*-empirically based facial attacks on the death penalty, and urged the trial court to deny the motion because "[h]is argument has been routinely made in death penalty cases for many years and has been repeatedly considered and rejected by the California Supreme Court." (13 CT 3833, *citing People v. Jones*, *supra*, 15 Cal.4th at p. 196, *People v. Ray*, *supra*, 13 Cal.4th at pp. 356-357 and *People v. Arias*, *supra*, 13 Cal.4th at pp. 186-187.)

Of course, the prosecutor could not have been more wrong. The challenge made by defendant here was *not* a facial attack on the statute, but an empirically based attack on the statute as it has been applied. In contrast to *every one of the cases on which the state relied*, the challenge here was based on evidence which *none* of the Court's cited cases had ever considered. Unfortunately, the trial court did not appreciate the difference, "deny[ing] that motion based on the fact that this has been found to be Constitutional." (5 RT 1249.)

In short, none of this Court's appellate decisions address an empirical attack on the statute based on Professor Shatz's data. And, as this Court has noted many times, cases are not authority for propositions which are not considered. (*See People v. Williams*, *supra*, 34 Cal.4th at p. 405; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 581; *General Motors Accept. Corp. v. Kyle* (1960) 54 Cal.2d 101, 114.) As more fully discussed below, when Professor Shatz's data is considered in light of the scheme found unconstitutional in *Furman v. Georgia* (1972) 408 U.S. 238, the California capital punishment scheme violates the Eighth Amendment.

B. The Unrebutted Empirical Evidence Shows That California's 1978 Death Penalty Law Provides No More Narrowing Than The Georgia Scheme Declared Unconstitutional In *Furman*.

In *Furman v. Georgia*, *supra*, 408 U.S. 238, Supreme Court addressed the question of whether Georgia's system of imposing capital punishment violated the constitution. The Georgia statute at the time of *Furman* made all defendants convicted of murder eligible for the imposition of the death penalty. (Former Ga. Code § 26-1005; *see Hawes v. State* (Ga. 1977) 240 S.E.2d 833, 841 n. 1 [conc. opn of Hall, J.]; *Furman v. Georgia*, *supra*, 408 U.S. at p. 309, n. 9 (opn. of Stewart, J.). According to Chief Justice Burger, the "empirical evidence" presented showed that "[a]lthough accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to

death . . . ." (408 U.S. at 386 n. 11, dissenting opn. of Burger, C.J.) Ultimately, Justices Brennan, Marshall, White, Stewart and Douglas voted to strike down the Georgia scheme.

Each of these five justices wrote a separate opinion. Justice Brennan, noted that "the punishment is not being regularly and fairly applied . . . However the rate of infliction is characterized - as 'freakishly' or 'spectacularly' rare or simply as rare - it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases." (408 U.S. at p. 293.) Justice Stewart famously concluded that the death sentences before the Court were "cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he petitioners are among a capriciously selected random handful . . . ." (408 U.S. at pp. 309-310.) And, Justice White opined that the death penalty system under review was unconstitutional because there was "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." (408 U.S. at p. 313.) The small number of individuals actually sentenced to death within the deep pool of the death-eligible was the systemic flaw that the Court identified as contributing to the arbitrary and capricious selection process. (*See also* 408 U.S. at p. 293 [Justice Brennan notes the unavailability of "exact figures," but concludes that only a "minute fraction" of the death eligible are actually sentenced to death].)

Because each of the justices in the five-justice majority in *Furman* wrote an opinion, the central principles of *Furman* were developed, in large part, through subsequent opinions. In response to *Furman*, Georgia amended its statutory scheme. While the death penalty was still authorized as a punishment for murder, the state legislature added a crucial narrowing provision: the defendant was actually eligible for the death penalty only if, during the second half of a bifurcated trial, the jury or sentencing judge found, beyond a reasonable doubt, at least one of ten "aggravating circumstances" specified in the new statute. (*Gregg v. Georgia* (1976) 428 U.S. 153, 165.)

The Court addressed and ultimately upheld this new scheme in *Gregg v. Georgia*, *supra*, 428 U.S. 153 noting that "*Furman* did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments," but, rather, *Furman* held that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." (428 U.S. at p. 188.) In a concurring opinion, Justice White explained why he thought the new scheme was different than the scheme struck down in *Furman* and complied with the Eighth Amendment: under the new scheme narrowly defining those cases eligible for death, "it becomes reasonable to expect that juries -- even given discretion not to impose the death penalty -- will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the

penalty is being imposed wantonly or freakishly or so infrequently that it loses its usefulness as a sentencing device. (*Id.* at p. 222, [conc. opn. of White, J.].)

The narrowing function absent from the scheme struck down in *Furman*, and present in the scheme approved in *Gregg*, has both a quantitative and a qualitative aspect. Many of the Supreme Court's post-*Furman* opinions in this area have dealt with the qualitative aspect -- that is, whether a particular sentencing factor was sufficiently defined to give actual objective narrowing guidance to the sentencer and thus avoid arbitrariness.[40]

But the Court's precedents establish that *both* aspects must be present in order to fulfill the "constitutionally necessary function." It is "not enough for an aggravating circumstance . . . to be determinate. Our precedents make clear that a State's capital sentencing scheme also must 'genuinely narrow the class of persons eligible for the death penalty.'" (*Arave v. Creech*, *supra*, 507 U.S. at p. 474.)

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[40] *See, e.g.*, *Maynard v. Cartwright*, *supra*, 486 U.S. 356 [involving Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance]; *Lewis v. Jeffers* (1990) 497 U.S. 764 [involving Arizona's "especially heinous, cruel, or depraved" aggravating circumstance]; *Shell v. Mississippi* (1990) 498 U.S. 1 [involving Mississippi's "especially heinous, atrocious, or cruel" aggravating circumstance]; *Espinosa v. Florida* (1992) 505 U.S. 1079 [involving Florida's "heinous, atrocious, and cruel" aggravating circumstance]; *Sochor v. Florida* (1992) 504 U.S. 527 [involving Florida's "cold, calculated, and premeditated" aggravating circumstance]; *Arave v. Creech* (1993) 507 U.S. 463 [involving Idaho's "utter disregard for human life" aggravating circumstance].)

In *Lowenfield v. Phelps* (1988) 484 U.S. 231 the Court reaffirmed the narrowing requirement even as it concluded that the narrowing could occur "in one of two ways": through a narrow definition of capital murder, or through the use of aggravating circumstances. "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." (484 U.S. at p. 244.)

A year after *Lowenfield*, the Court made clear that Justice White's articulation in his *Gregg* concurrence was the constitutional touchstone: by selecting a "narrowly defined" and "limited" group of death eligible defendants, a capital punishment scheme avoids the "constitutional infirmity" identified in *Furman* because "it becomes reasonable to expect that juries . . . will impose the death penalty in a substantial portion of the cases so defined." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 327.) Since then, the Court has consistently reinforced the constitutional necessity of the narrowing requirement in capital punishment schemes. (*See, e.g., Romano v. Oklahoma* (1994) 512 U.S. 1, 7 ["to pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"]; *Loving v. United States* (1996) 517 U.S. 748, 755 [under *Furman*, the narrowing function of

aggravating factors is "necessary to the constitutional validity" of a capital punishment scheme].)

Consequently, in order to avoid the constitutionally impermissible systemic arbitrariness identified in *Furman*, a capital sentencing scheme must both quantitatively narrow the pool of murder defendants and accomplish that narrowing in a qualitatively rational way. A statute that makes nearly all murderers eligible for the death penalty accomplishes neither of these things and thus "does not narrow the death-eligible class in a way consistent with our cases." (*Loving v. United States*, *supra*, 517 U.S. at p. 756.)

At this point, it is important to note that the United States Supreme Court has never approved of the California statute or upheld it in the face of a challenge to its failure to narrow the death-eligible pool in a constitutionally adequate way. In *Tuilaepa v. California* (1994) 512 U.S. 967, the Supreme Court addressed a portion of the California capital sentencing scheme and rejected a challenge to the facial validity of three of the eleven sentencing factors listed in § 190.3 and utilized during the penalty phase trial. In so doing, the Court did not address the overbreadth of the § 190.2 special circumstances, but several justices expressed their concern over the California system. Justice Blackmun noted that "[b]y creating nearly 20 . . . special circumstances, California creates an extraordinarily large death pool. . . . [but] the Court is not called on [in this case] to

determine that they collectively perform sufficient meaningful narrowing." (512 U.S. at p. 994 [dis. opn.].) Justice Stevens similarly noted that the majority's holding was contingent upon "the assumption (unchallenged by these petitioners) that California has a statutory 'scheme' that complies with the narrowing requirement." (512 U.S. at p. 984 [conc. opn].)

Here, the empirical evidence introduced from Professor Shatz -- which the state did not rebut -- convincingly shows that the California scheme under which petitioner was sentenced fails to comply with the narrowing requirements of the Eighth Amendment. In fact, the capital sentencing rate under the 1978 law (11.4%) is comparable, if not worse, than the rate *Furman* condemned as arbitrary and capricious (15%-20%). In contrast to the observation Justice White was able to make about the post-*Furman* Georgia scheme upheld in *Gregg*, the empirical evidence shows that although the California scheme defines cases eligible for death, California juries have *not* "impose[d] the death penalty in a substantial portion of the cases so defined." (428 U.S. at p. 222.) Absent a scheme that does that, as Justice White noted, the death penalty "is being imposed wantonly or freakishly or so infrequently that it loses its usefulness as a sentencing device. (*Ibid.*) As a result, the death sentence here violates the Eighth Amendment and must be vacated.

XVI. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS, MR. MILES'S DEATH SENTENCE MUST BE REVERSED.

In the capital case of *People v. Schmeck* (2005) 37 Cal.4th 240, the defendant presented a number of attacks on the California capital sentencing scheme which had been raised and rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (37 Cal.4th at p. 303.) This Court acknowledged that in dealing with these systemic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (37 Cal.4th at p. 303, n.22.) In order to avoid detailed briefing on such claims in future cases, the Court held that a defendant could preserve these claims by "(I) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (37 Cal.4th at p. 304.)

Mr. Miles has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck*, Mr. Miles identifies the following systemic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case:

(1) The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die. (20 RT 6760.) This aggravating factor was unconstitutionally vague in violation of the Eighth Amendment and requires a new penalty phase. This Court has already rejected this argument. (*People v. Ray* (1996) 13 Cal.4th 313, 358.) The Court's decision in *Ray* should be reconsidered.

(2) California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has already rejected this argument. (*People v. Schmeck, supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck, supra*, however, the Court's decision should be reconsidered.

(3) Penal Code section 190.3, subdivision (a) -- which permits a jury to sentence a defendant to death based on the "circumstances of the crime" -- is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death. The jury in this case was instructed in accord with this provision. (20 RT 6759.) This Court has already rejected this argument. (*People v. Schmeck, supra*, 37 Cal.4th at pp. 304-305.) For the same reasons set forth by the appellant in *People v. Schmeck, supra*, however, the Court's decision should be reconsidered.

(4) During the penalty phase, the state introduced evidence that Mr. Miles had prior felony convictions. (18 RT 6100.) This evidence was admitted pursuant to Penal Code section 190.3, subdivision (c). The jurors were instructed they could not rely on the prior conviction unless it had been proven beyond a reasonable doubt. (20 RT 6762.) The jurors were never told that before they could rely on this aggravating factor, they had to unanimously agree that defendant had committed the prior crime. In light of the Supreme Court decision in *Ring v. Arizona* (2002) 536 U.S. 584, the trial court's failure violated Mr. Miles's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Schmeck, supra*, 37 Cal.4th at p. 304.) For the

same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(5) During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (20 RT 6759-6760.) Evidence supporting this instruction had been admitted at the guilt phase, and the jury was authorized to consider such acts at the penalty phase pursuant to Penal Code section 190.3, subdivision (b). The jurors were instructed they could not rely on this evidence unless it had been proven beyond a reasonable doubt. (20 RT 6764.) The jurors were told, however, that they could rely on this factor (b) evidence even if they had not unanimously agreed that the conduct had occurred. (20 RT 6764.) In light of the Supreme Court decision in *Ring v. Arizona*, *supra*, 536 U.S. 584, the trial court's failure to require unanimity as to these crimes violated Mr. Miles's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decision in *Lewis* should be reconsidered.

(6) Under California law, a defendant convicted of first degree murder cannot receive a death sentence unless a jury (1) finds true one or more special circumstance allegations which render the defendant death eligible and (2) finds that aggravating circumstances outweigh mitigating circumstances. The jury in this case was not told that the second of these decisions had to be made beyond a reasonable doubt. This violated Mr. Miles's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(7) At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (20 RT 6759-6761.) This instruction was constitutionally flawed in five ways: (1) it failed to delete inapplicable sentencing factors, (2) it failed to delineate between aggravating and mitigating factors, (3) it contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as "extreme" or

"substantial," and (5) failed to specify a burden of proof as to either mitigation or aggravation. (*Ibid.*) These errors, taken singly or in combination, violated Mr. Miles's Fifth, Sixth, Eighth and Fourteenth Amendment rights. This Court has already rejected these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359.) The Court's decisions in *Schmeck* and *Ray* should be reconsidered.

(8) Because the California death penalty scheme violates international law -- including the International Covenant of Civil and Political Rights -- Mr. Miles's death sentence must be reversed. This Court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the Court's decision should be reconsidered.

(9) At the penalty phase, the jury was properly instructed that before it could rely on prior criminal activity as a basis for imposing death, it had to find the prior activity true beyond a reasonable doubt. (20 CT 6762.) Allowing a jury which has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker. This Court has already rejected this argument. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decision in *Hawthorne* should be reconsidered.

To the extent respondent argues that any of these issues is not properly preserved because Mr. Miles has not presented them in sufficient detail to this Court, Mr. Miles will seek leave to file a supplemental brief more fully discussing these issues.

XVII. THE CUMULATIVE EFFECT OF ERRORS IN THIS CASE REQUIRES REVERSAL.

As discussed in some detail above, there are numerous errors in this case which even when considered in isolation from one another, require reversal. However, assuming *arguendo* these errors alone are insufficient to require reversal of the guilt, competency and penalty phases verdicts, this Court must also consider the cumulative impact of these errors.

In this regard, this Court has long recognized that even where individual errors themselves do not require reversal in a criminal case, the cumulative impact of these errors may itself require reversal. (*See*, *e.g.*, *People v. Holt* (1984) 37 Cal.3d 436, 459-460; *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Underwood* (1964) 61 Cal.2d 113, 125.) The federal courts have also recognized that the cumulative impact of individual errors may itself violate due process. (*See*, *e.g.*, *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179 [cumulative effect of three significant trial errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [collecting cases considering prejudicial effect of multiple errors].)

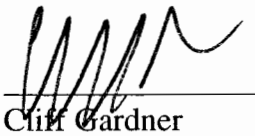
That is exactly the case here. Even if none of the errors discussed above separately require relief, when considered in conjunction with one another in any combination, the cumulative impact of these errors itself violates state law, as well as Mr. Miles's federal due process right to a fair jury trial and his Eighth Amendment right to a reliable determination of guilt, competency and penalty. Reversal is required.

CONCLUSION

For all these reasons, the conviction, competency finding, and penalty verdict must all be reversed.

Dated: 8/15/13

Respectfully submitted,



Cliff Gardner
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 70,529 words in the brief.

Dated: 8/15/13

Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows: I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, California 94702.

On August 15, 2013, I served the within

APPELLANT'S OPENING BRIEF

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

California Appellate Project
101 2nd Street
San Francisco, CA 94105

Office of the Attorney General
Kevin R. Vienna, Deputy Attorney General
P.O. Box 85266
San Diego, CA

Johnny Duane Miles
H-8-153
San Quentin State Prison
San Quentin, CA 94974

Hon. James Edwards
Superior Court
401 North Arrowhead Ave
San Bernardino, CA 92415

Office of the District Attorney
316 North Mountain View Ave
San Bernardino, CA 92415

I declare under penalty of perjury that the foregoing is true. Executed on August 15, 2013 in Berkeley, California.

Declarant