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SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHRISTOPHER HENRIQUEZ,

Defendant and Appellant.

No. S089311

(Contra Costa County
Superior Ct. No.
N. 961902-4)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of
the State of California for the County of Contra Costa

Honorable Peter Spinetta

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	No. S089311
v.	(Contra Costa County Superior Ct. No. N. 961902-4)
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Pen. Code §§ 1170.12 2

OTHER AUTHORITIES

Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making (1999) 83 Cornell L.Rev 1476, 1497-1499 124

Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; 169

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRISTOPHER HENRIQUEZ, Defendant and Appellant.	)	S089311 Contra Costa County Superior Court No. 961902-4

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code § 1239, subd. (b); Cal. Rules of Court, rule 8.204(a)(2)(B).)

STATEMENT OF THE CASE

On October 10, 1996, in Contra Costa County Superior Court, appellant Christopher Henriquez was indicted by a grand jury for three murders. (Pen. Code § 187.) The indictment alleged the special

circumstance of multiple murder pursuant to Penal Code section 190.2(a)(3). The indictment also alleged the use of a deadly weapon pursuant to Penal Code section § 12022(b). (CT 132-137.) By express amendment to the indictment, appellant was additionally charged with having a prior conviction constituting a "strike" (Pen. Code §§ 1170.12 (b) and (c)) and with being subject to a habitual criminal enhancement. (Pen. Code § 667(a).) (CT 136.)[1]

On November 20, 1998, appellant filed a motion to quash the jury master list and jury venire on the ground that the composition of the master list from which jury venires were drawn in Contra Costa County resulted in systematic underrepresentation of potential jurors of African-American descent. (CT 360.) The District Attorney and the Jury Commissioner both opposed the motion to quash. (CT 565, 608, 641.) On March 10, 1999, Alameda County Superior Court Judge Thomas Reardon was appointed to try the issues related to the jury composition motion. (CT 639, 666.) An evidentiary hearing was held, as described in greater detail in Argument I, below, and on June 2, 1999, the motion was denied. (CT 739.)

The trial began on November 15, 1999, with jury selection (CT 872.) The jury was selected and sworn on November 22 and 23, 1999. (CT 878, 880.)

On November 30, 1999, opening statements were given by both parties, and the prosecution began its case-in-chief. On December 9, 1999, the prosecution rested and the defense presented its case. On December 10, 1999, the prosecution and defense gave closing arguments. (CT 950.)

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[1] The Clerk's Transcript is referred to as "CT"; the Reporter's Transcript is designated "RT," and is referred to by citing the appropriate volume and page number.

On December 13, the jury was instructed and commenced their deliberations. (CT 952). On December 14, the jury rendered its verdicts, finding appellant guilty of first degree murder of his wife Carmen Henriquez and their daughter, Zuri Henriquez, and guilty of second degree murder of the fetus carried by Carmen Henriquez. The jury also found true the special circumstance of multiple murder and found true the allegation of use of a deadly or dangerous weapon. (CT 954.) The habitual criminal enhancement allegations and the strike allegation were also found to be true by the combined findings of the jury and the court. (CT 1095-1101, 1127.)

On January 24, 2000, the penalty phase began. (CT 1236.) The following day, the prosecution and defense gave opening statements, and the prosecution began its case-in-chief. On January 27, the prosecution rested, and the defense began its presentation of mitigating evidence. On February 2, 2000, the defense rested.

On February 3, instructions were given and the jury was admonished and commenced deliberations. On February 7, 2000, after approximately fourteen hours of deliberations, the jury returned a verdict of death. (CT 1311-1314.)

Appellant's motion for new trial, filed on March 29, 2000 (CT 1322), was denied on April 12, 2000. (CT 1410.) On June 2, 2000, appellant was sentenced to death after the court denied the automatic motion for modification of the death verdict pursuant to Penal Code section 190.4(e). (CT 1413.)

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STATEMENT OF FACTS

A. Guilt Phase

The defense admitted that appellant killed his pregnant wife and daughter, but contended that the homicides were the result of spontaneous domestic violence stemming from appellant's extreme fear of abandonment. While the prosecution attempted to establish that the killings constituted planned and premeditated first degree murder in order to prevent his wife from talking about bank robberies that appellant had committed, the defense argued that the manner of killing – an example of "overkill," which appellant took no effort to conceal – demonstrated an impulsive reaction to estrangement.

Appellant was born in 1971, the second of six children, and raised in Bronx, New York. (IX RT 2157.) The family belonged to the Jehovah's Witness community. (IX RT 2138-2140.) Appellant met Carmen Jones, and they married in 1992, and moved to California. (IX RT 2159-2160.) Appellant and Carmen soon separated and appellant returned to New York. Their daughter Zuri was born in 1993. (X RT 2388.)

In 1994 in New York, appellant was convicted of second-degree robbery. On July 28, 1995, after serving 18 months, he was released on three years parole with permission for supervision to be transferred to California. (XII RT 2789.) Appellant returned to California in 1995, and reconciled with his wife. (IX RT 2160.)

Appellant and Carmen moved from San Francisco to Antioch, California, to live in the same apartment complex where Carmen's best friend, Angelique Foster, had recently moved. (X RT 2390.) They had marital problems, arguing frequently, and it was no secret that they did not get along well. (IX RT 2139-2141, 2149; X RT 2393.)

After moving to Antioch, appellant began looking for work. Foster introduced appellant to Gregory Morton, who lived in the same complex. Foster thought Morton could help appellant find a job. (X RT 2391.) Morton and Appellant decided to rob banks together. Morton did not want to return to prison, and became concerned that Carmen was talking about the proposed robberies. (IX RT 2196.) He said he would have to kill Carmen if appellant did not keep her in check. (IX RT 2195-2196, 2363.) Appellant also allegedly made comments about having to kill Carmen if she did not keep quiet. (IX RT 2144-2145.)

Carmen left with Zuri in July 2006, due to Morton's threatening behavior, and went to live with Carmen's father, Harold Jones, for several weeks. (IX RT 2196.) They also spent part of July with Carmen's cousin, Treniece White. (IX RT 2127.) According to White, Carmen appeared stressed and withdrawn. She said that appellant was into "heavy stuff," but did not elaborate. (*Ibid.*)

On July 26, 1996, appellant and Morton robbed the Cal Fed Bank at 2600 Ocean Avenue in San Francisco and obtained $9,054. On July 31, 1996, they robbed the Bank of America at 5628 Diamond Heights Blvd. in San Francisco and obtained $179,397. (XII RT 2790.)

Appellant took his family to Disneyland. He also gave his mother $5000. (IX RT 2133, 2165-2166.) Although it appeared that everyone had gotten along well on the trip, (IX RT 2169), Carmen spoke to her sister-in-law, Heidi Jones, when they returned and told her that "things are very bad right now." (VIII RT 1960.) On August 12, 1996, the day after returning from Disneyland, appellant killed his wife and child.

At approximately 5:30 p.m., on August 12, appellant called his mother, Deborah, who was on her way to a Jehovah's Witness meeting.

Appellant arrived at her house by cab before she left. (IX 2171-2172.) He looked dazed and sick, and was incoherent. (X RT 2137.) Appellant's sister, Vanessa thought appellant was intoxicated, although he did not smell of alcohol. (IX RT 2142, 2172.) He was in a very bad state, and seemed different than he had ever seemed before. (IX RT 2148, 2172.)

Appellant told his mother and sister that Carmen had left and taken baby Zuri with her. (IX RT 2134.) He said that he and Carmen had an argument. He was incoherent and kept mumbling, "[S]he just doesn't listen." (IX RT 2174, 2207.) Appellant lay on the floor in the living room. Deborah got towels to wipe him because he was sweating profusely. (IX RT 2206.) He could not communicate and his eyes rolled back as if he were having a seizure. (IX RT 2207.) Although it was clear something was terribly wrong, Deborah told Vanessa to sit with appellant while she went out to her meeting. (IX RT 2138, 2139.) Appellant never told Vanessa what had happened. (IX RT 2133.) Appellant started crying and asking, "Where is my Zuzu?" (IX RT 2137.) When Deborah came home from her meeting around 9 p.m., appellant was vomiting and said he had a headache. (IX RT 2175.)

Appellant asked his mother if she could stay home the next day, August 13, but she said she had to go to work. At 6 a.m., on the 13th, appellant left his mother's house by taxi. (IX RT 2135.) He called his mother two times that morning, asking her to come home, and saying he needed to talk to her. (IX RT 2209.) At 9:35 a.m., Deborah called her own house, and appellant was there again. He told her that he killed Carmen and Zuri. (IX RT 2180, 2181.) Deborah called a friend to come get her and then called her brother-in-law, Daniel Stewart. (IX RT 2182.) When they arrived, appellant told his mother that he and Carmen had argued when they

came home from Disneyland. He said they argued, and that she just "kept on talking" and wouldn't listen. (IX RT 2185, 2212.) Appellant was upset, tearful and felt very bad about what had happened, but despite urging from Deborah and Daniel, would not turn himself in. (IX RT 2188-2189; X RT 2361, 2374.) Appellant's last words to his mother were, "I am so sorry." (IX RT 2217.)

Appellant left, and Deborah, her sister Chryisse, and Daniel went to the Vallejo Police Department, and told them that appellant had killed his wife and daughter. (VIII RT 1872; IX RT 2192.) Deborah told the police that appellant had told her he was going to New York. (IX RT 2193.)

The F.B.I. tracked appellant, who left for New York from Oakland Airport, and was met by New York Detective John Trotter at La Guardia Airport at approximately 11:40 p.m., on August 13, and placed under arrest. (X RT 2431, 2434-2435.) Appellant was in possession of jewelry, including a Rolex watch, and $49,000 in cash. (X RT 2457.)

Appellant told Detective Trotter that he killed his wife and daughter. He was re–interviewed by Trotter on August 14, and was further interviewed by Detective Orman the following morning. (X RT 2493.) With varying degree of detail, appellant admitted to the detectives that he and Carmen had an argument, and after she left to go to the bank, he hit Zuri on the face and head with a hammer, and suffocated her in a pillow. (X RT 2441-2442, 2450, 2453, 2513.)

Appellant told Detective Trotter that when Carmen returned, he started beating her and put a plastic bag over her face until she was dead. Appellant could not explain why he wrapped a cord around Carmen. (X RT 244-2449.) He was later able to provide more information to Detective Orman, describing how he tied up Carmen's hands and feet. (X RT 2518.)

Appellant also said he went to the kitchen and got plastic shopping bags and put them over her head and wrapped them tightly around her neck. He grabbed her around the neck and throat, choked her until she stopped moving, wrapped her in a blanket. He said he removed the bag, hoping she was breathing, but she was not. (X RT 2520.) Appellant said that as he was killing his wife, he was aware that he was killing his unborn child, although he had a thought it might survive. (X RT 2523-2524.)

Appellant also admitted to the July 31, 1996 bank robbery, initially claiming to Detective Trotter he acted alone. (X RT 2446, 2448. 2449.) In a later interview with Trotter, he admitted to both bank robberies, and stated they were committed with his cohort, Gregory Morton. (X RT 2450.)

Detective Orman entered the Henriquez apartment on August 13, 1996, and found the blood and bodies of Carmen and Zuri. (X RT 2422-2424.) Dimitri Barakos, a police officer for the City of Antioch, was called to the crime scene to document and collect evidence. Blood was found in the living room and in the west bedroom. (IX RT 2031, 2034.) Carmen was found in the west bedroom, rolled in a blanket, lying on her stomach, with her hands tied behind her back with a phone cord, her legs and ankles tied with shoelaces, and a plastic bag with a knot in it near her face. (IX RT 2034, 2050, 2064.) In the bedroom, Zuri was found in a box that had bedding in it, as well as a bloody hammer. (IX RT 2035, 2066.)

Dr. Arnold Josselson, a forensic pathologist, performed the autopsies. He found injuries to Zuri's face, head, chest and neck and hemorrhaging on both eyes. (VIII RT 1905-1907.) He determined the causes of the hemorrhaging to be blunt force trauma to the head. (VIII RT 1921.) There was also evidence consistent with strangulation. (VIII RT 1910, 1913.) In Dr. Josselson's opinion, Zuri would have become

unconscious after the blunt force blows and died very shortly after. (VIII RT 1922.) There was no evidence of prior physical abuse. (VIII RT 1921.)

Carmen had hemorrhages in her eyes and injuries on her internal neck, and hemorrhaging in these muscles indicative of manual strangulation. (VIII RT 1925, 1929.) There was swelling of her face consistent with trauma to the face. Defensive wounds were found on her arms. The cause of Carmen's death was manual strangulation. (VIII RT 1931.) Any blows Carmen suffered were likely before the strangulation. (VIII RT 1935.)

Carmen was eight months pregnant. The fetus was male and weighed about four pounds. It had no injuries or bruising and was found to be viable. (VIII RT 1930.) The cause of death for the fetus was maternal death – it suffered a lack of oxygen shortly after Carmen died. (VIII RT 1931.)

The defense presented evidence to show that appellant's actions stemmed from his fear that Carmen had plans to leave him, which caused appellant to react in an impulsive, violent manner.

Dr. Gamble, a psychiatrist at Alta Bates Hospital in Berkeley, California, admitted Carmen on July 27, 1996 for psychiatric care following domestic abuse and discharged her three days later, on the 30th of July. Carmen was given options for follow-up care and resources through Kaiser and the Battered Women's Association. (XII RT 2936-2938.)

Dr. Donald Dutton testified as an expert on domestic violence and spousal homicide. He categorized spousal killers as either "instrumental"

or "impulsive/rageful." (XII RT 2813.)[2] The majority of spousal killers are the impulsive killers. The primary difference between an instrumental and impulsive killer is their reaction to estrangement. (XII RT 2808, 2824, 2858.) In two-thirds of the cases of spousal homicide, there is a history of domestic violence, and in the vast majority of cases, there is a history of separation. These men are six times more likely to kill because of their fear of departure or the end of their marriage. (XII RT 2807.) They suffer from a failure of attachment typically early on in life, and experience extreme rage generated by a real or perceived abandonment. (XII RT 2799, 2800.)

Dr. Dutton explained that crime scene analysis and the post-homicidal state are the most reliable ways of determining whether people fit into the instrumental or impulsive/rageful category. In an instrumental murder case, there is typically evidence of a plan, strategy, method of cover-up, and the like. In an impulsive murder case, "overkill" is a typical characteristic. (XII RT 2798, 2805, 2858.) The men who commit impulsive murders typically have either spotty recollection of what happened prior to the homicide or complete amnesia. They do not have ordinary temporal ordering, and the post-homicidal state is normally typified by total confusion. (XII RT 2803, 2804.)

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[2] In Argument II, below, appellant argues that the trial court erroneously limited the scope of Dr. Dutton's guilt phase testimony.

B. Penalty Phase

The prosecution's case in aggravation consisted of evidence of: 1) 1994 robbery of Frank Pecoraro in New York, for which appellant was convicted (XIV RT 3611-3617); 2) 1994 robbery and murder of Jerome Bryant for which appellant was never charged (XV RT 3698-3727, 3741-3757); and 3) the two 1966 San Francisco bank robberies. (XIV RT 3491-3549, 3571-3609; XV RT 3692.)

In addition, the prosecution presented testimony from the victims' family on the impact of the deaths upon them. Carmen's father, Harold Jones (XIV RT 3624-3627); her friend, Angelique Foster (XIV RT 3629-3633); her sister-in-law, Heidi Jones (XIV RT 3636-3643); and her brother, Valen Jones (XIV RT 3645-3648) all testified.

In mitigation, the defense presented evidence of the adverse conditions in which appellant was reared and lived. There was evidence of a poor, crime-ridden neighborhood, an abusive father who was a drug-user and a poor role model, and a mother who was cold and failed to meet appellant's basic needs as a child. Appellant was a devoted Jehovah's Witness, and the negative forces in his life combined with his religious beliefs to leave him with psychological difficulties which tainted his relationships, caused him to act in an impulsive and angered manner, and, ultimately led to the tragic consequences of this case.

Several witnesses described appellant as having led most of his life as a man of exceptional character. The mental health experts opined that the killings were not the cold-blooded acts of a sociopath, but rather the emotional killings of a man acting out of a sense of loss and abandonment triggered by his belief his wife was leaving him. Wtnesses who testified on behalf of appellant included Sandra Coke, an investigator (XV RT 3760-

3809); Dr. Dutton, an expert in spousal abuse cases (XV RT 3811-3900); psychiatrists Leonti Thompson (XVI RT 3945-3988) and Jonathan Mueller (XVI RT 3990-4071); his brother Edwin (XVI RT 4079-4082); his uncle Modesto (XVI RT 4237-4253); his mother Deborah (XVI RT 3919-3937); and four members of his Jehovah's Witness congregation (XVI RT 4094-4150).

Appellant was born on August 21, 1971 to Edward and Deborah Henriquez, and was the second oldest of six siblings. (XVI RT 3919-3921.) According to appellant's uncle, Modesto, appellant's father had "mental problems." (XVI RT 4251.) There was a history of confirmed psychiatric disorders in the family, including appellant's paternal grandfather and aunt, who both had been committed to mental institutions. (XV RT 3766-3767.) Appellant suffered from auditory hallucinations (XVI RT 3998), and it was suggested that the chicken pox and encephalitis he suffered as a child may have had enduring neurological impact. XVI (RT 4012.)

Appellant was raised near Yankee Stadium in the South Bronx. It was a poor and violent community where fighting, drug dealing, and gunfire were routine. (XV RT 3819.) There was a history of dysfunction and violence in the family, as well. Appellant's father and his brothers, Timothy and Michael, had spent time in prison. (XV RT 3770-3772.) Michael was convicted of shooting his girlfriend in 1994, and was in state prison at the time of trial. (XV RT 3774.) Brother Edwin had been living in a homeless shelter after having been evicted by his mother. (RT 4081).

Appellant grew up in a very violent household. Appellant routinely heard and saw his parents verbally and physically abusing one another. Both parents participated in beatings of the children. (XV RT 3814, 3820; XVI RT 3995.) Appellant's father struck the children with his hands and

other objects, kicked them and humiliated them. He was an unstable heroin addict, who drank excessively, sold drugs, was involved in prostitution, and engaged in fights on the street. He was unable to control his temper, and carried an axe to intimidate people. (XV RT 3826; XVI RT 3994, 4242-4243, 4246-4250.) Appellant's father taught appellant and his brothers to steal food. (XV RT 3821.)

Appellant perceived his father as more human than his mother. (XVI RT 3995.) Appellant struggled to be close to his mother, Deborah. Deborah was a Jehovah's Witness, who was very strict and rigid. (XVI RT 3952, 3997.) She was physically abusive, and punished the children at random. (XV RT 3817.) She was strong, loud and heavy-handed; considered cold, rejecting and lacking in maternal warmth; shamed the children in public in order to alter their behavior; and condemned illegal activities unless they benefitted her. (XV RT 3824, 3826.)

Despite appellant' difficult upbringing, members of the Jehovah's Witness congregation, some of whom had known appellant since he was five years old and through his high school years, testified that he was an exemplary child and young man, who was devoted to his faith. (XVI RT 4094-4150.) As a teenager, he was well-mannered, trustworthy, and faithful. (XVI RT 4097.) He was loving, sincere, respectful, and caring. (XVI RT 3921-3923, 4136). He was helpful to others and sought to do good. (XVI RT 4099-4100, 4127-4128, 4131.) People described him as sweet, cooperative, compliant and submissive, and as a person who would walk away from fights. (XVI RT 3996, 4097, 4132.)

When appellant was sixteen, his father died. Appellant went through a period of depression following his death and appeared saddened, discouraged and withdrawn. (XVI RT 3922, 3952, 3998.) Appellant was

not involved in drinking or drugs and was the one the family counted on. After his father's death, there was pressure on him to help care for the other children. His mother said he was a good son, and that he was dependable and responsible in helping her care for the family. (XVI RT 3921, 4130, 4136-4138.) He was a kind brother to his younger siblings, played ball with them and helped them with their homework. He was the one his peers, younger children and his siblings all looked up to as a role model. (XVI RT 4079, 4130, 4137.)

Appellant was an upstanding citizen (RT 3833) who had lived a clean life with no criminal history until the age of 22. (XV RT 3833, 3859; XVI RT 3999.) Appellant moved to California at the end of 1991, when he was 20 years old. He married Carmen in 1992, and she soon became pregnant. (*Ibid.*) When appellant learned in 1993 that his brothers were planning on taking money from his mother, he decided to return to New York to protect her. (*Ibid.*) Carmen refused to return with him. His relationship with his wife had been his first significant emotional attachment, and he reacted very badly to the dissolution of that relationship. Until that time, there was no evidence of appellant' participation in any criminal activity. (XV RT 3833.)

Appellant began drinking, was homeless for a period of time, and had difficulty controlling his rage. He was so full of shame and anger that he felt that he could no longer go to Jehovah's Witness meetings. He then fell under the influence of his brother, Michael, who was a poor influence and dangerous person. (XVI RT 4000-4001.) It is at this time that appellant became involved in the criminal activity in New York mentioned above. Appellant eventually returned to California and reconciled with Carmen, however, they continued to have marital difficulties.

Leonti Thompson, a psychiatrist, testified that appellant repeatedly expressed his remorse for the homicides. He was in disbelief at what he had done, and expressed concern about his Jehovah's Witness affiliation. (XVI RT 3951, 3954.) Appellant described the anger that came over him as something like he had never experienced before. His feelings were spontaneous, and it was as if he were seeing red. (XVI RT 3955.)

Jonathan Mueller, also a psychiatrist, opined that appellant could not form a clear identity. He testified that appellant had Intermittent Explosive Disorder as well as Borderline Personality Disorder. Appellant had a sense that he was at some deep level, dark, defective, evil and not worthy of love. (XVI RT 4069-4070.) Dr. Mueller testified that appellant had paranoid ideas and was impulsive. (XVI RT 4071.) Appellant lived his life with a fear of abandonment and of displeasing his mother and the Jehovah's Witness community. (XVI RT 4004-4005.)

Dr. Dutton testified that appellant was a textbook case of a man who ends up killing his spouse. (XV RT 3814.) Appellant grew up in an abusive home where he was shamed and had no secure attachment, which led to anger and rage. Children who are shamed are particularly prone to any slights or stresses that occur later in life, and frequently cover up that shame with rage. (XV RT 3816-3817.) Dutton drew comparisons between appellant and his brother Michael, who killed his common-law wife with whom he had a child. Both of their relationships were marked with sexual jealousy which is an adult continuation of insecure attachment that children experience. People who are insecurely attached have extreme emotional reactions to the prospect of abandonment. Both appellant and his brother were the products of traumatic attachments and were terrified of being abandoned. (XV RT 3854-3857.) Dutton opined that appellant was not an

anti-social batterer, but rather the killing appeared to have occurred while appellant was in a dissociative state. (XV RT 3885-3887.)

ARGUMENTS

I.

THE TRIAL COURT DENIED APPELLANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY

"How many years of operating in this fashion and getting numbers that underrepresent African-Americans does it take for a court to finally say, you know what, this isn't race neutral." (Oscar Bobrow, Deputy Public Defender 3/29/99 RT 48.)

A. <u>Introduction</u>

The underrepresentation of African-Americans on jury panels in Contra Costa County criminal trials has persisted unabated for decades. Despite the fact that the County had been put on notice that its process of jury selection resulted in underrepresentation of African-Americans in prior cases, notably *People v. Bell* (1989) 49 Cal.3d 502 and *People v. Buford* (1982) 132 Cal.App.3d 288, the County has done nothing. As this case demonstrates, the stubborn refusal of the County to take any affirmative steps to change its policies in order to resolve this endemic problem constitutes systemic exclusion of African-Americans that can only be redressed by the Courts.

B. <u>The Legacy of Discrimination in Contra Costa County</u>

Contra Costa County has not come close to ensuring representative jury venires in its Superior Court trials. Previous cases have illustrated how endemic this problem has been. As the court of appeal in *People v. Currie* (2001) 87 Cal.App.4th 225, recognized: "The underrepresentation of

African-Americans on Contra Costa County jury venires . . . is a longstanding problem, dating back at least 20 years." (*Id.* at p. 235.)

African-Americans have been severely underrepresented on jury venires in Contra Costa County since at least 1978. During 1978 and 1979, African-Americans constituted 7.3 percent of the adult population of Contra Costa County, yet no African-Americans were represented among separate venires of 63 and 70 jurors. In another case, a 53-member panel contained only one African-American, and on another occasion a jury pool of 266 persons contained only 6 to 10 African-Americans. (See *People v. Buford, supra,* 132 Cal.App.3d at p. 290.)[3]

The chronic underrepresentation of African-Americans was documented in a series of cases after *Buford.* The evidence in *People v. Jones* (1984) 151 Cal.App.3d 1029, 1031, showed that African-Americans over 18 constituted 8.1 percent of Contra Costa's total population in that age group, yet only 4.2 percent of persons called for jury service were African-Americans. (See also *People v. Black* (1984) 160 Cal.App.3d 480, 482 [same evidence as *Jones*]; *People v. Pervoe* (1984) 161 Cal.App.3d 342, 351 [for five weeks, there was an average of 3.76 percent of African-Americans in the weekly jury pools]; and *People v. Simmons* (1985) 164 Cal.App.3d 1070 [African-Americans comprised 4.6 percent of the summoned venires and 3.3 percent of the assigned panels].)

The issue reached this Court in *People v. Bell, supra,* 49 Cal.3d 502, where the jury commissioner testified that less than 3 percent of the average

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[3] In *Buford*, no jury pool during the period for which evidence was admitted contained a proportion of African-Americans equal to, or greater than, the proportion of African-Americans in the general population of the county. (*Id.* at p. 296.)

jury panel consisted of African-Americans. And as further described below, the appellate court in *People v. Currie* acknowledged, "comparative disparity statistics demonstrated 'a constitutionally significant difference between the number of members of the cognizable group appearing for jury duty and the number in the relevant community.'" (*People v. Currie*, 87 Cal.App.4th at p. 234, quoting *People v. Ramos* (1997) 15 Cal.4th 1133, 1155.)

As will be shown in greater detail, below, the problem continues unabated. The evidence presented at the joint hearing in this case established that African-Americans constitute 8.4 percent of the Contra Costa County adult population, based on the 1990 census. The absolute disparity between those African-Americans over 18 in the general population, and those who responded to a jury summons (after factoring in citizenship), was over 3.8 percentage points,[4] and the comparative disparity was as high as "around" 43 percent.[5] Thus, in this case – as in prior Contra Costa cases on this issue spanning two decades – African-Americans were significantly underrepresented in the jury venire. The ultimate question is whether the County's persistent inaction in the face of this underrepresentation constitutes systematic exclusion to establish a denial of

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[4] Absolute disparity measures the difference between the percentage of members of the distinctive group in the relevant population and the percentage of group members in the jury venire.

[5] Comparative disparity measures the percentage by which the number of group members in the actual venire falls short of the number of group members one would expect from the overall eligible population figures. It is calculated by dividing absolute disparity by the underrepresented group's proportion of the population and multiplying by 100.

appellant's rights to a fair cross-section of the community.

C. <u>Summary of Facts</u>

On November 20, 1998, appellant, a capital defendant and an African-American resident of Contra Costa County, filed a motion to quash the jury master list and jury venire on the ground that the jury was not drawn from a representative cross-section of the relevant community in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, section 16 of the California Constitution, as well as on the fact that the jury selection procedure in Contra Costa County failed to comply with state statutory procedure resulting in a selection of jurors in a constitutionally impermissible manner. (CT 360-361.)

The motion contended that "the composition of the master list from which jury venires are drawn results in the systematic underrepresentation of potential jurors of African-American descent who appear on Contra Costa County venires." (CT 362.) The motion relied, inter alia, on a survey conducted by Dr. Robert S. Ross, an expert in areas of survey design, implementation and analysis, which found that African-Americans comprised 4.6 percent of the venired jurors, while they represented 8.4 percent of the county's population, resulting in a comparative disparity of 45.2 percent and an absolute disparity of 3.8 percentage points. (CT 362-363, Exhibit S.) As the motion argued, "[t]his underrepresentation has remained constant since the early 1980's when the county jury selection procedure was first scrutinized by California appellate courts." (CT 363, citing *People v. Buford, supra,* 132 Cal.App.3d 288; *People v. Black* (1984) 160 Cal.App.3d 480; *People v. Simmons* (1985) 164 Cal.App.3d 1070.)

The defense contended that the underrepresentation of African-Americans on the master list was systematic for several reasons: 1) the

source lists used to prepare the juror lists from which venires were drawn did not fairly represent the African-American jury eligible population of Contra Costa County; 2) the criteria for merging the two source lists and for purging duplicate names appearing on both lists, and the failure to adequately follow-up with potential jurors summoned who do not respond, resulted in a list of qualified jurors which was underrepresentative of the African-American jury-eligible population; 3) there is a historical pattern of residential and employment segregation of the County's African-American population in the east and west ends of the County. (CT 363, see Exhibit A, Table 5.) This pattern persisted at the same time as access to the Superior Court judicial and other county services were restricted and impaired for East and West County residents in comparison to those provided to residents of Central County. The segregation of these communities from government functions was compounded further by the lack of viable public transportation from East and West County to the courthouse in Martinez. (CT 363, see Exhibits D and E.) The defense argued that "this collective action by county officials resulted in a systematic exclusion of African-Americans from appellant's jury venire in violation of his federal and state constitutional rights to a jury drawn from a representative cross-section of his community." (CT 364.)

Appellant sought an evidentiary hearing in support of the motion. (CT 373.) In accordance with appellant's request, a judge from another county, Hon. Thomas Reardon, an Alameda County Superior Court Judge, was selected by the Judicial Council to hear the motion. (CT 601-602, 666.)

The People opposed the motion to quash the venire, contending that the defense offered nothing but speculation as to the cause of the alleged

statistical disparity. (CT 608-622.) County Council filed an opposition to the motion to quash on behalf of the Jury Commissioner, contending that there has been no showing that the race-neutral jury selection process used in Contra Costa County systematically excluded African-Americans from jury panels. (CT 641-665.)

The defense indicated that they wished to "build slightly" on the evidentiary record in the *Currie* case. (3/29/99 RT 14.) The defense position was that the evidence in *Currie* essentially established the second prong of *Duren v. Missouri* (1979) 439 U.S. 357 – underrepresentation – and that further evidence was to be presented on the third prong – to show that nothing has been done to change the current system. (3/29/99 RT 14.) In addition, the defense intended to present evidence of county public defenders who had made observations in the Bay Superior Court in Richmond (West County District) and the percentage of the African-American population that was appearing for jury service. (*Id;* Court Exhibits AA and BB.)

1. Evidence from People v. Currie

The evidence and transcripts of the proceedings of *People v. Currie,* No. 962407-3 were taken into consideration. (5/17/99 RT 29-30, 75.)[6]

Contra Costa Demographics

Contra Costa County is a large county, home to roughly 600,000 adult residents and 38 different zip codes. (Currie CT 1338; Def. Exhibit 30.) According to the 1990 census, 8.4 percent of its adult population is African-American. (Currie RT 2073-2074, 2439, 2848.)

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[6] Appellant's record on appeal was augmented with the *Currie* record. The transcripts from *People v. Currie* are cited by reference to "Currie" before "RT" or "CT."

The county has been divided into four judicial districts: Bay, Delta, Mt. Diablo and Walnut Creek. 26.5 percent of the population lives in Bay, 20.1 percent in Delta, 24.9 percent in Mt. Diablo and 28.5 percent in Walnut Creek. The African-American population is concentrated in the Bay District and, to a lesser extent, in the Delta District. 23 percent of the population of the Bay District is African-American, 6.3 percent of Delta, 2 percent of Mt. Diablo and 1.1 percent of Walnut Creek. Indeed, 74.5 percent of all African-Americans in Contra Costa County live in the Bay District and 15.6 percent in the Delta District, a total of 90.1 percent between them. (Currie CT 1575; RT 1968; Def. Exhibit 29.) The high percentage of African-Americans living in the cities of Richmond and Pittsburg, situated in the Bay and Delta districts respectively, account for this fact.

Each of the four districts have a Municipal Court where misdemeanor cases are tried. All felony trials, however, are held in the Superior Court in Martinez.

Procedure for Impaneling Jurors

Kenneth Torre, the Contra Costa County Jury Commissioner, and Sherry Dorfman, Assistant Jury Commissioner, described how juries in Contra Costa County are selected. To obtain names, the county uses lists from the Department of Motor Vehicles of driver's licenses and identification cards and from the Registrar of Voters. (Currie RT 1716, 1898, 2626.) A computer program merges these lists and removes duplicate names as well as persons who have fulfilled jury service within the previous year ("merge-purge process"). (Currie CT 1017-1021; Currie RT 1722-1723, 2637-2638.) From the resulting master list, names of jurors expected to be summoned for a six-month period are randomly drawn.

(Currie RT 2639.) Twice a year, the source list is "refreshed" to include new names and current addresses and to check for duplicate names. (Currie RT 2716.) A file is prepared with the names and addresses of jurors required for a given day and a summons is then generated and mailed. (Currie RT 2651.)

Beginning in 1992, two changes to the summoning process were made. (Currie RT 2634.) First, the county converted from a one-week, one-trial term of service to a one-day, one-trial term of service. Jurors are summoned to appear for only one day. If by day's end they have not been assigned to a department or sworn as a juror, their jury service is considered completed and they need not return the next day. (Currie RT 2634-2635.) This system was designed to reduce the burden of jury service on potential jurors and employers.

Second, jurors are selected proportionately by percentage of the population from the four judicial districts, i.e., 27 percent from Bay, 20 percent from Delta, 25 percent from Mt. Diablo and 28 percent from Walnut Creek. (Currie CT 1574, RT 2651, 2868.) For each case, the number of jurors needed is entered into the computer, and "the computer proportionately selects jurors from the four districts through a randomization process." (Currie RT 1905.) This change was intended to ensure that every jury pool reflects the demographics of Contra Costa County. (Currie RT 2716-2717.)

If a person does not report for jury service, the county mails them a failure to appear card 10 days later. (Currie RT 1940, 2250-2251.) The card reads: "California Code of Civil Procedure, Sec. 209 states in part that any juror who fails to attend may be found in contempt of court which is punishable by fine, incarceration or both. Call the Jury Services Office at

the above number for assistance. YOUR IMMEDIATE ATTENTION TO THIS MATTER IS REQUIRED." If the person responds, another appearance date is arranged. (Currie RT 2264.) The county, however, takes no further action if the person does not respond. (Currie RT 1941, 2251, 3103.) Lorie Rethage, the former Court Services Manager, conceded that "if the public knew that they were going to get a post card and then there was no follow-up after that, that they would fail to appear." (Currie RT 2252.)

The Evidence of Underrepresentation

The defense in *Currie* presented three scientifically valid studies, all demonstrating underrepresentation of African-Americans on Superior Court venires.

Number of Summoned Jurors

First, the defense presented data from January 1997 through January 1998, based on the summons yield report supplied by the Contra Costa County Jury Commissioner's office, and prepared by Dr. Hiroshi Fukerai, an associate professor of sociology of legal studies at the University of California at Santa Cruz who studies race and its effect on the jury selection process. (Currie CT 919-933; Currie RT 1958-1959.) The study showed that though persons in Contra Costa County's four judicial districts (Bay, Delta, Mt. Diablo and Walnut Creek) are summoned at levels nearly approximating their proportion to the total population of Contra Costa County, persons in Bay and Delta districts, the two containing the highest concentration of African-Americans, are underrepresented on Superior Court venires. The following table summarizes the data (Currie CT 1338; Currie RT 2447-2448; Def. Exhibit 46):

District	% of county	% Summoned	% Blacks in district	% of Jurors[7]
Bay	26.5	25.8	23.0	20.2
Delta	20.1	19.7	6.3	19.0
Mt. Diablo	24.9	24.9	2.0	27.1
Walnut Crk.	28.5	29.6	1.1	33.7

This evidence revealed a number of significant facts. First, it showed the concentration of African-Americans in the Bay District and the negligible proportion of African-Americans in the Walnut Creek District. Second, persons in the district with the lowest percentage of African-Americans, Walnut Creek, are summoned at a slightly higher rate than they should be whereas persons in the two districts with the greatest percentage of African-Americans are summoned at a slightly lower rate than they should be. Third, and most importantly, there is a relationship between the percentage of African-Americans living in a district and the percentage of jurors from that district; as the percentage of African-Americans increases, the proportion of jurors from that district decreases. Thus, Walnut Creek District residents are overrepresented by 4.1 percentage points and 15.4 percent in relative terms while residents of the Bay District are underrepresented by 5.6 percentage points and nearly 24 percent in relative terms. The two districts having the lowest percentage of African-Americans are overrepresented on jury venires and, correspondingly, the two districts having the highest percentage of African-American are underrepresented on jury venires.

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[7] This column represents the percentage of persons on jury venires during 1997 and January 1998.

Ross Survey

Robert Ross, a professor and chair of the Political Science Department at the California State University at Chico (Currie RT 3161), designed a telephone survey of eligible jurors in Contra Costa County. (Currie RT 3164-3165.) Using the data of 41,087 persons who had appeared for jury duty in Contra Costa County Superior Court from January 1997 to February 1998, his team randomly called 1,325 people from May 4 to May 9, 1998, from which he gathered 608 participants. (Currie RT 3171-3173, 3177.) The survey results, which had a sampling error of plus or minus 4 percent, showed that while African-Americans constitute 8.4 percent of the County's population, they represent only 4.6 percent of the venired jurors. (Currie CT 1581; RT 3181-3182, 3193.) The county conceded the scientific validity of this survey. (Currie RT 3468.) Based on the Roth Study, the comparative disparity between African-Americans in Contra Costa County and African-Americans on jury venires was 45.2 percent. The absolute disparity was 3.8 percentage points. (Currie CT 1581.)

Public Defender Survey

The third statistical showing used data collected by county public defenders of 42 Superior Court panels from February 1996 to July 1997. (Currie RT 2024, 2440; Def. Exhibit 45.) The attorneys filled out questionnaires on which they visually identified the number of African-Americans reporting for jury duty at their trials. (Currie CT 830-913.) These attorneys then testified about their observations at the motion to quash. (Currie RT 1547-1847.) The results showed that African-Americans made up only 4.8 percent of the venires, consistent with the other data. (Def. Exhibit 45.) Significantly, African-Americans appeared

in proportion to their population percentage only seven out of the 42 times. And when African-Americans were underrepresented, the under-representation was significant. In one case, no African-Americans were among 45 panel members, in seven cases, only one African-American appeared in panels ranging from 45 to 70 members, in nine cases, only two African-Americans appeared in panels ranging from 40 to 70 members, and in six cases only three African-Americans appeared in panels ranging from 50 to 128 members. (Def. Exhibit 45.) The comparative disparity based on this study was 40.3 percent and the absolute disparity was 3.26 percentage points. (Currie RT 2440; Def. Exhibit 45.)

2. Evidence from People v. Henriquez, et al.

The hearing on the motion to quash was held on May 17, 1999, and June 1 and June 2, 1999. (CT 685-687, 735-736, 739-740.)[8]

The evidence was supplemented with exhibits including additional surveys done by public defenders [Exhibits AA and BB]. (CT 1541, 1693; 5/17/99 RT 78.) Tally sheets had been prepared by deputy public defenders working in the Richmond courthouse in regard to panels brought in on misdemeanor cases there with regard to the number of African-Americans on those panels. (5/17/99 RT 77-79; Court Exhibit AA, BB.) As previously shown in the *Currie* proceedings, 74.5 percent of the African-Americans in the County live in Bay District, and 23 percent of Bay District residents are African-American. (6/2/99 RT 631; Currie RT 2484.) The public defender surveys showed a 26 percent appearance rate for African-American prospective jurors in the Bay District – which is consistent with

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[8] Several cases were consolidated for purpose of the hearing in addition to *Henriquez* (3/29/99 RT 54-55; 5/17/99 RT 4-11.)

the population in the District.

This evidence demonstrated that when summoned to their local municipal court, African-Americans appear at a rate very close to their population percentage. As Dr. Fukerai testified in *Currie*, "[Y]ou cannot say the extent that the African-Americans are less likely to report to jury service than any others." (*Currie* RT 2472.)

The People sought to revisit, albeit unsuccessfully, the issue of statistical disparity that was established in *Currie*. Assistant Jury Commissioner and Assistant Executive Officer of the Superior Court, Sherry Dorfman, testified on behalf of the People. She had previously testified in the *Currie* case. (5/17/99 RT 118.) She based her opinions on a survey she conducted that, as discussed below, was challenged by the defense and ultimately found inadmissible and unreliable by the trial court.

Dorfman was unable to point to any substantial remedies undertaken by the Jury Commissioner to cure the underrepresentation in the Martinez courthouse of African-Americans. Dorfman acknowledged that other changes had been made not affecting racial composition. For example, jurors who had been previously summoned from Mount Diablo to a countywide panel in either Superior or Municipal Court were now being summoned to Walnut Creek to serve on misdemeanor panels, at least in part to permit the Martinez Courthouse to be available for felonies. (6/1/99 RT 424-431.) However, she never recommended that Superior Court trials for felonies be conducted in the Bay Judicial District, e.g., Richmond, where the majority of African-Americans in Contra Costa County reside. (6/1/99 RT 477.) What this demonstrated, as defense counsel argued, was that since the Jury Commissioner can decide to have Walnut Creek residents sit for Mt. Diablo cases in the Walnut Creek courthouse, and can clear out

Martinez for felonies, they can also decide to try felony cases in West County, where African-American appear in numbers consistent with their population. (6/2/99 RT 631-632.) However, they have failed to do so, and as a result, "year after year over and over again the juries that decide the fates of these people and decide whether they live or die are predominantly Caucasian. And that is the way that this county runs things." (6/2/99 RT 634.)[9]

Peter W. Sperlich testified for the defense as an expert in statistical analysis and in statistical computation of jury selection issues. (6/1/99 RT 547-548.) Dr. Sperlich found Dorfman's findings were based on an inadequate survey of potential jurors in the Contra Costa Superior Courts. (6/1/99 RT 548.) In his view, Dorfman relied on an inadequately drawn sample that was based on people who came in for jury service during a two-and-a-half month period, an insufficiently short period which failed to take into account seasonal fluctuations. (6/1/99 RT 548-550.) Another concern with Dorfman's numbers was that the data she based it on was not capable of being verified because there was no identification information given by the respondents. (6/1/99 RT 555; see also 6/2/99 RT 591-594.)

Defense counsel argued that "the failure of the county to do any more assertive or aggressive follow up is a form of systematic exclusion." (6/2/99 RT 640.) Where there is significant follow up, the failure-to-appear rate drops, and as the record in the *Currie* proceedings indicated, the only follow up consisted of a postcard sent to people asking them to reschedule the date. (6/2/99 RT 641.) The reason for the high failure to appear rate

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[9] The People also submitted the declaration of Michael Sullivan in opposition to the motion, which criticized the surveys offered by the defense. (CT 690-734; Court Exhibit CCC.)

was due in part to the fact that prospective jurors knew that nothing would be done if they did not appear. Underrepresentation would be remedied by far greater follow up and far more aggressive procedures, and the failure of the County to implement such procedures constituted evidence of systematic exclusion. (6/2/99 RT 641-642.) Also, the fact that the County was holding all Superior Court felony trials in Martinez, which was difficult for residents of Bay and Delta Judicial Districts to get to was further evidence of systematic exclusion. (6/2/99 RT 648.) Finally, the source lists used – Department of Motor Vehicle (DMV) and Voter Registration (ROV) – were too limited, and other sources should be used to increase the number of African-Americans in the jury pool. Because nothing was done despite the summons-yield reports, which show underrepresentation in the part of the County where there are the highest number of African-Americans, the defense argued that the underrepresentation was systematic. (6/2/99 RT 666.)

The prosecutor argued that the underrepresentation did not constitute systematic exclusion but conceded that "[n]o one is defending the historic underrepresentation. Even under the best scenario today there's an underrepresentation of African-Americans under the best view of the Jury Commissioner's and the People's evidence." (6/2/99 RT 674.)

3. Trial Court's Ruling

The trial court determined that the adult population of African-Americans in Contra Costa County fell in the low eight percent. (6/2/99 RT 697.) It found that the Ross Study was the most valuable evidence to consider and discounted Dorfman's opinion based on her survey because of the flaws in the study discussed by Dr. Sperlich. (6/2/99 RT 699-700.) The court therefore relied on Dr. Ross's survey which showed a difference

between 8.4 percent African-Americans population and 4.8 percent rate at which African-Americans were appearing on jury panels. (6/2/99 RT 700.) The court, relying on the "comparative disparity" test as the better measure, found, based on the low eight percent African-Americans population with a 4.6 percent appearance rate that the comparative disparity is "somewhere around 43 percent." (6/2/99 RT 704-706.) The court found this to be statistically significant. (6/2/99 RT 705.)

The trial court acknowledged that for two decades there had been a pattern of underrepresentation and "the fact that this has gone on so many years can't be chance." (6/2/99 RT 702.) The court, however, did not find that the Jury Commissioner was intentionally taking steps or failing to take steps in order to suppress the African-American population on panels, although it stated: "I don't think that they are doing everything they could do to improve the representation of African-Americans on jury panels in Contra Costa County." (6/2/99 RT 701-702.)

The court did not find any particular evidence that using DMV and ROV lists was problematic. (6/2/99 RT 696.) However, the court did recognize that there could be other lists to use that might improve the numbers of African-Americans. (6/2/99 RT 711-712.)

The court held that the defense did not establish that the difficulty in transportation was the reason for underrepresentation in Martinez. The court relied on evidence that African-Americans from the Bay District were not showing up to nearby Richmond at the same rate they were not showing up in Martinez, and those asking for hardship excusals based upon transportation difficulties in Martinez was not high. (6/2/99 RT 707.) Nevertheless, the court agreed that steps could be taken to improve the transportation problems. (6/2/99 RT 712.)

The court suggested that the Jury Commissioner could do more to increase the number of African-Americans on jury panels – it could conduct more follow up in areas with a higher concentration of African-Americans and could pay jurors more to reduce the disparity. (6/2/99 RT 709-710.)

The court, citing *People v. Morales* (1989) 48 Cal.3d 527, 546, believed that a prima facie case for systematic exclusion for underrepresentation could not be made by demonstrating that neutral jury selection procedures have resulted in the exclusion of a higher percentage of a particular class, and something more than a showing of statistical underrepresentation is needed. (6/2/99 RT 702-703.) Thus, a showing that underrepresentation has occurred continuously for years does not prove systematic exclusion. (6/2/99 RT 703.) In the court's view, the defense was required to show the probable cause of the disparity and that the cause was constitutionally impermissible. (6/2/99 RT 712.) The court found that the defense had not carried its burden of showing that the probable cause of the underrepresentation of African-Americans was constitutionally impermissible systematic exclusion. (6/2/99 RT 712-713.)

D. Standard of Review

Whether appellant established a prima facie case of a violation of his right to an impartial jury drawn from a fair cross-section of the community is a mixed question of law and fact. (*People v. Ramos, supra*, 15 Cal.4th at p. 1154.) De novo review applies to all legal issues while factual findings of the trial court are accepted if supported by substantial evidence. (*Ibid.*)

E. Applicable Legal Principles

The Sixth Amendment of the United States Constitution and Article I, Section 16, of the California Constitution protect a defendant's right to be tried by a jury selected from a fair cross-section of the community. (*People v. Wheeler* (1978) 22 Cal.3d 258, 272.) As this Court has recognized, jury service serves "essential functions in our society, such as promoting citizen participation in government, legitimizing the judgments of the courts, and preventing further stigmatization of racial minority groups." (*Id.* at p. 267, fn. 6.) While this right does not require a particular jury mirror the population or include members of the defendant's race, it does mean that "a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." (*Id.* at p. 277.)[10]

The right to an impartial jury applies at every stage of the jury selection process: The compiling of the master list of potential jurors, the selection of venires from that list, and the use of peremptory challenges to preclude potential jurors from serving. (*People v. Bell, supra,* 49 Cal.3d at p. 525.)

The federal and state jury trial guarantees are coextensive and the analysis for deciding such a claim is identical. (People *v. Bell, supra,* 49 Cal.3d at p. 525, fn. 10.) That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in

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[10] In addition to this constitutional right, California Code of Civil Procedure section 203 requires that in "the selection of persons to be listed as available for service as trial jurors [the] persons so listed shall be fairly representative of the population in the area served by the court, and shall be selected upon a random basis."

the community. (*People v. Mattson* (1990) 50 Cal.3d 826, 842; *People v. Horton* (1995) 11 Cal.4th 1068, 1087-1088.)

The Equal Protection Clause of the Fourteenth Amendment also requires that a jury must be truly representative of the community and prohibits systematic exclusion of any racial group during the selection process. (*Smith v. Texas* (1940) 311 U.S. 128.)

In a capital case, the importance of a representative jury is even more critical, where the fair administration of justice is required by the Eighth Amendment's mandate that there be reliability at every stage of the criminal process:

> Nowhere is a representative jury more critical than in a capital case. In such cases the jury not only resolves the question of guilt or innocence but also serves as the conscience of the community in its most compelling role: it decides whether a person shall live or die. In this life or death determination the interplay of diverse values and views is imperative if a fair and impartial judgment is to be rendered. A just decision in a capital case requires that people of all the different ethnic, racial and religious groups in our society have an equal chance at being selected as jurors.

(*People v. Sanders* (1990) 51 Cal.3d 471, 543 (dis. opn. of Broussard, J.).)

"In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." (*Duren v. Missouri,*

supra, 439 U.S. at p. 364; *People v. Howard, supra*, 1 Cal.4th at p. 1159.)

If a defendant makes a prima facie case showing that the fair-cross-section requirement is violated, "the burden shifts to the prosecution to provide either a more precise statistical showing that no constitutionally significant disparity exists or a compelling justification for the procedure that has resulted in the disparity in the jury venire. (*People v. Sanders, supra,* 51 Cal.3d at p. 491.)" (*Horton, supra*, 11 Cal.4th at p. 1088.)

Appellant established all three prongs of the *Duren* test, thereby establishing a prima facie case of the denial of a jury selected from a fair cross-section of the community.

1. *First Prong*

There appears to be no dispute that African-Americans are recognized as a distinctive group. (*People v. Harris* (2005) 36 Cal.3d 36, 51.) In this case, the parties below agreed that the first prong had been met. (3/29/99 RT 26-27.)

2. *Second Prong*

The second prong of the *Duren* test "requires a constitutionally significant difference between the number of members of the cognizable group appearing for jury duty and the number in the relevant community." (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1155.) The judges in both *Currie* and *Henriquez*, which supplemented the *Currie* record, found that the second prong was established. The defendant in *Currie* presented statistical evidence that the number of African-Americans in Contra Costa County totaled 8.4 percent of the county's adult population, but only approximately 4.6 percent of the persons who appeared for jury duty in response to summonses were African-Americans. As the Court of Appeal

summarized: "The trial court found that appellant made a prima facie showing as to the second prong, in that comparative disparity statistics demonstrated 'a constitutionally significant difference between the number of members of the cognizable group appearing for jury duty and the number in the relevant community.'" (*People v. Currie*, 87 Cal.App.4th at p. 234, quoting *Ramos*, 15 Cal.4th at p. 1155.) The trial court, using the comparative disparity approach in *Currie*, found "[a]n underrepresentation of 45.2 percent, with a sampling error of plus or minus 4 percentage points (which on the high side means 49.2 percent and on the low side of 41.2 percent) is significant." (CT 1597.) The trial court in *Henriquez,* also relying on comparative disparity, found underrepresentation of "somewhere around 43 percent," which it found statistically significant. (6/2/99 RT 704-706.)

Before discussing the statistical analysis, it is important to emphasize that while *Duren* undoubtedly requires a statistical showing of underrepresentation to satisfy its second element, neither *Duren* nor any other court has held that statistics are the only relevant evidence. As one court stated in a related context, "[A]ny given disparity means little in isolation; a determination of intentional racial discrimination requires an examination of all the facts and circumstances of a given case." (*United States ex rel. Barksdale v. Blackburn* (5th Cir. 1981) 639 F.2d 1115, 1123.)

In this regard, it is quite relevant that the underrepresentation of African-Americans on Contra Costa County jury venires has been documented by Contra Costa County litigants for 20 years. Indeed, even the prosecutor in this case conceded that "[e]ven under the best scenario today there's an underrepresentation of African-Americans under the best view of the Jury Commissioner's and the People's evidence." (6/2/99 RT

674.)

The statistical evidence supporting the trial court's finding in this case was formidable. The underrepresentation of African-Americans was documented by three independent studies. The studies approached the question from different angles, from actual data of jury summonses, to a scientific survey of the jury-eligible public to a survey based on actual voir dires. And each study yielded the same result: African-Americans are significantly underrepresented on Superior Court jury venires in Contra Costa County.

As noted above, the comparative disparity of approximately 43 percent was found sufficient to establish the second prong of *Duren* by the trial court. The absolute disparity figure was not deemed significant. However, in *Currie*, the appellate court, remarked that the absolute disparity of 3.8 percentage points, was less than the absolute disparity of 5 percentage points found in *Bell,* and in *Bell*, this Court did not find the absolute disparity figure dispositive but stated that it did not appear that such a disparity "renders the representation of Blacks on jury venires less than fair and reasonable in relation to their numbers in the general population of Contra Costa County." (*People v. Currie, supra*, 87 Cal.App.4th at pp. 234-235, quoting *People v. Bell, supra,* 49 Cal.3d at p. 527.)

It is important to note that this Court has not relied solely on absolute disparity in deciding whether a fair cross-section challenge has merit. In *Ramos*, it was observed that both this Court and the United States Supreme Court have "declined to adopt any one statistical methodology to the exclusion of others. [Citation.]" (*People v. Ramos, supra*, 15 Cal.4th at p. 1155.) *Ramos* itself cited both comparative disparity and absolute disparity

statistics in rejecting the defendant's challenge. (*Ibid.*)

Moreover, absolute disparity should never be the sole basis of whether unconstitutional underrepresentation exists since it does not account for the group's size. For instance, if no African-Americans were present on Contra Costa County venires, the resulting absolute disparity of 8.4 percentage points would be more significant than the 10 percentage point difference that would exist if women constituted 50% of the population but only 40% of venires. The same absolute disparity number grows in significance as the population size of the group at issue decreases. The problem with absolute disparity, as one commentator has shown, is that it "does not take the size of the group into account, [and therefore] it cannot be the correct measure to use in fair cross-section cases." (Detre, A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel (1994) 103 Yale L.Rev. 1913, 1930.)

Where, as here, the cognizable group comprises less than 10% of the population, absolute disparity cannot be controlling. As the Fifth Circuit has noted, an absolute disparity measure would not necessarily apply where "reliance on absolute disparity could lead to approving the total exclusion from juries of a minority that comprised less than ten percent of the population of the community." (*United States v. Maskeny* (5th Cir. 1980) 609 F.2d 183, 190.) As a result, the absolute disparity test has been the subject of a great deal of criticism on both "statistical" and "logical grounds." (*United States v. Royal* (1st Cir. 1999) 174 F.3d 1, 10.) Some courts have ascribed "limited value" to absolute disparities "when considering small populations." (*United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1256; see also *United States v. Rogers* (8th Cir. 1996) 73 F.3d 774, 776-77 ["Although utilizing the absolute disparity calculation

may seem intuitive, its result understates the systematic representative deficiencies; the percentage disparity can never exceed the percentage of [the distinctive group] in the community"]; *Jefferson v. Terry* (N.D.Ga. 2007) 490 F.Supp.2d 1261, 1284.)

Both trial courts and the appellate court in *Currie* all agreed that the second prong had been met. As the evidence demonstrated – statistically, as well as through evidence of the observations presented through public defender surveys – there was significant underrepresentation of African-Americans on jury venires in Contra Costa County.

3. *Third Prong*

It was not appellant's burden to prove systematic exclusion conclusively, but rather to raise a prima facie case to this effect. This showing would shift the burden of proof to the County to justify its jury selection system. The outcome of such analysis is not at issue here. Appellant's evidence was sufficient to meet this test.

Twenty years of chronic underrepresentation, as well as Contra Costa County's failure to take steps to remedy this problem itself demonstrates systematic exclusion. In addition, the defense fulfilled *Bell*'s mandate to identify aspects of the selection process as the probable cause of the disparity.

Appellant demonstrated that the underrepresentation was the result of systematic exclusion of African-Americans. The phrase "systematic exclusion" derives from *Duren v. Missouri, supra,* 439 U.S. 357, where the Supreme Court held that petitioner's "demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic – that is, inherent in the particular jury-

selection process utilized." (*Id.* at p. 366.) "Systematic exclusion" under *Duren* does not require proof of intentional discrimination. All that *Duren* requires is underrepresentation that is "inherent in the particular jury-selection process utilized."

Indeed, as the Ninth Circuit has held, "disproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic." (*Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, 1141.) "Courts have found systematic exclusion to be shown, for example, where a jury selection system allowed women to opt out of service more easily than men, where a computer error resulted in the exclusion of individuals from two regions where a large proportion of racial and ethnic minorities lived, and where jurors were selected based on wholly subjective criteria." (*United States v. Rodriguez-Lara* (9th Cir. 2005) 421 F.3d 932, 944-945 (citing *Randolph, supra*, 380 F.3d at p. 1141); *Duren, supra,* 439 U.S. 357; *United States v. Jackman* (2d Cir. 1995) 46 F.3d 1240; *Gibson v. Zant* (11th Cir. 1983) 705 F.2d 1543.)

This Court has to date maintained that there is no systematic exclusion despite "'[e]vidence that "race/class neutral jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw" [Citation.]' " (*People v. Danielson* (1992) 3 Cal.4th 691, 706.) It has held that appellant must "show the state selected the jury pool in a constitutionally impermissible manner that was the probable cause of the disparity. [Citation.]" (*People v. Ochoa* (2001) 26 Cal.4th 398, 427.) Thus, as this Court has stated: "A defendant does not discharge the burden of demonstrating that the underrepresentation was due to systematic exclusion merely by offering statistical evidence of a disparity. A defendant

must show, in addition, that the disparity is the result of an improper feature of the jury selection process. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 857.)

However, at some point the persistent refusal of the county to correct such a disparity cannot be attributed to neutral reasons. Significantly, in *Bell,* this Court did not hold that employing race-neutral procedures insulates a county against challenges to its jury system. As the Court stated, its holding did not mean "that if neutral procedures and criteria are used in the selection process, the impact of those procedures on the defendant's ability to select a jury from a representative cross-section is never relevant." (*Id.* at p. 530.)

Contrary to the appellate court's conclusion in *People v. Currie, supra*, the chronic nature of the underrepresentation itself demonstrates systematic exclusion. *Duren* used the term "systematic exclusion" to mean consistent underrepresentation that results from the system of jury selection procedures. It held that petitioner's "demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic – that is, inherent in the particular jury-selection process utilized." (*Duren*, *supra*, 439 U.S. at p. 366.) That is exactly what occurred in Contra Costa County.

For at least 20 years, the jury pool for felony criminal trials in Contra Costa County underrepresented African-Americans. This state of affairs changed little from *Buford* to *Jones* to *Pervoe* to *Simmons* to *Bell* to this case. While the percentage of African-Americans in Contra Costa County during this period appeared to have remained between 8.1 and 8.4 percent, in none of these cases was there evidence that the percentage of African-

Americans on jury venires reached even 5 percent. In light of this long-standing, consistent and significant underrepresentation of African-Americans, one can only conclude that this underrepresentation is an inherent feature of the present Contra Costa County jury selection process.

The evidence establishes that Contra Costa County failed to seriously redress this problem and has simply institutionalized the underrepresentation of African-Americans. The only reasonable conclusion is that the underrepresentation is systematic, and, therefore, prima facie unconstitutional.

As appellant demonstrated in this case several procedures implemented by county officials were the cause of the underrepresentation of African-American jurors, which remained unchanged despite the persistence of underrepresentation over many years. Thus, unlike *Bell*, appellant did identify aspects of Contra Costa County's jury system which are the "probable cause" of the underrepresentation of Blacks. As the trial court found, the Jury Commissioner failed to do all it could to abate the situation. Even though the procedures themselves were facially "race neutral," the County's failure to take any significant steps, resulting in decades of underrepresentation constitutes systematic exclusion.

Appellant showed that the underrepresentation of African-Americans is traceable to the proportionately higher failure-to-appear rate of persons from Bay and Delta districts. (The failure-to-appear rates for the four districts were 42 percent for Bay, 28.5 percent for Delta, 10.7 percent for Mt. Diablo and 13.4 percent for Walnut Creek. (Currie RT 2063.)

Appellant demonstrated that this failure-to-appear rate stemmed from factors inherent in the County's jury selection system. The centralization of the Superior Court in Martinez contributed to the

systematic exclusion of African-Americans from jury venires. The courthouse in Martinez is located far from the centers of the African-American population. Nevertheless, the County insisted on holding all felony trials there, and refused to hold them in Richmond and Pittsburg, the location of the Bay and Delta Municipal Courthouses.

This was exacerbated by the failure of the County to provide reasonable public transportation between Martinez, where all felony jury trials were taking place, and East and West County. This also made it difficult and almost impossible for East and West county residents to travel to Martinez to participate as jurors. Public transportation between the courthouse in Martinez and the cities of Richmond and Pittsburg was completely inadequate, taking more than an hour and a half and requiring many transfers to and from trains and buses. (Currie CT 978-983; RT 1851, 1850, 1854, 3069.)

In light of all the evidence of the historic underrepresentation of African-Americans in the courthouse in the city of Martinez, which is 20 miles away from the communities where the majority of the African-Americans in the county reside, when juxtaposed with the evidence presented that African-Americans citizens do appear in the Bay courthouse consistent with their population numbers in that judicial district, one can only conclude that the county made an affirmative and systematic choice to not hold felony trials in that courthouse in order to perpetuate their system of exclusion of African-Americans from consideration of felony (death penalty) trials – although, as discussed above, no such intentionality need be shown.

The county also insisted on restricting its source lists to Department of Motor Vehicle and Voter Registration, even though an expansion of

source lists would have provided a greater number of African-Americans. California Code of Civil Procedure codifies the fair cross-section requirement. Section 197 requires that a random process select persons for jury service from a source "inclusive of a representative cross-section of the population of the area served by the court." Sources may include customer mailing lists, telephone directories, utility company lists, DMV lists of license holders or I.D. card holders, and the list of registered voters. (Cal. Code Civ. Proc. § 197 (a) & (b).) A source list compiled from the list of registered voters and DMV license and I.D. card holders is considered inclusive of a representative cross-section of the population under Code of Civil Procedure section 197(b).

The Code permits the use of other source lists specifically so that the source list is inclusive of a representative cross-section of the area served by the court. The reason for the reference to other source lists in the Code is because some lists will underinclude certain segments of the community. For example, minorities register to vote in lower percentages than do whites statewide. Because of their lower economic position, minority residents of the county own cars, keep insurance and maintain current driver's licenses in much lower numbers than do non-minority residents of the county. Underrepresentated members of the community not on traditional source lists may be included in other sources, for example utility company lists. The law does not preclude the use of other source lists to supplement the current use of the voter registration and DMV list of license or identification card holders.

Given the historical underrepresentation of African-Americans, the Jury Commissioner's failure to use, or at least attempt to use, these other lists cannot be excused, especially since it is well known that minorities

register to vote at lower rates than Whites and that poorer people are less likely to own automobiles. (Currie RT 3387.) The "Final Report of the California Judicial Counsel Advisory Committee on Racial and Ethnic Bias in the Courts," of which the trial court in *Currie* took judicial notice, made precisely this recommendation. (Currie RT 1718-1719.)

This Court previously has rejected the contention that the County should use other lists to encompass more of the underrepresented group in the jury pool: "[T]his claim fails because the United States Constitution 'forbids the exclusion of members of a cognizable class of jurors, but it does not require that venires created by a neutral selection procedure be supplemented to achieve the goal of selection from a representative cross-section of the population.' " (*People v. Burgener* (2003) 29 Cal.4th 833, 857-858 (quoting *People v. Ochoa, supra*, 26 Cal.4th at p. 427.) Thus, the state's failure to adopt such measures to increase a group's representation alone may not be sufficient to satisfy the third prong. (*Id.* at p. 858, citing *Ochoa*, 26 Cal.4th at pp. 427-428.) However, a system that routinely and historically countenances the exclusion of a disproportionately large segment of the African-American population of Contra Costa County on its master list and resulting jury venires is not equitable. Thus, the master list utilized by Contra Costa County – and the failure to use other sources – is a factor in the underrepresentation of African-Americans on the jury.

In fact, the Code of Civil Procedure imposes on the county jury commissioner an affirmative duty to make sure that "all qualified persons have an equal opportunity . . . to be considered for jury service in the state . . . ." The Code further states that "[i]t is the responsibility of the jury commissioner to manage all jury systems in an efficient, equitable, and

cost-effective manner." (Cal. Code Civ. Proc. § 191.) The county has long been aware of the chronic under-response of minorities to jury questionnaire mailings and jury summonses, and of the resulting underrepresentation of minorities on jury panels themselves. However, county officials have not taken any meaningful corrective steps toward the inclusion of the minority population of Contra Costa County on its master jury list. In particular, where a potential juror does not respond to the initial summons, there is no follow up to the one letter sent after the initial questionnaire fails to generate a response.

After more than 20 years, the jury pool for felony criminal trials in Contra Costa County has underrepresented African-Americans. It cannot be seriously disputed that this has become an inherent – and therefore – systematic feature of feature of the present Contra Costa County jury selection process. At minimum, a prima facie showing has been made. At some point the court's refusal to take any affirmative steps to improve representation of African-Americans on the venire must be found to be systematic. Otherwise, the County will have no incentive to take any such steps, such as holding felony trials in Bay or Delta Districts as it is authorized to do (Cal. Code Civ. Proc. § 198.5; Govt. Code, §§ 69743, 69753), or using source lists other than voter registration and DMV records – as it is authorized to do (Cal. Code Civ. Proc. § 197(b))[11], or by instituting more aggressive follow-up procedures, as has been employed in other

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[11] The "Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts," of which the trial court in *Currie* took judicial notice, made the latter recommendation. (Currie RT 1718-1719.)

counties. (Currie RT 2277-2278.)[12]

F. Conclusion

The persistent underrepresentation of African-Americans on jury venires in Contra Costa County is due to policies and procedures implemented by the County which it has stubbornly refused to change or improve in order to ensure more African-Americans on juries. This has resulted in a systematic exclusion of African-Americans from appellant's jury venire in violation of his federal and state constitutional rights to a jury drawn from a representative cross-section of the community. The violation of appellant's rights requires reversal of his conviction and sentence.

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[12] The two changes instituted in 1992, noted above, have done little if anything to redress the problem. Summoning jurors by district attempts to ensure that no one district will be underrepresented on a particular case, but it does nothing to address the overall problem of underrepresentation from the Bay and Delta districts. The change from a one-week one-trial system to a one-day one-trial system was intended to "reduce the burden that jury service may impose upon the public and for employers as well in releasing their employees to serve." (Currie RT 2635.) While these two changes may have improved the general management of the jury selection system (Currie RT 2634), they have not made any significant difference in Black underrepresentation, nor were they intended primarily to do so.

II.

THE TRIAL COURT ERRONEOUSLY RULED THAT THE PROSECUTION COULD USE AN UNCHARGED PRIOR MURDER ON CROSS-EXAMINATION OR REBUTTAL WHICH PRECLUDED APPELLANT FROM PUTTING ON CRITICAL EVIDENCE IN HIS OWN DEFENSE

A. Introduction

The defense did not deny that appellant killed his wife and daughter. The defense case was geared toward establishing that the murders were not premeditated and deliberate, and to rebut the prosecution's theory that he killed them to avoid the risk of reincarceration. According to the prosecutor, in mid-to-late 1996, appellant participated in two bank robberies and told his wife about them, and then felt compelled to kill her out of fear that she would tell the police about these crimes. The defense sought to make the jury aware of the substantial evidence that existed of appellant's problems in dealing with his anger, that his relationship with his wife had long been an abusive one, and that their marriage had been characterized by verbal and physical arguments, separations and reconciliations. The defense wished to present to the jury evidence that appellant harbored a distorted image of his wife and their marriage, and that on August 12, 1996, his long-suppressed anger erupted in an uncontrollable fit of rage that resulted in the killings.

The defense intended to present this defense primarily through the testimony of Dr. Dutton, an expert in domestic homicides. He was prepared to testify that the killings were consistent with a "rage" killing. The trial court, however, ruled that if the defense sought to present this testimony, the prosecution could introduce evidence of an uncharged homicide in the course of cross-examining Dr. Dutton. The court so ruled despite the fact

that Dr. Dutton was not offering the opinion that appellant was not capable of violence or goal-driven behavior, and therefore evidence of the prior murder would not undermine Dr. Dutton's opinion while being extremely prejudicial. As a result of the court's ruling, the defense was forced to restrict Dr. Dutton's testimony to non-specific generalities about spousal homicide to avoid introduction of the prior murder by the prosecution. This undermined the defense and denied appellant a fair trial.

B. Summary of Facts

On September 10, 1999, the prosecutor represented to the court that while it intended to present evidence at the penalty phase of appellant's alleged commission of an uncharged robbery and murder of Jerome Bryant on January 2, 1994 in New York, it had "no current intention" to use it in the case-in-chief at the guilt phase. However, the prosecutor indicated that he might seek to introduce the evidence of this incident in cross-examination of defense witnesses or in rebuttal depending on what the defense presented. (II RT 501-504.)

On October 21, 1999, the defense filed a motion to preclude the prosecution's introduction of this evidence at the guilt phase. (CT 760-766.) The motion argued that such "other-crimes" evidence was inherently prejudicial and its admission would violate California Evidence Code section 1101, as well as appellant's state and federal constitutional rights. (*Ibid.*) The prosecution responded that the motion was premature and that a ruling should await defense discovery or testimony by a defense witness which opened the door to allow evidence of uncharged crimes pursuant to Evidence Code section 1101, subdivision (b). (CT 791-793.)

On December 7, 1999, the defense filed a motion requesting an ex parte in camera hearing to present the court with an offer of proof regarding

the testimony of Dr. Donald Dutton. (CT 929-938.) The motion stated that whether the defense would call Dr. Dutton would depend on the court's ruling as to the admissibility of the Bryant incident in any cross-examination of Dr. Dutton or in any rebuttal by the prosecution. (CT 929.) The court ruled that the motion could be heard in open court. (XI RT 2545.)

The defense then provided an offer of proof for Dr. Dutton's testimony. Dr. Donald Dutton was offered as an expert on the subject of domestic violence and the personality of male batterers and those who kill their wives. (XI RT 2547.) If permitted to testify, Dr. Dutton would describe "the characteristics of male batterers who perpetrate violence in intimate family relationships," based on data and studies. (XI RT 2548.) He would further testify that "the specific personality disorders and defects that he has identified are highly correlated with and scientifically associated with the personality of the batterer." (XI RT 2548.) Third, he would testify with regard to how these characteristics manifest themselves in behavior. (XI RT 2549.) Dr. Dutton was also prepared to testify that "persons with these characteristics react in certain ways in certain situations" and that "these reactions are consistent with mental states, frequently characterized as being driven by rage, anger or passion." (*Ibid.*) These reactions are "inconsistent with mental states commonly characterized as dispassionate, cool, calculated, etc." (XI RT 2550.) Dr. Dutton was further prepared to specifically testify regarding appellant's mental condition at the time of the August 12, 1996 killings, and how that mental condition affected his conduct. He had been provided with appellant's statements, police reports and other materials regarding appellant's background and development. (XI RT 2550.)

Defense counsel stated that Dr. Dutton's opinion would assist the jury in reaching its conclusion about whether or not appellant had premeditated and deliberated. His testimony would also correct misconceptions about the conduct of people in intimate relationships who end up in domestic violence situations. (XI RT 2550.)

Dr. Dutton's proposed testimony, which was precluded by the trial court's ruling on the admissibility of the prior homicide, constituted the most significant portion of the defense case. His opinions were essential to establishing reasonable doubt as to the prosecutor's premeditation theory, and essential to dispelling some commonly held misconceptions regarding the emotional development and mental states of those who commit domestic violence.

According to the defense, Dr. Dutton was an expert regarding "intimate aggression" or domestic homicide. (XI RT 2547-2548.) He had interviewed and counseled many men who have killed their wives and testified both for the prosecution and defense. Dr. Dutton had reviewed hundreds of pages of documentation specific to the facts of this case, including numerous police reports describing the crime scene, interviews with family and friends of the victim and defendant, and the defendant's multiple statements to law enforcement. Dr. Dutton was prepared to testify that the August 1996 killings appeared consistent with the type of rage killing that he had studied and published upon extensively. He was also prepared to relate specific details of this particular case to his studies in support of such an opinion. (RT 2550-2607.)

Dr. Dutton then testified outside the presence of the jury. Dr. Dutton testified that he was a psychologist with a specialty in the field of domestic violence. (XI RT 2555.) Dr. Dutton then described a profile of males who

perpetrate domestic violence that has been developed: "[W]e've isolated a type of cyclical or sometimes called borderline personality, which is a person who's extremely emotionally volatile and who has, in effect, a personality relevant to intimate relationships that in many ways is unrelated to their personality, their public persona." (XI RT 2557.) Spousal homicides, according to Dr. Dutton, are "characterized typically by a history of domestic violence" that precedes the homicide. (XI RT 2560-2561.) He explained that in these cases there are typically a series of separations and reconciliations that precede the homicide. (XI RT 2561.) Further, the homicide is "an inexplicably violent act, frequently referred to as 'overkill.'" (*Ibid.*)

> That is, there's so much rage that's released in an act of spousal homicide, because so much rage builds up on an intimate bond, that the amount of violence that occurs is frequently more than would be required to kill a person. It has more to do with a releasing of tension in the perpetrator than it has to do with whether the person's dead or alive.

(XI RT 2561.)

In addition, after the homicide, the men who "express this huge explosion of rage" are typically in a "disassociated state," they are "confused after the fact." (XI RT 2561.)

> Many of them describe walking around without any sort of clear plan. They're somewhat befuddled by what has just occurred. There's a noticeable alteration. They almost become the opposite of what they were ahead of time, which was focused and rageful.

(XI RT 2562.) In addition, their memory for the event "varies from amnesia up to being spotty and incomplete." (XI RT 2562.)

Dr. Dutton stated that he had reviewed materials provided by the defense, including various police reports and transcripts of police interviews with appellant, appellant's taped statement, letters from the victim to appellant, the victim's diary, and selected trial transcripts. (XI RT 2562-2563, 2565, 2568.) Based on his review of these materials, Dr. Dutton observed that there was a "very disorganized crime scene," that did not show much planning. (XI RT 2566.) For example, the weapons used were every-day household items that appeared to have been "grabbed on the spot." (*Ibid.*) There was also "considerable amount of violence" which Dr. Dutton described as "overkill." He opined that "this was a homicide that had the earmarks of what I would call an 'estrangement homicide' or an 'abandonment homicide' that seemed to be precipitated by intimate issues, and had the characteristics of intimate rage associated with it." (*Ibid.)*

Dr. Dutton further testified, in reviewing appellant's stated recollections of the crime, that his confusion, a "shifting ability to recall events," difficulties with "temporal relationships of the crime scene" are all "consistent with a type of intimate rage homicide that I've been describing." (XI RT 2569.)

Dr. Dutton testified, based on information he reviewed regarding his relationship with his wife, that their relationship was "highly conflictual," involving physical and verbal abuse, with a number of separations and reconciliations. (XI RT 2570.) "So two of the kind of hallmark characteristics of what I would call a spousal estrangement homicide appeared to be evident in the evidence that I reviewed." (*Ibid.*)

Dr. Dutton found significant the history of abuse as well as the fact that it looked as if the victim was planning on leaving the relationship. (*Ibid.*) He explained that a plan to exit the relationship as highly related to

spousal homicide. (XI RT 2571.) "It raises the likelihood of spousal abuse by a factor of approximately 6." (*Ibid.*)

Dr. Dutton also testified about "intergenerational transmission of violence." (XI RT 2572.) Dr. Dutton explained that because of the violence in appellant's upbringing, he learned to resolve conflicts in his marriage through violence, and that he would act out impulsively and violently if he perceived an impending separation. (XI RT 2572.) To such people, impending separation "creates a state of terror that translates instantaneously into rage. Because these people have a certain kind of ego deficit, where it's absolutely essential for them that they have their partner in place. That she becomes kind of a cornerstone of their identity." (*Ibid.*) Thus, when it appears that she is leaving, it feels like a "life or death situation." (XI RT 2573.)

Dr. Dutton had been provided with a police report of the 1994 Bryant homicide, in which appellant gave a statement to the police which described that he and his brother decided to rob a man they had seen near a bank, that his brother threw the man over a bridge, and that appellant thereafter went through the man's wallet and pockets. (XI RT 2575.) Dr. Dutton was also told about appellant's involvement in two bank robberies shortly before the August 12, 1996 events. (XI RT 2575-2576.) He was also informed about appellant's escape attempt from jail. (XI RT 2576.)

Dr. Dutton stated that there was nothing about the Bryant robbery-homicide that in any way affected his opinion about the root causes of appellant's conduct on August 12, 1996. He placed no reliance on this incident in reaching his opinions, even assuming that appellant's participation constituted murder. (XI RT 2576, 2578.) According to Dr. Dutton, with regard to the killing of his wife and child, "the things that

triggered the impulse, the things that triggered the rage, the way that the particular modus operandi of the killing appears to have occurred, all those things would be dependent on the specifics of the intimate bond. And I would see them as estrangement or anticipated as estrangement intimate killings." (XI RT 2578.) The fact that appellant may have engaged in violent acts outside the relationship was not relevant because they were motivated by different factors and was not characterized by the same kind of extreme volatility, emotion, and disproportionate rage. (XI RT 2593.)

Defense counsel argued that the Bryant homicide was not something that would reasonably be considered or relied upon by an expert in forming an opinion about a homicide that took place almost three years later in entirely different circumstances, i.e., in the context of a familial dispute as opposed to a robbery of a stranger. The Bryant murder had minimal probative value to appellant's state of mind for the events of August 12, 1996. (XI RT 2612.) Although Dutton considered the evidence it did not in any way affect his opinion. (XI RT 2616.)

Particularly because Dr. Dutton was in no way offering the opinion that the defendant was not capable of violence or goal-driven behavior, the probative value of introducing the Bryant homicide ostensibly to impeach Dr. Dutton's opinion was marginal at best. (XI RT 2622.) As defense counsel explained, Dr. Dutton did not intend to opine that appellant cannot premeditate or plan but that in the context of his domestic relationship that is not what has occurred; other violent acts outside of this relationship were thus not relevant to his opinion. (XI RT 2622.) While such other-crime evidence had little or no probative value, its prejudicial value was great. In terms of prejudice, the trial court noted that questions about the 1994 crime would likely lead the jury to consider it more for its propensity value than in

determining the expert's credibility. (XI RT 2619.)

The court denied the defense motion to exclude the evidence. (XI RT 2713.) The court noted that given that Dr. Dutton was prepared to testify that the charged crimes were "impulsive in nature," that it was a crime of "impulsive domestic rage," the jury was entitled to consider evidence of his participation in the prior killing. (XI RT 2713-2715.) The court determined that although there is a "prejudicial concern," it is substantially outweighed by the probative value of the evidence. (XI RT 2723.) Thus, "if the defense calls Dr. Dutton, and he does testify to this effect, that this was an impulsive crime of intimate rage, then the People would have an opportunity to introduce evidence of the . . . Bryant killing . . . ." (XI RT 2717.) This would include not just cross-examination of Dr. Dutton but also introduction of evidence of the killing as well. (*Ibid.*)

Given the court's ruling, defense counsel determined that the only way it could preclude the prosecution from questioning Dr. Dutton on the Bryant killing or from introducing evidence of the killing itself was to restrict Dr. Dutton's testimony to general criteria regarding impulsive domestic homicides, and not allow him to testify regarding the specific facts of this case. (XII RT 2747-2749.)

As a result, Dr. Dutton's testimony was generic, non-case-specific and ineffectual. (XII RT 2791-2844, 2853-2869.) He testified about the salient features of spousal homicides: 1) they are often preceded by a history of domestic violence; 2) they are also often preceded by a history of separations and reconciliations; 3) the killings are characterized by "overkill," and are largely driven by "an explosion of rage from the perpetrator; and 4) these are usually spontaneous acts and weapons used are those found at the scene. (XII RT 2798, 2805.) Dr. Dutton explained that

this rage is derived from real or perceived abandonment of the perpetrator by the victim, which is something intolerable to the perpetrator because of their particular deficits. These deficits seem to occur in men raised in dysfunctional families. (XII RT 2799.) Dr. Dutton also testified that the perpetrators of these homicides have "spotty recollection" of what they had done. (XII RT 2803.) Dr. Dutton testified that there is no relationship between a person's public persona and their behavior in an intimate relationship. (XII RT 2800.) He was not asked and did not testify about any facts specific to appellant.

C. The Trial Court Erroneously Ruled That the Bryant Murder Could Be Used as Impeachment Evidence

As outlined above, Dr. Dutton, an expert in domestic violence and spousal homicides, was a critical defense witness who was prepared to testify that appellant's family background and conduct immediately prior, during and subsequent to the killings was consistent with an impulsive rage killing rather than a premeditated and deliberate one. However, the trial court effectively reduced Dr. Dutton to testify in generalities by ruling that if Dr. Dutton testified consistent with the offer of proof, the prosecution could introduce as evidence and cross-examine Dr. Dutton about a 1994 robbery-murder in which appellant was involved.

The court failed to grasp that although Dr. Dutton had been informed of the Bryant homicide, it was irrelevant to his findings, and its probative value in impeaching Dr. Dutton's opinion was far outweighed by its prejudicial impact. There was no reliable evidence as to what occurred in the Bryant incident, particularly as to appellant's mental state. There was nothing that suggested that the mental state appellant may have harbored on January 2, 1994, when Bryant was killed was at all relevant to his mental

state on August 12, 1996. It was appellant's brother who killed Bryant, throwing him over a bridge. While appellant admittedly went through Bryant's pockets and wallet after he was killed, appellant's participation in the actual killing was unclear. Dr. Dutton's proposed testimony was that the latter killing suggested an impulsive rageful killing typically seen in spousal homicides based on a number of characteristics of the crime and appellant, as described in detail above. This earlier incident which would have been extremely inflammatory and prejudicial if revealed to the jury had minimal probative value in evaluating Dr. Dutton's credibility.

To be "relevant," evidence must have a tendency in reason to prove or disprove a disputed fact of consequence to the determination of the action. (Evid. Code § 210.) Evidence that is not relevant is not admissible. (Evid. Code § 350.) Here, as noted above, Dr. Dutton explicitly stated that the prior homicide was irrelevant to the issue of whether the present homicide was a rage killing.

Under Evidence Code section 352, a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, n. 14.)

Evidence Code section 1101, subdivision (a) prohibits the admission

of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101, subdivision (b), provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Under section 1101, subdivision (b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent . . .) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.)

As discussed above, the evidence of appellant's participation in the Bryant murder had no bearing on Dr. Dutton's opinion about the spousal homicide at issue in the present case. Given that Dr. Dutton did not dispute that appellant could commit goal-driven violent acts outside the domestic relationship but that such acts were motivated by a wholly different set of factors, the only relevance of the prior homicide was to demonstrate appellant's propensity for violence.

The rule excluding evidence of criminal propensity derives from early English law and is currently in force in all American jurisdictions. (See *People v. Ewoldt*, supra, 7 Cal.4th at p. 392; *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.) Such evidence is impermissible to "establish a probability of guilt."

The admissibility of prior bad acts depends upon the materiality of the fact to be proved or disproved, and the tendency of the proffered evidence to prove or disprove it. (*People v. Catlin, supra,* 26 Cal.4th at pp.145-146.) There must be a strong foundational showing that the evidence is sufficiently relevant and probative of the legitimate issue for which it is offered to outweigh the potential, inherent prejudice of such

evidence. (*People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Because such evidence can be highly inflammatory and prejudicial, its admissibility must be "scrutinized with great care." (*People v. Thompson* (1980) 27 Cal.3d 303, 315.)

The trial court in this case relied on *People v. Hendricks* (1988) 44 Cal.3d 635, in which this Court, noting that other crimes evidence may be used to impeach the testimony of an expert witness, found the trial court did not err in ruling that the defense psychologist would be subject to cross-examination on three other homicides if she testified that the charged homicides were the product of "homosexual rage." (*Id.* at pp. 641-642.) *Henricks*, however, provides little guidance – the factual discussion is truncated and the reasoning is relatively cryptic. To the extent the facts are discussed in the opinion, they reveal that the case is distinguishable. It appears that the victims of at least two of the three other homicides were homosexuals, therefore providing far more of a connection with the charged homicides and the defense in that case than is present here.

Furthermore, the trial court still must "exercise its discretion pursuant to Evidence Code section 352 in order to limit the evidence to its proper uses." (*People v. Coleman* (1985) 38 Cal.3d. 69 [trial court abused its discretion by permitting extensive questioning of the expert witnesses on the contents of the letters in which defendant's wife claimed, that he had previously threatened her with violence].) The Court in *Hendricks* found the evidence more probative than prejudicial under the facts of that case; the same cannot be said of the other crimes evidence here.

The great danger here is that if admitted the prior murder would be considered as propensity evidence. Indeed, the prosecution's purpose was to use this evidence to establish appellant's propensity to commit homicides

not triggered by rage. This would have been extremely prejudicial and would have undermined the defense case that the charged homicides were the product of impulse and rage rather than pre-planned. The trial court's ruling to allow the prior murder to be introduced and to be used in cross-examination of the defense expert was therefore error.

D. The Court's Rulings Restricted the Defense Case and Violated His Constitutional Rights and Was Prejudicial

The trial court's ruling violated appellant's Sixth Amendment and Fourteenth Amendment due process rights to present a defense and to a fair trial, his Sixth Amendment right to effective counsel and an impartial jury and his Eighth Amendment right to a fair, reliable sentencing determination, and the state constitutional analogs to the federal Constitution.

The defendant in every criminal case has the right to present a defense under the Sixth and Fourteenth Amendments. "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations]." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

The trial court's erroneous restriction of the defense case was not harmless beyond a reasonable doubt. As described above, Dr. Dutton's proposed testimony would have gone to the key issue in this case – whether appellant's actions were consistent with an impulsive killing as opposed to a premeditated and deliberate one, thus undermining the prosecution's theory. [See XIII RT 3086 [The prosecutor argued: "The big question is: Is there deliberation and premeditation?"] The trial court's ruling, however, resulted in the defense restricting its presentation to a far more general and less effective presentation of factors in spousal homicides without reference to appellant's particular circumstances. The prosecutor was able in cross-

examination to undermine Dr. Dutton's generalized testimony with specific facts that he otherwise may have been able to explain. She stressed these facts in her argument to the jury. (See, e.g., XIII RT 3106-3115, 3197 [the killing was cold-blooded and deliberate; there was no "overkill;" it was not an impulsive rage-filled crime, but a slow, sadistic one; appellant was in control; he had sufficient recollection].) In response to these specific facts, all defense was left with was discussing Dr. Dutton's studies, and his statistics, which acknowledged that not all spousal killings resulted from rageful outbursts of domestic violence. (XIII RT 3159-3160, 3165, 3168.) The prosecutor was able to ridicule Dr. Dutton because of the lack of specificity in his testimony: "Do we need a doctor worth $12,000 to tell us that sometimes people are violent inside the home, but on the flip side sometimes they're violent outside?" (XIII RT 3197.) Had the trial court not ruled that the prior murder would have been admissible if Dr. Dutton testified specifically about the circumstances of this case, Dr. Dutton could have explained that the killing was an impulsive rage killing. The lack of such testimony seriously undermined and restricted the defense case on the key issue – whether or not the killing was premeditated and deliberate or the result of an impulse and rage. Had Dr. Dutton been able to testify fully, as described above, the prosecutor's arguments undermining the defense case would have been blunted. The error was not harmless beyond a reasonable doubt.

III.

THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTOR TO INTRODUCE HIGHLY PREJUDICIAL EVIDENCE OF A JAIL ESCAPE ATTEMPT

A. Introduction

As discussed above, there was no dispute as to appellant's commission of the killings. The guilt phase trial was essentially limited to the question of whether the crimes were premeditated and deliberate first degree murder or a non-planned second degree murder. In such a circumstance evidence that would establish a defendant's consciousness of guilt would be irrelevant and unnecessary since he had already acknowledged his guilt for the crimes. Nevertheless, the trial court permitted the admission of highly prejudicial evidence of appellant's jail escape attempt, which occurred two years after the charged offense, for the purpose of proving consciousness of guilt. This highly inflammatory evidence should not have been admitted and the error requires reversal.

B. Summary of Facts

Prior to trial, the prosecutor moved to have admitted at the guilt phase evidence that appellant had attempted an escape from the Martinez Detention Facility on August 5, 1998. (CT 818-829.) According to the prosecution, a window in room 33 of the jail had suffered damage. A metal screen covering the interior side of the window had been pried back and bent, a glass portion of the window was broken out, and there were chipped pieces of concrete that surrounded the window. In addition, numerous sheets from one of the beds were tied together in a rope. A confidential informant told a sergeant that he saw appellant and another inmate ramming a metal piece against the concrete, trying to chip it away from the window. Appellant admitted that he was "fully responsible." (CT

823.)

The prosecutor argued for admission of the escape attempt as evidence of consciousness of guilt. According to the prosecutor, "even if an actual escape is never attempted, evidence of a pretrial escape plan can be admitted to show a defendant's guilty state of mind." (CT 829.) The defense opposed the prosecution's motion, arguing that admission of such evidence would violate California law and deprive him of a fair trial under the state and federal constitutions. (CT 836-841.) Appellant argued that since the defense was not disputing the identity of the perpetrator in the charged homicides, evidence of consciousness of guilt was not relevant. Even if relevant, appellant contended, the evidence was far more prejudicial than probative and should be excluded under Evidence Code section 352. (CT 837-841.)

The trial court held a hearing, at which the prosecutor reiterated its argument that the evidence was admissible as consciousness of guilt: "Well, this is consciousness of guilt, and there are cases that hold that an attempt to escape once you face trial is relevant to show the defendant's consciousness of guilt in the charged offense." (RT 615; see also RT 597.) The court agreed, and concluded that the evidence was admissible as relevant to appellant's consciousness of guilt. (RT 723-737.) Based on this ruling, appellant entered a stipulation in the jury's presence that he had been involved in the attempted jail escape. The stipulation informed the jury that on August 5, 1998, five inmates, including appellant, using part of a cell bunk, had attempted to pry open a cell window to escape from the custody of the Main Detention Facility of Contra Costa County where they were housed awaiting trial. (X RT 2419.) The jury was ultimately instructed: "If you find that defendant attempted to escape from jail after being charged

with the crimes in this case, that conduct may be considered by you as a circumstance tending to show consciousness of guilt." (XIII RT 3223.)

C. The Trial Court Erred in Admitting the Jail Escape Attempt

To be "relevant," evidence must have a tendency in reason to prove or disprove a disputed fact of consequence to the determination of the action. (Evid. Code § 210.) Evidence that is not relevant is not admissible. (Evid. Code § 350.) Although "consciousness of guilt" evidence may be probative of whether a defendant committed a crime, it bears no evidence as to the *degree* of any crime committed by the defendant. Because appellant did not contest that he killed his wife and daughter, there was no issue as to "identity" at trial."

The escape attempt was not admissible as other crimes evidence. As argued in Argument II, above, Evidence Code section 1101, subdivision (a) prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101, subdivision (b), provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 393.) Under section 1101, subdivision (b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent . . .) other than his or her disposition to commit such an act." (*People v. Catlin, supra,* 26 Cal.4th at pp. 145-146.) It cannot reasonably be argued that the escape attempt falls into any of these categories.

To be guilty of first-degree murder, the defendant must possess the requisite mental states at (and before, for purposes of planning and

reflection) the time of the killing. Any "evasive conduct" by the defendant after inflicting death is not probative as to whether premeditation and deliberation existed. (*People v. Anderson* (1968) 70 Cal.2d 15.) Because evidence of the jail escape is not probative of the only issue contested at trial – the mental state of the defendant – it is not admissible. In other words, the escape may be relevant to consciousness of guilt of murder but has no relevance to degree of murder, which is the issue in dispute. Given the lack of probative value the evidence should not have been admitted, particularly given its inflammatory impact.

This Court has recognized that evidence – such as the making of deceptive or false statements – is not admissible if not relevant as consciousness of guilt. (See *People v. Kimble* (1988) 44 Cal.3d, 480, 496.) Thus, in *People v. Fritz* (2007) 153 Cal.App.4th 949, the appellate court concluded that "the false out-of-court statement made by Fritz in this case – concerning as it did, his prior crimes, rather than the ones at issue – could not be fairly characterized as evidencing his "consciousness of guilt" about the latter." (*Id.* at p. 960.) Similarly, the evidence of escape in this case is not relevant to appellant's consciousness of guilt of first degree murder.

In rejecting challenges to the giving of standard CALJIC instructions, which inform the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt on the ground that they draw impermissible inferences with regard to mental state, this Court has repeatedly stated that such instructions "do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard hereto." (*People v. Crandell* (1988) 46 Cal.3d 833, 871.) Along the same lines, evidence of consciousness of guilt then, would not address a defendant's mental state,

and where here, that is the only issue for the jury to decide, such evidence is irrelevant.

Even if evidence of the jail escape attempt two years after the charged homicides was somehow deemed relevant, such evidence far more prejudicial than probative. The only basis given by the prosecutor for admission was consciousness of guilt. As discussed above, appellant did not deny his guilt of the killings and the only issue was degree of murder. This evidence had no probative value on this issue while being extremely prejudicial.

D. The Admission of Jail Escape Violated Appellant's Constitutional Rights

The admission of this evidence violated appellant's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, permitting the jury to find appellant guilty of first degree murder in large part because of his bad acts and criminal propensity unrelated to the charged crimes. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67.)

Appellant was also deprived of his Eighth and Fourteenth Amendment rights to a reliable adjudication at all stages of a death penalty case. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck* v. *Alabama* (1980) 447 U.S. 625, 638.)

E. The Use of Bad Character Evidence Was Not Harmless

The critical issue in this case was whether the killings were premeditated and deliberate by a cold-blooded killer or the product of an impulsive explosion of rage. To persuade the jury that appellant was guilty of first degree premeditated and deliberate murder, the prosecutor sought to significantly bolster its case through the presentation of extremely inflammatory evidence that portrayed appellant as a person of bad character. Evidence such as the escape attempt had no relevance to whether the murder was first or second degree, but was likely to inflame the jury and mislead it with regard to appellant's guilt. Reversal is required because the error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

At the penalty phase, escape evidence is understood to be prejudicial where the jury is determining whether or not a defendant should be put to death or can be safely put in prison for the rest of his life. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1232-1233.) Thus, even if not prejudicial at the guilt phase, evidence of the escape attempt was not harmless beyond a reasonable doubt at the penalty phase.

IV.

THE TRIAL COURT ERRONEOUSLY ALLOWED THE INTRODUCTION INTO EVIDENCE OF THE VICTIM'S HEARSAY STATEMENT

A. Introduction

In an attempt to buttress its theory that appellant killed his wife because she was talking about his involvement in bank robberies, the prosecutor sought to introduce a hearsay statement that Carmen had complained to her cousin, Treniece White, three weeks before her death, that appellant was into "heavy stuff." Over defense objection, the court

admitted this statement as a spontaneous declaration or as evidence of Carmen's state of mind. (IX RT 2113- 2127; see also XIII RT 3257-3260.) After the case was submitted to the jury, the court informed counsel that its ruling that this was a spontaneous statement, although a close call, was correct, but that it had been wrong to rule that it was admissible as relevant to Carmen's state of mind. However, the court decided it was also admissible to corroborate evidence of appellant's statements to others that Carmen was talking to friends about bank robberies. The statement was hearsay, and not relevant for any purpose. Its admission violated appellant's state law and state and federal constitutional rights.

B. <u>Summary of Facts</u>

The defense moved to exclude the hearsay statements attributed to Carmen Henriquez on state law as well as federal constitutional grounds. (CT 882-888.) More specifically, prior to the testimony of Treneice White, the defense objected to her testimony to Carmen's statement that appellant was into "heavy stuff." (IX RT 2114.) The court noted that it would be hearsay if offered for the truth but admissible if being offered for Carmen's state of mind that she knew of his doing some heavy stuff. (IX RT 2115.)

The prosecutor stated that it was offering it as a spontaneous statement. (IX RT 2116.) According to the prosecutor, it was a spontaneous statement that showed Carmen was under stress caused by the "heavy stuff," appellant was doing, i.e., the bank robberies. (*Ibid.*)

The defense pointed out that the bank robberies had not occurred at the time the statement was made. (IX RT 2116-2117.) The court nevertheless allowed the statement into evidence under the spontaneous statement exception to the hearsay rule, Evidence Code section 1240. The court found the statement described what Carmen perceived and that it was

made under the stress caused by the fact that she perceived her husband was involved in heavy stuff. (IX RT 2117-2119.) The Court also stated that it was admissible as relevant to Carmen's state of mind – that she had knowledge of bank robberies and was talking to others about it. (IX RT 2119, 2120, 2124.) The court ruled that it was admissible on either ground: state of mind or as a spontaneous statement. (IX RT 2120, 2124.)

Treneice White testified before the jury. She was Carmen's first cousin. (IX RT 2126.) White testified that in July 1996, Carmen and Zuri came to her apartment for three days. According to White, Carmen was abnormal, withdrawn and stressed. Carmen told her that appellant was "into heavy stuff," but did not elaborate. (IX RT 2127.)

The court later reexamined its ruling. (XIII RT 3213.) During jury deliberations, the court stated that it had reviewed the ruling in its mind and finally concluded that it was correct on two grounds. (XIII RT 3257.) The court reiterated that it was "a spontaneous statement, a statement made under stress about what was being perceived." (XIII RT 3258.) The court noted this was a "close question," boiling down to "whether the statement was made while still acting under the stress of the excitement." (*Ibid.*) The court acknowledged that there was not "any evidence as to precisely when Carmen learned about the defendant being into heavy stuff or committing the bank robberies." (*Ibid.*) Therefore, it is "hard to tell how that relates to how much time passed between her finding that out and passing on the information to Ms. White that was testified to. But it could have been a very short time." (*Ibid.*) What the court found to be dispositive was that White found Carmen to be acting differently than she had ever seen her before and "very stressed." (*Ibid.*) Therefore, "the statement appears to have been made during a period of time while the stress occasioned by

defendant – her having learned that defendant was in heavy stress was still governing." (XIII RT 3259.)

The court stated that it has also permitted the statement to come in for the nonhearsay purpose of showing Carmen's state of mind. However, the court later determined that it was not really "so much state of mind" as "evidence of a communication made by Carmen to a friend." To that extent, the court states, it corroborated other evidence that appellant complained that Carmen was talking to her friends. "I just wanted to state that for the record. I'm sorry, I started talking about it in terms of state of mind of Carmen. That created some problems. It's really not state of imnd; it's simply evidence of a communication." (XIII RT 3259-3260.)

C. <u>The Statement Was Inadmissible Hearsay</u>

The trial court allowed admission of Carmen's statement to her cousin that appellant was into "heavy stuff" as a spontaneous statement under Evidence Code section 1240. The trial court's evidentiary rulings are reviewed for abuse of discretion. (*People v. Jablonski* (2006) 37 Cal.4th 774, 821; *People v. Rowland* (1992) 4 Cal.4th 238, 264.) "Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] The determination of the question is vested in the court, not the jury. [Citation.] In performing this task, the court 'necessarily [exercises] some element of discretion. . . .' [Citation.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318; see also *People v. Pirwani* (2004) 119 Cal.App.4th 770, 787 ["We apply the abuse of discretion standard in reviewing the trial court's determination to admit or exclude hearsay evidence. That standard applies to questions about the existence of the elements necessary to satisfy the hearsay exception."].)

The court abused its discretion. Section 1240 creates an exception to

the hearsay rule for statements that narrate, describe, or explain an event perceived by the declarant provided that the statement "[w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." For the statement to be spontaneous, it "must have been [made] before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance." (*Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468.)

Assuming that the "heavy stuff" Carmen was relating to her cousin had to do with planning bank robberies, there was no evidence, as even the court acknowledged, to show when in relation to the statement that Carmen heard about such "stuff." There was no evidence that Carmen's statement was a spontaneous reaction to finding out what appellant was doing. The prosecutor never clearly identified the alleged "startling" event or when that event was supposed to have occurred. While a brief period of time may elapse without precluding application of the spontaneous utterance hearsay exception (see, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 541; [two-and-one-half hours]; *People v. Raley* (1992) 2 Cal.4th 870, 893-894; [18 hours]; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1713 [one to two days]), there was no way of knowing how many hours, days or weeks had elapsed in this case.

"The rationale of the spontaneous statement exception to the hearsay rule is that the utterance must be made without reflection or deliberation due to the stress of excitement. [Citation.]" (*People v. Corella* (2004) 122 Cal.App.4th 461, 469.) There was nothing to suggest that Carmen's statement was made without reflection. She may have been under stress and acting different, but this is far from the requisite showing needed for

admissibility under 1240.

Nor was the evidence admissible under the state of mind exception, as ultimately acknowledged by the trial court. Evidence Code section 1250 makes an exception to the hearsay rule for evidence of a statement of a declarant's then-existing state of mind, including statements of intent, plan, motive, design, or mental feeling, when the evidence is offered to prove state of mind or to prove or explain a declarant's acts or conduct. (Evid.Code, § 1250, subd. (a).) As this Court has stated, "[a] prerequisite to this exception to the hearsay rule is that the declarant's mental state or conduct be factually relevant." (*People v. Hernandez* (2003) 30 Cal.4th 835, 872.)

The prosecutor initially claimed not to be offering Carmen's statement as probative of her state of mind, but rather argued that the statement constituted an exception to the hearsay rule as a "spontaneous declaration." (IX RT 2115.) Indeed, the relevance of Carmen's state of mind is non-existent. First, it was never established what "heavy stuff" Carmen was talking about. As the prosecutor conceded, Carmen "never said anything about the bank robberies" to Ms. White. (IX RT 2114.) The court ultimately agreed that it had erred in admitting the evidence on this ground. The only issue at trial was whether the defendant had premeditated or deliberated; Carmen's state of mind was not relevant.

Finally, the court gave a post-hoc rationale for admitting the statement, that it was corroborative of the motive for the killings, ostensibly that appellant killed his wife because she was talking about the robberies to others. Of course, the robberies had not taken place at the time Carmen talked to White. That conversation occurred during July 19-22, according to the witness's testimony. The bank robberies occurred subsequently. (CT

899.) Nor was there ever any evidence that showed that appellant was aware of the comment Carmen made to White.

The statement was irrelevant hearsay that was far more prejudicial than probative and should not have been admitted for any purpose. The trial court's ruling was an abuse of discretion.

D. **The Admission of the Statement Was Prejudicial and Violated Appellant's Constitutional Rights**

The introduction of this evidence violated appellant's Sixth and Fourteenth Amendment rights to due process and to confront and cross-examine witnesses. The trial court's failure to apply the California Evidence Code in a non-arbitrary manner also violated appellant's liberty interest in violation of due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) In addition, the introduction of this evidence infringed upon appellant's right to a reliable determination of guilt and penalty as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the California Constitution.

Statements of victims regarding either past or future conduct by a defendant has been found unduly prejudicial by this Court. (See *People v. Coleman* (1985) 38 Cal.3d 69.)

> The potential for unfair prejudice from the admission of prior statements of a victim declarant regarding either past or future conduct by an accused has been recognized repeatedly by this court and the United States Supreme Court. The limitations imposed on the admissibility of such evidence have been sufficiently stringent as to virtually preclude the evidence unless the victim's state of mind has been placed in issue or the statements are relevant to prove or explain the acts of the victim (e.g., where the defendant claims

> provocation or self-defense). [Citation] The rationale is that the " 'true evidentiary bearing of the evidence is at best slight and remote' " and is outweighed by its prejudicial effect.

(*Id.* at p. 83.)

Here, the statement that appellant was into "heavy stuff" provided words from the victim's own mouth that appellant was involved in serious activities that were causing her a great deal of stress. The prosecutor urged the jury to consider this statement as evidence that Carmen was aware in mid-July that appellant was planning on robbing a bank and to use this to establish motive. As the prosecutor explained, it was important to corroborate Angelique Foster's testimony that appellant told her that Carmen was "going crazy and telling people that he was trying – that he was going to rob banks." (X RT 2395-2396.)

Thus, the prosecutor in her argument to the jury contended that to determine whether or not the murders were premeditated and deliberate – the only issue in this case – one looks to whether there was a motive. The statement about appellant being into "heavy stuff" was then used to demonstrate that Carmen was upset because she became aware appellant was planning the bank robberies – by July 19th:

> July 1st they move to Antioch. All of a sudden, by the 19th, that's when we know Carmen goes to her cousin, Treniece White. Shows up at the house. She's stressed, shaking. She says, "Christopher's into some heavy stuff."

(XIII RT 3092.)

The introduction and use of this statement to establish appellant's motive was not harmless beyond a reasonable doubt.

V.

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT OF FIRST DEGREE MURDER

A. Introduction

Over defense counsel's objection, the trial court delivered three related instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt which were misleading and constituted improper pinpoint instructions.

The trial court gave a modified version of CALJIC No. 2.03, which stated as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning any of the crime[s] for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide. It is for you to determine whether such conduct in fact shows consciousness fo guilt, and if so, guilt of what crime or degree of crime.

(CT 101.)

The court also gave a modified version of CALJIC No. 2.04, as follows:

> If you find that defendant [attempted to] escape from jail after being charged with the crimes in this case that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to

> decide. Again, it is for you to determine whether such conduct in fact shows consciousness of guilt, and, if so, guilt of what crime or degree of crime.

(CT 1012.)

The court also gave a modified version of CALJIC No. 2.52, as follows:

> The flight of a person immediately after the commission of a crime, or after he or she is accused of a crime, is not sufficient in itself to establish his or her guilt, but it is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilt or not guilty. The weigh, if any, to which such circumstance is entitled is a matter for you to decide. Once more, it is for you to determine whether such conduct in fact shows guilt, and, if so, guilt of what crime or degree of crime.

(CT 1025.)

The court refused a defense instruction that would have read: "Although 'consciousness-of-guilt evidence (such as any evidence of flight or attempted escape) may be probative of whether the defendant committed a homicide [crime], it does not have any logical relevance as to the degree of any crime committed by the defendant. You must not, therefore, consider any evidence of consciousness of guilt in determining whether the defendant committed first (as opposed to second) degree murder. (CT 999.)

After giving the CALJIC instructions, and refusing the defense instruction which would have ensured the jury did not use the consciousness of guilt evidence on the issue of consciousness of guilt of premeditated and deliberate first degree murder – as opposed to the issue simply of

consciousness of guilt of murder – the trial court appeared to have second thoughts. (XIII RT 3261.) While the jury was deliberating, the court mused on the issue, and asked for further argument on whether the defense instruction should be given. (XIII RT 3260-3262.) The trial court and prosecutor engage in a colloquy as to how the making of false statements and escape attempt after the crime are at all probative of premeditation and deliberation. (XIII RT 3263-3264.) The prosecutor, however, was never able to adequately explain how this so-called consciousness of guilt evidence is probative of appellant's state of mind at the time of the crime. (See XIII RT 3263-3267.) As defense counsel argued: "Of all the things that [the prosecutor] said, I thought virtually none of them related to the question that the Court, I think is considering. Which is the question not of consciousness of guilt, once again, of proving murder . . . as opposed to . . . consciousness of guilt as it relates to the question of premeditation." (XIII RT 3268.) Ultimately, the court refused to instruct the jury further. (XIII RT 3279-3283.)

The consciousness of guilt instructions given were unnecessary and argumentative. Moreover, they permitted the jury to draw irrational inferences against appellant. These instructional errors violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstance and penalty, as well as their state constitutional analogs. Accordingly, reversal of the conviction, special circumstance findings and death judgment is required.

B. The Consciousness-of-Guilt Instructions Improperly Duplicated the Circumstantial Evidence Instructions

These instructions were unnecessary. This Court has held that

specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa, supra,* 26 Cal.4th at pp. 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on other ground, *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00 and 2.01. These instructions informed the jury that it may draw inferences from the circumstantial evidence, i.e. that it could infer facts tending to show appellant's guilt from the circumstances of the crimes. There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection].)

C. <u>The Consciousness-of-Guilt Instructions Were Unfairly Partisan and Argumentative</u>

The consciousness-of-guilt instructions were not just unnecessary, they were impermissibly argumentative. The trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral,

authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, the three consciousness-of-guilt instructions given in this case were impermissibly argumentative. Structurally, they are almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th 408, which read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.) The instructions here tell the jury, "[i]f you find" certain facts (escape attempt, making willfully false statements and flight in this case and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not

premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and it also should hold the consciousness of guilt instructions to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet*, *supra*, 405 U.S. at p. 77.) Moreover, the prosecution-slanted instructions given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions

not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

The argumentative consciousness-of-guilt instructions invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. They therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

D. The Consciousness-of-Guilt Instructions Permitted the Jury to Draw Irrational Permissive Inferences about Appellant's Guilt

The consciousness-of-guilt instructions suffer from an additional constitutional defect – they embody improper permissive inferences. The instructions permitted the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., escape attempt or making willfully false statements or flight. (See *People v. Ashmus* (1991) 54 Cal.3d. 932, 977.) A permissive inference instruction can intrude

improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to

flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, there was no dispute that appellant killed the victims. The defense conceded that appellant committed the killings, and thus, his guilt was a foregone conclusion. The only issue was guilt for which homicidal crime: first degree premeditated and deliberate murder or second degree murder.

The irrational inference concerned appellant's mental state at the time the charged crimes allegedly were committed. The improper instructions permitted the jury to use the consciousness-of-guilt evidence to infer not only that appellant committed the murders, but that he had done so with premeditation and deliberation. The evidence had no other relevance given the defense concession of appellant's commission of the homicides. Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)[13]

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[13] Professor LaFave makes the same point: "Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time

(continued...)

Therefore, appellant's actions after the crime, upon which the consciousness-of-guilt inferences were based, simply were not probative of whether he harbored the mental states for first degree murder at the time of the shooting. There was no rational connection – much less a link more likely than not – between appellant's escape attempt, false statements and flight, and consciousness by him of having committed the homicide with premeditation and deliberation. Given appellant's admission that he was criminally culpable of the murders, the consciousness-of-guilt instructions were completely irrelevant. His alleged escape attempt, false statements and flight cannot reasonably be deemed to support an inference that he had the requisite mental state for first degree murder, as opposed to second degree murder.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) However, appellant respectfully asks this Court to reconsider and overrule these holdings and to hold that in this case delivery of the consciousness-of-guilt instructions was reversible constitutional error.

Because the consciousness-of-guilt instructions permitted the jury to draw an irrational inference of guilt against appellant, use of the instructions undermined the reasonable doubt requirement and denied him a

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[13](...continued)
and not before or during the killing." (LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics, fn. omitted.)

fair trial and due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15). The instruction also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

E. Reversal Is Required

Giving the consciousness-of-guilt instructions was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's murder conviction and the special circumstance findings must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The error in this case was not harmless beyond a reasonable doubt. Since the escape attempt, making of false statements and flight were not disputed, it was almost certain that the jury found the instructions applicable. Moreover, the error affected the only contested issue in the case, i.e., the degree of murder. The combined effect of the consciousness-of-guilt instructions was to tell the jury that appellant's own conduct showed he was aware of his guilt for the very charge he disputed. In the context of this case, these instructions were not harmless beyond a reasonable doubt. Therefore, the judgment on the murder convictions and

the special circumstance allegations must be reversed.

VI.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

A. Introduction

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> 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.

(CT 1024.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process, and a reliable verdict in a capital case under the Fifth, Sixth, Eighth and Fourteenth Amendments and their state constitutional analogs.

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

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320 (a "mere modicum"of evidence is not sufficient). Motive alone does not meet this standard because a conviction based on such evidence would be speculative

and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (See, e.g., CT 1025 [CALJIC No. 2.52, stating with regard to flight that it "is not sufficient by itself to establish [] guilt . . ."]; CT 1011 [CALJC No. 2.03, re making false or misleading statements]; CT 1012 [CALJIC No. 2.04, re attempted escape].) The prominence of these three instructions, including the placement of the motive instruction, immediately before the flight instruction, served to highlight its different standard.

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

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

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest

> offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

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

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case.

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

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish the defendant's guilt and that the absence of motive could be used to show the defendant was not guilty. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

D. Reversal Is Required

Although appellant admitted his guilt in the homicide, whether the crime was first or second degree murder was very much at issue. The crucial question in this case was whether he committed the killings as a spontaneous explosion of anger or as part of a plan to silence his wife. The instruction erroneously encouraged the jury to find appellant guilty, despite the contested evidence of planning because appellant had the motive to commit the crime. Accordingly, the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra,* 386 U.S. at 24.)

VII.

THE TRIAL COURT'S DENIAL OF APPELLANT'S REQUESTS FOR SEPARATE GUILT AND PENALTY JURIES AND FOR SEQUESTERED VOIR DIRE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS

A. Introduction

The court denied appellant's motion to impanel a separate penalty phase jury or, in the alternative, to impanel dual juries. (III RT 696-711.) The court also denied appellant's request for sequestered, individualized "death qualification." (III RT 711.) Finally, the court refused to permit limited voir dire prior to the penalty phase. (XIV RT 3378-3379, 3430-3435.) The court's denial of appellant's motions resulted in the deprivation of appellant's rights to voir dire, an impartial jury, a fair trial, due process and reliable guilt, special circumstance and penalty determinations under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs.

B. Factual and Procedural Background

On October 21, 1999, prior to trial, appellant moved for the

empanelment of a separate penalty jury or dual juries and the implementation of certain jury selection procedures. (CT 767-785.) Appellant argued that such procedures were necessary to: 1) safeguard appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights; 2) permit a reasonable inquiry into specific legal prejudices held by jurors as the basis for challenges for cause (citing *People v. Balderas* (1985) 41 Cal.3d 144, 183 and *People v. Noguera* (1992) 4 Cal.4th 599); and 3) minimize the time required for the selection of a fair and impartial jury. (CT 767-768.) The motion explained that appellant first and foremost wished for a new jury to be selected if a penalty phase were to be held. Alternatively, appellant requested dual juries to sit simultaneously, with the first determining the issue of guilt and the second to decide penalty, if necessary. Under either scenario, appellant requested that "if death qualification is to take place, only the penalty-phase jury be death qualified (and only the penalty-phase jury be exposed, through questions in voir dire or otherwise, to evidence that the state seeks to introduce in aggravation)." (CT 768.) Appellant also requested that any death qualification be conducted on an individual, sequestered basis. (*Ibid.*)

The prosecution opposed the motion. (CT 795-803.) The motion was denied on November 11, 1999. (CT 871.)

The court conducted all voir dire in open court, and failed to voir dire adequately on the death penalty. Indeed, it particularly failed to voir dire on any circumstances of the case which might have biased the jurors. As discussed below, the failure to allow for sequestered voir dire on issues of death qualification unfairly skewed the jury towards death. In addition, because the court denied the request for separate juries, the court precluded the defense from conducting essential voir dire of potential jury members

regarding an uncharged murder. In "death qualifying" the jurors, the court limited itself to leading questions as to whether or not the jurors would vote to impose the death penalty automatically under various scenarios that were not applicable to this case.

Not only was the method for questioning jurors about their death penalty views in open court unduly limited and unlikely to elicit meaningful responses necessary to determine bias, but counsel was also left with a choice between two competing constitutional rights. He was forced to forsake either the defendant's right to have the jurors questioned regarding their ability to follow the law and render an individualized sentencing determination (after learning about a prior uncharged murder) or his right to a fair guilt phase trial untainted by prejudicial views regarding the uncharged murder. The defense chose the latter, and thus, the jurors were not asked whether they would automatically impose the death penalty if they were to learn that the defendant had participated in the murder of another person on an unrelated occasion. (VI RT 1780.)

The denial of all of appellant's various requests for separate juries and for sequestered voir dire, as well as the court's own failure to conduct an adequate voir dire deprived appellant of his right to voir dire and violated the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as California statutory and constitutional law.

C. **Failure to Allow Separate or Dual Juries**

Voir dire plays a critical function in assuring a criminal defendant that his Sixth Amendment right to a fair trial by jury will be honored. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and

evaluate the evidence cannot be fulfilled." (*Ibid*; see *Connors v. United States* (1895) 158 U.S. 408, 413.)

One of the critical functions of voir dire in a capital case is determining whether prospective jurors hold beliefs regarding the death penalty which would make them unable to follow the court's instructions. Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Adams v. Texas* (1980) 448 U.S. 38, 45; *People v. Heard* (2003) 31 Cal.4th 946, 958.)

The *Witt-Adams* qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty. (*Morgan v. Illinois* (1992) 504 U.S. 719, 728-729 ["a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do"].) For prospective jurors who are strong supporters of the death penalty, the question "is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without the possibility of parole in the case before them." (*People v. Cash* (2002) 28 Cal.4th 703, 719-720.) A defendant may make a challenge for cause based on the juror's response when informed of facts or circumstances likely to be present in the case being tried. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) "A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of the aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging

document." (*Ibid.*)

Appellant had the right to be tried by a jury free of jurors who, in view of the circumstances of the case, were prevented or impaired from returning a verdict of life without the possibility of parole. He therefore had to be given the opportunity to identify such jurors through voir dire. (See *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-734; *Lockhart v. McCree* (1986) 476 U.S. 162, 170, fn. 7.) Either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias as to some fact or circumstance shown by the trial evidence that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 720-721.)

In *Cash*, the trial court allowed the parties to conduct some voir dire but refused to allow the defense to ask prospective jurors whether they would automatically vote for the death penalty if the defendant had committed another murder. Noting that a prior murder by defendant would likely be significant to jurors, this Court held that the trial court's refusal to allow this inquiry was error. (*Id.* at p. 721.)

Here, appellant also wished to question prospective jurors on a prior murder. Indeed, this was a primary reason for wanting separate or at least dual juries – so that jurors who would be deciding the appropriate penalty after hearing about an additional murder could be asked about its impact without tainting jurors at the guilt phase of the case. By denying the motion for separate or dual juries, as in *Cash* – although for a different reason – appellant was effectively deprived of his ability to question prospective jurors on a critical issue. Accordingly, appellant was deprived of his rights to voir dire and to a fair and impartial jury by the absence of voir dire on the

circumstances of the case.

This Court has held that not every error in restricting death-qualification voir dire requires reversal of the death judgment. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722; *People v. Cunningham* (2001) 25 Cal.4th 926, 974.) In *Cunningham*, restrictions on questioning during *Hovey* voir dire was deemed harmless where the error was ameliorated by the defense's ability to ask the same question during general voir dire. (*Ibid.*) Appellant had no such ability in the present case because there was no *Hovey* voir dire and appellant's attorneys were restricted in asking questions during general voir dire.

This Court has also suggested that such errors could be harmless "if the record otherwise establishes that none of the jurors had a view about the circumstances of the case that would disqualify that juror." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 974; *People v. Cash*, *supra*, 28 Cal.4th at p. 722.) The record does not establish such a fact in this case. Because of the denial of the motion for separate or dual juries, jurors were not asked any questions about the impact of another murder on their ability to be impartial at the sentencing phase. The record does not establish that none of the jurors would have been disqualified if they had been properly questioned.

A defendant is entitled to a reversal when he establishes that any juror who eventually served was biased against him. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 975.) Here, as in *People v. Cash*, *supra*, 28 Cal.4th at p. 723, because the trial court essentially precluded adequate voir dire with regard to a significant fact – the commission of a prior murder – it is impossible to determine from the record whether any of the people ultimately seated as jurors held disqualifying views on the death

penalty. Therefore, the court's error violated appellant's rights to due process (see *Morgan v. Illinois*, *supra*, 504 U.S. at p. 739) and cannot be deemed harmless. (See *People v. Cash*, *supra*, 28 Cal.4th at p. 723.) The death judgment must therefore be reversed.

D. Failure to Permit Sequestered Voir Dire

Prior to 1990, California required individualized, sequestered voir dire in capital cases. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-82.) *Hovey*, however, was superceded by Proposition 115 on June 5, 1990, which amended Code of Civil Procedure section 223. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1172-1179.) The non-sequestered, judge-only jury selection procedures promulgated in that initiative were held to apply to all trials conducted after June 5, 1990, including this one.

As amended, the statute provided that, "In a criminal case, the court shall conduct the examination of prospective jurors." This section also gave the court discretion to permit the parties "upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Cal. Code Civ. Proc. § 223.) Finally, it provided that, "Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death cases." (*Ibid.*)

Conducting voir dire in front of all the other jurors was prejudicial in this case. First, as the *Hovey* opinion noted, studies have shown that group voir dire contributes to the "tendency of a death-qualified jury to presume guilt and expect conviction." (*Hovey v. Superior Court, supra,* 28 Cal.3d at p. 80.)

In addition, without sequestered voir dire, the court's inquiry as to the jurors' feelings regarding the death penalty was perfunctory, often limited to asking leading questions which required little more than an affirmative or negative response. (See, e.g., V RT 1077-1080, 1091-1093, 1103-1105, 1120-1121, 1126-1127; VI RT 1386-1389 1401-1402, 1522) or none at all (see, e.g., V RT 1082-1086; VI RT, 1389-1397, 1408-1409, 1516-1519, 1541.)

Several jurors indicated on their questionnaires that they would automatically vote to impose the death penalty in certain situations. In response, the court merely asked these jurors leading questions without ensuring that the jurors truly understood that the death penalty was not automatic. (V RT 1103 [" you indicated that the death penalty should always be imposed upon one who murders a human being, commits multiple murders or murders his spouse and\or child. I am not going to repeat everything I said before. You understand that the law never requires that the death penalty be imposed under any of these circumstances? Do you understand that? A. Yes."]; see also, e.g., V RT 1120-1121, 1126-1127; VI RT 1386-1389, 1401-1402, 1408-1409, 1522.) While these prospective jurors were merely asked leading questions that required an affirmative answer in order to qualify them for the jury, those who expressed doubts about the death penalty were similarly asked questions that essentially tracked the questionnaire, without permitting any efforts at rehabilitating them. (See, e.g., V RT 1094-1096; VI RT 1402-1403, 1403-1406, 1530-1531.) As a result, jurors who initially entertained a belief that the death penalty should automatically be imposed and answered affirmatively to the leading questions posted by the judge were permitted to stay on the jury panel; jurors who were reluctant to impose the death penalty

were led to answer questions in a manner that subjected them to excusal. (RT 1445-1447, 1556-1557.)

This process had to have had an impact on the jury venire as a whole. The other jurors listening to these questions and answers had to have realized that jurors who expressed doubt about the death penalty were disapproved of, and ultimately removed, while those who at least initially stated their belief in automatically voting for death were not.

Because the trial court, albeit in a leading manner, questioned jurors about their views in front of all the other jurors, the jurors actually impaneled were repeatedly focused upon the death penalty in advance of any determination as to appellant's culpability. Thus, jurors heard, for example, the prejudicial views of many other actual and potential jurors that the death penalty should automatically be imposed in cases where there are multiple murders or where a child is killed. (V RT 1103, 1143, 1248, 1273; VI RT, 1543.) For example, one prospective juror stated that "I have strong, strong feelings about when you take someone's life. And I understand what the law says. I understand self-defense, and all that, but I also think to myself when you take a young child's life, an eye for an eye, and that's my feeling." (V RT 1128.) That same prospective juror stated "Again, it's the premise that I feel when you take someone's life -- I understand what the law says. You are innocent until proven guilty. But the fact that there were lives taken, particularly a child's life, I just have strong feelings about." (V RT 1129.) Another juror was of the opinion, expressed through the court, that "You indicated in response to Question 104, which asked about general feelings about the death penalty, you said: I favor it, but I'm not sure that California ever executes anyone anymore. (VI RT 1384.) And as noted above, while the court asked questions of the

jurors who initially expressed their belief in automatic imposition of the death penalty in a manner which enabled them to be kept on the jury, the court did not make any such efforts with respect to jurors who initially expressed strong feelings against the death penalty.

These conditions contributed to an overall unfairness that easily could have been corrected with sequestered, individual voir dire.

E. Failure to Permit Limited Voir Dire Prior to Penalty Phase

After the jury's guilt verdicts, the trial court addressed whether, in light of the fact that the prosecution intended to present evidence of the 1994 uncharged murder, whether it would be appropriate to conduct limited voir dire of the jury prior to the penalty phase. (XIV RT 3344-3352.) The court stated that it was "prepared to consider voir diring this jury panel further, relative to the 1994 matter" and asked counsel to prepare questions that should be asked of the jurors. (XIV RT 3346.)

The defense then submitted four proposed questions for the jurors:

1. Having heard all of the evidence that was presented to you at the culpability phase (and having found Mr. Henriquez guilty of two counts of first-degree murder, one count of second-degree murder, and certain enhancements) have you formed an opinion as to the appropriate penalty in this case?
2. At the penalty phase of a capital case, the prosecutor is entitled to introduce evidence of other crimes committed by a defendant during his lifetime. Based on the evidence that you have already heard and the findings that you have already made in the culpability phase, do you have any assumptions about whether Mr. Henriquez may have committed other

crimes not yet brought to your attention? If so, what are those assumptions?

3. The judge will instruct you that, in determining the appropriate penalty in this case, you are not allowed to consider evidence of any other crime unless you first find that the prosecutor has proven to you, beyond a reasonable doubt, that the defendant committed that other crime. Given that you have already heard much evidence against Mr. Henriquez and have already found him guilty of a number of crimes, do you think you can begin now with the presumption that Mr. Henriquez is not guilty of any other crime, and discard that presumption if and only if the prosecution proves to you beyond a reasonable doubt each and every element of any other "crimes"?

4. Together with the evidence that you have already heard in the culpability phase, if you were to hear additional evidence that the defendant had participated in a robbery where the victim had been killed, would you automatically vote for imposition of the death penalty?

The defense asked the court to submit these questions to the jurors. (XIV RT 3432.) The trial court denied the request for further voir dire, finding the absence of good cause. (XIV RT 3468-3469.)

However, because the jury was never asked about the impact of an unrelated murder – due to the refusal of the court to allow for separate or dual juries – the defense was effectively precluded from inquiring about this critical issue. Having prevented such questions prior to the guilt phase, the trial court should have found good cause for permitting such questions after

the guilt phase. The failure of the court to do so deprived appellant of his right to ensure that a fair and impartial jury heard and decided the appropriate penalty.

The trial court's decision not to re-voir dire the jury is subject to reversal only upon an abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 482.) This Court has required "more than the speculation or desire of defense counsel" to establish good cause to discharge the jury. (*People v. Rowland, supra*, 4 Cal.4th 238; *People v. Pride* (1992) 3 Cal.4th 195, 252-253.) Here, where, the defense had a legitimate concern that the jury would be biased in considering an uncharged murder, which they were precluded from questioning the jury about prior to the guilt phase, it was far more than speculative that appellant was prejudiced. Indeed, the court's refusal to re-voir dire the jury to ensure that the court's denial of separate juries was not prejudicial, was itself an abuse of discretion.

F. Reversal Is Required

A great deal of deference is allowed trial courts in conducting voir dire of prospective jurors. (See *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 189; *People v. Chapman* (1993) 15 Cal.App.4th 136, 141.) Nonetheless, an inadequate voir dire that thwarts the selection of a fair and impartial jury violates the constitutional rights of a defendant.

A view of the jury selection as a whole shows a voir dire more conducive to an expedient empanelment of jurors than finding a fair, impartial jury. The combination of the denial of separate juries, sequestered voir dire and limited voir dire prior to the penalty phase resulted in an inadequate jury selection process.

Where the jury selection includes an intensely restricted voir dire that has infringed upon a defendant's right to an impartial jury, reversal of the

conviction is required. (*People v. Winborn* (1999) 70 Cal.APp.4th 339, 347-348; *People v. Box, supra*, 152 Cal.App.3d at p. 466.) So it should be here.

In the alternative, where jury selection corrupts the penalty phase decision-making process of the jury, reversal of the death penalty is required. (*Turner v. Murray*(1986) 467 U.S. 28, 37; *Morgan v. Illinois, supra,* 504 U.S. at p. 739.) If the convictions are not overturned, at minimum, the death sentence must be vacated.

VIII.

THE INTRODUCTION OF VICTIM IMPACT EVIDENCE AND THE PROSECUTOR'S CALL FOR VENGEANCE ON BEHALF OF VICTIM'S FAMILY UNDERMINED APPELLANT'S RIGHT TO A RELIABLE SENTENCING DETERMINATION

A. Introduction

The prosecutor introduced over objection the testimony of four victim impact witnesses: Carmen's father, brother, sister-in-law and best friend. These witnesses gave testimony regarding the characteristics of the victims and the impact of their loss upon them and their families. This evidence was then used as a platform for the prosecutor to call for vengeance, arguing that since the family was not permitted to kill the defendant themselves, it was the jury's duty to do so. The evidence presented, individually and together with the prosecutor's remarkably inappropriate argument, unduly inflamed the jury and resulted in a fundamentally unfair trial and unreliable sentencing determination in violation of appellant's Sixth, Eighth and Fourteenth Amendment rights and their state constitutional analogs.

B. Summary of Facts

The prosecutor informed defense counsel that it intended to present

victim impact evidence from several witnesses, all of whom were either family or friends of the deceased, including Harold Jones, Valen Jones, Heidi Jones, and Angelique Foster. No further discovery was provided. (CT 1152, 1214.) The prosecutor also sought to introduce photographs of the victims to depict how they appeared when they were alive. These included three photographs, one of which was of mother and child taken shortly before their deaths, one taken of the two of them a year earlier, and a third photograph of the child at her day care. (XIV RT 3361-3362, 3439-3440, 3451-3453.)

Appellant filed a motion for discovery and to permit appellant to preview any victim impact evidence that the prosecution intended to introduce at the penalty phase. (CT 1150-1156.) Appellant also filed a motion to exclude victim impact evidence that would render the trial fundamentally unfair. This included evidence of the victims' family members' characterizations of or opinions about the crime, the defendant and/or the appropriate punishment. (CT 1157-1170.) Appellant filed another motion to preclude admission of the photographs of the victims. (CT 1223-1227.)

The prosecutor opposed the restriction on victim impact evidence sought by the defense. (CT 1181-1190.) The prosecutor also opposed the motion for discovery, contending that there are no "discoverable" statements of proposed victim impact witnesses to provide. (CT 1212-1221.)

At argument on the motions, it was agreed, and the court ordered that the witnesses would be admonished that they were not to characterize or give an opinion of the crime or of appellant. (XIV RT 3409.) The defense argued that particularly victim impact testimony from non-family members

was inappropriate, and that Angelique Foster's proposed testimony, which would focus on the characteristics of the victims and the impact of the crime – not on Foster, but on the victims, themselves – was unduly inflammatory. The defense also argued that having several witnesses testifying as to victim impact would be cumulative. Furthermore, the defense argued that victim impact evidence should be limited to what appellant knew at the time of the killings. (XIV RT 3414-3426.)

The court recognized that the evidence could be "very inflammatory" but determined that the victim impact evidence proposed by the prosecution was admissible. (XIV RT 3414, 3422-3423.) The court therefore denied the motion to exclude victim impact evidence. The court cautioned that if Foster was intending to go beyond the proposed testimony regarding the victim's characteristics to testify about the effect of their deaths on her, the prosecution was required to put the court on notice before doing so. (XIV RT 3419-3420, 3426.)

The court also ruled that the photograph of mother and child, taken shortly before their deaths, Exhibit 2, was admissible. (XIV RT 3454.) Subsequently, it permitted another photograph of Zuri, a portrait taken months before her death. (XIV RT 3554-3557; Exh. 6.) The court denied the motion for further discovery and a preview of the prosecution's evidence was denied. (CT 3407.)

The prosecution's presentation went far beyond the permissible scope of victim impact evidence. In her opening statement, the prosecutor summarized the victim impact evidence it intended to present to the jury:

> [Y]ou are going to hear what we call victim impact evidence. And these are Carmen's father, her step-mother, Angie Foster, who was Zuri's day care provider for the first almost first

> two years of her life while Carmen went to school and worked as a dental assistant. Her sister-in-law, Heidi Jones, who you saw previously, who had been pregnant at the same time as Carmen. Their due dates were a day apart. And Carmen's only living full brother, Valen Jones. We expect they are going to tell you just how precious and unique and wonderful this child who never saw her third birthday, this mother who was waiting the birth of her child, and the unborn baby who was a month away from being delivered were to this family and to Angie Foster.

(XIV RT 3479.)

The victim impact testimony – which was far more extensive and inflammatory than described – violated appellant's rights to a fundamentally fair trial and to an individualized, non-arbitrary and reliable sentencing determination in violation of the Sixth, Eighth and Fourteenth Amendments.

Before the victim impact witnesses testified, the court informed them that they were not permitted to characterize the crimes or the defendant, but that their testimony would have to be limited to questions about the victims and the impact of the absence of the victims on them. (XIV RT 3620-3621.)

Carmen's father, Harold Jones, testified about Carmen's qualities and how she meant everything to him. Zuri was his first grandchild, and he described his close relationship with her. He then described how he learned about their deaths. He also testified about the pain, sorrow and emptiness he continued to feel. (XVI RT 3625-3627.)

Angelique Foster testified about Zuri's birth and the child care she provided for her after she was born until she was about two years old. She

described Zuri's close relationship with her mother. She also testified about the things Zuri liked to do and that she was an affectionate child. Although the trial court had previously ruled that testimony regarding the impact of the victims' deaths on Foster should not be introduced without permission from the court, the prosecutor elicited from Foster that she felt as if Zuri were her own child, that she was devastated when she learned of Zuri's death, and felt a sense of guilt because she knew Zuri was in a dangerous situation and did not do anything about it. Foster testified that she thought of Zuri every day. (XVI RT 3629-3633.)

Heidi Jones, Carmen's sister-in-law, testified about her close relationship with Carmen. (XVI RT 3636.) As did Foster, Jones described the kind of happy child Zuri was and the things she liked to do. She also described the close relationship between Zuri and Carmen. Jones also testified about Carmen, and the things she liked to do. Jones testified that she got pregnant after finding out that Carmen was pregnant, and moved back to California after having moved away so that her baby and Carmen's baby could grow up together. Their respective due dates were one day apart. Jones testified that she moved back to California but the killings occurred before she had a chance to see Carmen and Zuri. Jones then described how she learned of the deaths. Jones testified that because of what happened, she went into labor prematurely, and gave birth a month early. Jones testified about the impact of Carmen and Zuri's death on her husband, Valen Jones, Carmen's sister. Jones further testified that she thinks of Carmen and Zuri all the time. (XVI RT 3636-3644.)

Valen Jones then also testified. He described what Carmen was like growing up and the close relationship they had. He described being raised as a Jehovah's Witness, and Carmen's faith. He testified about his close

relationship with Zuri. He described the impact of the loss of Carmen and Zuri on his family. (XVI RT 3645-3649.)

The defense moved for a mistrial and to strike some of the victim impact evidence that was elicited. (CT 1230-1235.) First, the defense moved to strike Foster's testimony regarding her own feelings about the killings, and how it impacted her because they were in violation of the court's ruling. (XVI RT 3656; CT 1230-1235.) As the defense pointed out, there were a number of questions asked of Foster which explicitly elicited the impact of the killings on Foster, herself. This included questions about how close she was to Zuri, how she learned that Zuri was dead, how Zuri's death made her feel, and how that feeling differed from how it would have felt if Zuri were killed in an accident, the guilt she felt, and how she now thinks of Zuri. (See, e.g., XIV RT 3631-3633.) The prosecutor claimed to have done so unintentionally. (XVI RT 3663, XVII RT 4208.)

The defense also objected to elicitation of testimony as to how the witnesses learned of the crimes after the court had ruled that there would be no testimony regarding characterizations of the crime. (XVI RT 3657.) The defense contended that the prosecutor attempted to circumvent the prohibition of having victim impact witnesses provide characterizations of the crime by having them contrast what they were feeling as a result of the killings with what they would feel if the victims were killed accidentally. (CT 1233.) The court overruled the objections and denied the motion to strike. (XVI RT 3657-3658.)

The defense further objected to the prosecutor's leading and improper questioning of Heidi Jones, in which the prosecution elicited testimony that Jones went into premature labor because of the killings. (CT 1233; XIV RT 3642.)

The trial court denied the defense motion for mistrial. (XVII RT 4212-4217.)

C. **The Trial Court Erroneously Failed to Limit the Scope of Inflammatory Victim Impact Evidence**

In *People v. Edwards* (1991) 54 Cal.3d 787, 834, this Court determined that some victim-impact evidence may be admissible under section 190.3, subdivision (a) as "circumstances of the crime of which the defendant was convicted in the present proceeding. . . ." *Edwards* held that factor (a) "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*Ibid.*) The holding is limited to "evidence that logically shows the harm caused by the defendant." (*Ibid.*) In addition, evidence of the effect of a capital crime on loved ones is relevant and admissible as a circumstance of the crime under Penal Code section 190.3, subdivision (a) "[u]nless it invites a purely irrational response from the jury." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057.) Such evidence can be "so unduly prejudicial that it renders the trial fundamentally unfair" under the Fourteenth Amendment. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

This Court has rejected several of the contentions raised by trial counsel and reiterated here with regard to the scope of victim impact evidence. This includes, but is not limited to, the admission of evidence of non-family members, evidence beyond the defendant's knowledge at the time of the crime, cumulative testimony by several witnesses, and evidence as to how family members learned about the crime. (See, e.g., *People v. Pollack* (2004) 32 Cal.4th 1153, 1182-1183 [citations omitted][rejecting claims that victim impact evidence improperly included testimony from victim's friends and evidence regarding the victims of which the defendant

was not aware].) Appellant asserts that the admission of such evidence was improper, inflammatory, beyond the scope of the statutory factors, and diverted the jury from its task in violation of his Eighth and Fourteenth Amendment rights. He raises them here for purposes of preservation.

This Court has recently suggested that there are outer limits to the sheer volume of victim impact evidence allowable before due process is violated. In *People v. Robinson* (2005) 37 Cal.4th 592, the victim impact evidence came from four witnesses whose testimony filled 37 pages of reporters transcript and focused on the attributes of each victim and the effects of the murders on the witnesses and their families. The prosecutor also introduced 22 photographs of the victims in life. (*Id.* at 644-649.) While declining to reach the merits of the issue because there was no objection to the victim impact evidence at trial, the Court suggested that the prosecutor may have exceeded the limits on emotional evidence and argument about which *Edwards* cautioned. (*Id.* at pp. 651-652.) Citing it as an "extreme example" of excessive victim impact evidence violating due process, the *Robinson* Court favorably quoted *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330:

> *[W]e caution that victim impact and character evidence may become unfairly prejudicial through sheer volume.* Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. . . . Hence, *we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence.*

(*Id.* at p. 336, emphasis in original.)

In this case, the prosecution presented four witnesses: the victim's father, brother, sister-in-law and best friend. They testified about the

victims' qualities and the impact of their deaths upon them. This included such speculative evidence as Heidi Jones testifying that she went into premature labor when she heard of the deaths, and witnesses testifying that they were far more devastated because the victims died by murder as opposed to an accident. Also poignant photographs of the victims – a mother and child – were introduced.

The purpose of allowing victim character evidence is to show each victim's uniqueness as an individual human being. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 823.) To this end, a state may decide that the jury should see "a quick glimpse of the life" defendant extinguished. (*Id.* at p. 830 (conc. opn. of O'Connor, J.), citing *Mills v. Maryland* (1988) 486 U.S. 367, 397 (dis. opn. of Rehnquist, J.).) The evidence in this case went far beyond these parameters.

Current law holds that a state may conclude that evidence about the impact of the murder on the victim's family is relevant to the jury's decision on whether or not to impose the death penalty. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827.) In *People v Edwards*, *supra*, 54 Cal.3d at p. 835, this Court held that some injurious impact of a crime could be admitted as a circumstance of the crime, but stated that its holding "only encompasses evidence that logically shows the harm caused by the defendant." Irrelevant information that diverts the jury's attention from its proper role or invokes an irrational, purely subjective response should not be admitted. (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Victim impact evidence which "invites an irrational, purely subjective response should be curtailed." (*People v. Edwards, supra,* 54 Cal.3d at p. 836.) Also, an injury may be too remote from any act by the defendant to be relevant to his moral culpability. (*People v. Harris* (2005) 37 Cal.4th 310, 352 [incident in which the

victim's coffin was accidently opened at the funeral, causing distress for the bereaved, was too remote].)

In *Edwards*, this Court suggested additional limitations, emphasizing that "we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* . . . ." (*Id.* at pp. 835-836.) The Court further warned that:

> Our holding also does not mean there are no limits on emotional evidence and argument. In *People v. Haskett*, *supra*, 30 Cal.3d [841] at page 864, we cautioned, "Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citation.]"

(*Id.* at p. 836, fn. 11.)

The sum total of the testimony in this case was far too broad, speculative, and inflammatory. This was capitalized upon by the prosecutor in closing argument. Particularly in a case such as this, where the victims are a pregnant mother and a young girl, the court must guard against an overly emotional appeal to the jury. However, by permitting the jury to hear and see the kind of inflammatory victim impact evidence detailed above, the jury's reasoned decisionmaking process was unfairly skewed. As discussed below, this evidence was used improperly by the prosecutor argue that the family desired vengeance and since they could not kill the defendant themselves, the jury was obligated to do it for them.

D. <u>The Prosecutor Committed Misconduct in Arguing for Vengeance on Behalf of the Family</u>

As the prosecutor conceded at the outset of her argument to the jury, this was an "emotional case." (XVII RT 4293.) She argued that the "pain and suffering the defendant inflicted upon the Jones family is relevant for you to consider." (XVII RT 4346.) She then described the victim impact in detail:

> When you think about how much Zuri meant to them. Remember Valen Jones said: "Yeah, the next generation of Joneses. . . . ." When you think of how much Carmen meant to her father, his only child. The one he proudly says: "She never even got a speeding ticket in her life. The first grandchild, the one that would climb into bed with him. He's not going to feel that warm little body I nestled up against him. They are not going to hear Carmen and Zuri singing. And this girl who never even got a speeding ticket, loved her husband . . .

(XVII RT 4346-4347.)

The prosecutor described the testimony of Heidi and Valen Jones, including how the deaths marred the joy they should have felt when their own baby was born:

> And Heidi and Valen Jones, they love Zuri and they love Carmen and the day their first child is born and brought home, the day they should be joyful about, what's Valen doing? He's crying, saying: "How can I protect this little one, when I couldn't protect Carmen and Zuri?

(XVI RT 4347.)

The prosecutor then explicitly called for vengeance: "[y]ou know vengeance is appropriate. It has a legitimate role in our society . . . The bottom line is that, yes, there is a lot of vengeance involved." (XVII RT

4348-4349.) The prosecutor stated that while the family is not permitted to lynch or stone the defendant, they deserved to have the state kill him. She concluded by arguing that the "victim's family is entitled to vengeance, plain and simple, from the state because they are not allowed to get it themselves . . And the state owes the victim's families something in return, doesn't it? It owes them what they are not entitled to get on their own." (XVII RT 4354.)

After the defense objected to this line of argument, and the trial court sustained the objection, the prosecutor continued to argue that the purpose of the death penalty is to give the victims a voice. (XVII RT 4355.)

This Court has approved the presentation of victim impact evidence as long as it is *not* a "clarion call for vengeance." (*People v. Kelly* (2007) 42 Cal.4th 763, 797.) The Court has indicated that it would be improper for the prosecutor to urge the jury to apply "frontier justice" and appeal to vengeance. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1380.)

Thus, the Court has held that " '[i]solated, brief references to retribution or community vengeance . . ., although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty.' " (*People v. Davenport* (1995) 11 Cal.4th 1171, 1222, quoting *People v. Wash* (1993) 6 Cal.4th 215, 262.) In *Davenport*, the prosecutor argued as follows: "Ladies and gentlemen, again I am only going to ask you to accept the fact that justice is a funny notion that cuts both ways. Sometimes the law requires a literal retribution for the taking of a life. Now, you all told us that you would render your individual verdict in this case. . . . If it is life without parole or if it is the death sentence, please work with the other jurors." (*Id.* at pp. 1221.) This Court held that these brief remarks "were

not particularly inflammatory, nor did they constitute the principal basis of his argument in favor of the death penalty." (*Id.* at p. 1222.)

In *People v. Wash, supra,* 6 Cal.4th 215, the prosecutor merely urged the jury "to make a statement," to do "the right thing", and to restore "confidence" in the criminal justice system by returning a verdict of death. (*Id.* at pp. 261-262.) More recently, in *People v. Hinton* (2006) 37 Cal.4th 839, 907, the prosecutor urged the jury to rely on "just retribution" and "controlled vengeance" in arriving at a verdict of death. (*Ibid.*) In that case, while the prosecutor mentioned those concepts, it was not to "justify imposition of the death penalty" but as a description of "human nature, not the criminal justice system" and that "[r]etribution and controlled vengeance should not be any longer the sole or the dominant objective of the criminal law." (*Ibid.*)

With regard to calls for *community* vengeance, this Court has explained that it is not error for a prosecutor to devote "some remarks to a reasoned argument that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance – i.e., punishment – exacted by the state, under controlled circumstances, and on behalf of all its members, in lieu of the right of personal retaliation. Retribution on behalf of the community is an important purpose of all society's punishments, including the death penalty." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1178, citing *Spaziano v. Florida* (1984) 468 U.S. 447, 462.)

In *Zambrano*, the Court acknowledged that the prosecutor's call for community retribution may not have been brief or isolated, but they were neither the principal basis of his argument or inflammatory. (*Id.* at p. 1179.) "They did not seek to invoke untethered passions, or to dissuade jurors from

making individual decisions, but only to assert that the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes." (*Ibid.*)

This is a far cry from encouraging the jury to exercise vengeance as a substitute for vigilante justice that is desired. The prosecutor here, as in these other cases, also appealed to the jury to be the conscience of the community. The prosecutor went much further, and, explicitly and emphatically called for vengeance on behalf of the victim's family. (XVII RT 4299-4302, 4633)

In *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812, the prosecutor reminded the jury that there had been no one there to ask for mercy for the victims of the killings, and encouraged the jury to give the defendant the same consideration that he had given his victims. The court in that case characterized the argument as a "thinly veiled appeal to vengeance" which is not permissible in a capital proceeding. (*Ibid.*) Here the appeal to vengeance was not thinly veiled at all.

In another Tennessee case, *State v. Middlebrooks* (1999) 995 S.W.2d 550, the prosecutor made the following argument: "His family asks you to impose the death penalty." (*Id.* at p. 558.) As in this case, there was no evidence introduced to this effect during the sentencing phase, and as the court noted, such evidence would have been inadmissible and in violation of the Eighth Amendment under *Payne*. Thus, "the prosecutor's statement clearly is an improper characterization of the family's view as to the appropriate sentence." (*Ibid.*)

Here, the prosecutor encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence. This was improper. Moreover, the call for

vengeance was magnified by the fact that it was not merely a general call for societal vengeance but a specific call for vengeance on behalf of the victims' family.

In a Third Circuit case, the court found prosecutorial comments that were "calculated to incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasonable moral response to the evidence" improper. (*Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, 1545.) In *Lesko,* the prosecutor urged the jurors to impose the death penalty stating: "I want you to remember this: We have a death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty." (*Id.* at pp. 1540-41.) The court in *Lesko* stated that "the prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned [the victims]." (*Id.* at p. 1545.)

The prosecutor's comments in this case violated not only the Eighth Amendment but also Due Process because they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly* v. DeChristoforo (1974) 416 U.S. 637, 643.)

Evidence of the victim's family's preference for the death penalty would have been inappropriate if introduced at the penalty phase. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2 [" the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment"].) The prosecutor's argument – without any support in the record – that the family wanted to kill appellant themselves, and that this was not only the

family's desire but the jury's obligation was to fulfill that desire, is even more improper.

E. **Conclusion**

The quantity and emotional quality of the victim impact evidence in this case, particularly when combined with the prosecutor's call for vengeance on behalf of the victim's family, completely shifted the focus of the jury's deliberative task from the appropriate sentence considering the defendant and the circumstances of the crime, to a wholly inconsistent and constitutionally unauthorized task – responding to the sorrow of the victim's family and imputing to them the desire to kill appellant.

The evidence and argument was so inflammatory that it diverted the jury from a "reasoned moral response to the defendant's background, character and crime." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328, quoting *California v. Brown* (1987) 479 U.S. 538, 545, conc. opn. of O'Connor, J.) The admission of this evidence together with the prosecutor's argument "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

In addition, the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict was violated. (*Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 776, citing *Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [holding that capital sentencing statutes must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death"].)

The admission of victim impact evidence and the prosecutor's

improper argument calling for vengeance on behalf of the family, individually and collectively, constituted prejudicial error in violation of appellant's constitutional rights. Respondent cannot establish that these errors were harmless beyond a reasonable doubt. Reversal of the death sentence is mandated.

IX.

THE INTRODUCTION OF IRRELEVANT BUT EXTREMELY INFLAMMATORY EVIDENCE AT THE PENALTY PHASE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

The prosecutor was permitted to introduce over objection gruesome photographs of the victims after the killings occurred. The evidence was excluded at the guilt phase because it was unduly prejudicial. For the same reasons, the photographs should not have been admitted at the penalty phase, where the evidence undoubtedly diverted the jury from its task of determining the appropriate penalty based on the background and character of the defendant.

B. Summary of Facts

Prior to the guilt phase, the defense moved to exclude photographs of the victims' bodies after the murders. (CT 890-896.) These photographs, Court Exhibit 9, consisted of two of Carmen (People's Exhs. I-21 and I-23, and two of Zuri (People's Exhs. G-18 and G-24.) As the defense pointed out, the photographs of a pregnant woman and small child were extremely gruesome and inflammatory. Any issue for which they might be conceivably relevant could be presented through less inflammatory means, such as through the testimony of the coroner and criminalists. Moreover, since the defense was not intending to dispute the identity of the perpetrator or the cause of death of the victims, the

photographs had no probative value. (*Ibid.*) The court ruled that if appellant were to admit the elements of second degree murder, then the prejudicial effect of the four photographs at issue, would outweigh their probative value. (VIII RT 1841.) After appellant so stipulated, the court ruled that the photographs would not be admitted at the guilt phase. (VIII RT 1976-1987; IX RT 2001-2007.)

At the penalty phase the prosecution again sought to have these photographs introduced. (XIV RT 3361.) The defense moved to exclude these photographs. (CT 1223-1227.) The motion to exclude the photographs was denied (XIV RT 3441-3443), although the court limited the prosecution to choosing two photographs, one of each victim. (XIV RT 3454.) The court ruled that the probative value exceeded their prejudicial effect. The court stated that the probative value of the photographs, which were taken within two days of the killings "lies in . . . the gruesome physical consequences of the murders." (XIV RT 3454.) The court further explained that while admission of the photographs at the guilt phase would have "brought into play a lot of undue prejudice and added very little probative value since there was really no question about the killing having taken place or much could be made of how they took place," the calculus is different at the penalty phase. (XIV RT 3556.) The court stated that the photographs "tell in ways that words could never do, the gruesome consequences of the unlawful acts that were perpetrated by the defendant, and are something that are properly to be considered by the jury in determining what the appropriate penalty is." (XIV RT 3556-3557.) Two of the photographs, renumbered People's Exhibits 22 and 23, were admitted into evidence. (CT 1239.)

C. <u>Applicable Law and Standard of Review</u>

When proposed testimony is subject to an objection grounded in section 352, the trial court's scrutiny must involve a thorough weighing of the probative value of the testimony and an assessment of its potential to prejudice the jury. (*People v. Jackson* (1971) 18 Cal.App.3d 504, 509 ["a trial judge must alertly supervise proceedings in his court, curbing when necessary over-zealous advocates and, in his rulings on evidence strike a 'careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption.' (citation.)"] .) "That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion." (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.)

A trial court which performs this balance appropriately will only be overturned if the reviewing court determines that the "probative value of the photographs clearly is outweighed by their prejudicial effect." (*People v. Crittenden* (1995) 9 Cal.4th 83, 134.) Conversely, the failure of a trial court to perform the balancing required when an Evidence Code section 352 objection is made itself constitutes an abuse of discretion. (*People v. Green* (1980) 27 Cal.3d 1, 24 [abuse of discretion when judge responds to 352 objection simply by accepting evidence subject to a limiting instruction], overruled on other grounds in *People v Martinez* (1998) 20 Cal.4th 225 and *People v. Hall* (1986) 41 Cal.3d 826.) Similarly, a trial court which refuses or fails to weigh these factors in a manner sufficiently clear to alert a reviewing court abuses its discretion. (*People v. Frank* (1985) 38 Cal.3d

711, 732; *People v. Green*, *supra*, 27 Cal.3d at p. 25.) Only when the trial judge has performed this function openly and on the record will reviewing courts be able to assess the trial court's actions. As this Court observed:

> The reason for th[is] rule is to furnish the appellate courts with the record necessary for meaningful review of any ensuing claim of abuse of discretion [and] to ensure that the ruling on the motion "be the product of a mature and careful reflection on the part of the judge.

(*People v. Green*, *supra*, 27 Cal.3d at p. 25.)

As explained below, the trial court failed to exercise its discretion appropriately in evaluating both the relevance of the evidence and the potential for undue prejudice which its admission would produce. Even assuming the court did engage in a balancing process, an examination of the record demonstrates that any probative value the photographs might possess "clearly is outweighed by [its] prejudicial effect." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 134.)

Appellant is aware of this Court's holding that: "the discretion to exclude photographs under Evidence Code section 352 is much narrower at the penalty phase than at the guilt phase. This is so because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (§ 190.3, factor (a)), and because the risk of an improper guilt finding based on visceral reactions is no longer present." (*People v. Bonilla* (2007) 41 Cal.4th 313, 353, citing *People v. Moon* (2005) 37 Cal.4th 1, 35.) In *People v. Anderson* (2001) 25 Cal.4th 543, 592, this Court noted that the circumstances of the capital crime are statutorily relevant to deciding if death is the appropriate penalty and the prosecution is entitled to show the circumstances "in a bad moral light."

(*Id.* at pp.591-592.)

However, the admission of photographs at the penalty phase that are irrelevant, cumulative and unduly gruesome and which are intended to arouse revulsion and anger rather than a reasoned moral response from the jury regarding penalty violates a defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See *People v. Coddington* (2000) 23 Cal.4th 529, 632-633; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [the Eighth Amendment requires reliability in the determination that death is the appropriate punishment].) Furthermore, as appellant contends below, while an improper guilt finding based on "visceral reactions" is no longer at issue, an improper penalty verdict can certainly stem from overly emotional reactions to gruesome yet irrelevant guilt phase evidence.

D. The Photographs Were Far More Prejudicial than Probative

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

Here, the jury had already heard at the guilt phase ample testimony with regard to how the killings occurred as well as the injuries the victims

suffered. The coroner provided detailed testimony about the cause of death and conditions of the victims' bodies. (VIII RT 1900-1935.) The crime scene, including how and where the bodies were found, was described by a police officer, with photographs and a videotape of the scene. (IX RT 2021-2080.) The blood spatter at the scene, again with photographs, was analyzed by a criminalist. (IX RT 2090-2103.) Even the trial court recognized, the photographs would be unduly inflammatory at the guilt phase. Similarly, at the penalty phase, the limited probative value would not outweigh its prejudicial effect.

Jurors' decisions at the penalty phase are far more discretionary and less constrained by law than their decisions at the guilt phase. (See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 ["The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts"].) Thus, a jury's death-sentencing discretion at the penalty phase is much more likely to be affected by evidentiary items such as inflammatory photographs as those in this case. Viewing graphic photographs, particularly of a mother and child, would create a strong emotional reaction in almost any person, thus making it likely that the reaction would be so strong that it would cause a juror to minimize or ignore other evidence presented on the ultimate question of whether the defendant should live or die.

The belief that the introduction of gruesome and graphic evidence causes jurors to ignore other evidence is supported by empirical study. It has been demonstrated that after viewing graphic photographs, jurors tend to prematurely reach a determination that the defendant should be sentenced to death. (Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision*

Making (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)

It is likely that the jurors at the penalty phase were greatly affected by the photographs. This is particularly true when viewed with the victim impact evidence described above and the prosecutor's call for vengeance on behalf of the victims' family. (See Claim VIII.) In light of this evidence and the prosecutor's argument, there is a grave danger that the jurors may have shut their minds to the defense evidence and decided to sentence appellant to death.

In sum, the error in admitting graphic, disturbing evidence at appellant's penalty phase was not harmless beyond a reasonable doubt. (See *Chapman v. California, supra,* 386 U.S. at p. 24.) Appellant's sentence of death should be reversed.

E. <u>Conclusion</u>

The admission of the photographs violated state statutory law, and appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights, as well as his rights guaranteed by article I, sections 7, 15, 17, and 24 of the California Constitution, to a fair trial and a reliable capital sentencing proceeding.

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Admitting photographs as graphic as the ones at issue in this case under circumstances where it had little probative value to the determination of the appropriate sentence resulted in a fundamentally unfair trial.

Moreover, the admission of this evidence violated appellant's right to a reliable capital-sentencing determination. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305 [requiring heightened reliability for capital-sentencing determination].) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

The admission of the photographs was so inflammatory that it diverted the jury from its task, and skewed its weighing of aggravating and mitigating factors. Reversal of appellant's death sentence is required.

X.

THE INTRODUCTION IN REBUTTAL OF APPELLANT'S CONVERSATION WITH ANOTHER INMATE ABOUT A HYPOTHETICAL ESCAPE ATTEMPT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Summary of Facts

After the defense rested at the penalty phase, the prosecutor sought to present evidence that a deputy at the Martinez Detention Facility overheard appellant say to another inmate that he would kill a guard in order to escape. (XVI RT 4197.)[14] The prosecutor conceded that the

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[14] The prosecutor had sought to introduce this evidence at the guilt phase as evidence of consciousness of guilt. (CT 823-829.) The court denied that this was a proper basis for admission, but suggested that it might be admissible under a theory that the evidence "corroborates" the "overarching motive that the People are attributing to the defendant." (RT 2540.) The court pondered, "[d]oesn't evidence about [appellant's] willingness to kill a guard in order to escape, isn't that just another manifestation of that underlying motive: killing in order to avoid imprisonment? And doesn't it corroborate all that very strongly?" (X RT (continued...)

evidence would not have been admissible as an aggravating factor, but was rebuttal to defense testimony that appellant was remorseful over the killings. (XVI RT 4198-4199.) The prosecutor also argued that the evidence would rebut testimony that the crimes were due to an extreme emotional disturbance and fear of abandonment. (XVI RT 4200.) In other words, according to the prosecutor, appellant was allegedly considering violent action where "there is no drinking involved, where Carmen's already dead. It has nothing to do with that. And it would serve to impeach these doctors who say, 'we see a reason for his violent behavior, and we're linking it back to Carmen or the way he was raised, etc.'" (*Ibid.*)

The next day, the prosecutor attempted to clarify the grounds for admission of the evidence. She contended that it would come in as "an extension of the nature of the offense" under factor (a), because it was relevant to consciousness of guilt. (XVII RT 4221.) The prosecutor argued that it was "relevant to show the defendant's consciousness of guilt regarding . . . the crimes of Carmen and Zuri." (*Ibid.*) The prosecutor also appeared to argue somewhat incomprehensibly that the evidence would rebut testimony that appellant's acts of violence were due to intoxication or feelings of abandonment. In addition, it was argued that it would be relevant to motive for the killings which the prosecution contended was to do whatever was necessary to stay out of prison. (XVII RT 4222.)

The court attempted to assist the prosecutor by offering another

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[14](...continued)
2540.) The prosecutor then sought to admit the evidence over defense objection on the ground suggested by the court, but ultimately decided not to admit the evidence at the guilt phase. (XI RT 2631-2633; CT 920-928; XI 2733.)

theory for admissibility; under Evidence Code section 1102, subdivision (b), which states that "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)." The court summarized the prosecution's position as follows: "You are saying that defense has produced evidence indicating that he had a character trait, if you will, that he was fearful of abandonment by his mother and women or wife, and that that was the – what occasioned the crimes, and you are offering it to rebut that by saying he did it for these instrumental goal oriented purposes. And this . . . conduct where he spoke about killing a guard to effectuate an escape, helps to underwrite that or help to prove that, corroborate that, that he – he did it for goal oriented purposes." (XVII RT 4223-4224.) The prosecutor added, "when they brought in these doctors to talk about what the motivation was behind the killing, which is what these doctors have done, they have revisited the issues of his guilt and what motivated him." (XVII RT 4225.)

The defense argued that the evidence did not constitute proper rebuttal because the defense did not present at the penalty phase evidence that appellant was motivated by fear of abandonment or that he was not capable of goal-oriented conduct. (XVII RT 4226.) The defense further argued that the character evidence introduced in mitigation related to appellant's early years; that the mitigation offered at the penalty phase related to his years up to the age of 20, his family and psychological background, and his feeling of remorse shortly after the offense. (XVII RT 4227-4228.) The defense also pointed out that the evidence the prosecution purportedly sought to rebut was introduced at the guilt phase, not the

penalty phase. (XVII RT 4228.)

The trial court then ruled that the evidence of appellant telling another inmate that he could kill a guard in connection with an escape was admissible under Evidence Code section 1102(b). The court explained its ruling as follows:

> The defense has presented . . . experts . . . [who] in effect have testified that he suffers from some sort of mental or emotional condition that arises from his growing up in what one of them described as a very dysfunctional family, that causes him to act in an emotional and sometimes rageful manner, and have expressly and/or implicitly indicated that he so acted in committing the crimes for which he has been convicted.
>
> The evidence that the People seek to introduce now, in my view, tends to show that he is, instead, not a person who acts emotionally out after an emotional or mental disturbance, but that he acts in a goal oriented, instrumental way. It's true that – that the defense does not deny that on some occasions he may have done that, but they are not the ones that should limit the prosecution in – in what regards the prosecution is going to prove this character trait to the jury. And if – if it tends to show a character and a character trait that's different than the ones that the defense experts have shown here, it's appropriate rebuttal evidence pursuant to 1102(b) on rebuttal evidence that contradicts or goes contrary to the evidence that the defense presented, clearly to argue mitigating factors pursuant to involved in the circumstances of the crime, that is 190.3(a), and also which the defense introduced, one has to believe is a mitigating factor under 190.3(d), which is

> defendant acting in these crimes subject to an emotional or mental disturbance.

(XVII RT 4233-4234.)

Based on the trial court's ruling, the prosecution presented in rebuttal Tom Lawrence, a police officer and former deputy sheriff, who testified that he was on duty at the jail on August 23, 1998. (XVII RT 4254-4255.) Lawrence monitored a conversation between appellant and another inmate named Puckett. (XVII RT 4256-4257.) In response to Puckett's statements about an earlier escape attempt he made, appellant discussed his involvement in an escape he had attempted. (XVII RT 4257.) They both then began talking about ways of escaping, and the fact that at night there is one deputy on watch instead of the two deputies who are on watch during the day. (XVII RT 4258-4259.) According to Lawrence, appellant then said that "[h]e believed during the night watch it would be easy for him to kill the deputy and that way escape unnoticed." (XVII RT 4259.) After Puckett said this probably would not work, appellant "was insistent that it was worth the risk to try to kill the deputy, if it would lead to his escape." (*Ibid.*)

B. <u>The Evidence of Conversations Regarding a Jail Escape Was Not Proper Rebuttal</u>

This Court has held that evidence which would be inadmissible at the penalty phase under section 190.3, as part of the prosecution's case-in-chief, may be admissible on rebuttal to counter evidence of good character introduced by the defendant. (*People v. Boyd* (1985) 38 Cal.3d 762, 776; *People v. Rodriguez* (1986) 42 Cal.3d 730, 791.) "The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines defendant's claim that

his good character weighs in favor of mercy." (*People v. Fierro* (1991) 1 Cal.4th 173, 237.) However, "the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*Id.* at pp. 237-238; *People v. Rodriguez, supra*, 42 Cal.3d at p. 792, fn. 24.) Thus, "the prosecution may rebut evidence of good character or childhood deprivation or hardship with evidence relating directly to the particular incidents or character traits on which the defendant seeks to rely." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1033, citing *People v. Rodriguez supra*, 42 Cal.3d 730, 792, fn. 24.) If a defendant puts his general character in issue, the prosecutor may rebut "with evidence or argument suggesting a more balanced picture of his personality." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 791.) In addition, "[e]vidence of future dangerousness may be introduced in rebuttal when the defendant himself has raised the issue of performance in prison and offered evidence that in a prison environment he would be law-abiding." (*People v. Malone* (1988) 47 Cal.3d 1, 31; *People v. Mattson* (1990) 50 Cal.3d 826, 878.)

In *People v. Ramirez* (1990) 50 Cal.3d 1158, the rebuttal evidence that the defendant became "out of control," went to juvenile court, was not attending school, and had used drugs, was found improper. In that case, the defense witness being rebutted, the defendant's mother, "did not testify generally to defendant's good character or to his general reputation for lawful behaviors, but instead testified only to a number of adverse circumstances that defendant experienced in his early childhood." (*Id.* at p. 1193.) The rebuttal evidence not relevant to the adverse circumstances was improperly admitted. Here appellant did not put his character in issue or introduce evidence of potential good conduct in prison, and, as explained

below, the rebuttal evidence was not relevant to any of the evidence presented by the defense.

The trial court ruled that evidence was admissible under Evidence Code section 1102, subdivision (b), purportedly to rebut appellant's character trait of acting violently out of an emotional disturbance or rage as opposed to goal oriented behavior. This was error.

"As a general rule, evidence that is otherwise admissible may be introduced to prove a person's character or character trait. (§ 1100.) But, except for purposes of impeachment (see § 1101, subd. (c)), such evidence is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion (§ 1101, subd. (a)), unless it involves commission of a crime, civil wrong or other act and is relevant to prove some fact (e.g., motive, intent, plan, identity) other than a disposition to commit such an act (§ 1101, subd. (b))." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Under Evidence code section 1102, criminal defendants may introduce evidence of their character or character traits to prove their conduct in conformity therewith (§ 1102, subd. (a)), and the prosecution may use similar evidence to rebut that evidence (§ 1102, subd. (b)). (*Ibid.*) However, "[s]ection 1102 only permits character evidence in the form of an opinion or reputation." (*People v. Felix* (1999) 70 Cal.App.4th 426, 432.) Such evidence about a defendant's character "may only be offered by the prosecution in rebuttal to similar evidence presented by the defense." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1216.)

Here, section 1102, subdivision (b) is inapplicable because it specifically relates to "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation." Evidence of a specific act does not fall under this category of evidence. In

addition, this Court has rejected the use of 1102 in the context of rebuttal at the penalty phase of a capital case: "The relevance of evidence of character or a character trait to the penalty determination in a capital case is not whether the defendant acted in conformity with a character trait, but whether the defendant's character or character trait should be considered a mitigating factor. Therefore, whether prosecution evidence is proper rebuttal must be determined in the peculiar circumstance of a penalty trial, not under Evidence Code section 1102." (*People v. Visciotti* (1992) 2 Cal.4th 1, 69 fn. 37.)

Furthermore, the evidence of a conversation of an intention in the future to kill a guard to effectuate an escape was not directly related to any incident or character trait appellant offered in his case in mitigation. (See *People v. Fierro, supra,* at p. 237; *People v. Rodriguez, supra,* 42 Cal.3d at p. 792, fn. 24.) The trial court determined that the evidence was proper rebuttal to the testimony of the mental health experts presented by appellant. However, none of them testified that appellant's violent conduct was never the result of planning.

Dr. Dutton testified that appellant was a "textbook example" of spousal abuser who kill their wives. (XV RT 3814.) He described appellant as someone "prone to violence in an intimate relationship." (XV RT 3820.) However, he made clear that this private personality in such settings is "frequently independent" of a public personality. (XV RT 3821.) Dr. Dutton also explained that appellant was "capable of more than one form of violence. He's capable of a form of public violence that was sociologically learned, largely through conditions of the neighborhood; and capable of a private form of violence, that is, a by-product of witnessing abuse in the family, being shamed, and having no secure attachment base."

(XV RT 3823.) Dr. Dutton further testified that "violence outside the home, as Chris Henriquez has demonstrated, can have a different modus operandi than violence inside the home." (XV RT 3830.) He reiterated that "the violence that he committed against his family was committed with an aftermath of tremendous emotion. And I think it was an estrangement killing. . . I think the violence he committed outside the home is the kind of what I'm calling sociological violence, which is what he grew up with." (XV RT 3830.) Indeed, Dr. Dutton was aware of the Bryant homicide but maintained that the killing of his wife and daughter "was of a different variety because it was an extremely emotional estrangement . . . generated in large part by the attachment disorders that he suffered as a result of growing up in the family that he grew up in." (XV RT 3857.) Thus, Dr. Dutton clearly differentiated the violence precipitated on the victims in this case – his wife and daughter – from other kinds of violence that appellant had committed. He agreed that the prior robbery and bank robberies that were introduced in aggravation constituted goal-oriented or instrumental type of violent conduct. (XV RT 3877-3878.) Evidence of a discussion about the killing of a guard to effectuate an escape in no way rebuts this testimony.

Dr. Leonti Thompson, a psychiatrist, testified for the defense at the penalty phase. (XVI RT 3945.) Dr. Thompson testified regarding appellant's expressions of remorse in 1996, when Thompson interviewed him. (XVI RT 3950-3951, 3953-3954.) Dr. Thompson testified that appellant described his extraordinary feelings of anger at the time of the offense, "an anger beyond which he had never experienced before." (XVI RT 3955.) On cross-examination, he agreed with Dr. Dutton that appellant "displays antisocial behaviors." (XVI RT 3960.)

Dr. Thompson's testimony was not subject to rebuttal with regard to appellant's conversation about killing a guard to escape. As did Dr. Dutton, Dr. Thompson agreed that appellant's behavior and mental state at the time of the killings was not similar to other criminal, antisocial or violent conduct that appellant committed. While the prosecutor argued that it was relevant to rebut feelings of remorse for the crime, this is not the kind of specific evidence directly related to a character trait or event that would constitute proper rebuttal.

Dr. Jonathan Mueller, another psychiatrist also testified regarding the factors that influenced appellant's development. (XVI RT 3990, 3993-3999.) Dr. Mueller testified that appellant was essentially law-abiding in the first 20 years of his life. (XVI RT 3999.) Appellant felt abandoned by both his wife and mother, and according to Dr. Mueller, appellant began to have problems, which included drinking and having difficulty controlling his rage. (XVI RT 4000-4005.) Dr. Meuller acknowledged that appellant engaged in explosive episodes of violence and rage. (XVI RT 4068-4069.) However, he did not testify that such incidents were the only times he engaged in violent activity.

Thus, none of the testimony presented in mitigation was rebutted by evidence of the jail conversation regarding appellant's apparent willingness to kill a guard to effectuate an escape. Indeed, it was consistent with such evidence.

Finally, even assuming the evidence of a violent escape attempt would constitute proper rebuttal, the evidence here, of a conversation between two inmates about a hypothetical escape attempt in which appellant boasts about killing a hypothetical guard is too vague, inconclusive and too remote. It was valueless and should have been

excluded. (See *People v. Martinez* (2003) 31 Cal.4th 673, 694-695 [inconclusive and speculative testimony of defendant's involvement in a shooting was improperly admitted as rebuttal evidence at penalty phase].)

C. The Admission of this Evidence Violated Appellant's Constitutional Rights

The admission of this unreliable and inflammatory evidence did not merely violate state evidentiary rules, but was so prejudicial that it rendered appellant's trial fundamentally unfair and resulted in an unreliable, arbitrary, and non-individualized sentencing determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights and their state constitutional analogs. The jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens* (1983) 462 U.S. 862, 885) undermined the heightened need for reliability in the determination that death is the appropriate penalty. (*Johnson v. Mississippi* (1988) 486 U.S. at 585. In addition, the evidence was so unduly prejudicial that it rendered the trial fundamentally unfair in violation of due process. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.).

Given the irrelevance of the evidence of a conversation with an inmate about a possible escape in the future to the disputed issues and the impropriety in admitting this evidence in rebuttal at the penalty phase -- and thus being the last item of evidence heard by the jury -- appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights (and their state constitutional analogs) were violated including his rights to a fair and reliable sentencing determination. Appellant was also deprived of his liberty interest in having the jury only consider proper rebuttal evidence or proper sentencing factors in violation of due process. (*Hicks v. Oklahoma,*

supra, 447 U.S. at p. 346.)

D. Admission of this Evidence Was Prejudicial

The trial court should have excluded this evidence for the reasons discussed above, and its admission was not harmless beyond a reasonable doubt.

As this Court has stated, "erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty." (*People v. Gallego* (1990) 52 Cal.3d 115, 196.) Such evidence may be particularly prejudicial if used to suggest to the jury that "the death penalty is the only means of protecting the public from a defendant who poses a significant escape risk." (*People v. Lancaster* (2007) 41 Cal.4th 50, citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1232-1233.) That is precisely what happened here.

The prosecutor argued that one purpose of the death penalty is "to prevent others from being harmed by that individual." (XVII RT 4302.) The prosecutor emphasized to the jury that it had a responsibility to "society," and that it was the "conscience of the community." (XVII RT 4305.) Immediately after mentioning the rebuttal evidence – appellant's statement about his willingness to kill a deputy (XVII RT 4350) – the prosecutor reminded the jury that "prison is a part of society" and urged the death penalty in order to protect those in the prison from appellant's future violence:

> Many of us don't see it, but there are people who work there: Jail nurses, inmates, inmates who are there for less than what the defendant has done. It's a part of our culture. And they get visitation, and those nurses and doctors expect some sense of security when they are doing their jobs . . . . People who are in prison

> for life without parole, some of them we know
> have hope of escape.

(XVII RT 4351.)

After the defense objection to the prosecutor's argument of future dangerousness was overruled, XVII RT 4351-4352, the prosecutor continued, that "for some," life without parole "is the chance to sit and dream and hope of escape." (XVII RT 4353.)

Given the inflammatory nature of the evidence and the prosecutor's future dangerous argument, the improper admission of the evidence in rebuttal that appellant had a conversation with another inmate in which he discussed killing a guard in order to escape from jail was not harmless beyond a reasonable doubt. (See *Chapman v. California, supra,* 386 U.S. at p. 24.)

XI.

THE TRIAL COURT ERRONEOUSLY REFUSED TO PERMIT THE JURY TO CONSIDER MERCY IN DETERMINING APPELLANT'S SENTENCE

A. <u>Summary of Facts</u>

Appellant requested an instruction at the penalty phase which would have informed the jury that it could consider mercy, among other things, as a factor to justify a life sentence. The instruction would have read as follows:

> A mitigating circumstance or factor does not
> constitute a legal justification or excuse that
> lessens factual guilt for the offense in question.
> A mitigating circumstance or factor is
> something about Christopher Henriquez or
> about the offenses, which in fairness, sympathy,
> compassion or mercy, may be considered in
> extenuating or reducing the defendant's degree
> of moral culpability or which justifies a

sentence of less than death.

(CT 1267.)

The trial court refused to instruct the jury that it could consider mercy in determining sentence and precluded the defense from arguing mercy to the jury. In the court's view, "mercy suggests disregard for the law." (XVI RT 4164.) "In other words, a merciful decision – ironic as it may sound – is, in a sense, an unjust decision. You only need to resort to mercy when justice compels you to a different conclusion, and you ignore justice and are acting mercifully." (*Ibid.*) The court concluded that "if [the jury] reach[es] a decision that death is in order, or vice versa, a decision that life is in order, they cannot then ignore it because they believe they're acting mercifully towards him. To the extent that mercy connotes treating someone in a way different than he should be entitled to under the law – rules, regulations, justice, whatever you want to call it – is misleading and it's erroneous." (XVI RT 4167.) Thus, while the court agreed that the jury could be instructed that it could exercise pity, sympathy and compassion, it would not instruct that they could be merciful. (*Ibid.*) Nor would the court allow the defense to argue to the jury that it could exercise mercy. (XVI RT 4169.)

B. The Trial Court Erred in Not Instructing the Jury on the Role of Mercy in the Penalty Decision

A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190); *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 865; *see Penry v. Lynaugh, supra*, 492 U.S. 302.) Accordingly, "in considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for

the respective parties than to those contained in the latest edition of ... CALJIC . . . ." (Cal. Stds. Jud. Admin., § 5.) It is well-established that the right to request specially-tailored instructions applies at the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

The trial court's refusal to give the instruction at issue here deprived appellant of the right recognized in the above-cited cases, as well as his rights to a fair and reliable penalty determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the applicable sections of the California Constitution.

This instruction should have been given because it contained a proper statement of law. Rejecting it denied appellant his Eighth and Fourteenth Amendment rights to a fair, non-arbitrary and reliable sentencing determination, to have the jury consider all mitigating circumstances (*see e.g., Skipper v. South Carolina* (1989) 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604), and make an individualized determination whether he should be executed, under all the circumstances. (*See Zant v. Stephens* (1983) 462 U.S. 862, 879.)

The role of mercy has long been acknowledged to be an important consideration in any capital sentencing decision. The United States Supreme Court struck down sentencing schemes that mandated a sentence of death for particular crimes in part because they excluded consideration of mercy. (See *Roberts v. Louisiana* (1976) 428 U.S. 325, 331 [Louisiana statute provided no role for mercy].) Moreover, it has acknowledged that even though jurors must be guided in their discretion to determine the appropriate sentence, mercy may still play an independent role in the sentencing decision. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 203 [isolated decision to extend mercy does not render statutes

unconstitutional.)

This Court has also acknowledged the role of mercy in the jurors' determination of the appropriate sentence. It has both explicitly and implicitly held that mercy is an appropriate consideration for the jury. It has held that the trial court "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*People v. Jurado* (2006) 38 Cal.4th 72, 131, quoting *People v. Edwards* (1991) 54 Cal.3d 787, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.) This statement implicitly recognizes that mercy is not a factor in mitigation itself, nor an aspect of the defendant's character. Rather, the capacity to show mercy is personal to the jurors; it is their "reasoned moral response" (*Penry v. Lynaugh*, *supra,* 492 U.S. at p. 328) to mitigating evidence, through the imposition of a penalty that is less than what is perceived to be deserved in light of the balance between statutory factors in aggravation and mitigation.

In addition, this Court has suggested in other holdings that the jury should not be precluded from exercising mercy. (See, e.g., *People v. DePriest* (2007) 42 Cal.1, 59 [instructions did not mislead the jury as to its responsibility to consider sympathy, mercy, and any other aspect of defendant's character and record in mitigation]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1176 [prosecutor did not improperly argue that the jury could not consider mercy]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 31 [same].)

In this sense, mercy is an evidence-based consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty notwithstanding the defendant's culpability in the commission of

the murder. (See *People v. Lanphear* (1984) 36 Cal.3d 164, 169.) This is precisely what the trial court believed would have been improper. (XVI RT 4168-4169.) Without instructional guidance there is a substantial likelihood the jury will exclude any consideration of mercy. The absence of instructions defining the role of mercy in the jurors' determination of the appropriate sentence conflicts with the importance of informing capital juries of their "obligation to consider all of the mitigating evidence introduced by the defendant." (See *California v. Brown* (1987) 479 U.S. 538, 542-543, 546, conc. opn. of O'Connor, J.)[15]

Even in the absence of mitigating evidence, a mercy instruction should be required when requested. "[D]iscretion to grant mercy – perhaps capriciously – is not curtailed." (*Moore v. Balkcom* (11th Cir. 1983) 716 F.2d 1511, 1521.) Indeed, this Court has consistently recognized that a jury may determine that the evidence is insufficient to warrant death even if there is no mitigating circumstance. (See *People v. Duncan* (1991) 53 Cal. 3d 955, 979 [jury may decide that aggravating evidence not comparatively substantial enough to warrant death].) Mercy offers a vehicle for the jury to deliver a just verdict even if they fail to find any mitigating factors as defined by the legislature and presented by the defendant.

Thus, the jury must be provided with a vehicle for dispensing mercy after their consideration of all the evidence, so they may express their

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[15] Justice Blackmun's dissent in *Brown*, expresses concern about the imposition of the death penalty without juries having considered mercy for the defendant: "In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value." (479 U.S. at pp. 562-563.)

"reasoned moral response" in a sentencing decision. If the jury is not told that it has the power to consider mercy, in the same way that it must consider all the statutory mitigation offered by the defendant, it may falsely believe that the sentencing process involves merely a calculated weighing of factors, leaving them no means of effecting a moral response to evidence falling outside the enumerated factors. Accordingly, the trial court should have granted appellant's request that the jury be instructed on mercy.

C. The Trial Court Erroneously Precluded the Defense from Informing the Jury in Argument That They Could Take Mercy into Account in Determining the Appropriate Penalty

Not only did the trial court refuse the defense instruction on mercy, but it ruled that the defense was not permitted to argue to the jury that they could consider mercy. The court ruled as follows:

> But to my mind, using the word "mercy" creates more problems than it serves. Because if the People were to argue, or [the defense] were to argue to the jury, "Ladies and gentlemen of the jury, even if you do the weighing that's called upon by the statute, even if you find that the aggravating circumstances outweigh the mitigating circumstances, I am asking you to be merciful. Give him life anyhow. Be merciful," that's what mercy means. To disregard. To accord to someone some sort of punishment other than the one that he or she is entitled to under the law.
>
> And if you are using the word in the sense, I would stop that argument. That's erroneous.

(XVI RT 4169.)

As explained in this Argument, as well as in Argument XII, *supra*, incorporated herein by reference, the trial court was incorrect in stating that

a juror cannot vote for life without possibility of parole if he or she believes that this is the appropriate sentence even after reaching the conclusion that aggravating circumstances outweigh mitigating circumstances. As defense counsel attempted to explain to the court, "[t]he concept of mercy, and the concept that when you reach that final decision, if, in your heart, as a juror, no matter how you might abstractly or intellectually view the evidence, I that the United States Constitution, as currently interpreted, permits that juror to reject the concept of death." (XVI RT 4171-4172.) It was therefore error to preclude defense counsel from arguing that the jury could exercise mercy and vote for life in such a circumstance.

The defendant in a criminal case is guaranteed the right to present a defense. (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, §§ 7 and 15; Chambers v. Mississippi (1973) 410 U.S. 284, 298-303.) "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Kentucky*, supra, 476 U.S. at p. 690; see also *Taylor v. Illinois* (1988) 484 U.S. 400, 407-409; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19.)

It is also firmly established that a criminal defendant has a state and federal constitutional right to have counsel present closing argument to the trier of fact. (*Herring v. New York* (1975) 422 U.S. 853, 856-862; *People v. Bonin* (1988) 46 Cal.3d 659, 694; *People v. Cory* (1984) 157 Cal.App.3d 1094, 1105.) Here the trial court abused its discretion and violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment constitutional rights to due process, to present a defense, to effective assistance of counsel and to a reliable sentencing determination by erroneously preventing defense counsel from arguing the concept of mercy as well as the ability of

the jury to choose life even if they determined that aggravation outweighed mitigation.

D. Because Mercy Is a Concept Separate and Distinct from Sympathy, Standard Penalty Phase Instructions Fail to Guide Juror Discretion to Consider Mercy

Mercy is an intrinsic part of the guided discretion afforded to jurors, yet it holds a unique position in the sentencer's decisional process. Sympathetic background and character evidence is only one potential source of a juror's decision to be merciful. While much of the evidence introduced pursuant to Penal Code section 190.3, factor (k), may evoke sympathy from jurors, mercy may be invoked even if the evidence has no sympathetic value. As Justice Mosk stated, mercy "is the power to choose life over death – whether or not the defendant deserves sympathy – simply because life is desirable and death is not." (*People v. Andrews* (1989) 49 Cal.3d 200, 236, dis. opn. of Mosk, J.)

This Court has never found the failure of a trial court to instruct a jury regarding mercy to be error. (See, e.g., *People v. Montiel* (1993) 5 Cal. 4th 877, 943.) A mercy instruction has generally not been required on the theory that factor (k) leaves adequate room for the consideration of mercy in the statement that the jury is to consider all relevant evidence. (*Ibid.*) Yet, mercy and sympathy under factor (k) are two distinct concepts. In the present case, the jury was not informed by the Court or counsel of its ability to exercise mercy because the court erroneously believed that it was an improper consideration. Thus, not only was the relationship of mitigating evidence to the jury's prerogative to be merciful not explained anywhere in the instructions, the defense was precluded from arguing the concept of mercy.

The preclusion of the jury's consideration of mercy violated the

principle that a capital defendant should receive an individual sentence based on the consideration of all relevant mitigating evidence. (See *Lockett v. Ohio, supra*, 438 U.S. 586.) Because mercy is an acknowledged part of the jury's capital sentencing determination (see *People v. Haskett, supra*, 30 Cal.3d. at p. 864; *Gregg v. Georgia, supra*, 428 U.S. 153, 203), it is constitutionally unacceptable for jurors to be uninformed of their right and ability to exercise mercy. Excluding considerations of mercy from the penalty determination process restricts the range of evidence the defendant is entitled to have the jury consider. Thus, it is impermissible to "[exclude] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind ...." (*People v. Lanphear* (1984) 36 Cal.3d 163, 167, quoting *Woodson v. North Carolina,* 428 U.S. at 304.) It also violated appellant's state-created liberty interest guaranteed by the Due Process Clause to have the jury consider all sentencing factors required by California law. (*Hicks v. Oklahoma, supra,* 447 U.S. at pp. 346.)

The jury should have been informed through an instruction and/or argument as to its ability to dispense mercy as mandated by both California law and the federal constitution.

E. The Instructional Errors Were Prejudicial

Appellant introduced relevant evidence in mitigation of punishment that was intended to inspire mercy and sympathy in the jurors. The state may "not preclude the jury from giving effect to any relevant mitigating evidence." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276, citations omitted.) However, because the trial court refused to permit the jury to consider the concept of mercy, "the jury was not provided with a vehicle for

expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." (*Penry v. Lynaugh, supra*, 492 U.S. 302, 328.)

The standard jury instructions provided no means to give effect to evidence that would have engendered a merciful response. Moreover, as explained in Claim XII, below, the court told the jurors that they were required to vote for death if aggravation outweighed mitigation. Accordingly, there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant matters.

This Court has held that the refusal to give the instruction proposed by the defense was not error where the standard jury instructions the court gave "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." (*People v. Kelly* (2007) 42 Cal.4th 763, 799, citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177; *People v. Smith* (2003) 30 Cal.4th 581, 638; *People v. Breaux* (1991) 1 Cal.4th 281, 314-315.) However, the trial court was very clear that it did not believe the jury should be informed that it could consider the concept of mercy. It therefore refused to so instruct or permit the defense to so argue. Nothing in the pattern instructions mentioned mercy and if they had the trial court surely would have stricken such language.

In this case the failure to permit the jury to consider mercy was particularly egregious, unfair and prejudicial given that the prosecutor was permitted to argue that the jury could consider vengeance. (See Claim VIII.) Allowing the jury to consider vengeance but not mercy in determining sentence unfairly skewed the process in the prosecution's favor and resulted in an unfair, unreliable and non-individualized sentencing

determination in violation of appellant's Sixth, Eighth and Fourteenth Amendment rights. The errors in failing to instruct the jury or permit argument on such a critical concept, individually and together, particularly in light of the trial court's misleading comments outlined in Argument XII and the prosecutor's argument in Argument VIII that vengeance was an appropriate consideration, cannot be deemed harmless beyond a reasonable doubt. The death sentence must therefore be vacated.

XII.

THE TRIAL COURT MISLED THE JURY REGARDING THE NATURE OF THEIR SENTENCING DETERMINATION

A. Summary of Facts

California's death penalty statute provides that the "trier of fact . . . shall impose a sentence of death if . . . aggravating circumstances outweigh mitigating circumstances." (Pen. Code § 190.3.) This Court has explained that this language "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541.) The Court has made clear that "[t]he jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather it is to determine, after consideration of the relevant factors, whether under all the circumstances 'death is the appropriate penalty' for the defendant before it." (*People v. Myers* (1987) 43 Cal. 3d 250, 276.)

During voir dire, the court advised prospective jurors they were required to vote for the death penalty if aggravation outweighed mitigation:

> There's no circumstance under the law in which
> it is automatically imposed for you to choose the

> death penalty in this case. If it comes to that, you must find that the aggravating circumstances outweigh the mitigating circumstances. And for you to impose life without possibility of parole you must find that the mitigating circumstances outweigh the aggravating factors or circumstances. . . But the important thing to remember is that there's -- except where the aggravating circumstances outweigh the mitigating circumstances, or the mitigating circumstances outweigh the aggravating circumstances, there is no situation in which you can impose the death penalty in the former instance, or life without possibility of parole in the latter instance.

(V RT 1078.)

Defense counsel objected to the court's characterization of the process as mandatory where aggravation outweighed mitigation. (V RT 1081-1082.) The court, however, maintained that the jury could only reach a life verdict if mitigation outweighed aggravation, and must reach a death verdict if it found that aggravation outweighed mitigation. The court stated its understanding to counsel, outside the jurors' presence: "This is a subject matter that I have researched at some length. If they were to conclude that the aggravating factors generally outweigh all the mitigating factors -- and remember, mitigating factors are essentially limitless. If they conclude that the aggravating circumstances outweigh the mitigating factors, then the law requires that they impose the death penalty. If they -- if they conclude that the mitigating factors outweigh the aggravating factors, then the law requires them to impose life without possibility of parole." (V RT 1081.) The court continued: "essentially, the bottom line is, as the statute provides, and the statute provides that they are to impose the death penalty -- if they

follow the law they will impose the death penalty when the aggravated circumstances outweigh the mitigating circumstances." (*Ibid.*) This gross misunderstanding of the nature of the sentencing process colored the court's comments and instructions to the jury and restricted defense counsel's argument.

The court also told jurors, the "law is neutral with respect to whether the death penalty should be imposed or life without possibility of parole should be imposed in any given situation." (VI RT 1506.) When a potential juror expressed the view that "it would be more difficult to prove that death was warranted rather than life without parole," the court reiterated its view of the mandatory nature of the California sentencing process:

> If you conclude that the aggravating factors outweigh the mitigating, the law provides it, the death penalty should be imposed. And if you conclude in this qualitative way that the mitigating factors outweigh the aggravating factors, then it provides for the imposition of life without possibility of parole.

(VI RT 1338; see also VI RT 1454 [reading unadorned language from Penal Code section 190.3].)

The court continued to display its misunderstanding of the sentencing process during the conference with counsel regarding jury instructions consistent with its misunderstanding regarding the concept of mercy, argued above. The court disputed the notion that the jury could reach a life verdict if it determined that death was not the appropriate penalty even if it found aggravation outweighed mitigation. The court indicated it was planning to instruct the jury with the pattern jury instruction, CALJIC No. 8.88, which states that "to return a judgment of

death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88.) (XVI RT 4176.)

The court cautioned defense counsel that they could not argue:

> to the jury that, "look, 'so substantial' means it's got to outweigh it. There's got to be so many aggravating factors as against a mitigating factor, that it's substantially greater. That the aggravating factors substantially outweigh." Because that can be misleading, as well.

(XVI RT 4177.)

In the court's view, as it informed the jury during voir dire, the instruction means that "the aggravating circumstances, when compared to the mitigating circumstances, are of sufficient import that they warrant death. Just like mitigating circumstances, when compared to the aggravating circumstances, are of sufficient import , that they warrant life without possibility of parole." (*Ibid.*) As the court explained: "[t]he jury has to be persuaded that the aggravating circumstances outweigh the mitigating circumstances, before they can vote for death, and vice versa. They have to be persuaded that the mitigating circumstances outweigh the aggravating factors, before they can find for life without possibility of parole." (XVI RT 4180.) The court also believed that if the aggravating and mitigating circumstances were in equipoise, a hung jury would result. (*Ibid.*)

These comments were meant to "guide" counsel with respect to their argument to the jury. (XVI RT 4182.)

B. Controlling Legal Principles

Because the "penalty of death is qualitatively different from a sentence of imprisonment," there is a heightened need "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 305 (plur. opn.).) To ensure such reliability, "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (*California v. Brown* (1987) 479 U.S. 538, 541, citing *Gregg v. Georgia* (1976) 428 U.S. 153 and *Furman v. Georgia* (1972) 408 U.S. 238.) Thus, a capital sentencing scheme must "suitably direc[t] and limi[t]" the sentencer's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1986) 428 U.S. 153, 189 (joint opn, of Stewart, J., Powell, J., and Stevens, J.).) The State must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428 (plur. opn.).)

In addition, once a state has implemented sentencing standards, it must comply with those standards or risk violating the defendant's due process rights. (*Hicks v. Oklahoma, supra,* 447 U.S. 343.) When a state has provided a specific method for determining whether a certain sentence shall be imposed, therefore "it is not correct to say that the defendant's interest in having that method adhered to 'is merely a matter of state procedural law.'" (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300, citing *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; see *id.* at p. 1300

["[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state"].)

As noted above, this Court has explained that the statutory language that the jury "shall impose a sentence of death" if aggravation outweighs mitigation "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People v. Brown*, *supra*, 40 Cal.3d at p. 541.) This Court has stressed that the "weighing" language of section 190.3 is a metaphor for a difficult-to-describe mental process by which each juror, after considering all relevant evidence, is to reach a personal judgment as to whether death is the appropriate punishment. (*Id.* at p. 541; see also *People v. Edelbacher* (1989) 47 Cal. 3d 983, 1037 ["the jury exercises an essentially normative task, acting as the community's representative, that it may apply its own moral standards to the aggravating and mitigating evidence presented, and that it has ultimate responsibility for determining if death is the appropriate penalty for the particular offense and offender"); *People v. Bonin* (1989) 47 Cal. 3d 808, 856 [the jury is required "to make a moral assessment on the basis of the character of the individual defendant and the circumstances of the crime and thereby decide which penalty is appropriate in the particular case"].) Further, because the sentencing function is "inherently moral and normative [citation] . . . the weight or importance to be assigned to any particular factor or item of evidence involves a moral judgment to be made by each juror individually." (*People v. Crandell* (1988) 46 Cal.3d 833, 883.)

In *People v. Allen* (1986) 42 Cal. 3d 1222, 1277, this Court noted

that it would be incorrect "to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as to the appropriate sentence and then [] to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances." As this Court has made clear, however, no one is to be sentenced to die in California unless the jury ultimately decides that death is the appropriate penalty: "[O]ur statute . . . give[s] the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan* (1991) 53 Cal. 3d 955, 979.) Moreover, this Court has repeatedly indicated that one mitigating factor, standing alone, may be sufficient to outweigh all other factors. (*People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5; *People v. Hayes* (1990) 52 Cal.3d 577, 642; *People v. Cooper* (1991) 53 Cal.3d 771, 845.)

C. The Court Comments on Voir Dire, Alone and Together with the Delivery of Caljic No. 8.88 and the Limits Placed on Counsel's Closing Argument Led to Juror Confusion about the Process

The court's comments to the jury during voir dire constituted an erroneous statement of the law which misled the jury as to its sentencing responsibilities. Below in Claim XIII, appellant argues that CALJIC No. 8.88 fails to adequately explain to the jury the fundamental principles undergirding the jury's sentencing determination, particularly that the jury would not understand from this instruction that it did not have to vote for death even if aggravation substantially outweighed mitigation. This was exacerbated in this case by the court's comments during voir dire – and to

counsel in guiding their closing arguments – that the jury must vote for death if they find that aggravation outweighs mitigation, and can only vote for life without parole if mitigation outweighs aggravation. Together, with CALJIC No. 8.88, the jury was reasonably likely misled as to its role, and to believe that if they found aggravation outweighed mitigation they would vote for death; that they could not vote for life if they determined that it was the appropriate penalty despite the fact that aggravation outweighed mitigation; and that they could only vote for life if they found mitigation outweighed aggravation.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (*Zant v. Stephens*, *supra*, 462 U.S. at p. 879). The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) The court's comments and the instructions given violated the Eighth and Fourteenth Amendments because the jury was left with guidance that was vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

The failure to provide the jury with "clear and objective standards that provide specific and detailed guidance," *Godfrey v. Georgia, supra,* 446 U.S. at p. 428, violated appellant's Eighth and Fourteenth Amendment rights to a reliable, non-arbitrary and non-capricious sentencing determination. In violation of California law, as well as the Eighth and Fourteenth Amendments, the jury was not informed that it could only vote to impose death if each juror determined that death was the appropriate penalty and that aggravation was "so substantial" in comparison with

mitigation, and that it could always vote for life without parole if it deemed such a penalty to be appropriate.

For the reasons articulated in Argument XI, supra, the court's preclusion defense counsel from arguing each juror's ability to vote for life even if he or she found that aggravation outweighed mitigation violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, to present a defense, to effective assistance of counsel, and to a reliable and non-arbitrary sentencing determination.

D. Misleading the Jury as to its Role Was Prejudicial

Because the prosecutor's closing argument exploited the court's erroneous comments, it cannot be established that the errors described above were harmless beyond a reasonable doubt. The prosecutor stressed that death was the required verdict if aggravation is "so substantial that it outweighs mitigating evidence." (XVII RT 4309.) The prosecutor then went on to discuss the graphic details of the facts of the crime (XVII RT 4310-4316), and argued that these circumstances were sufficient for the jury to reach a death verdict. (XVII RT 4316.) As the prosecutor reiterated, "The legal standard is simply that there are substantial aggravating factors under either and/or (a) and (b) that are so substantial that they outweigh any mitigating evidence presented by the defense." (XVII RT 4327.)

Thus, the prosecutor misled the jury to believe that they must vote for death if the aggravation is substantial and outweighs mitigation. This is not the correct standard, as described above. It is not even a correct interpretation of CALJIC No. 8.88, which permits a death verdict only where "aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." However, together with the court's comments during voir dire, it

cemented in the jurors' minds that they must vote for death where aggravating circumstances outweigh mitigating circumstances, and could only vote for life where mitigation outweighs aggravation.

Because it is reasonably likely that the jurors were misled as to their role, based on the court's comments, the prosecutor's argument and the lack of any countervailing defense argument, the error was not harmless beyond a reasonable doubt.

XIII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

A. Introduction

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

B. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 32 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

C. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; CT

1279.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In this case, the prosecutor argued that this cold-blooded, deliberate, premeditated, methodical killing was aggravating. (XVII RT 4296, 4306.) The prosecutor explicitly informed the jury that the aggravating circumstances of factor (a) included all the "little details of the crime," such as

> The planning. The separation of Carmen and Zuri so that he could kill one without the other's interference. The actual killing itself. Suffocating Zuri, taking, picking her up as she is playing in her room. Smothering her to the point that she defecates. Thinking she is dead, but coming back with that hammer to finish the job when she starts to cry a little bit.

(XVII RT 4310.) The prosecutor provided further details of the murders, including the repeated striking of Zuri's head with hammer and described the killing of Carmen as a "slow, methodical, tortuous act where Carmen knew every step of the way what was happening to her." (XVII RT 4310-4311, see also XVII RT 4311-4312, 4316.) The prosecutor also argued the relevance of the fact that Carmen knew what was happening to her and knew that her child was dead. (XVII RT 4311.) The prosecutor argued that the manner in which the defendant left the bodies after killing them, including putting Zuri in a cardboard box was also aggravating. (XVII RT

4312.) The prosecutor argued that appellant's alleged motives for the murders – to stay out of custody and so he could keep the proceeds of bank robberies – were also part of the aggravating circumstances of the crime. (XVII RT 4315.) In addition, the fact that appellant, who was supposed to be the father and protector of his family, killed his family is an aggravating circumstance under factor (a). (XVII RT 4316.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

D. **<u>The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof</u>**

1. **Appellant's Death Sentence is Unconstitutional Because It is Not Premised on Findings Made Beyond a Reasonable Doubt**

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; CT 1300-1301.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these

findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi, Blakely,* and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi, Ring, Blakely,* and *Cunningham.*

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (CT 1279-1280, 1300-1302), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf.

People v. Williams (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

Appellant's request to instruct the jury that a finding with respect to an aggravating factor must be unanimous was rejected. (CT 1261.)

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was

instructed that unanimity was not required. (CALJIC No. 8.87; CT 1289.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson, supra,* 25 Cal.4th at pp. 584-585.)

Here, the prosecution presented extensive evidence regarding two unadjudicated bank robberies, and argued their relevance to the penalty determination during closing argument. (XVII RT 4323-4326.)

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward.*

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating

circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 1300-1301.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth

Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the

nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life without the possibility of parole is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1706, 1712-1724; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal

Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed On The Presumption Of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const.

14th Amend.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

E. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other

similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

G. **The California Capital Sentencing Scheme Violates the Equal Protection Clause**

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

H. <u>California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms</u>

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, and "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

XIV.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Assuming this Court finds that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction, the special circumstance and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial

of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The cumulative effect of the errors at the guilt phase so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. 14th amend.; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo, supra,* 416 U.S. at p. 643.) Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137;

see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The cumulative effect of the errors relating to the penalty phase of the trial rendered the trial fundamentally unfair and undermined the reliability of the death sentence in violation of the Eighth and Fourteenth Amendments, and their state constitutional analogs. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

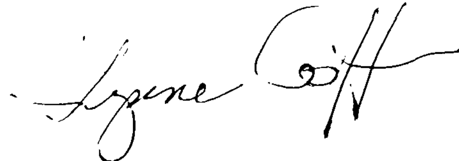
Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

CONCLUSION

For all of the reasons stated above, the judgment of conviction, special circumstance finding and sentence of death in this case must be reversed.

DATED: 1/28/09

Respectfully submitted,



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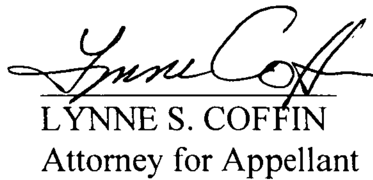
CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Lynne S. Coffin, am a attorney at law, appointed to represent appellant Christopher Henriquez in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 49,070 words in length.

Dated: 1/28/09



LYNNE S. COFFIN
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Proof of Service By Mail

I, Lynne S. Coffin, the undersigned, declare:

That I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within cause.

On this date I caused to be served on the interested parties hereto, a copy of

REQUEST FOR EXTENSION OF TIME

by placing a true copy thereof enclosed with postage thereon fully prepaid, in the United states Mail at Mill Valley, California, addressed as set forth below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 28th day of January, 2009 at Mill Valley, California.

LYNNE S. COFFIN