IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALEJANDRO AVILA Defendant and Appellant.	CASE NO. S135855 CAPITAL CASE

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE (CASE NO. 02CF1862)

APPELLANT ALEJANDRO AVILA'S OPENING BRIEF

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UNDER APPOINTMENT BY THE
CALIFORNIA SUPREME COURT

ATTORNEY FOR DEFENDANT AND APPELLANT
ALEJANDRO AVILA

DEATH PENALTY

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STATEMENT OF THE CASE

On July 15, 2002, five-year old Samantha Runnion was abducted while playing in front of her Smoketree condominium in Stanton, California, taken to a remote mountain area, sexually molested, and murdered. (23 R.T. 4269 *et seq.*) Alejandro Avila was detained, interrogated, and arrested several days later. (48 C.T. 12827 *et seq.*)

On December 5, 2002, Alejandro Avila was accused, in an Information filed in the Orange County Superior Court, of kidnaping Samantha (Count 1), forcibly committing "lewd and lascivious" acts (Count 2 and 3), and murder (Count 4) in violation of Penal Code sections 207, 288, subdivision (b), and 187, subdivision (a). The accusatory pleading alleged the murder was committed under "special circumstances" while Mr. Avila was engaged in the

commission of the lewd and lascivious acts (Penal Code § 190.2, subdivision (a)(17)(E)), thus making Avila subject to either the death penalty or life imprisonment without possibility of parole. (1 C.T. 156 *et seq.*)

Mr. Avila's motions for a change of venue, made on the grounds that massive and inflammatory pretrial publicity had made it impossible for him to receive a fair trial in Orange County, were denied. (6 C.T. 1148 *et seq*; 46 C.T. 12221 *et seq*; 17 R.T. 3117 *et seq*; 21 R.T. 3908 *et seq.*)

Jury selection commenced on March 3, 2005, and continued until March 16, 2005, when a jury was impaneled. (17 R.T. 3194; 21 R.T. 3879.) On April 28, 2005, at the conclusion of the guilt phase trial, the jury, having retired to deliberate, returned verdicts finding Mr. Avila guilty as charged. The jury further found the special circumstances allegation true. (46 C.T. 12480 *et seq*; 34 R.T. 6581 *et seq.*)

On May 16, 2005, following a penalty phase trial, the jury imposed death. (47 C.T. 12705; 36 R.T. 7216 *et seq.*)

On July 22, 2005, the trial court, having denied defense motions for a new trial and modification of the death verdict (Penal Code §§ 1181 and 190.4, subdivision (e)), sentenced Alejandro Avila to death for the special circumstances murder of Samantha Runnion. Sentence on the non-homicide offenses was stayed pursuant to Penal Code section 654. (48 C.T. 12810; 36

R.T. 7243-7244.)

Defendant Avila's appeal to this Court is automatic. (Penal Code § 1239, subdivision (b).)

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

STATEMENT OF FACTS

I. GUILT PHASE EVIDENCE

Lizbeth Veglahn and Alejandro Avila met during the summer of 1996, began dating two or three years after that, and began living together a few months later. According to Lizbeth, Alejandro was not interested in having a normal sexual relationship, never initiated sex, and would only consent to sexual intercourse occasionally after Lizbeth "begged" for it. He told her he simply was not interested in sex. However, he seemed preoccupied with adult pornographic movies, displayed an abnormal interest in young girls, wanted her to dress in little girls' clothing, and would tell her how much he liked blond and blue-eyed little girls. (25 R.T. 4649 *et seq.*, 4656 *et seq.*)

Lizbeth's daughter Catherine lived with both her mother in Lake Elsinore and her father, Jim Coker, in the Smoketree Condominiums in Stanton. While staying in Stanton Catherine got to know other young girls who were also residing there, including Samantha Runnion. On weekends Catherine would often stay with her mother in Lake Elsinore. Her mother, sometimes accompanied by Alejandro Avila, would drive over to Stanton to pick her up. (25 R.T. 4569, 4592, 4660.)

Catherine testified that, during the time her mother and Avila lived together and while her mother was away at work, Alejandro sexually

molested her. While he never sexually penetrated her, he would have her take off her clothes, kiss her mouth and vagina, and ask her to insert tubes into her vagina for practice so that he could have intercourse with her when she was older. He also showed her pornographic films. She was initially afraid to report these incidents, but eventually complained about them to both her mother and father. (25 R.T. 4586 *et seq.*, 4597 *et seq.*) Eric Davis, a Riverside County Sheriff's Detective, investigated the matter and interviewed Alejandro Avila. Alejandro denied he had inappropriately fondled Catherine, but acknowledged he may have touched her vaginal area in a non-sexual way while bathing her and drying her off. (25 R.T. 4686 *et seq.*)

Alexis Drabek, Catherine's cousin, would sometimes go to visit her and her Aunt Lizbeth in Lake Elsinore. During one of these visits, when she was about seven years old, Alejandro showed Alexis and Catherine how to masturbate so they could "feel good." (24 R.T. 4455 *et seq.*) On another occasion Alejandro told Alexis and Catherine to take off their clothes and play together. (24 R.T. 4474.)

Alejandro's mother and sisters, who sometimes stayed with Alejandro and Lizbeth in Lake Elsinore, did not observe any unusual or sexually inappropriate behavior. Alejandro was never alone with Catherine or Alexis in either the bedroom or bathroom for any prolonged period of time. (30 R.T.

5594 *et seq.*, 5612 *et seq.*, 5622 *et seq.*) According to Alejandro's sister Elvira, Lizbeth—while she never mentioned the above described sexual molestations—was very angry at Alejandro, and vowed revenge. (30 R.T. 5639 *et seq.*)

Alejandro Avila was arrested and prosecuted for sexually molesting Catherine and Alexis. (Exhibit P-101.)

However, on January 5, 2001, a jury found him not guilty since—as the prosecutor in the instant case candidly acknowledged—the State had not proven its case beyond a reasonable doubt. (23 R.T. 4213 *et seq.*) Elvira Avila testified her brother had stated, after the acquittals, that he could now do anything he wanted to "those little girls" and never be criminally charged again due to double jeopardy. (26 R.T. 4746 *et seq.*, 4752.)

Cara Barragan, the daughter of Alejandro Avila's former roommate Jose Barragan, told investigators in 1999 Alejandro had once asked her to touch his penis and had inserted a test tube into her vagina. He warned her that, if she told anyone about this incident, someone could be killed. (24 R.T. 4512 *et seq.*) Jose Barragan was so angry at Avila, when he learned about this incident, that he threatened to shoot him. Jose testified that, in January 2000, he found a photograph in the bedroom formerly occupied by Alejandro Avila (previously overlooked by the police) of a seven-year old Asian girl

straddling an adult man's penis. He turned the photo over to investigating officers. (24 R.T. 4494 *et seq.*) However, Avila was never prosecuted for his alleged molestations of Cara Barragan.

Alejandro Avila met Ruby Hernandez in November 2001, and began dating her the following month. The couple broke up on July 11, 2002. (26 R.T. 4783.)

During this time Mr. Avila was living with family members in an apartment complex in Lake Elsinore. Alejandro and his sister Elvira shared one apartment. His mother Adelina and his sister Adelita lived in another apartment. Prosecution computer expert James Dale Vaughn testified a computer found in the mother's apartment and sometimes used by Alejandro contained child pornography. There were photographs of adults and children engaged in various sexual activities. On July 14, 2002, at about 4:30 a.m., someone printed out a multi-part story involving an adult man engaging in sexual activities with his daughters and granddaughters. There were also chat room conversations in which the participants shared their feelings and sexual desires concerning children. (25 R.T. 4700 *et seq*; 29 R.T. 5347 *et seq.*)

However, defense computer expert Jeff Fischbach testified Mrs. Avila's computer had been infected with a Trojan-Horse virus and, as a result, it

would have been possible for numerous other computer users to remotely log-in and access child pornography. (30 R.T. 5708 *et seq.*)

On the following day, July 15, 2002, at about 4:00 p.m., Alejandro Avila left his family apartment complex in Lake Elsinore to buy bottled water. Cell phone records indicated that during the next two hours he drove around, called Bank of America to check his balance, and received telephone calls. At 5:15 p.m., according to Bank of America records, he withdrew $40 from the Lake Elsinore branch. Mr. Avila's mother Adelina and his sister Elvira testified they telephoned him to ask why he had not returned home to cook chicken for the family, as promised. (26 R.T. 4722 *et seq.*, 4733 *et seq.*)

At 6:30 p.m., five-year old Samantha Runnion and six-year old Sarah Ahn were playing in front of the Smoketree Condominium complex in Stanton. A green car passed by, went around the block, and stopped in front of them. A young Hispanic male, who fit Alejandro Avila's general description, asked the children if they had seen a little puppy. Samantha asked how big the puppy was. Suddenly the man grabbed her, threw her into the car, and sped away. Sarah ran home and told her mother and Samantha's grandmother Virginia (who was taking care of Samatha while her parents were at work). Someone called 911. Based upon 6-year old Sarah's description, a police artist prepared a sketch of Samantha's abductor. The

sketch was broadcast on local television stations. Tammy Jean Drabek, the stepmother of Alexis Drabek (one of the alleged victims in the previous case), saw the sketch, believed it resembled Avila, and notified law enforcement. (23 R.T. 4269 *et seq.*, 4283 *et seq*; 24 R.T. 4450-4453; 29 R.T. 5444-5453.)

Cell phone records indicated that, over the course of the next three hours, Mr. Avila drove all over Southern California. He twice stopped for gas as reflected in gas station receipts and video tapes. However, the video tapes do not show Samantha Runnion was in Avila's car.

Shalina Carlson was driving that evening from San Clemente to Lake Elsinore along the Ortega Highway. According to her testimony, she heard what sounded like a little girl's scream for help. However, she was unsure whether she heard the little girl screaming at 6:00 p.m. or at 8:30 p.m. Moreover, she was unsure precisely where she was when she heard the scream. (23 R.T. 4305-4325; 30 R.T. 5681 *et seq.*)

At about 9:15 that evening, Mr. Avila checked into the Comfort Inn in Temecula. Numerous Comfort Inn employees and guests testified he did not have a child with him and noticed nothing unusual. (29 R.T. 5433 *et seq.*, 5436 *et seq.*, 5441 *et seq.*, 5519 *et seq.*, 5523 *et seq.*, 5527 *et seq*; 30 R.T. 5558 *et seq*; 32 R.T. 5991 *et seq.*)

Ruby Hernandez, Avila's recent girlfriend, testified that, at about 11:15

p.m., she received a telephone call from him. He asked her to meet him at the motel. However, she refused. Several hours later, at about 3:00 a.m., Avila telephoned her again, and again attempted to persuade her to meet him at the Comfort Inn. She agreed to do so, but never did. (26 R.T. 4783 *et seq.*)

At about 3:20 a.m., Elvira Avila was at home in the Lake Elsinore apartment which she shared with her brother. She received a telephone call from Alejandro. He stated he was outside the gate and asked her to let him in. She did so. She asked him where he had been. He replied he had gone to the beach and joked that he had also gone to Japan and China. He did not seem to be nervous or upset and left the apartment after a minute or two. (26 R.T. 4736.)

The following day, July 16, 2002, at about 3:00 p.m., Samantha Runnion's naked body was discovered near the intersection of the Killen Truck Trail and the Ortega Highway. The area, which is relatively remote, is a popular hang-gliding spot (although hang-gliders do not usually arrive until the afternoon). Johan Larsson, who lived near the area, testified that, when he left for work between 4:15 and 4:45 a.m. that day, he had noticed a small SUV or pick-up truck. The trunk of the vehicle was open and an individual was leaning in either taking something out or putting something in. There was also a motorcycle parked in the area. It was highly unusual for

there to be any vehicles in that area at that time of day. (29 R.T. 5455-5476.) Elvira Avila testified she and her brother were familiar with the area since they had been there about two months earlier. (26 R.T. 4740 *et seq.*)

Numerous law enforcement officers and forensic technicians went to the "crime scene," took measurements, and retrieved evidence.

On July 17, 2002, at about 8:00 p.m., Dr. Richard Fukumoto performed an autopsy. He determined, based upon the dilation of Samantha's vaginal orifice and anus, bruising, blood, and other evidence, that she had been sexually molested. She had been struck in the head and strangled. He opined, based upon the degree of rigor mortis, that Samantha had died some time during the night of July 15, perhaps as early as 8:00 p.m. (24 R.T. 4416-4446.)

Brian Sutton, an Orange County Sheriff's Department Investigator, attempted to retrace Mr. Avila's movements on the night Samantha was abducted, molested, and killed. He drove over 200 miles. He testified it would have been possible for Avila to drive from Lake Elsinore through Southern California, arrive at the Smoketree complex in Stanton and abduct Samantha at about 6:30, drive around, stop for gas, arrive in the Killen trail hang-gliding area at about 8:30 p.m., and still arrive at the Temecula Comfort Inn in time to check in shortly after 9:00 p.m. (29 R.T. 5404.)

However, James Webb, an entomologist, opined, based upon the size and number of maggots recovered from Samantha's body and the time they deposited their larvae, that Samantha could not have been killed until the early morning hours of July 16, *i.e.*, hours after Alejandro Avila had checked into the Comfort Inn. (29 R.T. 5505 *et seq.*)

On July 18, 2002, Alejandro Avila was detained by Orange County Sheriff's Department investigators near his Lake Elsinore apartment. According to his neighbor, Leonard Ward, who was with him at the time, he did not seem at all nervous, helped to flag down the law enforcement officers, and voluntarily agreed to accompany them to the Sheriff's station. (29 R.T. 5477 *et seq.*)

He was interrogated and arrested. (48 C.T. 12827 *et seq.*)[1]

A green Ford Thunderbird, generally matching the description of the car used by Samantha's abductor, was found at Avila's residence. (25 R.T. 4696 *et seq.*) However, Lynn Grimm, one of Samantha's neighbors, who had seen the "lime green vehicle" immediately before Samantha was kidnaped,

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[1] The defense moved to exclude Mr. Avila's statements, made to the investigating officers during the Sheriff's station interview, on the grounds that he was "in custody" at the time, and that the officers had violated his *Miranda* rights by continuing to interrogate him after he repeatedly asked for a lawyer. The court, after conducting an Evidence Code section 402 hearing, ruled that Mr. Avila's statements were admissible. (15 R.T. 2721 *et seq.*) However, it appears from the record that the prosecution never actually introduced Mr. Avila's statements during trial.

told investigating officers the abductor's car was probably a Honda. (29 R.T. 5444 *et seq.*) Similarly, Sarah Ahn, Samantha's playmate, told a social worker about three hours after Samantha was kidnaped that the kidnapper's car had capital "H"s on its wheels. (4 C.T. 572.)

Forensic experts compared tire tracks found near Samantha's body with the tires on Avila's Ford Thunderbird. They concluded there were certain similarities and that it was possible—although by no means certain—the tracks could have been made by the Thunderbird. The forensic experts also compared barefoot impressions at the crime scene with impressions taken of Avila's feet. They testified that, although there were certain similarities, they could not conclusively say the footprints found near Samantha's body were in fact Avila's. The forensic experts also compared shoe prints taken from the scene with shoes found during a search of Avila's apartment, and concluded none of those shoes matched the shoe prints. (23 R.T. 4339-4346; 28 R.T. 5112-5156, 5242-5290' 29 R.T. 5334-5337.)

Forensic technicians extracted DNA from a sample of Samantha's Runnion's heart blood and her fingernails, a napkin found near Samantha's body, swabs taken from Mr. Avila, and Avila's Ford Thunderbird. Prosecution analysts, after testing and comparing the samples, concluded Avila had left his DNA under Samantha's fingernails and that her DNA had

been left in Avila's car. (24 R.T. 4554 *et seq*; 26 R.T. 4796 *et seq*; 28 R.T. 5157 *et seq.*)

However, defense experts testified the proper protocols had not been followed in collecting and analyzing this evidence, the Orange County Crime Laboratory where the testing had been done had a history of failing to follow proper procedures, the DNA samples had been improperly mixed, and as a result there was a possibility of contamination. Furthermore, DNA is transferable and there was a possibility the DNA found in Avila's Thunderbird might have been planted to incriminate him. Orange County forensic expert Elizabeth Thompson told the jury that, when Avila's vehicle had first been examined, no DNA had been found. It was only after the car had been super glued, and she was asked to examine it a second time, that Samantha's DNA was discovered. (30 R.T. 5562 *et seq.*, 5666 *et seq*; 31 R.T. 5766 *et seq.*, 5848 *et seq.*, 5869 *et seq*; 32 R.T. 5996 *et seq.*, 6067 *et seq.*, 6179 *et seq.*)

Prosecution experts testified in rebuttal the DNA had been properly analyzed and claimed the defense experts had misinterpreted the available data. (33 R.T. 6236 *et seq.*)

Elvira Avila noticed a scratch on the back of her brother's leg some time after Samantha Runnion had been abducted, molested, and murdered. Alejandro told her he had been scratched while climbing over a baby gate.

However, this made no sense to her since the gate had no rough edges. (26 R.T. 4743 *et seq.*)

II. PENALTY PHASE EVIDENCE

The prosecution relied heavily on the evidence presented during the guilt phase of the trial, and emphasized the nature and circumstances of the crimes pursuant to Penal Code section 190.3, subdivision (a). (44 R.T. 6614 *et seq.*)

The prosecution also presented victim impact evidence. Virginia Runnion, Samantha's grandmother, recalled feeling as if the life had been sucked out of her when she found out about Samantha's death. Samantha had been much loved and her loss was keenly felt. The other children at the Smoketree complex (including Samantha's stepbrother and sister) were afraid to go outside and play least they—like Samantha—be abducted and "gone forever." (34 R.T. 6629-6633.)

Erin Runnion, Samantha's mother, had received cell phone messages on July 15, 2002, informing her that her daughter had been kidnaped. She initially thought Samantha's biological father, who lived in Massachusetts, had decided to visit her and was not concerned. The following day, when she learned of Samantha's death, she had screamed "why do they have to kill them?," and collapsed on the floor of the Sheriff's office. Samantha was a courageous child who believed in heroes and doubtless thought someone would save her. Erin had recovered in the two-and one-half years that had

elapsed between Samantha's death and the trial and was now able to think about her happy memories of Samantha. However, having to be in the same courtroom with the man who killed her daughter had brought back the terror. Erin was unable to fully enjoy being a mother even though she had since given birth to the baby sister Samantha had wanted. Her stepson, Connor, still had nightmares. (34 R.T. 6623-6640.) A number of photographs, including one depicting Samantha as an angel on the last Halloween before her death, were admitted. (34 R.T. 6640 *et seq*; People's Exhibits 112-118.)

The defense, on the other hand, presented Penal Code section 190.3, subdivision (k) evidence. Alejandro Avila came from a family which had been impoverished, sexually, physically, and psychologically abusive, and dysfunctional for generations. Numerous family members described how the Avila men, almost all of whom were alcoholics, would sexually assault their wives and daughters and have fist fights in front of their children. Alejandro was the youngest and smallest of the boys in his family. His father Rafael would call him a "fag" and a "fairy," would get drunk, and would hit him repeatedly with a belt. The women in the Avila family were completely dependant upon their husbands, lazy, and did not care properly for their children. Often, Alejandro's mother Adelina would not feed her children. (34 R.T. 6657 *et seq.*, 6667 *et seq.*, 6680 *et seq.*, 6751 *et seq*; 35 R.T. 6779 *et seq.*, 6799 *et*

seq., 6811 *et seq.*, 6845 *et seq.*, 6891 *et seq.*)

Tammy Daddato, a Bell Gardens' police officer testified that, in 1989, Alejandro's father Rafael had been arrested for child abuse, and the children had been removed from the family home by the Department of Children's Services. (35 R.T. 6819 *et seq.*)

Rafael Avila shot and killed a neighbor in front of his son Alejandro, fled the country, and eventually returned, pled guilty to manslaughter, and went to prison. (35 R.T. 6906 *et seq.*)

Dr. Matthew Mendel, a child psychologist specializing in the effects of sexual abuse on male children and the author of *The Male Survivor: Impact of Sexual Abuse Upon Men*, testified for the defense. He stated that, as a result of a profound pattern of alcoholism, sexual abuse, and physical abuse in Avila's paternal family going back generations, the male children were traumatized, ashamed, and endured years of pain and suffering. However, he acknowledged it was not foreordained that molested or abused children would themselves become molesters or abusers as adults. In fact, none of the patients mentioned in *The Male Survivor* became molesters. (34 R.T. 6692-6750.)

Francisco Gomez, a forensic psychologist, had done an assessment of the Avila family history which was based upon numerous reports and

interviews. Alejandro's father Rafael was a brutish man who was controlling, manipulative, and an alcoholic who physically abused his children. (35 R.T. 6933-6944.)

Alejandro's mother, Adelina, was completely dependent, highly depressed, and submissive. (35 R.T. 6933 *et seq.*)

Because Alejandro Avila had grown up with two dysfunctional parents in the midst of continual domestic violence and in poverty, there had always been a high risk he would experience severe problems as an adult. Children who have been molested have at least a fifty-percent chance of becoming molesters themselves when they grow up. The numerous other risk factors present in the Avila family increased significantly the chances Alejandro would be unable to function as a normal adult. (35 R.T. 6949-6991.)

Park Dietz, a forensic psychiatrist who testified for the prosecution in rebuttal, reviewed the reports of Drs. Mendel and Gomez and listened to their testimony. He concluded, based upon this and the evidence at trial (including the evidence that Alejandro Avila may have downloaded a story involving incest from his computer the night before Samantha Runnion was abducted and molested) that Avila was a pedophile. However, pedophiles have free will and have the ability to refrain from attacking children. Furthermore, pedophilia does not include an impulse to kill the child victims.

(36 R.T. 7032-7097.)

Toni Arnsberger, a one-time co-worker of Avila's, described him as a generally upbeat, cheerful, and generous person. Avila was a hard worker who did not want to talk about his father. (34 R.T. 6643-6648.)

Ellen Micheli, who had been Mr. Avila's teacher when he was placed in a "high risk" class at the age of 14 or 15, testified he had not been a disciplinary problem. However, he did not easily associate with other boys and seemed effeminate. (35 R.T. 6775 *et seq.*)

Rudolph Gil, a former priest, told the jury that, after Alejandro's father had killed the neighbor and fled to Mexico, he had to become the man of the house while still in high school. Alejandro had made sure his sisters attended Mass and Catechism classes. (35 R.T. 6838 *et seq.*)

Ruth Olivia Conley, one of Alejandro Avila's co-workers, testified he would often help people in distress and had once helped her with a flat tire on the freeway at 2:00 a.m. (35 R.T. 6930 *et seq.*)

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO GRANT A CHANGE OF VENUE, DESPITE THE UNPRECEDENTED INFLAMMATORY PRETRIAL PUBLICITY AND THE WIDE-SPREAD PRECONCEIVED OPINIONS OF PROSPECTIVE ORANGE COUNTY JURORS THAT APPELLANT WAS GUILTY AND DESERVED TO DIE, DEPRIVED APPELLANT OF ANY REASONABLE LIKELIHOOD OF A FAIR TRIAL AND PENALTY DETERMINATION IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 1033, THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND ANALOGOUS CALIFORNIA CONSTITUTIONAL PROVISIONS.

A. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2002, Samantha Runnion was abducted, sexually molested, and murdered. Several days later, Appellant Avila was arrested and accused of committing these offenses. (23 R.T. 4269 *et seq.*)

On October 19, 2004, more than two years after these events, and approximately six months before jury selection began, Appellant Avila filed a motion for a change of venue on the grounds there was at least a reasonable likelihood that he would be unable to receive a fair trial in Orange County. There had been an "unprecedented firestorm of publicity in Orange County,"

Orange County Sheriff Mike Carona, who was dubbed "America's Sheriff,"[2] had announced he was "one-hundred percent" sure Appellant Avila was guilty, and President Bush had thanked Sheriff Carona for apprehending Samantha's killer. There had been a nationally televised funeral for the child-victim attended by 3,000 mourners at Crystal Cathedral in Orange County (while an additional 2,000 persons who could not be seated stood outside and listened through loud speakers). Sheriff Carona had referred to Samantha as "our little girl." Additionally, Mr. Avila had been portrayed in the Orange County media as a man who had gotten away with child molestation in the past when the "idiot" jurors had found him not guilty of molesting Catherine Coker and Alexis Drabek and "a serial rapist and perhaps a serial killer who will strike again."

There were editorials in *The Orange County Register* and other media that Appellant was a sexual predator who deserved the death penalty and the media published unproven allegations by a brother of his ex-girlfriend

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[2] Michael S. Carona, "America's Sheriff," was subsequently convicted of witness tampering. Specifically, he was convicted of trying to persuade a former Assistant to lie to and withhold evidence from a Federal Grand Jury investigating claims of corruption in Carona's campaign and administration. A United States District Judge, emphasizing that "lying will not be tolerated in the court room, especially by law enforcement, especially the highest-ranking law enforcement official in the county," sentenced Carona to 5-½ years in Federal prison. (Rachanee Srisavasdi; "Ex-Sheriff Carona heads back to court for appeal;" *The Orange County Register*, May 4, 2010 [www.ocregister.com/articles/Carona-247209-court-prosecutors]; Michael Martinez and Irving Last, "Convicted California lawman, dubbed 'America's Sheriff,' enters prison," CNN.com\Justice, January 25, 2011.)

that he had committed arson, assaults, and other violent crimes, and that he was addicted to child pornography.

Orange County KFI-AM radio "Shock Jocks" John and Ken broadcasted several particularly vitriolic shows, which consumed hours of air time, in which they expressed their opinions that Appellant Avila was guilty and that any defense of him would be a "lie."

A large shrine was erected at Samantha's family home, but soon grew so large that it had to be dismantled. Erin Runnion, Samantha's mother, set up the Joyful Child Fund to support local non-profit groups working to prevent child abduction and abuse. Orange County District Attorney Rackauckas held a press conference to announce he would be seeking the death penalty in accordance with the views expressed in hundreds of letters from Orange County residents.

Mr. Avila's right to be presumed innocent and to be tried by fair and impartial jurors was ignored. (6 C.T. 1148-1157 [motion for change of venue]; 7 C.T. 1227-1237 [amended motion].)

Copies of over 400 newspaper articles, transcripts of television and radio broadcasts and Internet bulletins which fill over 30 volumes of the Clerk's Transcripts were lodged as exhibits in support of the defense motion. (7 C.T. 1238 *et seq*; 47 C.T. 12742 [Index to Exhibits].)

The publicity subsided over time. However, the public indignation, anger, and hysteria generated by the unprecedented inflammatory publicity did not.

In May 2004, almost two years after Samantha Runnion was murdered and Appellant was arrested, a random poll conducted by the Social Science Survey Center for Professor Edward Bronson found 86 percent of Orange County residents were still familiar with the case, 72.6 percent of these people had formed the opinion Appellant was definitely or probably guilty, and 61 percent believed he should be given the death penalty. (6 C.T. 1174-1176.)

The prosecution, in a memorandum of points and authorities in opposition to the change of venue motion, recognized the crimes of which Appellant was accused were extremely serious, that this was a notorious case, and that much of the publicity which it had generated was prejudicial. However, the publicity was not so pervasive and inflammatory that the court should presume it was impossible for Appellant to receive a fair trial in Orange County. Most of the publicity had occurred within a few weeks after Samantha Runnion was killed and Appellant was arrested. Since then, two- and a-half years had elapsed. The prosecution recognized that jurors would naturally be sympathetic towards the child-victim and angered by the horrendous nature of the crimes no matter where the case was tried.

However, the prosecution asserted that Orange County was the second largest County in California and the fifth largest in the United States with an estimated population of over three million persons. There was undoubtedly a large group of individuals who either had not heard about the case or had heard so little that they had not prejudged Appellant's guilt or innocence or the appropriate penalty. If, and only if, it became apparent during jury selection that an impartial jury could not be selected, should the court order the case transferred to another County. (38 C.T. 10393-10418.)

The prosecution also argued the defense public opinion poll failed to establish Appellant could not receive a fair trial in Orange County since no attempt was made to determine how the participants would be likely to act if selected as jurors and sworn to decide the case based solely upon the law and the evidence presented in court. A survey designed by Dr. Ebbe Ebbesen had found that, although a majority of potential jurors in Orange County might have heard about the case, many knew little about it. Only a very small proportion of the potential jurors were personally involved in the case. (44 C.T. 11875 *et seq.*)

On February 14, 2005, the court held a hearing on the change of venue motion.

Professor Bronson, who had published several papers on this subject

and related issues and had testified for both the defense and prosecution in more than 100 cases including the Oklahoma City bombing case and the Enron case, testified concerning the methodology used in the random poll of Orange County residents in the Samantha Runnion case and the approximately 70 newspaper articles he had reviewed.

He described the unusually inflammatory media coverage, how Appellant Avila had been repeatedly portrayed as a "serial killer" and "monster," the lengthy KFI John and Ken radio broadcasts in which the jurors who had previously acquitted him were called "vegetables, idiots, easily manipulated, and almost as bad as the defendant himself," Sheriff Carona's statement that he was one-hundred percent certain of Appellant Avila's guilt, and his references to Samantha as "our little girl," publicity about allegedly "conclusive" DNA evidence, the police artist's sketches of Samantha's abductor, and the unproven allegations that Appellant had committed other uncharged violent crimes.

He opined, based upon all of the above, that the sensational and hysterical media coverage had caused the public to pre-judge Appellant's guilt and poisoned the pool of potential Orange County jurors as reflected in the random poll. There was a reasonable likelihood that Appellant could not receive a fair and impartial trial in Orange County. The case was in many

ways similar to that of Richard Allen Davis, the kidnapper, molester, and murderer of Polly Klaas, in which a change of venue was granted on the grounds the defendant could not receive a fair and impartial trial in light of the inflammatory publicity and wide spread potential juror attitudes in Sonoma County that the defendant was guilty and deserved to die. (12 R.T. 2172-2305; 13 R.T. 2327-2377, 2420-2501.)

Dr. Ebbesen, the prosecution's expert, criticized Professor Bronson's assumption that, merely because the survey respondents had heard about the case and formed an opinion, they could not be fair and impartial if selected as jurors. Any person who heard the facts of the horrendous offenses perpetrated against the child-victim in this case would naturally feel sympathy for her and her family. It was unsurprising that a majority would conclude, based upon the extensive media coverage, that Appellant was probably guilty and deserved to die. However, this did not necessarily mean they could not be fair and impartial as jurors. The attitude of most people, in Orange County or anywhere else, was that the defendant in a criminal case should be required to prove his innocence. That attitude, however, often changed when they were instructed by a judge that there was a presumption of innocence, that they must decide the case based solely upon what they heard in the courtroom and not the media reports, and that they could only

find a defendant guilty if the prosecutor proved his guilt beyond a reasonable doubt. (14 R.T. 2511-2609; 16 R.T. 2828-2988.)

Craig New was a researcher and litigation consultant who had worked on eight cases involving change of venue motion surveys. He was a qualified expert on media analysis. He testified that generally the more people know about a case, the more likely they are to prejudge the defendant guilty. Mr. New reviewed both Bronson's and Ebbesen's surveys as well as a substantial amount of the media coverage in this case. He opined that both Dr. Ebbesen's survey and his conclusions were flawed since they were based upon a series of leading or loaded questions and a fictitious case rather than the facts in the instant case. While jurors' views that Appellant Avila was probably guilty might be based in part on their general attitudes towards the criminal justice system, the inflammatory pretrial publicity also influenced their ability to objectively assess the evidence they would hear in the courtroom. (16 R.T. 2989-3044; 17 R.T. 3045-3079.)

The trial court denied the change of venue motion without prejudice and invited the defense to renew the motion during jury selection if defense counsel remained convinced a fair and impartial jury trial could not be obtained in Orange County. The court accepted the results of Dr. Bronson's random poll as valid. However, the court disagreed with his conclusion that

the potential jury pool in populous Orange County had been so tainted that it was reasonably likely Appellant could not receive a fair trial. Appellant was not an Orange County resident and was virtually unknown in the County before the crimes were committed and he was arrested. Samantha Runnion was also a virtual unknown until she was abducted. Furthermore, most of the inflammatory publicity was generated at the time of the murder and Appellant's arrest two-and a-half years earlier. All of these factors militated against granting a change of venue before jury selection even commenced. Most importantly, the trial court judge could not ignore his experience in 225 felony trials which convinced him that biased jurors could be weeded out through careful questioning during *voir dire*. (17 R.T. 3117 *et seq.*)

On March 3, 2005, jury selection commenced. A number of jurors were excused by stipulation due to hardship, difficulty with the English language, their relationship with the attorneys in the case, and other reasons. (17 R.T. 3194-3243; 18 R.T. 3248-3328, 3330-3393.)

However, on March 7, 2005, defense counsel advised the court prospective jurors were telephoning and e-mailing KFI radio talk show hosts John and Ken. John and Ken had announced they had received five e-mails from potential jurors. They had stated in a recent broadcast that their listeners, if summoned as prospective jurors, should deny they had heard

about the case, and assure the court of their impartiality, so they could be selected, find Appellant guilty, and make sure he received the death penalty he deserved. One of these "stealth jurors" expressed disappointment that "I couldn't sit for that long, I wish I could have sat and convicted him." Some of the excused jurors telephoned John and Ken even though "the judge told us not to listen to you or call you," and despite the fact the written juror questionnaires specifically admonished them not to pay attention to media reports about the case. Defense counsel also advised the court that 90 percent of the prospective jurors who had completed the questionnaires recognized the case and a great many of them had prejudged it and expressed the opinion that Appellant was guilty. The court, however, elected to continue jury selection until, and unless, the court became convinced the jury pool had been poisoned beyond rehabilitation. (18 R.T. 3244-3248.)

Jury selection continued. The trial judge at one point stated that his preliminary calculations, based upon his review of the written juror questionnaires, indicated 22 of the potential jurors had indicated in their responses that they had not heard of the case. Fifty-six acknowledged hearing of the case but could not recall specific details. Three admitted they had formed an opinion about Appellant Avila's guilt that they were unable to set aside, and two of those three had been excused. Many jurors had

sympathetic feelings towards the victim's mother, Erin Runnion. None had anything good to say about Appellant Avila. However, the trial court judge expressed concerns about the effect of the KFI radio broadcasts and the possibility that members of the jury pool were communicating directly with John and Ken. (18 R.T. 3398 *et seq.*)

Jury selection resumed.

On March 14, 2005, the defense renewed its motion for a change of venue. Defense counsel noted none of the jurors had concluded Appellant was not guilty, whereas several had expressed the opinion he was. Moreover, the John and Ken radio broadcasts had placed enormous pressure on the jurors to convict and impose the death penalty. The radio "Shock Jocks" were doing their level best to taint the jury pool and affect the verdict, to vilify defense counsel, and to make disparaging comments about the court. They had even gone so far on one occasion as to portray defense counsel as being worse than a murderess and characterized her "mission in life" as putting child molesters and killers on the street. All of this created a real security problem and made it "so far beyond. . . [any] likelihood that. . . [Appellant Avila] is not going to get a fair trial as to be absurd." The prosecutor, while acknowledging John and Ken were not doing him any favors, stated he had not been persuaded a change a venue was necessary.

The court reserved ruling on the renewed motion pending further examination of the potential jurors.

Jury selection continued and numerous additional potential jurors were excused for various reasons. Several of the potential jurors, when questioned by counsel, acknowledged they would have difficulty being fair to Appellant Avila after learning about the prior child molestation allegations and what they had heard and read in the media, but insisted they could set all of this aside and be objective. (*e.g.*, Responses of jurors 260 and 108 at 19 R.T. 3507-3543.)

The defense again renewed its motion for a change of venue. Defense counsel's review of the written questionnaires submitted by potential jurors at this point indicated over 80 percent of the potential jury pool had been exposed to the media coverage, close to a third had formed an opinion that Appellant was guilty, many had expressed affection for the child-victim and her mother, and many felt Appellant must be a "monster" who had been wrongfully acquitted of earlier sexual molestation crimes and necessarily must be guilty of the crimes charged in the current case. The opinions expressed by the potential jurors went way beyond those of potential jurors in any other case and had been exacerbated by the radio talk show hosts' unrelenting campaign to ensure the selection of "stealth jurors" committed to

finding Appellant guilty and imposing the death penalty. It was impossible for Appellant to receive a fair trial in Orange County. (46 C.T. 12221 *et seq.*)

Jury selection continued. A number of potential jurors acknowledged, when questioned by the court and counsel, they had listened to the John and Ken show and heard the radio talk show hosts' comments regarding this case. However, they denied they agreed with these comments, and were confident they could base their verdicts, as to both guilt and penalty, solely upon what they heard in the courtroom. (*e.g.*, Answers of juror No. 114 at 20 R.T. 3631-3635.)

A number of jurors were excused for cause after they admitted they could not put out of their minds the prior case in which Appellant was accused of molesting a child, their preconceived opinions based upon what they had heard or seen in the media concerning this case, what they had heard on KFI, and their opinions Appellant should have the burden if found guilty to prove why he should not suffer the death penalty. (*e.g.*, Excusals of prospective jurors Nos. 108, 121, 236, and 260 at 20 R.T. 3648-3656.)

However, defense challenges for cause to several other prospective jurors, who had been exposed to the prejudicial pretrial publicity and expressed opinions Appellant was guilty and deserved the death penalty, but believed they could set these opinions aside, were denied. (*e.g.*, Refusal to

excuse for cause jurors No. 113 and 135 at 20 R.T. 3729.)

The defense, after using all of its 20 peremptory challenges to excuse jurors whom the defense was convinced could not be fair and impartial in light of their exposure to the unprecedented inflammatory publicity, despite their assurances to the contrary, requested six additional challenges. Defense counsel stated she was not satisfied with the jury selected and that the additional peremptory challenges were necessary since the court had denied defense challenges for cause. Defense counsel wished to use the additional peremptory challenges to excuse jurors Nos. 151, 194, 201, 210, 211, and 225, all of whom had acknowledged varying degrees of exposure to the publicity. These jurors had acknowledged prejudging Appellant's guilt based upon information they had received from the media, beyond the information provided to them by the court, and defense counsel was unconvinced by their protestations that they could set all of this aside and provide Mr. Avila with a fair trial. The court, however, saw no need for additional peremptory challenges and denied this request. (21 R.T. 3976.) The result was that all six of the jurors the defense wanted to excuse ended up sitting on the jury.

The court once again denied a change of venue. The court was satisfied a sufficient number of jurors who were not adversely influenced by pretrial publicity were available to ensure Appellant Avila received a fair

trial and penalty determination. More than 150 prospective jurors had been questioned, those who had extensive recollection of the details of the crimes and the media accounts had been excused for various reasons, and those unsuccessfully challenged by the defense for cause had only a limited knowledge of the facts of the case. (22 R.T. 4206-4208.)

B. DISCUSSION

The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. The Due Process Clause of the Fourteenth Amendment guarantees a fundamentally fair trial in which jurors set aside their preconceptions, disregard extra-judicial influences, and decide guilt or innocence based on the evidence presented in the courtroom. A denial of these rights in a capital case also violates the defendant's right to a fair penalty determination under the Eighth Amendment. Community passions, often inflamed by adverse pretrial publicity, can seriously compromise these fundamental constitutional rights. Consequently, a trial court **must** grant a change of venue if there is even a **reasonable** likelihood that a fair and impartial trial cannot be had in the County or District wherein the crimes were committed and the charges were brought, and the failure to do this is reversible error. (*Skilling v. United States* (2010) 561 U.S. ___, 130 S.Ct. 2896; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362; *Maine v. Superior Court* (1968) 68 Cal. 2nd 375; *People v. Leonard* (2007) 40 Cal. 4th 1370, 1393; *People v. Famalaro* (2011) 52 Cal. 4th 1, 21; Penal Code § 1033.)

Normally both the trial court and this Court on appeal consider a number of factors including: (1) the nature and gravity of the offense, (2) the nature and extent of the media coverage, (3) the size of the community, (4)

the community status of the defendant, and (5) the prominence of the victim (*People v. Leonard, supra*, 40 Cal. 4th 1394; *People v. Farley* (2009) 46 Cal. 4th 1053, 1082-1083; *People v. Famalaro, supra*, 52 Cal. 4th 21.)

However, both the United States Supreme Court and this Court have recognized there are cases where adverse pretrial publicity has so tainted the jury pool that jurors' assertions they can disregard everything they have heard and read should not be credited and prejudice must be **presumed**.

For example, in *Rideau v. Louisiana* (1963) 373 U.S. 723, the High Court held that repeated television broadcasts of the defendant's confession to murder, robbery, and kidnaping so thoroughly poisoned local sentiment as to raise doubts that even the most careful *voir dire* could have secured an impartial jury. A change of venue, the Court determined, was the only way to assure a fair trial.

Similarly, in *Irvin v. Dowd* (1961) 366 U.S. 717, the High Court concluded the trial court's *voir dire* was insufficient to counter the "wave of public passion" that had swept the community prior to the defendant's trial. The local news media had extensively covered the crimes (a murder spree), arousing great excitement and indignation. Following Irvin's arrest, the media had "blanketed" the community with a "barrage" of newspaper headlines, articles, *etc.*, communicating numerous unfavorable details about

Irvin. Nearly 90 percent of the hundreds of prospective jurors examined during the trial court's *voir dire* entertained some opinion as to the defendant's guilt—ranging in intensity from mere suspicion to absolute certainty (*Id.*, at 727.) Of the 12 jurors actually selected, eight thought Irvin was guilty, although each indicated that notwithstanding this opinion he could render an impartial verdict. The Court emphasized that a juror's word on this matter is not decisive when the build-up of prejudice in the community is clear and convincing.

In *Daniels v. Woodford* (9th Cir. 2005) 428 Fed. 3rd 1181, the Court held that, like in *Rideau* and *Irvin*, prejudice had to be presumed since the venue was saturated with prejudicial and inflammatory media publicity about the crime. The murders of the two Riverside County police officers-victims had generated extensive and nearly continuous publicity immediately after they were fatally shot and again before Daniel's trial. All of the news accounts had described the perpetrator as a black paraplegic closely resembling Daniels and had repeatedly identified him in press accounts as the killer from the very beginning.

Although the publicity diminished after Daniel's arrest, it resumed as trial approached. One month before Daniel's trial was to begin, on the anniversary of the killings, a nine-foot tall statue commemorating the fallen

officers was unveiled by the County across the street from where Daniels would be tried.

The result of this publicity was a huge wave of public passion. Police stations were deluged with calls from citizens offering to establish a memorial fund. Local newspapers printed numerous letters from readers calling for Daniels' execution. The officers were turned into posthumous celebrities, and approximately 3,000 people attended their funerals. Eighty-seven percent of the jury pool recognized the case from the media coverage, and two-thirds of those impaneled remembered the case from the press accounts. The sensational press accounts did not merely report the facts. Letters and editorials repeatedly called for the imposition of the ultimate penalty. The Ninth Circuit concluded that, under these circumstances, the nature and extent of the pretrial publicity, coupled with the fact the majority of actual and potential jurors remembered the pretrial publicity, compelled a change of venue. The trial court's denial of a change of venue violated Daniels' right to a fair and impartial jury, and thus his right to due process.

This Court has also recognized that "in exceptional cases . . . adverse pretrial publicity [alone] can create such a **presumption of prejudice** in a community that the jurors' claims that they can be impartial should not be believed." However, this Court has also stated that the category of cases

where prejudice may be presumed in the face of juror attestation to the contrary is narrow, and that "pretrial publicity itself—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." (*People v. Prince* (2007) 40 Cal. 4th 1179, 1216; *People v. Farley* (2009) 46 Cal. 4th 1053, 1086-1087.)

In *People v. Famalaro, supra,* this Court refused to presume prejudice in an Orange County capital case. The local media coverage was heavy but "relatively unspectacular." The trial court properly excused all of the biased and "problematic" prospective jurors and the jury selection process resulted in a panel of jurors untainted by the publicity. This Court saw no evidence that any of the jurors selected to try the case held biases the selection process failed to detect. (*Famalaro, supra,* 52 Cal. 4th 19-34.)

Appellant Avila's case is remarkably similar to *Daniels* and easily distinguishable from *Famalaro.* This is one of those "extraordinary" or "exceptional" cases where the pretrial publicity was so unduly prejudicial and the passions of the potential Orange County jurors were so aroused, that it must be **presumed** there was at least a **reasonable** likelihood Appellant would not receive a fair trial in the absence of a change of venue.

Here, as in *Daniels,* and unlike in *Famalaro* where the trial court found the publicity "relatively unspectacular" (52 Cal. 4th 21), there was an

unprecedented firestorm of prejudicial publicity immediately following the murder and arrest. Orange County Sheriff Mike Carona announced he was "one-hundred percent" sure Mr. Avila was guilty. Both "America's Sheriff" and Orange County District Attorney Rackauckas appeared on local and national television on multiple occasions.[3] President Bush publicly thanked Sheriff Carona for apprehending Samantha's killer. Just as in *Daniels*, and unlike in *Famalaro*, there was a mass funeral for the victim attended by thousands of people. Just as in *Daniels*, and unlike in *Famalaro*, a memorial shrine was erected. Samantha was dubbed by Sheriff Carona as "our little girl" and later by the *Orange County Register* as "America's little girl." Erin Runnion, Samantha's mother, set up a Joyful Child Fund to support local groups working to prevent child abduction and abuse analogous to the memorial fund for the slain officers in *Daniels*. Moreover, there were repeated references to Appellant as a serial rapist wrongfully acquitted of previous molestation charges, who had allegedly committed prior arson and assaults, and who should not be allowed to escape justice and the death penalty he so richly deserved. To compare the "heavy" but "relatively

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[3] Sheriff Carona appeared on *Larry King Live*. It was apparently CNN-Host King who first credited Carona with the nickname, "America's Sheriff," after describing him as a genuine American hero. (See footnote 2, *ante*, "Convicted California lawman, dubbed 'America's Sheriff,' enters prison," CNN.com\Justice, January 25, 2011.)

unspectacular" publicity in *Famalaro* with the massive and unprecedented "firestorm" of prejudicial publicity in the instant case and *Daniels* would not merely be like comparing apples and oranges. It would be akin to comparing apples and battleships. There simply is no meaningful comparison.

The predictable result, just as in *Daniels*, was that, even though the publicity subsided, two-and a-half years later, shortly before the commencement of Appellant's trial, the vast majority of Orange County residents (86%) still remembered the case. Even more disturbing, 70 percent of those who recalled it believed Appellant Avila was definitely or probably guilty, and more than 60 percent believed he should be put to death.

It is true that there were similar polls in *Famalaro*. It is also true that this Court concluded that the defendant in that case nonetheless received a fair trial since biased and "problematic" jurors were eliminated during jury selection. (52 Cal. 4th 19-21, 24-30). Here, however, it is impossible to reach a similar conclusion.

Unlike in *Famalaro*, Orange County radio "Shock Jocks" John and Ken re-inflamed the public passions on the eve of trial **and during jury selection** by repeatedly vilifying not only Appellant Avila, but his counsel whom they described as "worse than a murderess" on a "mission," "to put rapists and murderers on the street." The "Shock Jocks" urged their listeners-potential

jurors to lie under oath, to deny that they knew anything about the case, and to do everything they could to be selected so that they could ensure Appellant Avila was convicted and sentenced to death. John and Ken even went so far as to communicate with potential jurors who had been excused and to broadcast these communications before jury selection concluded.

This last-minute campaign was uniquely prejudicial and makes it impossible for this Court to conclude, as in *Famalaro*, that the jurors selected were in fact fair and impartial as opposed to "stealth jurors" secretly committed to carrying out John and Ken's personal agenda.

Additionally, it should be noted that in *Famalaro* the trial court ultimately granted the defense additional peremptory challenges to eliminate "problematic" jurors not subject to challenges for cause (52 Cal. 4th 28).[4] Yet, in Appellant Avila's case, the trial court did not allow any additional peremptory challenges even though defense counsel specifically identified six jurors who had been exposed to the extensive publicity, whom the defense had unsuccessfully challenged for cause, and whom the defense remained convinced could not give Avila a fair trial.

It may be that the case was not tried in a "circus" atmosphere inside the

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[4] The *Famalaro* trial judge denied several defense requests for additional peremptory challenges, but granted both parties two additional challenges on the court's own motion.

courtroom like some of the United States Supreme Court cases discussed by this Court in *Famalaro, supra* at 52 Cal. 4th 33. However, the High Court has not limited the presumption of prejudice to **only** these cases. (See concurring and dissenting opinion of Justice Sotomayor in *Skilling v. United States, supra.*) The publicity in this case, and the public passions it generated, were so exceptional and extraordinary that this Court should presume there was at least a reasonable likelihood Appellant could not receive a fair trial in Orange County, the assertions of the jurors during *voir dire* not withstanding. A change of venue was necessary.

Alternatively, even under the five factor analysis traditionally utilized by this Court, a change of venue was required.

Appellant Avila was charged with capital murder committed in the course of kidnaping, child molestation, and sodomy. The victim was a five-year old child who was abducted from her front yard and was found a day later in a remote mountain area. While all capital murders are obviously extremely serious offenses (*People v. Fauber* (1992) 2 Cal. 4th 792, 817-818), **sexual child** murders are particularly likely to have the "sensational overtones" necessitating a change of venue. (*People v. Green* (1980) 27 Cal. 3rd 1, 46.)

The only comparable case in recent memory was the Richard Allen

Davis case in which the defendant—a recent parolee—was charged in Somona County with the abduction, molestation, and murder of 12-year old Polly Klaas, in 1993, which generated a similar "firestorm of prejudicial publicity," resulting in a jury pool which could not be fair and impartial as to either Davis' guilt or the appropriate penalty. However, the critical difference between these two cases is that the Somona County trial court recognized Davis could not receive a fair trial in that County and granted a defense motion for a change of venue (*People v. Davis* (2009) 46 Cal. 4th 539, 569 *et seq.*), whereas the Orange County Superior Court in Appellant Avila's case refused to do this. The Sonoma trial court's recognition of the necessity of a change of venue was an important factor in this Court's decision affirming Mr. Davis' conviction and death sentence. The adamant refusal of the trial court in this case to grant a change of venue, despite the sensational nature of the charges, requires reversal..

It is true that Orange County has a large population. However, this Court has stated that population **alone** is not the determinative factor governing whether or not a change of venue should be granted. (*Fain v. Superior Court* (1970) 2 Cal. 3rd 46, 52, f.n. 1.)

Appellant Avila was not an Orange County resident. He had lived his entire life in Los Angeles and Riverside Counties and had little contact with

Orange County or friends in the Orange County community. Thus, like the defendant in *People v. Proctor* (1992) 4 Cal. 4th 499, 526, he was essentially "a stranger to . . . [and] friendless in, the community."

Moreover, the Orange County community regarded him as a man who had gotten away with child molestation in the past, a pedophile, and an individual without any redeeming positive qualities as the result of the "unprecedented firestorm of [hostile] publicity" detailed *ante.* Thus, the way in which Appellant Avila was viewed in Orange County also militated in favor of a change of venue.

In addition, while five-year old Samantha Runnion was certainly not a prominent citizen of Orange County before she was abducted, molested, and murdered, her death catapulted her into posthumous stardom. She had become Orange County's "little girl," her funeral was attended by thousands, her mother established a child-abuse prevention group, and a large shrine was erected in her honor. The Orange County Sheriff's office even named two of their command posts "Samantha I" and "Samantha II." While it is true jurors would sympathize with this child-victim no matter where the case was tried, the sympathy generated for her in **Orange County** ran much deeper and distinguishes this case from cases like *People v. Kelly* (1990) 51 Cal. 3rd 931.

Thus, even if this Court is unwilling to presume prejudice and the lack

of any reasonable likelihood that Mr. Avila could receive a fair trial in Orange County from the pretrial publicity and passions it engendered, a consideration of the traditional factors used by this Court in previous cases inevitably leads to the same conclusion.

The trial court, in reaching a contrary conclusion and denying the repeated defense motions for a change of venue, relied heavily on the court's experience in weeding out biased jurors through careful *voir dire* in the 225 felony cases over which the trial court judge had presided.

However, this case was different from any of the other cases over which the Orange County trial judge had presided. In this case the jurors' assertions they could be objective and set aside their preconceived opinions of Avila's guilt could not be accepted at face value. The KFI radio talk show hosts' pleas to their listeners (which included a number of the prospective jurors) to lie about what they had heard and falsely claim impartiality in order to carry out John and Ken's agenda to convict Appellant and see him dead makes this case unique and the trial court's experience in other cases irrelevant.

There is at least a reasonable likelihood Appellant could not receive, and that he did not receive, a fair trial in Orange County. The denial of the defense motions for a change of venue violated Appellant's Fifth, Sixth, and

Eighth Amendment rights to a fair trial and penalty determination, as well as his rights under analogous California constitutional provisions and Penal Code section 1033. The judgment must be reversed.

II. THE TRIAL COURT'S REFUSAL TO ALLOW ADDITIONAL DEFENSE PEREMPTORY CHALLENGES, DESPITE THE PREJUDICIAL PRETRIAL PUBLICITY AND THE PRECONCEIVED OPINIONS AND PROBABLE BIASES OF THE PROSPECTIVE JURORS, DEPRIVED APPELLANT OF A REASONABLE LIKELIHOOD OF A FAIR TRIAL AND PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND CALIFORNIA LAW

A. RELEVANT PROCEDURAL BACKGROUND

As detailed *ante* in Argument I. A, the abduction, sexual molestation, and murder of five-year old Samantha Runnion triggered an "unprecedented firestorm of publicity" in Orange County and poisoned the pool of potential jurors so as to make it extremely difficult—if not impossible—for Appellant Avila to obtain a fair trial. Appellant incorporates the previous discussion by reference as though fully set forth herein.

The trial court's response, rather than granting a change of venue or continuing the case, was to conduct an unusually extensive *voir dire* in the hope of finding 12 jurors who could set aside their preconceived opinions and afford Appellant the fair trial all accused criminal defendants are entitled to. Hundreds of prospective jurors were asked to complete written questionnaires. Some were excused for hardship, because of language difficulties, or for other reasons. The remaining 150 jurors were questioned

by the court and counsel. Those candid enough to admit they could not be fair were excused for cause. However, the situation was complicated by the relentless campaign of Orange County radio talk show hosts John and Ken—both immediately before trial and during jury selection—to ensure Appellant was found guilty and put to death. They invited their listeners, if summoned for jury service and assigned to this case, to become "stealth jurors," commit perjury, deny they had listened to the radio broadcasts, and falsely assure the court they would be fair and impartial in the hope they would be selected to sit on the jury and give Appellant what John and Ken thought he deserved. Thus, the court and defense counsel could have no assurance that jurors who claimed they could be fair were telling the truth.

Defense challenges for cause to jurors who had been exposed to the pretrial publicity in varying degrees, but claimed they could be fair and impartial, were denied.

Defense counsel, after using all 20 of her statutorily available peremptory challenge, asked for six more. She stated she wished to excuse six jurors she believed could not be fair and impartial in light of (1) their exposure to the inflammatory publicity, (2) their personal identification with the victim and her mother, and/or (3) their sympathy with close friends and relatives who had been victims of sexual assaults, even though they might

not be excusable for cause. Defense counsel stated, in response to the trial court's inquiry, the additional peremptory challenges would be used to excuse jurors Nos. 151, 194, 201, 210, 211, and 225.

One of the jurors defense counsel wished to excuse was a stay-at- home Mom who had written in her questionnaire responses that she was committed to the death penalty for truly heinous crimes, but could set aside her feelings of sympathy for Samantha Runnion and her Mom, Erin, and be fair and objective in both the guilt and penalty phase trials. (21 R.T. 3945.) Another juror insisted he could be fair even though he had recently listened to the John and Ken show and could disregard what they had said. (20 R.T. 3631.) Another juror assured the court and counsel he could be fair to Appellant even though he had written in his questionnaire responses that his former girlfriend had been the victim of a violent sexual assault. (16 C.T. 3479 *et seq.*) Another juror asserted she would be fair to Appellant even though her niece had been a rape victim. (16 C.T. 3518.)

The trial court denied additional peremptory challenges and all six jurors the defense wished to excuse sat on the jury which convicted Appellant and sentenced him to death. (21 R.T. 3976.)

B. DISCUSSION

Code of Civil Procedure section 231, subdivision (a) entitles a defendant in a capital case to 20 individual peremptory challenges. (*People v. Lewis* (2008) 43 Cal. 4th 415, 490-495.) This Court has held that to establish entitlement under the Federal Constitution or State law to additional peremptory challenges, a criminal defendant must show that in the absence of such additional challenges he is reasonably likely to receive an unfair trial before a partial jury. (*People v. Bonin* (1988) 46 Cal. 3rd 659, 679; *People v. Pride* (1992) 3 Cal. 4th 195, 230-231; *People v.Lewis, supra*, 43 Cal. 4th 495.)

Here, there was a reasonable likelihood that unprecedented pretrial prejudicial publicity had made it at least reasonably likely that a fair trial could not be obtained in Orange County for all of the reasons discussed in Argument I, *ante.* Yet, the trial court had refused to grant a change of venue and did not continue the trial in the hope that the threat might abate. (*Bonin, supra; Sheppard v. Maxwell, supra*, 384 U.S. 363.) Thus, the only chance Appellant Avila had of receiving a fundamentally fair trial was to identify and excuse jurors who had made up their minds he was guilty and should be put to death before they ever walked into the courtroom.

And, yet, the defense could not successfully challenge the six jurors in question, even though defense counsel had good reason to believe they

would be unable to afford her client a fair trial, for cause due to actual bias. Code of Civil Procedure section 225(b)(1)(C) defines actual bias as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." Since the jurors in question assured the court and counsel they would decide the case exclusively based upon the law and the evidence, and that extraneous matters—such as their sympathy for other Moms or for a victim who like their girlfriend or niece had been sexually assaulted or what they may have heard on the John and Ken show or read in the newspapers—would not enter into their decision making process, they were not excusable for cause. (*People v. Hecker* (1990) 219 Cal. App. 3rd 1238, 1242.)

The only option left for defense counsel was to remove the jurors she believed could not be fair to Avila by peremptory challenge. The problem, as defense counsel stated, was that there were too many of these jurors. The 20 peremptory challenges allotted to the defense under the Code of Civil Procedure were not enough.

Appellant Avila met his burden to establish his Constitutional entitlement to the six additional peremptory challenges requested since it was reasonably likely that in the absence of the additional challenges he

would not receive a fair trial. The refusal of the trial court to recognize this, especially when coupled with the trial court's adamant refusal to grant a change of venue, constitutes another reason for reversal of both the convictions and the death sentence.

III. THE TRIAL COURT ABUSED ITS DISCRETION—AND DEPRIVED APPELLANT AVILA OF A FUNDAMENTALLY FAIR TRIAL AND PENALTY DETERMINATION IN VIOLATION OF BOTH THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—BY ADMITTING EVIDENCE AVILA HAD MOLESTED OTHER CHILDREN

A. RELEVANT PROCEEDINGS

Appellant Avila, prior to trial, filed a motion to exclude evidence he had molested Catherine Coker, Alexis Drabek, and Cara Barragan between 1997 and 1999, approximately two years before the currently charged offenses were committed. Appellant had been acquitted of the charges involving Catherine and Alexis, and had not been charged with the offenses involving Cara. Appellant argued in his motion and later during the motion hearing that this evidence was extremely weak. Appellant had never been convicted of any of these charges, the complainants' allegations had never been corroborated, and the charges involving Catherine and Alexis were originally made by Catherine's mother and Appellant's ex-girlfriend, Lizbeth Veglahn, a year after a very bitter separation.

While evidence that Catherine and Samantha lived at the same Smoketree Condominiums and Appellant knew young children resided there

since he would sometimes help Lizbeth pick Catherine up might be relevant, the jury could easily be apprized of these facts without ever mentioning Catherine's alleged molestations.

Moreover, the probative value of this evidence was outweighed by its likely undue prejudicial effect on the jury. It would be extremely difficult—if not impossible—for the jury to objectively weigh whether or not the prosecution had proved the prior alleged molestations by a preponderance of the evidence since Appellant had already been "convicted" of these offenses by the Orange County media, the jurors in the previous case had been denounced as "idiots" and "vegetables" by the Shock Jocks John and Ken, and the jurors in the instant case would naturally assume Appellant was a habitual child molester and pedophile who necessarily must be guilty of abducting, molesting, and murdering Samantha Runnion even if they might otherwise have reasonable doubts.

Finally, it would be difficult for the jurors during the penalty phase to disregard the prior crimes evidence they had already heard during the guilt phase, and not consider **all** of this evidence as an aggravating penalty factor, notwithstanding the court's instruction that they could not consider the offenses of which Appellant had been acquitted. (43 C.T. 645-655; 15 R.T. 2812-2816, 2818.)

The prosecution, both in its written opposition and during the motion hearing, argued this evidence was highly probative as to both Appellant's identity as the perpetrator of the currently charged offenses and his propensity to molest young girls under Evidence Code sections 1101 and 1108.[5] The prosecution's theory was that Appellant had returned to the Smoketree condominium complex in Stanton for the specific purpose of abducting a young girl to gratify his sexual desires and that he selected this location because he knew young girls resided there. Furthermore, the acquittals in the previous case were highly relevant in view of Appellant's subsequent statements that he was now free to do anything he wanted to these girls. In addition, this evidence was relevant to prove Appellant's motive to murder Samantha in order to eliminate the victim-witness, avoid being re-arrested and going though another trial, and escape being punished for his crimes a second time.

According to the prosecution, the prior crimes evidence was not unduly prejudicial. The uncharged crimes involving Catherine, Alexis, and Cara did not involve the brutality of the crimes against Samantha, the

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[5] While the prosecutor, as well as the trial court and defense counsel, primarily discussed the admission of the other crimes evidence as Section 1108 propensity evidence, they also discussed its admissibility to prove Appellant's identity as permitted by Evidence Code §1101, subdivision (b).

previous victims were not brutally assaulted and murdered, and the jury would not naturally assume Appellant was guilty as currently charged even if convinced Appellant had perpetrated the prior offenses. Additionally, the jurors were presumed to follow the instructions given, and would be told to take into account the previous acquittals when deciding Appellant's guilt or innocence. Similarly, they would be instructed to decide the case based solely upon the evidence and the law (as they had sworn they would), and there was no reason to believe they could not put aside what they had heard about the prior offenses and Appellant's supposed propensity as a pedophile and child molester by the media.

Finally, the prosecution argued that this evidence was admissible as factor (a) evidence during the penalty phase trial since it involved the nature and circumstances of the crime and also constituted factor (b), other crimes evidence. Alternatively, assuming the court disagreed, the jury could be instructed not to consider the other crimes of which Appellant was acquitted and, once again, it had to be presumed they would follow the instruction. (45 C.T. 11972 *et seq*; 15 R.T. 2806-2812, 2817.)

The trial court, agreeing with the prosecution, ruled the prior crimes evidence admissible under Evidence Code section 1108 during the guilt phase trial since the probative value was extremely high, and the prejudice,

especially in light of the acquittals, was relatively minimal. The prior offenses did not involve sodomy or sexual intercourse like the currently charged offenses. The court was confident the jurors were capable of following their instructions, assuming Appellant was innocent until proven guilty, and taking into account the previous acquittals in determining Appellant's guilt or innocense. The court deferred its ruling concerning the admissibility of this evidence during the penalty phase trial. (15 R.T. 2819-2821.) Consequently, during the guilt phase trial, the jury heard the evidence concerning the previous alleged offenses summarized *ante* in the Statement of Facts, and reiterated here.

Lizbeth Veglahn and Alejandro Avila met during the summer of 1996, began dating two or three years after that, and began living together a few months later. According to Lizbeth, Alejandro was not interested in having a normal sexual relationship, never initiated sex, and would only consent to sexual intercourse occasionally, after Lizbeth "begged" for it. He told her he simply was not interested in sex. However, he seemed preoccupied with adult pornographic movies, displayed an abnormal interest in young girls, wanted her to dress in little girls' clothing, and would tell her how much he liked blond, blue-eyed little girls. (25 R.T. 4649 *et seq.*, 4656 *et seq.*)

Lizbeth's daughter, Catherine, lived with both her mother in Lake

Elsinore and her father Jim Coker in the Smoketree Condominiums in Stanton. While staying with her father, Catherine got to know other young girls who were also residing at Smoketree, including Samantha Runnion. On weekends, Catherine would often visit her mother in Lake Elsinore. Her mother, sometimes accompanied by Alejandro Avila, would drive over to Stanton to pick her up. (25 R.T. 4569, 4592, 4660.)

Catherine testified that, while her mother was away at work, Alejandro sexually molested her. While he never sexually penetrated her, he would have her take off her clothes, kiss her mouth and vagina, and ask her to insert tubes into her vagina for practice so that he could have intercourse with her when she was older. He also showed her pornographic films. She was initially afraid to report these incidents, but eventually complained about them to both her mother and father. (25 R.T. 4586 *et seq.*, 4597 *et seq.*) Eric Davis, a Riverside County Sheriff's Detective, investigated the matter and interviewed Alejandro Avila. Alejandro denied he had inappropriately fondled Catherine, but acknowledged he may have touched her vaginal area in a non-sexual way while bathing her and drying her off. (25 R.T. 4686 *et seq.*)

Alexis Drabek, Catherine's cousin, would sometimes go to visit her and her aunt Lizbeth in Lake Elsinore. During one of these visits, when she was

about seven years old, Alejandro showed Alexis and Catherine how to masturbate so that they could "feel good." (24 R.T. 4455 *et seq.*) On another occasion Alejandro told Alexis and Catherine to take off their clothes and play together. (24 R.T. 4474.) According to Alejandro's sister Elvira, Lizbeth—while she never mentioned the above described sexual molestations—was very angry at Alejandro, and vowed revenge. (30 R.T. 5639 *et seq.*)

Alejandro Avila was arrested and prosecuted for sexually molesting Catherine and Alexis. (Exhibit P-101.) A jury found Avila not guilty. (23 R.T. 4213 *et seq.*) Elvira Avila testified her brother had stated, after the acquittals, that due to double jeopardy he could now do anything he wanted to "those little girls" and never again be criminally charged. (26 R.T. 4746 *et seq.*, 4752.)

Cara Barragan, the daughter of Alejandro Avila's former roommate Jose Barragan, told investigators Alejandro had once asked her to touch his penis and had inserted a test tube into her vagina. He warned her that, if she told anyone about this incident, someone could be killed. (24 R.T. 4512 *et seq.*) When Jose Barragan learned about this incident, he was so angry at Avila, that he threatened to shoot him. Jose testified he found a photograph in the bedroom formerly occupied by Alejandro Avila (previously overlooked by the police) of a seven-year old Asian girl straddling an adult man's penis. He

turned the photo over to investigating officers. (24 R.T. 4494 *et seq.*) However, Avila was never prosecuted for his alleged molestations of Cara Barragan.

The jury was instructed, at the conclusion of the guilt phase trial, that they could consider the alleged prior crimes for the "limited" purposes it was offered if convinced Appellant had perpetrated these crimes by a preponderance of the evidence, that in making this determination they could consider the previous acquittals, and that the prior crimes were one factor they could consider in evaluating whether or not the prosecution had proved Appellant's guilt of the currently charged offenses beyond a reasonable doubt and overcome the presumption of innocence. (CALJIC Jury Instructions 2.50.01, 2.50.1, 2.50.2, 2.90; 46 C.T. 12403 *et seq.*)

The jury found Appellant guilty as charged.

Prior to the commencement of the penalty phase, the prosecutor conceded the incidents involving Catherine Coker and Alexis Drabek were inadmissible as factor (b) evidence since Appellant had been acquitted. However, the prosecutor argued the fact of the acquittals was nonetheless admissible as evidence of Appellant's premeditation and motive for the murder as factor (a) evidence. The court and the parties agreed the prosecutor could argue to the jury that "the motive for this killing was to

avoid having to go through a sexual assault trial as he had in the past," but could not otherwise refer to the offenses involving Catherine and Alexis during the penalty phase. The prosecutor also argued, and the court agreed, despite Appellant's arguments of undue prejudice, that evidence relating to the incident involving Cara Barragan could be considered by the jury as aggravating factor (b) evidence in making its penalty phase determination. (47 C.T. 12526 *et seq.*, 12534; 34 R.T. 6590-6601.)

The prosecutor limited his references to the prior crimes involving Catherine and Alexis in accordance with the court's rulings and the agreement of the parties. During his penalty phase closing argument the prosecutor asked the jury to consider the prior criminal activity involving Cara Barragan as an aggravating factor, even though he was not asking the jury to impose the death penalty for the previous offense. (36 R.T. 7126.)

The jury returned a death verdict. (36 R.T. 7216 *et seq*; 47 C.T. 12705.)

B. DISCUSSION

Evidence Code section 1101, subdivision (a) prohibits the introduction of other offenses as character evidence, *i.e.*, to show a propensity to commit crimes in general. Other crimes evidence may be admitted only for the limited purposes of proving the defendant's criminal intent, *modus operandi*,

motive or identity. (Evidence Code § 1101, subdivision (b); *People v. Davis*, supra; 46 Cal. 4th 602; *People v. Lewis* (2006) 39 Cal. 4th 970, 1000; *People v. Ewoldt* (1994) 7 Cal. 4th 380.)

In determining whether evidence of uncharged misconduct is relevant, courts must distinguish the nature and degree of similarity required (between uncharged misconduct and the charged offenses) in order to establish a common design or plan from the degree of similarity necessary to prove intent or identity.

A lesser degree of similarity (between the uncharged acts and the charged offenses) is required to prove intent since the reoccurrence of a similar result tends increasingly with each instance to establish ("provisionally, at least, though not certainly") the presence of the requisite criminal intent accompanying such an act. However, in order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference the defendant probably harbored the same intent in each instance. (*People v. Ewoldt, supra*, 7 Cal. 4th 402.)

The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the

same person committed both acts. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature. (*Ewoldt, supra*, 7 Cal. 4th 403.)

Evidence Code section 1108 creates an exception to the general rule that evidence of previous offenses may not be admitted solely as character evidence or to establish a defendant's propensity to commit similar crimes. Said Evidence Code section provides that, in criminal cases in which the defendant is accused of sexual offenses, evidence of the commission of other sexual offenses is admissible, despite Evidence Code section 1101. (*People v. Fitch* (1997) 55 Cal. App. 4th 172; *People v. Falsetta* (1999) 21 Cal. 4th 903.)

Because evidence of other crimes may be highly inflammatory, the admission of such evidence, whether under section 1101 or 1108, is limited by Evidence Code section 352. Under Evidence Code section 352, the probative value of a defendant's prior acts must not be substantially outweighed by the probability its admission would create substantial danger of undue prejudice. (*People v. Davis, supra*, 46 Cal. 4th 602; *People v. Ewoldt, supra*; 7 Cal. 4th 404.)

The improper introduction of other crimes or bad acts into a criminal trial violates the defendant's right to a fundamentally fair trial and due process under the Fourteenth Amendment. (*McKinney v. Rees* (9th Cir. 1993) 993 Fed. 2nd 1370; *Jammal v. Van De Kamp* (9th Cir. 1991) 926 Fed. 2nd 918, 920;

People v. Falsetta, supra, 21 Cal. 4th 915; *People v. Harris* (1998) 60 Cal. App. 4th 727.) In *Falsetta,* in upholding section 1108 and rejecting a defense due process challenge, this Court stated it was confident that "in light of the substantial protections afforded to defendants in all cases to which 1108 applies, [there is] no undue unfairness in its limited exception to the historical rule against propensity evidence." In other words, so long as Evidence Code section 352 is properly applied to exclude unduly prejudicial other crimes evidence, there is no due process problem.

A trial court's rulings on relevance, prejudice, and admission or exclusion of evidence under Evidence Code sections 1101, 1108, and 352, are reviewed on appeal for abuse of discretion. (*People v. Davis, supra;* 46 Cal. 4th 602.)

Here, the admission of the alleged other offenses involving Catherine Coker, Alexis Drabek, and Cara Barragan, violated Appellant Avila's right to a fundamentally fair trial and penalty determination, deprived him of due process, and constituted an abuse of discretion and reversible error.

The probative value of this evidence was minimal, at best.

First, the other offenses had little if any relevance on the issue of identity since they were markedly dissimilar to the offenses involving Samantha Runnion in this case. The earlier incidents, unlike the offenses in

the instant case, did not involve the abduction of the child-victims. Moreover, as both the prosecutor and trial court recognized, the earlier incidents consisted primarily of "lewd and lascivious" touching, and, unlike this case, did not involve forcible sexual assaults, sodomy or sexual intercourse. Finally, and most obviously, the earlier alleged victims—unlike Samantha Runnion—were not murdered.

Second, the evidence Appellant was the perpetrator of the earlier offenses was extremely weak since he had been acquitted of the alleged molestations of Catherine and Alexis, those charges had been instigated by Catherine's mother who was also Appellant's ex-girlfriend more than a year after an extremely bitter breakup, Appellant was never prosecuted for the alleged molestations of Cara Barragan, and the previous victims' allegations were uncorroborated by physical evidence. The unproven allegations regarding the other child-victims thus did little to establish Appellant was the perpetrator of the Samantha Runnion offenses, much less that he intended to murder Samantha.

Moreover, contrary to the prosecutor's assertions, the acquittals were not relevant to this case in light of Appellant's statements. The actual testimony was that Appellant had stated, shortly after he was found not guilty of molesting Catherine and Alexis, that he could now do anything he

wanted to "those little girls" and never be criminally charged again due to double jeopardy. This statement cannot be reasonably construed as a statement by Appellant that he had *carte blanche* to molest **other** little girls, much less murder them.

The alleged molestation of Catherine was also not relevant to establish Appellant's intent to abduct, sexually assault, and murder Samantha. The two crimes were dissimilar since (1) Catherine was never abducted or murdered and (2) the lewd and lascivious touching which Catherine said she endured was far less brutal than the sexual assaults to which Samantha was subjected. While the prosecutor theorized Appellant selected the Smoketree Condominiums because he knew small children resided there, the jury could have easily been informed of this fact without any mention of what had allegedly happened to Catherine. Thus, the earlier child molestations had little probative value in the Samantha Runnion case.

However, this evidence was enormously prejudicial.

First, Appellant had already been "convicted" in the Orange County media of the other offenses. Orange County radio show hosts John and Ken had castigated the jurors who had acquitted him as "idiots" and "vegetables." Appellant had been repeatedly portrayed as a pedophile and habitual child molester. Hearing this same evidence once again from the alleged child-

victims and their parents necessarily made it much more difficult for the jurors to disregard the earlier media accounts and to objectively weigh whether the prosecution had proved Appellant in fact committed the prior offenses by a preponderance of the evidence. It also made it doubly difficult—indeed virtually impossible—for the jurors to consider the evidence for only the limited purposes for which it was offered and to objectively weigh whether or not the prosecution had established Appellant's guilt in the instant case beyond a reasonable doubt.

Second, while the jurors may have been instructed they could consider the prior acquittals (*People v. Griffin* (1967) 66 Cal. 2nd 459; *People v. Mullens* (2004) 119 Cal. App. 4th 648), it is impossible to believe that the acquittals would have been given much weight in light of the above. Indeed, the jurors would likely conclude Appellant had gotten away with molesting the two child-victims in the earlier case, thus making them more determined than ever to follow John and Ken's advice and make sure he did not once again escape justice.

Third, assuming *arguendo* that the jury was not inflamed against Appellant to the point they could not be objective during the guilt phase, the same cannot be said for the penalty trial. The jurors could hardly fail to remember the prior molestations of which Appellant was acquitted even

though they were duly instructed they could not consider them in determining whether or not Appellant was to live or die. (*People v. Heishman* (1988) 45 Cal. 3rd 147.) Telling the jurors not to consider the earlier alleged offenses was like telling them not to consider pink elephants. The very first thing that comes to mind when anyone is given such an admonition is the thing they are told not to consider (*i.e.*, prior offenses or pink elephants). Thus, telling the jurors this may actually have exacerbated the problem.

As Justice Jefferson wrote more than 30 years ago:

> "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial [prior crimes] evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. Of what value are the declarations of legal principles with respect to the admissibility of other-crime evidence . . . , if we permit the violation of such principles in their practical application? We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner." (*People v. Gibson* (1976) 56 Cal. App. 3rd 119, 130.

Thus, the trial court abused its discretion in admitting the other crimes evidence, notwithstanding the well intentioned limiting instructions, and Appellant Avila was denied a fundamentally fair trial and penalty determination in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

The remaining question is whether the error in admitting this highly inflammatory and prejudicial evidence can somehow be deemed harmless.

Since the error involved a violation of Appellant's Federal Constitutional rights, this Court could only reach this conclusion if it found the admission of this evidence harmless beyond any reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

Alternatively, even if this Court were to construe the improper admission of the prior crimes evidence as mere state law evidentiary error, reversal would nonetheless be required unless this Court could say that it was not reasonably probable Appellant would have obtained a more favorable result had the jury not heard the improperly admitted evidence. (*People v. Watson* (1956) 46 Cal. 2nd 818.) A more favorable outcome includes a hung jury. (*People v. Soojian* (2010) 190 Cal. App. 4th 491, 520-521; *People v. Bowers* (2001) 87 Cal. App. 4th 722, 735-736; *Richardson v. Superior Court* (2008) 43 Cal. 4th 1040, 1045; *People v. Brooks* (1979) 88 Cal. App. 3rd 180, 188.)

Here, regardless of which standard is employed, this Court cannot conclude the jury's consideration of this evidence did not make a difference, or that Appellant would have been convicted and sentenced to death even if the jury never heard it.

There were significant weaknesses in the prosecution's case which might have caused at least **some** of the jurors to have reasonable doubts about his guilt in the absence of the prior crimes evidence.

Appellant never confessed to the charges and denied he was responsible.

The only eye witness to identify Appellant as Samantha's abductor was six-year old Sarah Ahn. According to Sarah and one of Samantha's neighbors, named Lynn Grimm, the abductor was driving a green car. However, according to both Sarah and Ms. Grimm, the car was a Honda with "H"s on its wheels (4 C.T. 572; 29 R.T. 5444), whereas the green car later found at Appellant's residence was a Ford Thunderbird. (25 R.T. 4696 *et seq.*)

Moreover, Sarah was able to give the police only a general description of Samantha's abductor. Appellant was identified as "resembling" the man who had carried off Samantha from a police artist's sketch by Tammy Drabek, the step-mother of Alexis, one of the alleged victims in the previous case whom Appellant had been acquitted of molesting, who was naturally

inclined to do everything she could to see Appellant punished for what he had done to Alexis. (23 R.T. 4269 *et seq*; 24 R.T. 4450-4453; 29 R.T. 5444-5453.)

There were no eye witnesses to the sexual assault and murder of Samantha.

Furthermore, while the prosecution theorized Appellant drove all over Southern California with Samantha, stopping *en route* for gas and at a Comfort Inn, the gas station video tapes did not show Samantha was in Appellant's car and numerous Comfort Inn employees and guests testified he did not have a child with him and they noticed nothing unusual. (29 R.T. 5433 *et seq.*, 5436 *et seq.*, 5436 *et seq.*, 5441 *et seq.*, 5519 *et seq.*, 5523 *et seq.*, 5527 *et seq*; 30 R.T. 5558 *et seq*; 32 R.T. 5991 *et seq.*)

Furthermore, the physical evidence was not as conclusive as the prosecution wanted the jury to believe. There was conflicting expert testimony, based upon the condition of Samantha's body, as to the time of her death, and it is by no means clear Appellant could have driven for hundreds of miles and for several hours before molesting and killing Samantha. (24 R.T. 4416-4446; 29 R.T. 5404, 5505 *et seq.*)

Additionally, prosecution forensic experts were forced to admit it was by no means certain the tire tracks found at the murder scene were made by Appellant Avila's Ford Thunderbird, that they could not conclusively say the

footprints found near Samantha's body were in fact those of Appellant's, and that none of the shoe prints taken from the scene matched shoes later found during a search of Appellant's apartment. (23 R.T. 4339-4346; 28 R.T. 5112-5156, 5242-5290; 29 R.T. 5334-5337.)

Finally, the DNA evidence characterized by the media as "conclusive," was questionable for a number of reasons. It is true that Prosecution experts testified Appellant left his DNA under Samantha's fingernails and in his car. (24 R.T. 4554 *et seq*; 26 R.T. 4796 *et seq*; 28 R.T. 5157 *et seq.*) However, defense experts testified (1) the proper protocols had not been followed in collecting and analyzing this evidence, (2) the Orange County Crime Laboratory where the testing had been done had a history of failing to follow proper procedures, (3) the DNA samples had been improperly mixed, and (4) as a result there was a possibility of contamination. Furthermore, DNA is transferable and the possibility the DNA found in Avila's Thunderbird might have been planted to incriminate him cannot be ruled out. Orange County forensic expert Elizabeth Thompson candidly acknowledged that, when Avila's vehicle had first been examined, no DNA had been found, and it was only after the car had been "super glued," and she was asked to examine it a **second** time, that Samantha's DNA was discovered. (30 R.T. 5562 *et seq.*, 5566 *et seq*; 31 R.T. 5766 *et seq.*, 5848 *et seq.*, 5869 *et seq.*, 3259 *et seq.*, 6067 *et seq.*, 6179 *et seq.*)

Thus, it is reasonably probable the jury would have been unable to **unanimously** agree beyond a reasonable doubt, and that Appellant would not have been convicted in the absence of the prior crimes evidence.

Similarly, it is reasonably probable the jury would not have imposed death had they not heard of the previous alleged molestations

The defense presented abundant factor (k) evidence Appellant had been a severely abused child, who had seen his father kill a neighbor and go to prison. There was a profound pattern of alcoholism and both sexual and physical abuse in Appellant's family going back generations. Forensic psychologists told the jury there was at least a 50 percent chance Appellant himself would commit sexual offenses as an adult. (35 R.T. 6819 *et seq.*, 6906 *et seq.*, 6933 *et seq.*, 6949-6991.) While this was not necessarily foreordained, and it was possible Appellant could resist the impulse to attack children (36 R.T. 7032-7097), this evidence established Appellant's offenses were attributable, to some degree, to factors beyond his control.

Furthermore, several witnesses testified Appellant was not totally without redeeming qualities. He was generous, a hard worker, and had become the man of the house and helped support his family after his father killed the neighbor and fled to Mexico before being incarcerated, while Appellant was still in high school. (34 R.T. 6643-6648; 35 R.T. 6775 *et seq*; 35

R.T. 6838 *et seq.*, 6775 *et seq.*, 6930 *et seq.*)

While the jury might have concluded that Appellant should be put to death based upon the aggravated nature of the offenses and the pain and distress experienced by Samantha's mother Erin, her grandmother, and her step-brother Connor (34 R.T. 6623 *et seq*; 44 R.T. 6614 *et seq.*), this is not a forgone conclusion.

The prior crimes evidence was not harmless beyond a reasonable doubt, as to the penalty determination, and Appellant Avila is entitled at the very least to a new penalty trial.

IV. THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352—AND DEPRIVED APPELLANT AVILA OF DUE PROCESS AND A FUNDAMENTALLY FAIR PENALTY DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS—BY ADMITTING UNNECESSARY, INFLAMMATORY, GRUESOME, CUMULATIVE AND TOTALLY UNNECESSARY PHOTOGRAPHS OF THE VICTIM'S BODY AND SURROUNDING "CRIME SCENE" AND TESTIMONY CONCERNING "DISGUSTING" CHILD PORNOGRAPHY PHOTOGRAPHS FOUND ON AN AVILA FAMILY COMPUTER

A. PROCEEDINGS BELOW

The prosecutor advised defense counsel, prior to trial, that he intended to introduce certain crime scene photographs, as well as child pornography photographs which had been found on an Avila family computer to which Appellant had access.

The prosecutor argued he needed to depict the child-victim's body, and the trauma to her vaginal and anal area, in order to prove she had been sexually assaulted beyond any reasonable doubt.

Defense counsel objected that all of these photographs were gruesome, inflammatory, unduly prejudicial, and cumulative and violated Appellant's rights to a fair trial and penalty determination under the Eighth Amendment and Due Process Clause of the Fourteenth Amendment, as well as analogous

California constitutional provisions. Defense counsel noted sexual abuse was undisputed, and that the jury did not need to see vaginal and anal tearing or the child's nude body in order to understand the pathologist's testimony.

The court ruled some photographs (prosecution Exhibits 2, 3 and 5) would be admissible. However, other photographs would be excluded since they were very prejudicial.

The prosecutor argued that the child pornography printed from a computer to which Appellant had access the night before Samantha Runnion was abducted was relevant to show he was interested in sexual activities with young girls, and thus his intent in regard to Samantha.

The defense, while conceding limited testimony Appellant possessed computerized child pornography the night before Samantha's abduction might be relevant, strongly objected to allowing the jury to view the photographs themselves, which depicted *inter alia* young girls straddling an adult man's penis and oral sex between adult males and children.

The trial court judge excluded the "disgusting" photographs themselves which the judge stated had turned his stomach. He stated it was impossible to believe the jurors could put aside these graphic photos, and objectively determine Appellant's guilt or innocence or whether he was to live or die. The court did, however, allow testimony concerning the specific

details of chat room conversations, stories, and what was depicted in the photographs. (15 R.T. 2720 *et seq*; 17 R.T. 3117-3156.)

Consequently, in accordance with the trial court's ruling, the jury viewed autopsy and crime scene photographs showing Samantha Runnion's bruised and bleeding vagina and anus in addition to hearing the testimony of the prosecution's pathologist. (24 R.T. 4416 *et seq.*)

The jury did not view the child pornography photographs themselves. However, they heard from prosecution witnesses about the photographs of adults and children engaged in various sexual activities, a multi-part story involving an adult man engaging in sexual activities with his daughters and granddaughters, and chat room conversations in which the participants shared their feelings and sexual desires concerning children, all found on the Avila family computer the night before Samantha's abduction. (25 R.T. 4700 *et seq*; 29 R.T. 5347 *et seq.*) The jury also heard, from Cara Barragan's father, Jose, that he had found a similar photograph in a bedroom once occupied by Appellant Avila which the police had overlooked. (24 R.T. 4494.)

The prosecutor, during his closing guilt phase argument, reminded the jury of this testimony and what the photographs depicted, and urged them to conclude from this that Appellant's motive and intent in the instant case was sexual molestation. (33 R.T. 6404-6410.) The prosecutor did not specifically

mention the photographs during his final argument at the conclusion of the penalty phase trial.

B. DISCUSSION

Appellant Avila now renews his objections to the introduction of the crime scene photographs and the testimony describing the computer child pornography since the trial court abused its discretion and irreparably prejudiced his Constitutional Rights to a fair trial and penalty determination, and due process, by ruling as it did.

Since this issue was litigated and ruled on in the trial court, it has obviously been preserved for this Court's appellate review. The questions are whether the trial court abused its discretion by admitting this evidence and, if so, whether Appellant is entitled to either a new trial and/or a new penalty determination.

The trial court has broad discretion in the first instance to decide whether photographs of the victim should be admitted and whether the probative value of such evidence outweighs any prejudicial impact under Evidence Code section 352. (*People v. Carpenter* (1997) 15 Cal. 4th 312, 385; *People v. Scheid* (1997) 16 Cal. 4th 1; *People v. Staten* (2000) 24 Cal. 4th 434, 462-464; *People v. Vieira* (2005) 35 Cal. 4th 264, 291-292; *People v. D'Arcy* (2010) 48

Cal. 4th 257, 298; *People v. Booker* (2011) 51 Cal. 4th 141, 169-170.) This Court has noted the trial court's discretion to exclude photographs as unduly prejudicial during the penalty phase trial is more circumscribed than admission of photographs during the guilt phase since "the sentencer is **expected** to subjectively weigh the evidence, and the prosecution is entitled to place the capital offense and the offender in a morally bad light." (*D'Arcy, supra*, 48 Cal. 4th 298-299; [emphasis in original].)

Nonetheless, this Court, as well as the Court of Appeal, has found in a number of previous cases that the trial court abused its discretion in allowing such evidence to be presented to the jury.

In *People v. Burns* (1952) 109 Cal. App. 2nd 524, the Court of Appeal held that the trial judge abused his discretion in admitting into evidence enlarged or blown-up photographs of the victim of a homicide, taken after the autopsy, where it was obvious that the only purpose of exhibiting such photographs was to inflame the jury's emotions against the defendant.

In *People v. Love* (1960) 53 Cal. 2nd 843, this Court held that the trial judge abused his discretion in admitting a face-up photograph of the victim which tended to prove only that the victim died in unusual pain. This Court reasoned that the admission of such a photograph, coupled with admission of a tape recording of her dying groans, was prejudicial error since this

evidence served primarily to inflame the passions of the jurors in the penalty phase of a capital case.

In *People v. Smith* (1973) 33 Cal. App. 3rd 51, 69, the Court of Appeal, in condemning the admission of gruesome photographs of the two victims' bodies, stated:

> "There were ample descriptions of the positions and appearances of those two bodies. There was autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification . . . they supplied no more than a blatant appeal to the jury's emotions."

In *People v. Gibson, supra*, 56 Cal. App. 3rd 134-135, the Court of Appeal similarly condemned the admission of certain gruesome photographs of the deceased. In that case the prosecutor represented that the photographs were relevant to illustrate the expected testimony of the coroner regarding the cause of death and the trial court admitted the photographs for this purpose. The Court of Appeal reversed the subsequent conviction. The court stated:

> "The two photographs, to which objection was made, are gruesome, revolting and shocking to ordinary sensibilities. In light of the many other photographs of the deceased victim used in connection with the testimony of Deputy Coroner

> Phillips, . . . [these photographs] represented cumulative evidence of slight relevancy. Their probative value was substantially outweighed by the danger of undue prejudice to defendant."

In *People v. Ramos* (1982) 30 Cal. 3rd 553, the prosecutor sought to introduce a photograph of the victim while alive to show she was a human being and that she was alive one day and found dead the next. After offering to stipulate to these facts, defense counsel argued that, given the stipulation, the photograph was not relevant to any disputed fact at issue. This Court agreed, holding that the picture had been improperly admitted since it "had no bearing on any contested issue in the case." (*Id.*. at page 578.)

In *People v. Hendricks* (1987) 43 Cal. 3rd 584, this Court found the introduction of a similar photograph erroneous because:

> "There was no dispute as to the identity of the person killed—evidentially the only issue on which the photograph was relevant—and therefore the photograph should have been excluded because it bore on no contested issue. (*Id.* 594.)

In *People v. Poggi* (1988) 45 Cal. 3rd 306, 322-323, this Court held that the trial judge had improperly admitted two photographs of the murder victim, one depicting the victim while still alive and a second autopsy photograph

showing incisions that the surgeons made performing a tracheotomy, rather than revealing the stab wounds inflicted during the offense, after defense counsel offered to stipulate that the victim was a human being, that she was alive before the attack, and that she died as a result of the attack. This Court stated:

> "The admission of the photographs was error. It is true, as the People argue, that the admissibility of photographs lies primarily in the discretion of the trial court . . . But it is also true that the court has no discretion to admit irrelevant evidence.
>
> . . . The photographs here are not relevant to any disputed material issue. The only matters on which they have probative value are the following: . . . [the victim] was a human being; she was alive before the attack, and she is now dead. In view of defense counsel's offer to stipulate, these issues were removed from the case as matters in dispute. When, as here, a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury . . ."

There appears to be no case directly on point concerning the admissibility of computer evidence of adults engaged in various sexual

activities with children in a capital murder case in which the child-victim was killed during a sexual assault. However, presumably, the analysis under Evidence Code section 352 is similar. The trial court must weigh the probative value of this evidence against its prejudicial effect, and the court's ruling is reviewable for abuse of discretion on appeal.

In the instant case the admission of photographs of Samantha Runnion, depicting *inter alia* her vaginal and anal injuries and the surrounding "crime scene," was error for the same reasons as in some of the cases discussed above.

First, these photographs had little or no probative value regarding any disputed issue in the case. Certainly the prosecutor's proffered justification they were necessary to prove Samantha had been sexually assaulted rings hollow since the defense never disputed this point.

Second, the photographs were cumulative and unnecessary to amplify the testimony of the forensic pathologist as to what had been done to the victim. The testimony of the prosecution witnesses was quite clear and there was no need to amplify or corroborate it with graphic photographs of the kind admitted here.

More importantly, any probative value these photograph might have had was substantially outweighed by their unduly prejudicial impact on the

jury. Any juror would have to be devoid of all human emotion to objectively weigh the evidence and dispassionately determine Appellant's guilt or innocence and whether he should live or die after seeing these inflammatory photographs.

A similar analysis compels the conclusion the child pornography evidence was also erroneously admitted.

The bare fact child pornography was found on the Avila family computer, and may have been printed out by Appellant the night before Samantha was abducted, may have been relevant to Appellant's motive and intent in committing the sexual assaults. However, the specific photographic descriptions of adults engaged in sexual activities with children and descriptions of a grandfather engaged in sexual activity with his daughters and granddaughters had no probative value in Appellant's case.

Moreover, this evidence was unduly prejudicial since it made it impossible for the jury to objectively evaluate Appellant's guilt or innocence or the appropriate penalty (as the trial court acknowledged). It is true the trial court attempted to reduce the prejudicial effect of this evidence by excluding the photographs themselves. However, this mattered little since the jurors were informed in graphic detail through testimony of precisely what the photographs depicted.

The trial court abused its discretion.

Furthermore, for the reasons previously discussed in Argument III. B., *ante*, it cannot be said the evidence against Appellant was so conclusive, or that the aggravating circumstances so clearly outweighed those in mitigation, that the jury would have convicted Appellant and sentenced him to death in the absence of the photographs. Appellant sees no need to reiterate his previous discussion of this point verbatim and simply incorporates that discussion by reference.

Suffice it to say there were genuine doubts concerning Appellant's guilt as the abductor, assailant, and killer of Samantha based upon, *inter alia*, the testimony of numerous witnesses and video tape evidence establishing Samantha was not in Appellant's car during the several hours which elapsed between her abduction and the sexual assaults and murder and the complete absence of any eye witness testimony concerning the sexual assaults and murder.

There were also real concerns DNA evidence may have been contaminated or planted in Appellant's vehicle in order to incriminate him. Once again, this case created an unprecedented firestorm of publicity, and the pressure to secure the conviction of the molester-murderer of "America's Little Girl" at any cost was enormous.

Similarly, it is by no means a virtual certainty the jury would have sentenced Appellant to death in view of the abundant mitigating evidence he committed the offenses, at least in part, as the result of severe child abuse and other factors over which he had no control.

Therefore, the admission of the evidence in question is yet another reason to reverse the judgment and remand the matter for a new trial and penalty determination.

V. THE JURY'S CONSIDERATION OF UNDULY PREJUDICIAL VICTIM IMPACT EVIDENCE DEPRIVED APPELLANT AVILA OF A FUNDAMENTALLY FAIR PENALTY TRIAL AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

A. RELEVANT PROCEDURAL HISTORY

The prosecutor, prior to the commencement of the penalty phase trial, notified the trial court and defense counsel of his intention to introduce victim impact evidence. The victim impact evidence included several photographs to which the defense objected, including photographs showing Samantha Runnion dressed as an angel and/or princess. The court marked the photographs and reserved ruling until after it had heard the testimony. (34 R.T. 6588.)

During the penalty phase trial Erin Runnion, Samantha's mother, described her reaction upon learning of Samantha's death, how she had collapsed on the floor of the Sheriff's office, and how her painful memories had been revived by having to be in the same courtroom with the man accused of killing her daughter. She was now unable to fully enjoy being a mother even though she had given birth to the baby sister Samantha had wanted and her step-son still had nightmares. (34 R.T. 6623-6640.) A number

of photographs, including one depicting Samantha as an angel on the last Halloween before her death were admitted over defense objection. (34 R.T. 6640 *et seq*; People's Exhibits 112-118.)

The prosecutor, during his closing penalty phase argument, urged the jury to take into account the impact of Samantha's death on her family (although he acknowledged the jury should not impose the death penalty solely in order to make Samantha's mother, Erin Runnion, feel better). (36 R.T. 7162.)

B. DISCUSSION

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court, reversing its earlier decision in *Booth v. Maryland* (1987) 482 U.S. 496, held evidence of a murderer's impact on a victim's family and friends is not *per se* inadmissible in the penalty phase of a capital trial.

This Court has also held victim impact evidence is admissible as a "circumstance of the crime" under Penal Code section 190.3, subdivision (a). (*People v. Edwards* (1991) 54 Cal. 3rd 787, 832-836; *People v. Roldan* (2005) 35 Cal. 4th 646, 731; *People v. Robinson* (2005) 37 Cal. 4th 592, 650; *People v. Brady* (2010) 50 Cal. 4th 547, 574; *People v. Booker* (2011) 51 Cal. 4th 141, 190.)

However, both the High Court and this Court have recognized victim

impact testimony and related photographic evidence should be excluded if it is irrelevant, largely cumulative, or unduly prejudicial since such evidence may render the penalty phase trial fundamentally unfair, and divert the jury's attention from its proper role or invite an irrational, purely emotional response. (*Payne, supra,* 501 U.S. at 825; *Booker, supra,* 51 Cal. 4th 190.)

In *People v. Edwards, supra,* this Court cautioned that allowing victim impact evidence under factor (a) "does not mean there are no limits on emotional evidence and argument," and that "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*Edwards, supra,* 54 Cal. 3rd 836.)

In *Salizar v. State* (Texas Criminal Appeals 2002) 90 S.W. 3rd 330, cited by this Court in *Robinson,* the Texas Court found that a "video montage" tribute to the murder victim should not have been admitted. The Court noted:

> "The punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life . . . of a unique individual . . . [are] not necessarily admissible in a criminal trial . . . We caution that victim impact . . . evidence may become unfairly prejudicial . . . [and] result in unfair prejudice . . . Hence, we encourage trial courts to place appropriate

limits upon the amount, kind, and source of victim impact . . . evidence." (*Id.* 336.)

In *People v. Prince*, (2007) 40 Cal. 4th 1179, 1286-1291, this Court cautioned against admitting video tape or photographic evidence tantamount to an emotional tribute to the victims, even though finding no prejudicial error in that case.

In *People v. Kelly* (2007) 42 Cal. 4th 763, 793, this Court, while reiterating that trial courts must be very cautious about admitting this type of evidence, concluded that any error was harmless, and that there was no reasonable possibility that objectionable portions of the video tape introduced in that case affected the penalty determination. However, Justices Werdegar and Moreno authored separate opinions concluding it was an abuse of discretion to admit a video tape which they regarded as containing elements of theatricality and going beyond a factual presentation of the victim as she was in life. They concurred in the judgment only because the error was harmless and did not so inflame the passions and sympathy of the jury that the penalty phase was rendered unfair. (*Kelly, supra*, at 42 Cal. 4th 801-806.)

The victim impact evidence presented in the instant case was considerably more limited than that introduced in some of the cases discussed above. Nonetheless, the photographs of Samantha dressed as an

"angel" or "princess" invited the jury to base its penalty determination on emotion rather than reason. These photographs cannot be viewed in isolation. Instead, they must be considered in light of the inflammatory pretrial publicity to which the jurors had been exposed. Samantha, as noted *ante*, had been essentially adopted by Orange County officials as "our little girl," and "America's little girl," a large shrine had been erected in her honor, and Orange County radio "Shock Jocks" John and Ken had repeatedly urged the jurors to impose the death penalty as a richly deserved punishment for the abduction, brutal sexual assault upon, and murder of this angelic figure. Under these circumstances the photographic evidence should not have been admitted.

Furthermore, it cannot be said the aggravating factors in this case were so overwhelming the jury would necessarily have unanimously concluded they outweighed the mitigating circumstances in the absence of the victim impact evidence. There was substantial factor (k) evidence Appellant Avila committed these offenses, at least in part, as the result of an unbelievably abused childhood, that he himself had been sexually molested when young, and that the instant offenses were due, at least to a degree, to these and other factors beyond his control.

At least some of the jurors might have been convinced to spare

Appellant Avila's life if they had not been reminded of the "angelic" nature of the child-victim and the incessant cries by public officials and the media to impose the death penalty as the only appropriate punishment for subjecting her to sexual assaults and murdering her. The victim impact evidence was not harmless beyond a reasonable doubt.

Appellant Avila is entitled to a new penalty trial.

VI. THE TRIAL COURT'S ERRORS WERE CUMULATIVELY PREJUDICIAL, AS TO BOTH THE GUILT AND PENALTY PHASES, AND, CONSIDERED COLLECTIVELY, WARRANT REVERSAL

Assuming the errors committed by the trial court are insufficient to compel a reversal when considered individually, the **cumulative** effect of **all** these errors necessitates a reversal of both the convictions and the jury's penalty determination.

The cumulative effect of multiple errors may compel reversal even though any one error—in and of itself—does not warrant this. (*People v. Buffum* (1953) 40 Cal. 2nd 709, 726; *People v. Cruz* (1978) 83 Cal. App. 3rd 308, 334; *People v. Guzman* (1975) 48 Cal. App. 3rd 380, 388; *People v. Sturm* (2006) 37 Cal. 4th 1218.)

Here, the combined effect of (a) the adamant refusal of the trial court to grant Appellant a change of venue despite the unprecedented firestorm of inflammatory publicity and the repeated calls of Orange County radio talk show hosts John and Ken for Appellant's death, (b) the trial court's failure to allow Appellant additional peremptory challenges to eliminate jurors who had been exposed to this publicity to varying degrees but were not excusable for cause, (c) the admission of evidence Appellant had molested other young girls despite the fact that he had never been charged as to one of these

molestations and had been acquitted by a jury of the others, (d) the admission of gruesome photographs depicting the child-victim's vaginal and anal injuries and verbal descriptions of "disgusting" and "stomach turning" child pornography photographs printed out from Appellant's family computer, and (e) victim impact evidence reminding the jury that Samantha Runnion was a little "angel" or "princess" and that Appellant deserved the death penalty for sexually assaulting and murdering her, **combined** was to deny Appellant any possibility of a fair determination of guilt or innocence and a reliable penalty determination in violation of the Eighth and Fourteenth Amendments.

The cumulative effect of **all** of these serious violations of Appellant Avila's constitutional rights mandates that the convictions and death judgment be set aside.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its Federal Constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. (*People v. Schmeck* (2005) 37 Cal. 4th 240, 304; this Court's January 24, 2007 order.)

To date, the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U. S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S. Ct. 2516,

2527, fn. 6.)[6] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime—even

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[6] In *Marsh*, the High Court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable double that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 Sup.Ct at p. 2527.)

circumstances squarely opposed to each other (*e.g.*, the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home)—to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code Section 190.2, the "special circumstances" section of the statute—but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD.

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal. 3rd 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal. 4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the

statute contained thirty special circumstances[7] purporting to narrow the category of first-degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal. 3rd 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (*People v. Hillhouse* (2002) 27 Cal. 4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U. S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature.

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[7] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal. 3rd 797. The number of special circumstances has continued to grow and is now thirty-three.

The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U. S. Constitution and prevailing international law.[8] (See Section E. of this Argument, *post.*)

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[8] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[9] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three

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[9] *People v. Dyer* (1988) 45 Cal. 3rd 26, 78; *People v. Adcox* (1988) 47 Cal. 3rd 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

weeks after the crime,[10] or having had a "hatred of religion,"[11] or threatened witnesses after his arrest,[12] or disposed of the victim's body in a manner that precluded its recovery.[13] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (*e.g., People v. Robinson* (2005) 37 Cal.. 4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa v. California* (1994) 512 U.S. 967, 986-990, *dis. opn.* of Blackmun, J.)

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[10] *People v. Walker* (1988) 47 Cal. 3rd 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[11] *People v. Nicolaus* (1991) 54 Cal. 3rd 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[12] *People v. Hardy* (1992) 2 Cal. 4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[13] *People v. Bittaker* (1989) 48 Cal. 3rd 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts—or facts that are inevitable variations of every homicide—into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case

proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal. 4th 1223, 1255, this

Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S.270.)

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice

between life and death, and not elements of the offense. (*Id.*, at 598.) The court found that, in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after

finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi,* and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra,* Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. In the Wake of *Apprendi, Ring, Blakely,* and *Cunningham,* any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra;* see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[14] As set forth in California's "principal

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[14] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also—and most important—to render an individualized, normative determination about the penalty appropriate for the particular defendant . . . " (*People v. Brown* (1988) 46 Cal. 3rd 432, 448.)

sentencing instruction" (*People v. Farnam* (2002) 28 Cal. 4th 107, 177), which was read to appellant's jury,"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[15] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[16]

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[15] In *Johnson v. State* (Nev., 2002) 59 P. 3rd 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P. 3rd 460)

[16] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal. 3rd 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal. 3rd 512, 541.)

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal. 4th 1, 41; *People v. Dickey* (2005) 35 Cal. 4th 884, 930; *People v. Snow* (2003) 30 Cal. 4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal. 4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal. 4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of fact finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal. 4th 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[17] In *Cunningham* the principle that any fact which exposed a

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[17] Cunningham cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely,* and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black,* 35 Cal. 4th 1253; *Cunningham, supra,* at p.8.)

defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law (DSL). The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra*, p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." *Id.*, p. 14.)

The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to

punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal. 4th 1260 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham,* it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi,* this Court held that since the maximum penalty for one convicted of first-degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal. 4yh 543, 589.) After *Ring,* this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra,* 30 Cal. 4th 263.)

This holding is simply wrong. As section 190, subd. (a)[18] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect."

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[18] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

> 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.
> (*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first-degree murder in Arizona, a California conviction of first-degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be

found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite fact finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such

factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors—a prerequisite to imposition of the death sentence—is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra,* 65 P. 3rd 915, 943; accord, *State v. Whitfield,* 107 S.W. 3rd 253 (Mo. 2003); *State v. Ring,* 65 P. 3rd 915 (Az. 2003); *Woldt v. People,* 64 P. 3rd 256 (Colo.2003); *Johnson v. State,* 59 P. 3rd 450 (Nev. 2002).[19])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[20] As the high court stated in *Ring, supra,* 122 Sup. Ct. 2432, 2443:

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[19] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[20] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring,* and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: *"[I]n a capital sentencing proceeding,* as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' (*Bullington v. Missouri* (1981) 451 U.S. 441 (quoting *Addington v. Texas,* (1979) 441 U.S. 418, 423-424, 60 L.Ed. 2nd 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra,* 524 U.S. 732 (emphasis added).)

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy

the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra,* 397 U.S. at pp. 363-364; *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (*Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal. 3rd 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1. 3rd 306 (same); *People v. Thomas* (1977) 19 Ca1. 3rd 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1. 3rd

219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra,* the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."
>
> (455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings

dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship, supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed

to exclude as nearly as possible the likelihood of an erroneous judgment.' (*Bullington v. Missouri* 451 U.S. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 543; *Gregg v. Georgia* (1976) 428 U.S. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (*Townsend v. Sain* (1963)

372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal. 4th 792, 859; *People v. Rogers* (2006) 39 Cal. 4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal. 3rd 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal. 3rd 267.)[21] The same analysis applies to the far graver decision to put someone to death.

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[21] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 *et seq.*)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 Fed. 2nd 417, 421; *Ring v. Arizona, supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias, supra*, 39 Cal. 4th 41-42) and "moral" (*People v. Hawthorne, supra*, 4 Cal. 4th 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See

Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that

death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review—a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the High Court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The High Court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first-degree murders that cannot be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort

of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See Section A of this Argument, *ante.*) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, *i.e.*, inter-case proportionality review. (*People v. Fierro* (1991) 1 Cal. 4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (*e.g., People v. Marshall* (1990) 50 Cal. 3rd 07, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on

Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (*Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W. 2nd 945.)

The U.S. Supreme Court's recent decisions in *Cunningham v. California, supra, U. S. v. Booker, supra, Blakely v. Washington, supra, Ring v. Arizona, supra,* and *Apprendi v. New Jersey, supra,* confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for

under California's sentencing scheme.

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not"—factors (d), (e), (f), (g), (h), and (j)—were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal. 3rd 1142, 1184; *People v. Edelbacher* (1989) 47 Cal. 3rd 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the

Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft* (2000) 23 Cal. 4th 1078-1079; 99 Cal.Rptr. 2nd 1; 5 P. 3rd 68; *People v. Memro* (1995) 11 Cal. 4th 786, 886-887; 47 Cal.Rptr. 2nd 219, 905 P. 2nd 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*"

(*People v. Arias* (1996) 13 Cal. 4th 92, 188; *People v. Morrison* (2004) 34 Cal. 4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal. 4th 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (*e.g.*, *People v. Montiel* (1994) 5 Cal. 4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal. 4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of non-statutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest—the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal. 3rd 765, 772-775)—and thereby violated appellant's Fourteenth Amendment right to due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 Fed. 2nd 1295, 1300 (holding that Idaho law specifying manner in

which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F. 2nd 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State—as represented by the trial court—had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings, supra*, 455 U.S. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to

case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (*e.g., Monge v. California, supra,* 524 U.S. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal. 3rd 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical

analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal. 3rd 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[22] as in *Snow*,[23] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (*People v. Demetrulias, supra*, 39 Cal. 4th 41.) However apt or inapt the analogy,

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[22] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto, supra*, 30 Cal. 4th 275; emphasis added.)

[23] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow, supra*, 30 Cal. 4th 126, fn. 3; emphasis added.)

California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (*e.g.*, §§ 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[24]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1 - C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to

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[24] In light of the supreme court's decision in *Cunningham, supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

loss of life; they violate equal protection of the laws.[25] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S. Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (*e.g., Mills v. Maryland, supra,* 486 U.S. 374; *Myers v. Ylst* (9th Cir. 1990) 897 Fed. 2nd 417, 421; *Ring v. Arizona, supra.*)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States*

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[25] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (*Ring, supra,* 536 U.S. 609.)

Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The non-use of the death penalty, or its limitation to "exceptional crimes such as treason"—as opposed to its use as regular punishment—is particularly uniform in the nations of Western Europe. (*e.g., Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [*dis. opn.* of Brennan, J.]) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth

Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2004) 536 U.S. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes—as opposed to extraordinary punishment for extraordinary crimes—is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (*Atkins v. Virginia, supra*, 536 U.S. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim

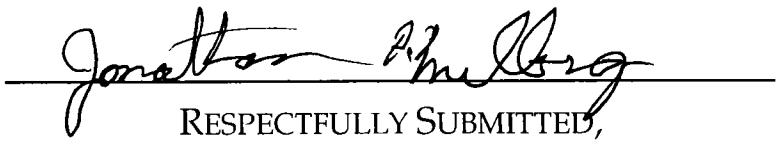
homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[26] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

CONCLUSION

The judgment must be reversed.

SEPTEMBER 5, 2012



RESPECTFULLY SUBMITTED,

JONATHAN P. MILBERG

ATTORNEY FOR APPELLANT ALEJANDRO AVILA

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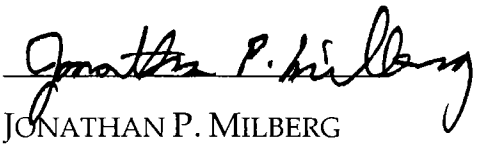
[26] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

CERTIFICATE OF COMPLIANCE

I, Jonathan Milberg, hereby certify, pursuant to Rule 8.360, subdivision (b) of the California Rules of Court, that the foregoing Appellant's Opening Brief contains 29,826 words as counted by the Corel WordPerfect, Version 8 application, and does not exceed 300 pages.

September 5, 2012

Respectfully submitted,



JONATHAN P. MILBERG

DECLARATION OF SERVICE BY U.S. MAIL

I, the undersigned, state that I am a citizen of the United States employed in the County of Los Angeles, that I am over the age of 18 years and not a party to this action. My business is 225 South Lake Avenue, 3rd Floor, Pasadena, California 91101.

On September 5, 2012, I served the foregoing:

APPELLANT'S OPENING BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California, addressed as follows:

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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, and that this Declaration was executed on, September 5, 2012, at Pasadena, California.

JONATHAN P. MILBERG

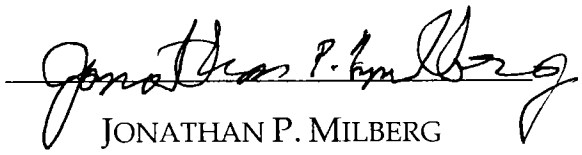
DECLARATION OF JONATHAN P. MILBERG

I, Jonathan P. Milberg, hereby declare:

I am the attorney of record for the Defendant and Appellant in *People v. Alejandro Avila*, California Supreme Court Case No. S135855, a death-penalty case.

I will serve the Defendant personally with a copy of the Appellant's Opening Brief on or before September 30, 2012, and shall notify the Court thereafter in writing that the Defendant has been served, pursuant to Policy Statement 4.

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Pasadena, California on September 5, 2012.



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